THE SUPREME COURT

[RECORD NO.: S:AP:IE:2019:000113]

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.

BETWEEN:

M.A.M. (SOMALIA)

APPLICANT/APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[RECORD NO.: S:AP:IE:2019:000111]

K.N. (UZBEKISTAN), E.N., S.M. (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND, K.N.) AND Y.M. (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND, K.N.)

APPLICANT/APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 19th day of June, 2020

Introduction

1. The Refugee Act of 1996 ("the 1996 Act" or "the Act") was enacted to give effect to the Convention relating to the Status of Refugees done at Geneva on the 28th day of July, 1951 ("the Convention"). The main purposes of the 1996 Act (since repealed and replaced by the International Protection Act, 2015 ("the 2015 Act")), were to remove uncertainty as to the legal status of persons who sought asylum, to give effect to the Convention in this State, to establish procedures for processing and determining applications for refugee status, and to create a regime of entitlements and benefits for those thus recognised.

2. This process was, in the first instance, to be carried out by the Office of the Refugee Applications Commissioner ("ORAC"; "the Commissioner") created under s.6 of the 1996 Act. Section 8(1) of the same Act laid down the manner in which, after interview by an immigration officer, applications for a declaration under s.17 that the applicant be recognised as a refugee, were to be made to the respondent ("the Minister"). Subject to a

range of conditions outlined in s.9, and on being satisfied that an applicant was seeking asylum, the Minister was empowered to grant leave for such person to remain in the State for that purpose. Breach of those conditions could give rise to detention either by an immigration officer or member of An Garda Síochána (s.9(8)).

3. Once an application was made, s.8(3) of the Act provided it would then be referred to the ORAC and notified to the United Nations High Commissioner for Refugees ("the High Commissioner"). Thereby, the process of investigating the entitlement of the applicant to a declaration under s.17 of the Act was begun. For that purpose, the powers of the Refugee Applications Commissioner, and all necessary ancillary procedures, were outlined in s.8 to s.13 of the 1996 Act and in the First Schedule thereto. By ss.15 and 16, a Refugee Appeal Board was created to deal with appeals from the ORAC. Section 17 of the Act provided, in turn, that an applicant determined to be a "*refugee*" as defined in s.2 of the Act would be granted a "*declaration*" by the Minister, the effect of which was that, thenceforth, he or she would be recognised as a refugee "*in relation to whom a declaration is in force*". Only persons so recognised were entitled to the enhanced range of benefits defined in ss. 3, 4 and 18 of the Act. It will be understood that in this judgment the references to "the Minister" are to be understood as concerning the successive holders of that office in their corporate capacity, and not to any personal actions of the present holder of that office or his predecessors.

4. The entitlements provided in the Act for those who were recognised under s.17 were, by the standards of the day, expansive, rather than restrictive. To take one illustration, whilst the Convention did not contain a *right* for refugees to apply for family reunification, s.18 of the 1996 Act did make such provision. The "Final Act of the United Nations Conference of Plenipotentiaries", which adopted the Convention in 1951, had merely proposed this concept as a "recommendation".

Section 18 of the 1996 Act

5. Section 18 of the Act lies at the centre of these appeals. For present purposes, it will be sufficient to quote the material parts of the provision. It made reference to two offices: first, the "Commissioner", again indicating the holder of the statutory office created by s.6 of the Act; and second, the "High Commissioner". Eliminating an irrelevant statutory exclusion therefore, s.18(1) provided that:

> *"… refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner…"*

Later, s.18(4) identified the range of family members eligible for reunification. The section also empowered the respondent Minister to refuse entry to the State to otherwise potentially eligible family members on grounds of national security or public policy (s.18(5)).

6. As a result of this innovative legislation, it can be said a significant number of refugees who had been forced to flee their native countries due to persecution for Convention reasons, and who had been granted political asylum in Ireland, were reunited with family members who were permitted to come to this State to join them.

The Appeals

7. Two appeals are before the Court. MAM is the appellant in Case 1. K.N. is the first named appellant in Case 2. Both were granted asylum and later received declarations pursuant to s.17(1) of the 1996 Act. As a result, they were eligible to bring family members here. They availed of this opportunity. Both appellants subsequently became citizens of this State. Later, they applied to bring in other close family members to join them. But, by then, the Oireachtas had enacted the 2015 Act. The appellants therefore applied under this new Act. However, the Minister held that, as the appellants had, by that time, become citizens of this State, they were ineligible to apply for family reunification under the 2015 Act. In the circumstances described below, the question of eligibility fell to be determined under the 1996 Act.

8. These appeals raise issues of statutory interpretation, and turn on how provisions of the 1996 Act should be understood. But, acknowledging that the Minister's officers were duty-bound to operate the system in accordance with the legislation, it is nonetheless helpful to an understanding of this case to record in full detail of how the system operated in the case of these two appellants over the years in question.

Case 1: M.A.M.

9. M.A.M. ("Ms. M"), the appellant in Case 1, became a "refugee" within the meaning of the Convention in the year 2007. As a result of a well-founded fear of persecution in Somalia, she was forced to flee her native country. In the process she became separated from her mother, her children and other children who were under her care. Later, she ascertained their whereabouts, and in January 2012, successfully applied to the Minister under s.18(1) of the 1996 Act to bring those family members into the State.

10. But, unfortunately, Ms. M had lost contact with her husband who remained missing and untraceable until December 2016. She became an Irish citizen on the 21st October, 2013. Remarkably, in December 2016, she was able to re-establish contact with her husband. She applied under s.56 of the then new 2015 Act to be reunited with him on the 7th April, 2017.

11. But this new Act contained a number of conditions which were significantly more limited than those contained in its predecessor. For the first time, s.56(8) of the 2015 Act introduced a statutory time limit on making applications for family reunification. Such applications could only be brought within 12 months of the grant of refugee status. This appellant had arrived in this State in 2007. Obviously, it would have been impossible for her to comply with that time limit as, during that time-period, she had no knowledge of her husband's whereabouts.

12. On the 16th May, 2017, Ms. M's application to bring her husband into the State was refused. The Minister's officials took the view that her application was out of time by

reference to the 12-month time limit contained in the then new 2015 Act. She brought judicial review proceedings. However, after she had been granted leave to bring an application to the High Court for this purpose, the Minister, in a letter dated the 14th September, 2007, accepted that the 2015 Act could not be retrospectively applied to her, and withdrew his decision. But this proved to be a pyrrhic victory.

13. Ms. M submitted further material for the purposes of the application. On the 20th October, 2017, the Minister again refused her application. This refusal will be referred to hereafter as the "first M decision". On this occasion, the officials relied on a further restriction contained in s.47(9) of the 2015 Act. This was to the effect that a refugee declaration given, or deemed to have been given, should cease to be in force "*where the person to whom it has been given becomes an Irish citizen*". Sections 9(1)(c) and 52(1)(b) of the 2015 Act contain provisions with the same restriction. Relying on this further limitation, the Minister's officials held that, because Ms. M had become an Irish citizen in 2013, she was for that reason no longer eligible to apply to be reunited with her husband.

14. Ms. M sought to appeal that decision through her solicitor by letter dated the 24th October, 2017. In a letter dated the 13th November, 2017, the Minister's department maintained its stance. The letter added that the provisions of the 1996 Act did not extend to Irish citizens. She was granted leave to bring judicial review of the Minister's decisions on the 20th November, 2017. She claimed entitlement to apply under s.18 of the 1996 Act.

Case 2: K.N.

15. K.N. ("Ms. N"), the first named appellant in Case 2, fled Uzbekistan and came to Ireland in February 2008. She was later granted a s.17 declaration by the Minister on the 25th February, 2009. In August 2012, Ms. N applied for and was granted family reunification with her two younger dependent daughters. She became an Irish citizen through naturalisation on the 13th November, 2012.

16. On the 26th July, 2016, Ms. N made an application for further family reunification, this time in respect of her eldest daughter, E.N. (the second appellant in Case 2), her son-in-law, R.M., and her grandchildren, S.M. and Y.M. (the third and fourth appellants in Case 2). As she explained to the Minister, when Ms. N had made her original application in August 2012, her eldest daughter had not then wished to leave Uzbekistan as she wanted to remain there with her fiancé, R.M. The couple subsequently married and had the children: S.M. and Y.M. But, subsequently, conditions changed for the worse for family members who remained in Uzbekistan. The second appellant's son-in-law, R.M., became embroiled in a political dispute, as a result of which, it is said, he was imprisoned, and when later released, he was placed under house arrest. Consequently, the family members in Uzbekistan became entirely dependent for support on the second appellant.

17. On the 10th August, 2016, the Minister accepted Ms. N's applications with regard to the second appellant's daughter and grandchildren, but determined that her son-in-law, RM,

did not come within the category of eligible family members as defined in s.18(4) of the 1996 Act. Thus, as she was later advised, his application could not be progressed further.

18. Further documentation and a completed questionnaire were provided on the 25th October, 2016. These were acknowledged by letter. By a further letter written in December 2016, Ms. N was notified that, although the 2015 Act had come into effect, her current application had been submitted prior to the date of the commencement of that Act, and would, therefore, be dealt with under the 1996 legislation.

19. On the 9th November, 2017, the appellant submitted further representations and documentation in relation to the application on behalf of her eldest daughter and her two grandchildren. There she explained why it was that she had not included them in the 2012 application, and provided documentary evidence as to their altered position in Uzbekistan.

20. On the 28th November, 2017, ORAC officials wrote indicating that, as Ms. N had become a naturalised Irish citizen, they had been requested to cease processing her application. One day later, on the 29th November, 2017, the Minister refused her application on the grounds that she had become a citizen of Ireland and, consequently, was ineligible to avail of the provisions of s.18(1) of the 1996 Act. She, too, initiated proceedings.

Legal Proceedings

21. In the proceedings for judicial review, both appellants contended that, even though they had become citizens, they were entitled to avail of s.18(1) of the 1996 Act. Their cases were heard in tandem in the High Court. To those two, a third case was added. But each case involved different applicants who had entered the State at different times and remained here in quite divergent circumstances. The situation of the third applicant for judicial review in the High Court, who is not an appellant here, was not covered by the 1996 Act. As a result of this diverse set of scenarios, the judge had to address a vast range of issues, not only having to give consideration to the terms of the 1996 Act, and its successor in 2015, but also to Article 20 of the Treaty on the Functioning of the European Union; the Charter of Fundamental Rights of the European Union; CJEU case law; E.U. directives; the Convention; and academic commentary on the effect of that Convention in international law. This was no easy task.

The High Court Judgment

22. The High Court decision, delivered on the 26th February, 2018, was clear ([2018] IEHC 113). The judge referred to s.2 of the 1996 Act and s.2(1) of the 2015 Act as being "*equivalent in effect*", as both defined the term "*refugee*" as "*a person who owing to a well founded fear of being persecuted for a convention reason* '***is outside the country of his or her nationality'*** *and is unable or unwilling to avail of protection of that country*" (para. 24). (Emphasis in original).

23. Section 2 of the 1996 Act, which defines the term "refugee", contained, as part of that definition, reference to the term "*country of nationality*". The High Court judgment concluded that on a plain reading of s.2 of the 1996 Act, the appellants, as Irish citizens by then living in Ireland, could not be characterised as "*refugees*" because, in simple

terms, neither was by then "*outside*" Ireland, which he held was now their country of "*nationality*" (paras. 24 and 34 – 35). On this interpretation, the High Court held that the appellants ceased to be refugees as soon as they had become Irish citizens (para. 24). The judge, therefore, upheld the Minister's contention that, by becoming citizens, the two appellants had ceased to be "*refugees*" and were, therefore, no longer entitled to avail of s.18(1) of the 1996 Act. In so concluding, he observed that becoming a citizen was a "*volitional act*", which created numerous benefits, and that the appellants' new status of citizenship superseded their former status of being refugees (para. 25). Referring to the wording of s.2(b) of the 1996 Act, he held that the definition of "*refugee*" contained therein did not include any person who, in the words of Article 1E of the Geneva Convention, had been:

> *"recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country"* (para. 25).

24. The judge expressed the view that, as a grant of refugee status was declaratory, it followed that the withdrawal of such status was also declaratory, in the sense that it recognised the person concerned had ceased to be, or was no longer, a refugee (para. 21). He observed that the interpretation and effect of the term "refugee" which he arrived at was consistent both with international instruments, such as the Convention, and national case law, which was extensively cited (paras. 25 – 26). The judgment also referred at para. 20 to commentary to the same effect contained in Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), at p. 51 and at para. 22 to the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* ("the United Nations Handbook") at para. 28.

25. Here it is helpful to observe that the judgment contained an observation that:

> *"In principle a person becomes a refugee at the moment when he or she satisfies the definition so the determination of status is declaratory rather than constitutive"* (para. 20).

This was, undoubtedly, an excerpt from Goodwin-Gill and McAdam. The exact words expressed in the judgment assist in understanding why the High Court arrived at its conclusion. But, excluding footnotes, the full paragraph in which the quoted sentence occurs actually reads:

> *"The legal consequences which flow from the formal recognition of refugee status are necessarily predicated upon determination by some or other authority [sic] that the individual or group in question satisfies the relevant legal criteria**. In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory rather than constitutive;** problems arise, however where States decline to determine refugee*

status or where States and UNHCR reach different determinations" (p. 51). (Emphasis added)

The judge, of course, accurately quoted the emphasised part of the sentence beginning with the words "*In principle*". But I think he was misled by those emphasised words being read in isolation from the remainder of what is contained in that paragraph.

26. In fact, when seen in context, the quotation makes clear that not only were the authors considering the meaning of the term "refugee" "*in principle*"; but in the passage quoted above, they drew a clear distinction between, on the one hand, the definition of "refugee" under the Convention, but on the other, the manner in which signatory States to the Convention addressed, or failed to address, the issues arising and the "*consequences which flow from the formal recognition of refugee status*". As the authors of this influential text pointed out two pages later, the Convention "*says nothing*" about procedures for determining refugee status, and leaves to the signatory States the choice of means as to "*implementation at the national level*" (at pp. 53 – 54 op. cit.). It would not be correct to say that the High Court judgment actually interpreted the 1996 Act only by reference to the Convention. But the judgment nonetheless contains a number of observations that the construction of the term "refugee", arrived at, was consistent with academic commentary, with the United Nations High Commissioner for Refugees ("UNHCR") Handbook, and, in particular, with the terms of Article 1 of the Convention itself. As will be seen, when read in its entirety, the text of the 1996 Act itself provides a conclusive guide as to how the term "refugee" is to be understood in this legislation enacted by the Oireachtas.

The Court of Appeal Judgment

27. Both appellants appealed the decision in their cases to the Court of Appeal ([2019] IECA 116). On one issue, that Court reversed the High Court decision. The first appellant was granted a declaration to the effect that s.47(9) of the 2015 Act did not have retrospective effect (para. 144). That provision had been the sole basis of the first M.A.M. decision, dated the 20th October, 2017. The Minister did not cross-appeal that decision on non-retrospectivity to this Court.

28. But, on the main issues, the Court of Appeal upheld the High Court decision. Like the High Court, the Court of Appeal concluded that by becoming citizens, neither of the appellants could be considered to be a "refugee" within the meaning of the 1996 Act. That court held that neither appellant could be said to have a "*refugee declaration*" still in force (para. 146). The Court concluded that the s.17 declarations they previously held had been revoked by "*operation of law*" once each acquired Irish citizenship. Thus, they were no longer eligible to avail of s.18. The Court agreed with the High Court judge's reasoning to the effect that, as a consequence of the interpretation of s.2, there might on occasions be a time lag between being a person "*being*" a refugee and being recognised as such (para. 66).

29. As briefly described earlier, in the High Court, the judge not only had to consider the Acts of 1996 and 2015, and the Convention, but also Article 14 of Council Directive

2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted ("the Qualification Directive"). This instrument deals with minimum standards for the qualification and status of third country nationals or stateless persons. The judge also gave consideration to Article 38(4) of Council Directive 2005/85/EC Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. I again mentioned the Qualification Directive as it figured in the High Court judge's reasoning, and in the Minister's response to the application for leave to appeal to this Court. For reasons appearing later, it is unnecessary to give consideration to the Minimum Standards Directive as a support for the appellant's case.

30. The Court of Appeal judgment observed on this that the High Court judge's interpretation of s.2 of the 1996 Act was consistent with the Convention, which expressly stated that the term refugee:

> *"shall cease to apply to any person falling under the terms of section A [person qualified as 'refugee'] if […] [h]e has acquired a new nationality, and enjoys the protection of the country of his new nationality"* (paras. 41–42).

31. The Court of Appeal judgment observes that the High Court judge asked himself:

> *"whether the result at which he had arrived by analysis of Irish statutory provisions led to a result which might offend international rules and thinking, and presumably, had he considered that the answer based exclusively on Irish law led to an absurdity or to a result which was inconsistent with international thinking, he might then have approached the question from a different angle. He did not do so and did not need to do so, and… his approach was correct"* (para. 47).

The judgment also noted the High Court's references to the interpretation of the term "*refugee*" contained in the UNHCR's Note on the Cessation Clauses of the 30th May 1997 and the Qualification Directive (cited at para. 29 above) of the 29th April, 2004 (paras. 51 – 54).

32. The judgment of the Court of Appeal is carefully nuanced, and there are passages which indicate that the Court may have reached its conclusions with some reluctance (see, paras. 125 and 140).

33. The extensive citation of legal authorities, academic commentary and international instruments and guides to be found in both judgments are such as would naturally cause one to hesitate prior to differing from either. The appeal before this Court was well argued, with full written submissions from all parties and assistance from counsel for the Irish Human Rights and Equality Commission, which applied to be joined as a notice party. Prior to proceeding further, a number of preliminary observations must be made.

The Minister's Interpretation of the 1996 Act between 2010 and 2017

34. These appeals not only concern a common legal issue, but also share a feature not usually encountered when questions of statutory interpretation arise for consideration. As was fairly acknowledged by his counsel, between 2010 and October 2017, the Minister and his predecessors actually interpreted and applied s.18 of the Act in the manner which he now contends was incorrect. Thus, in that timelines, refugees who had become citizens were permitted to continue to avail of the 1996 Act for the purposes of family reunification. It is said that this was on foot of legal advice received in 2010. But the Minister argues that, as he now interprets the Act, he is precluded from interpreting or applying the legislation in that broader way.

35. While the appellants' advanced written submissions in relation to whether the Minister was estopped from applying the 2015 Act, this was not the main thrust of the appeal. The argument in this Court was distilled down to the simple question of how the 1996 Act should be interpreted. The gravamen of the case is whether, on a true construction, the appellants were precluded from availing of s.18(1) and s.18(4) of the Act of 1996.

Some Observations

36. A number of further observations should be made. First, in determining that leave should be granted, this Court observed in passing that the effect of the Minister's case, as it had been advanced, might actually be to create uncertainty in relation to the status of that group of persons who had been granted rights to family reunification during the period of 2010 to 2017 ([2019] IESCDET 206, para. 14). However, this Court made clear that, although the Minister had made assurances that the rights of such persons would not be disturbed, that issue was not before the Court at this time, and, therefore, leave was limited to the grounds set out in the appellants' notice. The Court of Appeal judgment correctly observed that, while the Minister's case, as now presented, might render problematic the practice between 2010 and 2017, such practical considerations could not have a bearing on the correct interpretation of the 1996 Act (para. 139). While all this is so, the very fact that the Minister and his predecessors applied the Act in a different way at least raises the question that how the Act of 1996 might be interpreted is a legitimate field of inquiry.

37. Second, on one view, the matter of statutory interpretation now to be considered might be thought of as arcane, or devoid of significance. But the issue is of considerable importance to the appellants. This is because, under the 1996 Act, family reunification can be exercised without fulfilling the more rigorous conditions set by the Immigration Act, 2004 and the Non-EEA National Family Reunification Policy. The latter policy sets out financial and other eligibility criteria. The appellants, who have become care givers in the home, say it would be difficult for them to comply with these. They also make the point that, had they been aware of the Minister's change in policy, they might have chosen to delay naturalisation until they had been able to fully exercise family reunification. But, again, this does not have a bearing on how the Act should be interpreted.

38. Third, as observed earlier, both judgments under appeal made extensive references to international instruments, including the Convention. But the question arises as to whether these extensive cross-references were actually of assistance in the interpretation of this

legislation enacted by the Oireachtas, or whether, to the contrary, this concern with consistency with international law may have been misleading.

39. Fourth, and more specifically, the two judgments both made reference to the international material mentioned earlier. The result of this consideration led to the conclusion that a grant of refugee status was "declaratory". The Minister's case is that it logically follows from this that the withdrawal or loss of such status also is "declaratory", in the sense that a person might cease to be a refugee by simple operation of law. While holding that being a refugee is an automatic condition, the High Court judgment nonetheless also held, perhaps rather enigmatically, that the making or revocation of a grant of refugee status also required a positive decision by the authorities of the host country, "*but a decision which is purely declaratory*" (para. 32). This is not an entirely easy concept to follow. If a revocation or withdrawal of status is automatic, or occurs by "operation of law", one might pose the rhetorical question of why did the withdrawal of that status require a "positive decision"? Here it should be noted that s.21 of the 1996 Act actually contains a comprehensive list of the circumstances in which the Minister could revoke a declaration to the effect that a refugee is recognised.

40. Fifth, as a corollary, it is necessary to emphasise that the legislation which is under consideration in this appeal, that is, the 1996 Act, is national legislation of this State, whereby the Oireachtas chose how it intended to give effect to the Convention. As pointed out in the academic commentary cited earlier, how signatory States gave effect to the Convention was left to those States. What falls to be interpreted in this case is the 1996 Act, not the Convention.

41. Sixth, it must be acknowledged that, even in the sequencing of its provisions, the scheme of the 1996 Act itself creates difficulty for the interpreter. Section 2, which provides a definition of "*refugee*", is followed by s.3, which contains a detailed description of the benefits and entitlements which accrue to persons who receive a declaration of recognition under s.17. Thereafter, s.4 deals with further benefits under the heading "*Travel document*". Then, s.5 addresses the issue of *non-refoulement*. But, as this judgment seeks to explain, the scheme of the Act, and the intention of the Oireachtas, was that the definition of refugee contained in s.2 should be a point of reference which identifies the criteria for the investigation process as to entitlement to refugee status which are contained in ss. 6 -16 of the Act.

42. Seventh, it is a fact that in the argument before this Court much focus was placed on ss. 2, 17, 18 and 21. There was lesser consideration of other provisions of the Act. That the legislation presents interpretative challenges is obvious. But other provisions which were less analysed in argument actually throw a considerable light on the four provisions just identified.

43. With all these observations in mind, it is helpful to pose the rhetorical question "by what means did the legislature choose to give effect to the Convention?" Put another way, the question might be phrased, "by what means were the legislative purposes of the 1996 Act to be fulfilled?" Insofar as the Act contains any degree of ambiguity, a court may apply

the provisions of s.5(1)(a) of the Interpretation Act. That provision makes clear that, where it occurs, statutory ambiguity may be resolved by a construction that reflects the plain intention of the Oireachtas, where that intention can be ascertained from the Act as a whole.

Context

44. But a more detailed consideration of the 1996 Act should begin with context. Prior to its enactment, the position of refugees had been governed by reference to the Aliens Act, 1935 and by a series of ministerial orders made under that Act. Additionally, the Department of Justice entered into what was called "administrative arrangements" with the High Commissioner. Later, two judgments of the courts confirmed that these arrangements were binding on the government (*Fakih and Ors. v. Minister for Justice* [1993] 2 I.R. 406 (O'Hanlon J.) and *Gutrani v. Minister for Justice* [1993] 2 I.R. 427 (Hederman, McCarthy and O'Flaherty JJ.)). But there remained uncertainty as to the rights of asylum seekers during the determination process as well as with regard to the rights of refugees when recognised.

45. As already outlined, by s.6 of the 1996 Act, the Oireachtas created the office of the Commissioner or the ORAC. The holder of this office was to perform the functions conferred by the State. ORAC officers were empowered to interview applicants and, for that purpose, obtain material from other sources with a view to validating or refusing claims (s.11(4)(a)). The Commissioner was to furnish an applicant concerned with copies of any reports, documents or representations in writing submitted to him or her under the section with an indication in writing of the nature and source of such information (s.11(6)). All these procedures, including the appeal process, were designed in order to determine whether, as a matter of national law, persons were entitled to recognition.

Section 12 of the Act: "Country of Nationality"

46. For reasons which will presently become clear, s.12 of the Act plays an important role in the process of interpretation. Under that section, the Commissioner was empowered to dismiss applications for refugee status which were "*manifestly unfounded*". These were defined in s.12(4)(a) – (c) as being applications which did not show on their face "any grounds for the contention that the applicant is a refugee"; those which gave insufficient details or evidence; or those where, in the words of s.12(4)(c), the Commissioner was satisfied that the applicant's reason for leaving and "***not returning to his or her country of nationality does not relate to a fear of persecution"***. (Emphasis added). These emphasised words, and in particular the word "returning", are all highly significant. They clearly explain what was meant in the Act by "*country of nationality*". It meant the country from which an applicant originally came, alleging that he or she had been subject to persecution there.

47. To illustrate: Ms. M's "*country of nationality"* was Somalia. Her application for asylum was held to be "*well-founded*" by reason of fear of persecution in that country. Thus, s.12(4)(c), which dealt with manifestly unfounded applications, did not apply to her. Her reason for not wanting to "*return*" to her country of nationality related to "*a well-founded fear of persecution*" there.

48. Section 12(4) also dealt with applications which were misleading, made in bad faith, or made for the sole purpose of avoiding a removal from the State. As will also be seen, it too assists in providing further examples of manifestly unfounded applications. Section 12(4) also addressed applications:

> *"(i) prior to which the applicant had made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the Commissioner is satisfied that his or her application was properly considered and rejected and the applicant has failed to show a material change of circumstances, [and]*
>
> *(j) by an applicant who is a national of or has a right of residence in a state party to the Geneva Convention in respect of which the applicant has failed to adduce evidence of persecution."*

49. A further reason contained in s.12(4) for holding that an application was manifestly unfounded was that:

> *"(l) prior to [the application] the applicant has been recognised as a refugee under the Geneva Convention by a state other than the State, has been granted asylum in that state and his or her reason for leaving or not returning to that state does not relate to a fear of persecution in that state."*

50. Each of the provisions just quoted will assist in an understanding the true meaning of s.2, the interpretation of which is one of the main questions in this appeal.

Sections 13 to 15

51. Section 13 provided that, where the Commissioner has carried out an investigation in accordance with s.11 and found that an applicant concerned should or should not be declared to be a refugee, he was to report to the Minister to that effect. The Act contained provisions relating to right of appeal to a Refugee Appeals Board (s.15). The appeals procedure was set out in detail in s.16.

52. Later, the judgment will consider in more detail ss. 3, 4 and 18, all of which outline the entitlements and benefits which accrue to a "*refugee in relation to whom a declaration [under s.17] is in force*". But the terms of s.12(4), and what is so clearly conveyed by its provisions, provide a revealing backdrop against which it is possible to consider the true meaning of the main provisions of the Act. When the Minister's interpretation is placed in this interpretive spotlight, the result can only be described as rather illuminating.

Section 2

53. Section 2 is essential to the Minister's case. It must be quoted in full. Parts of the provision are now emphasised as they form the main focus for consideration. First, there is the "main body" of s.2:

> *"2. In this Act "a refugee" means a person who, **owing to a well founded fear of being persecuted** for reasons of race, religion, nationality, membership of a*

particular social group or political opinion, is ***outside the country of his or her nationality*** *and is unable or****, owing to such fear, is unwilling to avail himself or herself of the protection of that country****; or who,* ***not having a nationality*** *and being* ***outside the country of his or her former habitual residence****, is unable or,* ***owing to such fear, is unwilling to return to it…"*** (Emphasis added)

The section then continues to provide for "exclusions" as follows:

"…but does not include a person who -

(a) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,

(b) ***is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,***

(c) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(d) has committed a serious non-political crime outside the State prior to his or her ***arrival in the State****, or*

(e) has been guilty of acts contrary to the purposes and principles of the United Nations." (Emphasis added)

54. In the Response to the appellants' Application for Leave to appeal to this Court, the Minister unequivocally asserts on this:

"3. The definition of "refugee" in section 2 (Refugee Act 1996) includes the requirement that the person "is outside the country of his or her nationality", and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country". (Emphasis added)

55. It continues:

"4. Article 2(C) of Council Directive 2004/83/EC defines a "refugee" as "a third country national who … is outside the country of nationality …"

"Refugee status" is defined in the Qualification Directive as "the recognition by a member state of a third country national, or a stateless person, as a refugee".

56. Having referred to these instruments, the Minister then contends that:

"5. …

(a) *the holder of a declaration of refugee status who becomes a citizen of the State ceases to be a refugee upon naturalisation,* ***as that person is no longer outside his/her country of nationality****, and is no longer* ***a third country national****, nor does* ***she require protection of the State as a refugee from her country of origin****, and*

(b) *that a declaration of refugee status ceases to be in force when the holder thereof acquires Irish citizenship by naturalisation."* (Emphasis added)

57. The Minister's Response continues:

> *"6. It is unnecessary for the respondent to revoke a declaration of refugee status upon the grant of naturalisation. The exclusion of a person who has acquired Irish citizenship from s.21(1)(c) Refugee Act, 1996 was deliberate, and is supported by above submission. Furthermore, as an Irish citizen within the State, is incapable of fulfilling the definition of "refugee", and cannot be recognised as such by the State. Neither the Constitution, nor E.U. law, requires the express revocation of the declaration upon the grant of naturalisation by the respondent".*

The position is made very clear. The High Court judgment arrived at the same conclusion (para. 49) as did the Court of Appeal (para. 146). The same position was adopted both in the Minister's written and oral submissions to this Court.

The Importance of Section 2 to the Minister's Case

58. The importance of this interpretation of s.2 to the Minister's argument is emphasised by the fact that the case then rests on the proposition that, in order to apply under s.18, not only must a refugee-applicant hold a s.17 declaration, but he, or she, must also still *be* a refugee within the meaning of s.2. The Minister's position is, therefore, as stark as it is straightforward: as Irish citizens living in Ireland, the appellants could no longer be characterised as refugees within the meaning of s.2, because they were no longer outside the "*country of their nationality*", which was, by then, Ireland (see also, para. 40 of the judgment of the Court of Appeal).

59. Section 2 will now be considered under the following two headings: first, the main body of the section; and, second, the exclusion at s.2(b). If there are points in what follows that appear critical of the Minister's case, I wish to make it clear these are not to be taken as, in any sense, a criticism of the way this case was argued. Counsel for the Minister argued the case with the greatest skill and tenacity.

60. For the purposes of empirical testing of the Minister's case however, it is helpful to take the instance of the appellant in Case 1, to be seen now against the definition of "refugee" contained in the main body of s.2. When Ms. M, in the words of s.8(1)(a), "*arrive[d] at the frontiers of the State*", she was simply treated as a person making an application for a declaration within the terms of that section. She was not, then, recognised as a refugee. Following the investigation of her entitlement to recognition, which took place by

reference to s.2, it was decided that she was entitled to refugee status. The Minister granted her a declaration under s.17 to that effect.

61. But, in order to claim asylum in the State, the appellant had had to leave Somalia, which was the "*country of her nationality*". She left owing to a "*well founded fear of being persecuted*". In the words of s.2, she was "*unable or, owing to such fear, unwilling to avail herself of the protection of that country*". However, on the Minister's case, by becoming a citizen the appellant's "*country of nationality*" became *this State*. Both interpretations cannot be true. Thus, even on a first empirical test, the Minister's case is shaken. The interpretation urged on his behalf simply does not make sense.

62. For the purposes of s.2, that appellant's "*country of nationality*" was not Ireland, but Somalia. The "*well founded fear"* which she had of persecution was from persecution in Somalia, not Ireland. There is nothing in the section to suggest that, by becoming a citizen, and by some metamorphosis, the appellant's "*country of nationality*" had altered to being Ireland. Her "*country of nationality*" was and remained Somalia.

63. The fallacy in the argument begins with conflating the definition of what constitutes a refugee under the law of this State, by contrast with what may be characterised as the *declaratory* meaning of the term "*refugee*" as a matter of international law. The error goes further by seeking to shoehorn the fact of acquired Irish citizenship into the statutory term "*country of nationality*" by a process that does violence to the statutory language. The full extent of this flawed interpretation is confirmed by reference to s.12(4)(c) which deals with "*manifestly unfounded applications*", quoted earlier. That section and sub-section state, in terms, that an application will be manifestly unfounded if the Commissioner is satisfied that the applicant's reason for leaving or "*not **returning** to his or her country of nationality*" does not relate to a fear of persecution. (Emphasis added). That "*country of nationality*" cannot be Ireland.

64. There is no room in the wording of s.12(4)(c) or, for that matter, s.2, for any contention that the term "*country of nationality*" has, or is capable of having, two meanings in the one statute, even the one section, or that, by reason of acquired citizenship, the term should be understood as having become this State by some undefined interpretive process.

65. The definition of "*refugee*" in the main body of s.2 goes on to deal with a person who does not have a nationality because they are "*outside the country*" of their "*former habitual residence*". As in the case of a person with a nationality, such person, without a nationality, is unable or unwilling, "*owing to a well founded fear of being persecuted*", to return to "*that country*" of their former habitual residence. What is noteworthy is that this part of the provision contains preconditions and conclusions in the same sequence, as in the earlier instance of a person who does have a nationality.

66. In submissions, the Minister, while accepting that the Convention does not have direct effect, nonetheless seeks to justify the interpretation of the main body of s.2 by virtue of the fact that this part of his interpretation is consistent with the Convention. But, when

actually applied in any given situation, and when viewed by reference to the terms of the Act as a whole, the Minister's interpretation simply does not withstand scrutiny. What is in question is a matter of the law of this State.

67. When seen within the same narrow textual basis, the Minister's interpretation of the main body of s.2 has a further consequence: it results in what in statutory interpretation is known as an "absurdity" when applied to benefits and entitlements. The absurdity is this: the Minister contends that, in order to avail of the benefits identified under ss. 3, 4 and 18 of the Act (including family reunification), not only must a beneficiary be within the meaning of those sections a "*refugee in relation to whom a declaration is in force*", but also must actually "***be** a refugee*" within the meaning of s.2, and presumably Article 1 of the Convention. The unavoidable consequence of that interpretation is that by being, within the words of s.2, a "*refugee*", such a person would also be one who "*owing to a well founded fear of being persecuted*" was unwilling to avail herself of the protection of what is now identified by the Minister as *this* State, his or her *"country of nationality".*

68. If we apply this logic a little further, it must follow that Ms. M, who sought asylum in this State, must, as a refugee, also fear persecution by this State. But not only this: by her application she sought to bring her husband into this State where, as a refugee, she feared persecution. The Minister's case on s.2 simply does not withstand scrutiny.

69. The incongruity created by reliance on the incorrect interpretation of the words "country of nationality" cannot be simply discarded as an inconvenience or sloughed off as the consequence of opaque or unfortunate drafting in the main part of the section. The Minister's position cannot be justified, either, by isolating some words of the section that might suit the interpretation and ignoring others. When subject to scrutiny, only one interpretation makes sense throughout the section. That is not the Minister's interpretation.

Comparison of Section 2(b) to Section 12(4)

70. Insofar as the Minister sought to retreat to what might have been thought to be the higher ground of s.2(b), that part of the provision can offer no comfort. Relying on the terminology there deployed, the Minister contends that the appellants had been "*recognised by the competent authorities of the country in which [they had] taken residence as having the rights and obligations which are attached to the possession of the nationality of that country*", and thereby are excluded from the definition of refugee.

71. Here, s.12(4) again assists in interpretation, because it explains what is set out in s.2(b) by reference to what would be a manifestly unfounded application under s.12(4)(g). In accordance with s.12(4), such an application would include: (g) one in relation to which the applicant had deliberately failed to reveal he or she had lodged a prior application for asylum in another country; (i) a situation where, prior to the application, the "*applicant had made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the Commissioner is satisfied that his or her application was properly considered and rejected and the applicant has failed to show a material change in circumstances"; or (j) "an applicant who is a national of or has a right*

of residence in a state party to the Geneva Convention in respect of which the applicant has failed to adduce evidence of persecution".

72. As set out in the Irish Current Law Statutes Annotated 1996 No. 17, according to the United Nations Handbook, this clause applies:

> *"to persons who might **otherwise** qualify for refugee status and who have been received in a country where they have been granted **most** of the rights normally enjoyed by nationals, but not formal citizenship"* (pp. 34 – 35). (Emphasis added).

The 1996 Current Law Statutes then quoted Hathaway, *The Law of Refugee Status* (Butterworths 1991) to the following effect:

> *"Exclusion based on de facto nationality is truly an exceptional occurrence which implies the effective legal assimilation of the refugee to his or her host population. Because the clause requires residence in the state willing to confer effective nationality, neither an inchoate right to protection, nor indeed physical presence, short of continued residence, is sufficient to warrant exclusion"* (p. 212)

(See, more recently, Hathaway and Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014), Chapter 6, "Persons no Longer Needing Protection", at p. 462 *et seq*. and p.494 *et seq*.). What is abundantly clear from this, is that the reference in s.2(b) to "country" is not to this State, but to some other and different State-party to the Convention.

73. What is actually provided in s.12(1)(4) again assists in identifying the purpose of s.2. When considered in context, the words of s.2 reflect the legislative purpose of the provision. The section was for the purposes of identifying the criteria for determining whether or not an applicant was entitled to be declared a refugee. This determination was to be made under the law of this State.

74. But additionally, here as in other provisions, a purely textual point may be made. Section 2(b) refers to recognition by the:

> *"competent authorities of **the country of in which he or she** has taken* residence as having the rights and obligations which are attached to the possession ***of the nationality that country."*** (Emphasis added)

But, later, s.2(d) refers to another of the excluded categories as being in relation to an applicant who has "*committed a serious non-political crime **outside the State** or prior to his or her arrival **in the State**".* (Emphasis added). When the drafters of the Act wished to refer to this State, as they did many times throughout, it was always as "the State". That term is not used in s.2(b). Had the Oireachtas wished to identify the country in which the applicant had "taken up residence" as being this State, they would have referred to "the State" in those precise terms. Rather than the words "the State", the reference was to the "*nationality of **that country***". (Emphasis added).

75. The effect of this empirical and textual analysis, therefore, is that the interpretation of s.2, which the Minister advances as the mainstay of his case, simply falls away. This conclusion is supported by reference to other provisions of the Act.

Section 17

76. By virtue of s.17 of the Act, it was provided:

> *"(1) Subject to the subsequent provisions of this section, where a report under section 13 is furnished to the Minister or where the Appeal Board sets aside a recommendation of the Commissioner under section 16, the Minister -*
>
> *(a) shall, in case the report or, as the case may be, the decision of the Appeal Board includes a recommendation that the applicant concerned should be declared to be a refugee, give to the applicant a statement in writing (in this Act referred to as "a declaration") declaring that the applicant is a refugee, and*
>
> *(b) may, in any other case, refuse to give the applicant a declaration,*
>
> *and he or she shall notify the High Commissioner of the giving of or, as the case may be, the refusal to give the applicant a declaration."*

77. Section 17(2) sets out the conditions under which the Minister may refuse to grant a declaration on the grounds of public policy or national security. It is mentioned at the beginning of the eligibility qualification in s.18(1).

78. But s.17(3), too, assists in elucidating meaning. It provides:

> *"For the purposes of this Act, a person who, before the commencement of this Act, was recognised by the Minister as a refugee within the meaning of the Geneva Convention shall be deemed to be a person in respect of whom* ***a declaration has been given under this section****."* (Emphasis added)

The Statutory Purpose of Section 17: The Creation of a Different Category

79. One of the aims of the Act was to remove prior uncertainties as to the status of persons who, prior to the commencement of the Act of 1996, had entered the State and been recognised as having refugee status. But, when it comes to the interpretation, what was provided in s.17(3) pointed only in one direction. The category of persons who were *already* in the State, and recognised by the Minister as refugees, were to be "deemed" to be persons "in respect of whom a declaration has been given". Thus, it was the *declaration* made under s.17 which constituted a legislative touchstone or mark that a refugee had been recognised. It was this which placed them in a different category to an "applicant" under s.8(1) who might indeed have been a "refugee" under the terms of the Convention. But, as s.17 shows, neither the fact that a person was a refugee in Convention terms, nor the fact that they had previously been recognised by the Minister, rendered them eligible for the entitlements and benefits conferred upon those who were given a declaration. To place them in this separate category required statutory words. The

persons had already been recognised by the Minister. But in order to receive the benefits conferred by ss. 3, 4 and 18, they had to be *deemed* to be persons who had received s.17 declarations, as a matter of Irish law. It was this "*deeming*" procedure that determined their enhanced status and identified them as members of a different and separate category under the law of this State.

80. The Court of Appeal judgment observed that a person is recognised in law as being a refugee when a declaration to that effect is made under the Act (para. 56). But the full consequences of that "recognition" go significantly further. The effect of a s.17 declaration was to place persons who received it in a separate or distinct category, and by virtue of belonging to that distinct basis *only*, they were entitled to those benefits and entitlements. Thus, s.2 can *only* relate to the definition of refugee, not to the juridical standing of the separate category of refugees in relation to whom a declaration was in force by virtue of s.17.

81. I respectfully agree with the Court of Appeal judgment that a declaration is a "*statement in writing*" that the applicant is a refugee, and that such a declaration has "*an important international context, in that the Minister is required, under s.17(1) of the 1996 Act, to notify the UNHCR of the making of a declaration or a refusal to do so"* (para. 58). But, insofar as there might have been any ambiguity in s.2, or s.17, or later s.21, the entirety of the Act makes it clear that the consequence of a declaration in this national legislation went much further, creating a defined category of refugees in relation to whom a declaration was in force.

The Status of the Convention

82. I add here that it is also clear from a consideration of the entirety of the Act that the drafters had no intention of incorporating the Convention into Irish law. It is referred to only twice in the text, first amongst the definitions in s.1. Here, the Act says the Convention will be alluded to as the "*Geneva Convention*" "*for convenience of reference*". Second, in s.17(3), it was used as a form of shorthand definition or reference point to identify that category of refugees who were already in the State when the 1996 Act came into effect. There are no statutory words whatsoever in the 1996 Act which suggest that, at variance from the words of Article 29.6 of the Constitution, the Convention was incorporated into the law of the State, although, where necessary, it may assist in interpretation (see *NS v. Judge Anderson and Ors.* [2004] IEHC 440; [2008] 3 I.R. 417 (O'Higgins J.), at paras. 15 – 17). With these thoughts in mind, one can now turn to s.18 of the Act.

Section 18: "A Refugee in Relation to Whom a Declaration is in Force"

83. The Minister submits that the Court should interpret s.18 as referring to an applicant who not only has a declaration *but is also actually a refugee*. For the reasons set out earlier, an argument based on this interpretation of s.2 is inherently unsustainable. But, furthermore, on a textual analysis, the preliminary words of s.18 which establish the qualifying criteria do not offer support for the Minister's case either.

84. Section 18(1) provides that, subject to s.17(2), mentioned earlier:

*"a refugee **in relation to whom a declaration is in force** may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State."* (Emphasis added)

As a buttress to his case, the Minister makes the point that the usage of the word "*is*" in the phrase, "***is** in force*", was phrased in the present tense. It is suggested this supported the contention that an applicant must not only have a declaration in force, but also must have the existing and current status as a refugee (see, para. 145 of the judgment of the Court of Appeal and para. 23 of the judgment of the High Court). But I am unable to agree that the word "*refugee*" found therein can be divorced from the surrounding words, *viz. "in relation to whom a declaration is in force"*. It is those other words which impart the true meaning of eligibility; that there must be a declaration *in force*.

85. The words "*a declaration **is** in force*" are precisely the same as those to be found in ss. 3 and 4 of the Act which confer benefits. To divorce the word "*is*" from the succeeding words which impart meaning might suggest that the Act should have contained a procedure for determining the continuing status of an applicant as an "actual refugee", not only for the purposes of s.18, but also for the purposes of ss.3 and 4. The Act makes no such provision. Such a hypothetical provision would run counter to the purpose and aim of the Act, which was to create certainty by the creation of the declaration and recognition process. The words of s.2 are not directed to the purpose of determining eligibility to avail of family reunification. That eligibility is determined by an applicant for reunficiaton having a declaration in force.

86. There is here even a simpler point. The imposition of such an important condition would require express statutory words. They could be implied. On a purely textual analysis, there are no statutory words in s.18 to the effect that not only must an application *actually be a refugee*, as well as being a refugee "*in relation to whom a declaration is in force".*

87. Finally, and without belabouring the point by needless repetition, the logic of the Minister's case is that the "refugee", who is purportedly "unable to avail himself or herself of the protection of the country of their nationality", and who is "in fear" of persecution in and by this State, is nonetheless to be understood as seeking to bring family members into this same State. That is not logical.

Section 21 of the Act

88. Section 21(1) of the Act provides:

"Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—

(a) has voluntarily re-availed himself or herself of the protection of the country of his or her nationality,

(b) having lost his or her nationality, has voluntarily re-acquired it,

(c) has acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality,

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution,

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality,

(f) being a person who has no nationality is, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, able to return to the country of his or her former habitual residence,

(g) is a person whose presence in the State poses a threat to national security or public policy ('ordre public'), or

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Appeal Board which was false or misleading in a material particular,

the Minister may, if he or she considers it appropriate to do so, revoke the declaration."

89. Sub-section 2 provides:

"(2) The Minister shall not revoke a declaration ***on the grounds specified in paragraph (e) or (f) where the Minister is satisfied that the person concerned is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of his or her nationality*** *or for refusing to return to the country of his or her former habitual residence, as the case may be."* (Emphasis added)

90. Later, s.21(3) to (5) detail a comprehensive set of procedures whereby, prior to revocation, a person who is the recipient of a declaration is to be placed on notice of the Minister's intention, is entitled to make representations to the Minister and, where necessary, may appeal to the High Court. All this speaks to the legislative significance of the enhanced status imposed by the declaration and to the fact that a status which carries substantial entitlements cannot easily be revoked.

Legislative Surplusage

91. Here again a textual analysis assists. The Minister argues that the exclusionary words in s.21(c) of *"(other than the nationality of the State)"* are explicable as the very fact of naturalisation meant that, as citizens, the applicants actually enjoyed the protection of this State. Before the Court of Appeal, and in this Court, counsel for the Minister argued

that the reason for the exclusion contained in parenthesis was that the Minister did not need the power to cancel or revoke a declaration of refugee status when a person becomes an Irish citizen; that the declaration automatically ceased to take effect; and that no other reading of s.21(1)(c) of the 1996 Act was consistent with common sense and with the definition of refugee contained in s.2 of the 1996 Act. The Court of Appeal accepted this reasoning, but also accepted that the section contained "*no express provision by which the Minister has the power to revoke a declaration when a person acquired the nationality of the State*" (para. 77).

92. But the hypothesis that an abrogation of this significant status conferred by s.17 could take place by operation of law, and would not require any express words, gives rise to legislative surplusage. In fact, on the Minister's case, it should have been unnecessary for the Oireachtas to add exclusionary words such as "*(other than the nationality of the State*)". For that reason alone, the Minister's interpretation must be seen as irreconcilable with the true meaning and purpose of s.2 as informed by the words of s.12. The principles of interpretation presume against wasted or vain words, or such surplusage (*Cork County Council v. Whillock* [1993] 1 I.R. 231, at p. 239). The argument can be seen as seeking to support the interpretation of s.2 by reference to s.21(1)(c). In fact, neither interpretation is sustainable and not simply for the reason of creating legislative surplusage. While s.21(1)(c) does contain some of the same phraseology as Article 1C(3) of the Convention, significantly the words "*(other than the nationality of the State)"* have been added in the Act.

93. There is, in fact, a much simpler explanation for the exclusionary words in s.21(1)(c). It is that the Minister might revoke a declaration when, and if, a refugee acquired a nationality *other* than *Irish* nationality; that is, the nationality other than the nationality of *this* State. Such an interpretation has the virtue of containing sensible meaning and being consistent with the entirety of the Act. It is also in conformity with the conditions outlined in s.12(4) of the Act which deal with manifestly unfounded applications when an applicant has sought and received the protection of a state other than this State (See again, Hathaway and Foster, *op. cit.,* at Chapter 6).

94. When one considers the entirety of the terminology of s.21(a) – (h), the Minister's case exhibits further frailty. The argument is that the reference to "*country of his or her nationality*" in s.2, should be understood as meaning this State. But this would render the entirety of s.21(1) legislatively obscure. On that argument, the words of s.21(1)(c) might then mean that the Minister might revoke a declaration in the case of a refugee who has acquired a new nationality, *but not* a refugee who has acquired Irish nationality. It is hard to see how this would make sense. As observed earlier, when the drafters of the Act wished to refer to this State, they did so by referring to this country as "the State". These are not the words used in s.21 save, significantly, in s.21(1)(g), which provided that the Minister may make a revocation using the words, "*is a person whose presence in the State poses a threat to national security or public policy ('ordre public')".*

Section 21(1)(c): An Expression of All Circumstances

95. But, turning now to a different interpretative principle, s.21(1) also made clear that, by its very terms, it was intended to be seen as an identification of each and all of the conditions under which the Minister may consider revocation. The descriptive legislative words setting out the conditions upon which revocation may take place are intended to create certainty. The breadth and range of the terminology deployed, setting out each condition, does not allow for any conclusion other than that the section is intended to contain a comprehensive description of all the circumstances in which the Minister may consider revocation of a declaration.

96. By expressing each of these contingencies in their totality, the Oireachtas precluded any other circumstance - *expresio unius exclusio alterius.* What is expressed nullifies what is not expressed, that maxim being strongest when the Oireachtas enunciates certain matters connected by a common theme, class or category, as opposed to covering them by general words, but then, as here, omitting certain things from the list, such as the acquisition of citizenship (*Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 I.R. 509). To this, the Minister responded that the section only outlined the circumstances in which a *declaration* is revoked, not refugee status itself. That does not fully answer the question as to why the exclusionary words contained in s.21(1)(c) are to be found in the Act?

97. The only fair conclusion which can be drawn from the entirety of the Act is that, in fact, it was the s.17 declaration which was determinative of a new and distinct status from that described in s.2, and that when s.21(1)(c) referred to *"(other than the nationality of the State)"*, it referred to a situation where the recipient of a declaration had acquired and received the protection of a State other than this State.

Sections 3 and 4: Other Benefits Conferred

98. The fact that, in addition to s.18, the 1996 Act conferred very considerable benefits on those who received declarations is, in itself, telling as a matter of interpretation. As s.3 provided, these included the right to seek and enter employment; to carry on any business, trade or profession; and to have access to education and training in the State, in the like manner, and to the like extent in all respects, as an Irish citizen. A refugee was entitled to receive, upon a declaration, the same medical care and services and the same social welfare benefits as those to which Irish citizens were entitled. In addition to the foregoing, s.3 conferred a right of residence in the State; the same rights to travel in or out of the State as citizens; the same freedom to practice religion; the same access to courts; and the same right to form, and be a member of, associations and trade unions as citizens.

99. But all of these rights were extended *only* to refugees in relation to whom a declaration was in force. The same qualification governed the entitlement to travel documents identifying the holder as a person to whom a declaration had been given (s.4). But it must be understood that the fact that refugees who received declarations were to be entitled to many of the same rights as citizens could not mean that the Act suggested, by virtue of becoming citizens, the declarations which they had received, *ipso facto,* ceased

to be in force. Not only would this have required express words, it would have run counter to the legislative intent and purpose of the statute.

DL (DRC) and ZN (Afghanistan)

100. The judgments of the High Court and the Court of Appeal, made favourable reference to *dicta* of Laws L.J., delivering judgment for the Court of Appeal of England and Wales in the joined cases of *DL (DRC) v. Entry Clearance Officer, Pretoria and ZN (Afghanistan) v. Entry Clearance Officer, Karachi* [2008] EWCA Civ. 1420; [2009] 1 F.L.R. 1128 at para. 29 onwards. There, in interpreting similarly rather complex United Kingdom provisions, Laws L.J. was prepared to draw a distinction for family reunification purposes, between a person or "sponsor" who remained a refugee in the United Kingdom, by comparison to one who had acquired citizenship. But, as both judgments fairly point out, *DL* was subsequently reversed by the Supreme Court of the United Kingdom, *sub nom., ZN (Afghanistan) (FC) and Ors. v. Entry Clearance Officer (Karachi)* [2010] UKSC 21; [2010] W.L.R. 1275.

101. It is, of course, true that the legislative words and the factual circumstances in *DL* and *ZN* differ from those in the 1996 Act and these proceedings. But the judgment of Lord Clarke for the Supreme Court of the United Kingdom in *ZN* makes clear the extent to which courts will be careful in interpreting a statute in such a way as might, in the absence of clear, express words, deprive persons of an existing entitlement by implication (para. 32).

102. In *ZN*, while agreeing that a coherent policy argument could be produced for an interpretation of the United Kingdom provisions which would render citizenship as a factor debarring a refugee from availing of family reunification, Lord Clarke went on to point out that there were also coherent policy reasons for applying the same principles to join or remain with a spouse or parent who has been granted asylum, both before and after they had become a citizen (para. 35). He observed that the need for protection of a refugee's family unit is likely to be the same whether or not the sponsor has acquired citizenship, and that this proposition was also consistent with Article 34 of the Convention, which calls on Member States to expedite the naturalisation of refugees (paras. 35 – 37). Insofar as legislative policy arises for consideration, it is hard to disagree with those sentiments in their application to the 1996 Act.

Summary

103. The consequence of the interpretation urged by the Minister would be to create substantial legislative uncertainty when the purpose of the 1996 Act was to achieve clarity. The case advanced would run counter to the legislative aim of the Oireachtas, which was, by a carefully devised procedure defined in the Act, to identify one definitive "mark" of recognition to persons who were entitled to refugee status in this State, which, in turn, would grant them benefits and entitlements. The s.17 declaration was this sign or mark of recognition. The Minister's interpretation would require that s.18 be interpreted restrictively when the indications are that the intention of the Oireachtas was, then, to be generous. The case advanced pays insufficient heed to ss. 6 – 17 of the Act which created a detailed system to investigate and process claims for recognition. Insofar as there might be statutory ambiguity, the respondent's case requires a form of interpretation of other

sections of the Act which, to my mind, are strained and not consistent with the legislative purpose when seen in the context of the entirety of the Act.

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104. It can also be said that the interpretation arrived at in this judgment is consistent with European Court of Human Rights case law regarding Article 8 private and family rights under the European Convention on Human Rights. While that jurisprudence does not impose any general obligation on contracting states to authorise family reunion, that Court has observed that family unity is a right of refugees and an essential element in enabling persons who have fled persecution to resume a normal life (*Tanda-Muzinga v. France* (App. No. 2260/10, 10th October, 2014; *Senigo Longue and Ors. v. France* (App. No. 19113/09, 10th October, 2014); and *Mugenzi v. France* (App. No. 52701/09, 10th October, 2014). More proximately, it might be thought that the interpretation arrived at in this judgment is more in keeping with the State's duties towards the family as a fundamental unit group of society guaranteed under Article 41 of the Constitution.

Conclusion

105. This judgment concludes that the fact that the appellants became citizens did not deprive them of the right to apply for family reunification under s.18 of the 1996 Act. The judgment says nothing about what is now contained in the Act of 2015 on these questions. I would hold the appellants' appeal must succeed, and would set aside the judgments of the Court of Appeal and the High Court.

106. The interpretation of s.18 of the 1996 Act arrived at may not only, potentially, work to the benefit of the two appellants, but also others from the group of some 50 other applicants who are said to be similarly situated, provided they are otherwise eligible to avail of the provision. The conclusions may also set to rest concerns regarding the category of applicants who, as citizens, achieved family reunification between 2010 and 2017. While the outcome of these appeals might be seen as consistent with values and ideals of human rights, the order proposed is simply based on the general principles of interpretation to be found in the case law and, where necessary, by application of s.5 of the Interpretation Act, 2005. I would allow the appeal, grant the orders sought by the appellants, and propose hearing counsel on the precise form of the orders to be made.