UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 149
Record Number: 2019/529
2019/540

Whelan J.
Faherty J.
Power J.

BETWEEN/

CHARLOTTE PUONG (A MINOR SUING BY HER MOTHER AND NEXT FRIEND PHEI WOOI CHEW) AND PHEI WOOI CHEW
APPLICANTS/APPELLANTS/ RESPONDENTS

- AND -

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

RESPONDENT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

APPELLANT/ RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of May 2021

1. There are two appeals before the Court arising from the judgment of the High Court (Barrett J.) dated 14 November 2019 and the Order made on 28 November 2019.

2. The applicants in the proceedings (hereinafter referred to as "the Mother" and "the Child") appeal against the "[i]mplicit refusal of Certiorari, Declaratory and Directive

relief" by the High Court as against the Minister for Foreign Affairs and Trade (hereinafter "the first respondent"). The Minister for Justice and Equality (hereinafter "the second respondent") appeals against the Order of *certiorari* quashing her decision of 22 March 2019, remitting the matter back for further consideration and directing that the Mother and Child recover fifty percent of their costs from the second respondent.

3. The appeals concern the grant of a passport to the Child and its subsequent cancellation by the first respondent.

The relevant statutory provisions

4. Before proceeding further, it is useful to set out the relevant statutory provisions in issue in the appeal.

5. Section 6(1) of the Passports Act 2008 ("the 2008 Act") provides that a person who is an Irish citizen and is, subject to the Act, thereby entitled to be issued with a passport, may apply in that behalf to the Minister for a passport.

6. Section 7(1) provides that before issuing a passport to a person, the Minister shall be satisfied: -

> "(a) that the person is an Irish citizen, and
>
> (b) as to the identity of the person."

7. Section 12(1) provides:

> "The Minister shall refuse to issue a passport to a person if-
>
> (a) The Minister is not satisfied that the person is an Irish citizen…"

8. Section 18(1) address the circumstances in which a passport may be cancelled. For the purpose of the present proceedings, the relevant provision is s.18(1)(a):

> "The Minister may cancel a passport issued to a person if-
>
> (a) The Minister becomes aware of a fact or a circumstance, whether occurring before or after the issue of the passport, that would have

> required or permitted him or her to refuse under section 12 to issue the passport to the person had the Minister been aware of the fact or the circumstance before the passport was issued…"

9. As to who is an Irish citizen, s.6(1) of the Irish Nationality and Citizenship Act 1956, as amended ("the 1956 Act") provides that, subject to s.6A:

> "Every person born in the island of Ireland is entitled to be an Irish citizen".

10. Section 6(6) provides that s.6(1) does not apply to a person born on or after the commencement of the Irish Nationality and Citizenship Act 2004 where *inter alia* neither of that persons parents was at the time of the person's birth an Irish citizen or entitled to be an Irish citizen, a British citizen, a person entitled to reside in the State without any restriction on his or her period of residence, or a person entitled to reside in Northern Ireland without any restriction on their period of residence.

11. Section 6A (1) of the 1956 Act is important in the context of this appeal. It provides:

> "A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the persons' birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."

12. Section 6B sets out in a number of subsections how the proper calculation of reckonable residence for the purposes of s. 6(A)(1) is to be determined. Section 6B (4) addresses residence of which account may not be taken in calculating residence for the purposes of s.6(A). For the purposes of the within proceedings, the relevant provision is s.6B(4)(b):

> "A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under s.6 A if – …

(b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State…"

13. The "Act of 2004" as referred to in s.6B(4)(b) of the 1956 Act is the Immigration Act 2004 (hereinafter "the 2004 Act"). Section 4 provides, in material part:

"(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission")

…

(7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned."

Background and procedural history

14. The Mother is a Malaysian national who arrived in the State in 2010. The Child was born in the State on 30 January 2018. On 26 February 2018, an application was made for an Irish passport for the Child. She was duly issued with a passport valid from 13 April 2018. The issue of the passport was based upon the residence permissions of the Mother to be in the State in the four years prior to the Child's birth, by reference to the requirement of s. 6A of the 1956 Act.

Cancellation of the Child's passport

15. The issuing of the passport came under review by the Passport Office in the following circumstances. The Child's father is a Malaysian national who arrived in the State on 6 March 2014. He was granted a Stamp 2 permission on 8 April 2014 until 11 March 2016 when his permission expired. In or about May 2018, the father was found to

be working in Dublin, presumably contrary to the conditions attached to his residence permission. Thereafter, a proposal to deport him issued from the Minister for Justice and Equality pursuant to s.3 of the Immigration Act 1999 following which solicitors acting on his behalf wrote to the Repatriation Division of the Irish Naturalisation and Immigration Service (INIS) in the Department of Justice and Equality on 3 July 2018, notifying them of the father's intention to apply for permission to remain in the State based on his parentage of an Irish citizen child. Enclosed with the father's application form in this regard was a copy of the Child's birth certificate and passport.

16. The father's application prompted Ms. Emma Donoghue of INIS to email the Department of Foreign Affairs and Trade on 25 July 2018 querying whether the Child was entitled to an Irish passport, having regard to the permissions which had been granted to the Mother. Ms. Donoghue's email cited the permissions as comprising Stamp 3 permission from 14 April 2010 to 9 March 2012, Stamp 2 permission from 17 July 2012 to 24 July 2015 and Stamp 3 permission from 13 July 2015 to 12 June 2018.

17. Following this query raised by the second respondent, on 2 August 2018, Mr. Kevin Walzer, Assistant Principal Officer in the Passport Office, wrote to the Mother in relation to the review then being undertaken with regard to the Child's passport. Reference was made in the letter to the basic legal requirement for passport entitlement as set out in s.7(1)(a) of the 2008 Act, namely that before issuing a passport to a person, the first respondent had to be satisfied that the recipient is an Irish citizen.

18. The letter referred to the supporting documentation which had been furnished with the Child's application for a passport, to wit:

(i) Her birth certificate and,

(ii) Her Mother's Malaysian passport which contained permissions to remain in the State as issued to her by the Garda National Immigration Bureau (GNIB) under the auspices of the Department of Justice and Equality.

19. It was explained that as the Child was born to parents who were non-EU/EEA citizens, the entitlement to Irish citizenship was subject to s.6A(1) of the 1956 Act. The letter recorded the permissions granted to the Mother, and which had been considered reckonable for the purposes of s.6A of the 1956 Act, as comprising:

- Stamp 2: reckonable residence from 30 January 2014 to 25 July 2014;
- Stamp 2: reckonable residence from 29 July 2014 to 24 July 2015;
- Stamp 3: reckonable residence from 25 July 2015 to 12 July 2016;
- Stamp 3: reckonable residence from 13 July 2016 to 20 June 2017; and
- Stamp 3: reckonable residence from 21 June 2017 to 30 June 2018.

20. The Stamp 2 permissions in the Mother's passport were expressed as follows:

> "Permission to remain in Ireland to pursue a course of studies on condition that the holder does not engage in any business or profession. (Employment for up to 20 hours per week during school term and for up to 40 hours per week during school holidays permitted) and does not remain longer than [date]."

21. It is not in dispute in this appeal that when the application for the passport was processed the periods between 30 January 2014-25 July 2014 and 29 July 2014-24 July 2015, when the Mother was in receipt of Stamp 2 permissions, were included as being reckonable periods of residence for the purposes of entitling the Child to a passport.

22. Mr. Walzer's letter went on to advise:

> "On the basis of the above, you had sufficient residence to demonstrate [the Child's] entitlement to Irish citizenship under section 6A of the 1956 Act.

However, the D/JE have recently advised this Department that your Stamps on page 19 and 21 cannot be accepted as they fall under stamp 2 category which cover periods of study. This means that those periods of your residence above, which fall under these permissions, are not reckonable for the purposes of section 6A.

It has, therefore, been established from my review that

(i) [The Child's] entitlement to Irish citizenship cannot be demonstrated under section 6A of the 1956 Act; and

(ii) [The Child] is, therefore, not an Irish citizen and thus, by law, has no entitlement to hold an Irish passport"

23. The Mother was advised that the Department of Foreign Affairs had no discretion in the matter and that it was legally required pursuant to s.18(1)(a) of the 2008 Act to cancel the passport. She was informed that she had until 15 September 2018 "to make any additional representations or provide any further information/ explanation or evidence that may be relevant to this decision" and that if no reply was received by that date the Department would proceed to cancel the issued passport. If she needed additional time the Passport Office was to be so advised and would consider such request.

24. On 6 September 2018, the Mother's solicitors wrote to Mr. Walzer, advising that the Mother had been continuously resident in the State since 2010 and that she was married to a Malaysian national who was a Stamp 4 resident in the State. Accordingly, when she had first attended on 14 April 2010 at the GNIB offices with her husband, she was given a "dependant-type residence" permission in the form of a Stamp 3 permission on the basis of her husband's residence status in the State, which had been renewed. It was explained that when the Mother's permission expired in March 2012 and she required a further renewal, albeit still married to her husband, owing to marital difficulties the couple were experiencing at the time he did not attend with her at GNIB. It was said that this had

resulted in the Immigration Officer refusing to give the Mother a renewed Stamp 3. The letter writer went on to explain that as the Mother was at the time a student of a named college she was given a Stamp 2 permission which permission was sporadically renewed. It was explained that she reconciled with her husband in or about April/May 2015 following which he attended with her to register a Stamp 3 permission on 13 July 2015. The solicitors advised that the Stamps in the Mother's passport pertaining to the requisite calculation period comprised pre-existing Stamp 2 from 30 January 2014 to 23 July 2014; a gap of 6 days between 23 July 2014 and 29 July 2014 with no Stamp; Stamp 2 between 29 July 2014 and 24 July 2015; and (various) Stamp 3 permissions between 13 July 2015 and 30 January 2018.

25. According to her solicitors, the Mother had some 932 reckonable days in the requisite calculation period. It was said that only approximately 163 reckonable days would be required to address the reckonablility deficit on the face of her passport.

26. The Mother's solicitors considered the decisions in 2012-2014 to issue the Mother with Stamp 2 permissions to have been made in error given that her husband was resident and working in the State and that she was in the State as his dependant in factual terms. It was submitted that the husband's unwillingness between 2012 and 2014 to cooperate by way of physical attendance at the GNIB for the Mother's registration should not have resulted in a decision to refuse to recognise her *prima facie* right to a renewal of her Stamp 3 permission as she was still the wife and dependant of her husband who was still exercising the rights of a Stamp 4 resident in the State. The Mother's solicitors considered it of no small significance that shortly after what proved to be the couple's final separation, the Mother had attended GNIB without her husband on 13 June 2017 and had been granted a Stamp 3 permission – "in contrast to the wrongful approach taken in 2012".

27. The writer went on to state:

"It is our submission that the true and correct position is that [the Mother] was at all times of the relevant period of calculation, resident in the State owing to her marriage to a Stamp 4 resident in the State. This was the primary basis upon which she was in the State, and could not have been deported from the State for this reason – notwithstanding the error of the GNIB… in not registering her as a Stamp 3 holder between 2012 and 2015.

Her right to be in the State owing to her marriage was real and substantive, and she did not cease to meet the criteria relevant to the grant of that status.

…

[The Mother's] residence in the State was not in contravention of the 2004 Act at any material time, and the period of her residence was not truly for the purpose of engaging in a course of study. As set out above, she was entitled to a Stamp 3 permission albeit that what she was given administratively was a Stamp 2 permission, and this did not change her status as a dependent of her husband in the State. She would also have been entitled to study in the State as a Stamp 3 holder. What occurred was an administrative response to the preference of a single Immigration Officer that [the Mother's] husband attend with her in person. This decision is not one which was made by [the Mother] … and it does not change the actual character of her residence as demonstrated by her having Stamp 3 permission both before and after her Stamp 2 permissions, and by her capacity to renew her Stamp 3 permission without her husband attending the GNIB offices in 2017.

As the concept of reckonable residence is set out in negative rather than positive terms, [the Mother's] residence in the State is not required to have any particular type of character and should not be excluded from reckonability. There is no exhaustive list of what should be included as reckonable; and her residence, being

lawful and beyond her activities as a student as it undoubtedly was, must therefore be within the exceptionally broad category of what is included, because it was not excluded by negative definition of "reckonable residence" in the 1956 Act."

28. As regards the Child, the solicitors advised as follows:

"There is no procedure which permits the revocation of citizenship by birth… Consequently, as [the Child] has obtained a passport, this is an act *"that only an Irish citizen is entitled to do"* and she is therefore a citizen of Ireland. There is no procedure which can deprive her of that citizenship, and we submit that as she is a citizen, her passport should not be cancelled – to do so is to seek in effect to deprive her of her citizenship".

29. Citing the judgment of the CJEU in Case C-135/08 *Rottmann v. Freistaat Bayern* [2010] E.C.R. 1-01449, the solicitors submitted that any procedure which may be legally adopted for the purposes of depriving the Child of her Irish citizenship required a proportionality assessment. It was stated that even if the Child's citizenship could be altered or undermined, such a decision should not be made on the facts of the case and would be manifestly disproportionate. It was further stated that the first respondent was not under any obligation to cancel a passport even where an error was believed to have been made in issuing it.

30. On 19 September 2018, Mr. Walzer replied to this correspondence stating, *inter alia,* that the Child's entitlement to Irish citizenship was governed by s.6A of the 1956 Act and that s.6B(4)(b) of the 1956 Act excluded Stamp 2 residence from being reckonable. He advised that the first respondent had erred in including the Mother's Stamp 2 permissions in his calculation of her residence and that as "[t]he actual amount of [the Mother's] residence that is reckonable for the purposes of section 6A, is less than the statutory requirement of three years … [t]his means that [the Child] is not an Irish citizen.

Moreover, the issue of a passport to her was not compliant with the 2008 Act and was thus unlawful."

31. He went on to state:

> "Your representations contain no proofs or documents from the Department of Justice and Equality and/or [GNIB]that could corroborate that certain permissions in [the Mother's] immigration history were issued in error. In the absence of this, it remains the Department's position that [the Child] is not an Irish citizen and has no entitlement to a passport under the 2008 Act.
>
> The Department, of course, accepts that it erred in issuing a passport to [the Child]. However, entitlements to citizenship and passports are matters that are clearly subject to defined terms in law. The Department is, therefore, legally obliged to proceed with the cancellation of the issued passport.
>
> …
>
> It should therefore be noted that as [the] passport … has now been cancelled, it is no longer valid for any use by [the Child] or by her guardians on her behalf…"

32. The Mother's solicitors responded on 2 October 2018, expressing their surprise that a decision to cancel the passport appeared to have been taken on the basis that the Mother had not provided documentation, and pointing out that she had only been offered the opportunity to make submissions on 2 August 2018. The letter continued:

> "We note in particular that proposal to cancel the passport was not made as a consequence of your own interpretation of the relevant residence periods, but rather relied on what had been sent to your office by the Department of Justice, and it is difficult to appreciate how in light of our direct response to what was the position of the Department of Justice (and not that of your own office), that your response to those submissions should be that it remains your Department's position, that the

> passport –holder is not an Irish citizen. It appears to this firm that your premise in fact relies on the initial position of the Department of Justice, and that our response to that position has not been processed by that Department (or by anyone)."

33. It was stated that if the cancellation of the passport was not withdrawn within 14 days it was the intention to challenge the decision to cancel by way of judicial review.

34. In his response of 31 October 2018, Mr. Walzer reaffirmed the position as set out in his earlier letter. He reiterated that no documentary evidence had been produced by the Mother to show that those Stamp 2 permissions had been changed by the Irish immigration authorities. The reason for the cancellation was expressed as follows:

> "… In cancelling the… passport, the Department acted pursuant to the power granted by section 18(1)(a) of the 2008 Act. This provision allows the Department to cancel a passport issued to a person if it becomes aware of a fact or circumstance, whether occurring before or after the issue of the passport, that would have required or permitted the refusal to issue a passport under section 12 of the same Act, had the Department been fully aware of the fact or circumstance before the passport was actually issued. Section 12(1)(a) of the 2008 Act obliges the Department to refuse to issue a passport to a person if s/he is not an Irish citizen."

35. The letter concluded by stating that if the Mother "is successful in any case that she may take to the Department of Justice and Equality, which is responsible for immigration matters, to have her Stamp 2 permissions changed to Stamp 3 permissions, the Department will consider a new passport application for [the Child]. It would be important to support such an application with a letter from that Department that states any approved change in her current immigration history.*"*

Contact with the Department of Justice and Equality

36. On 21 November 2018, the Mother's solicitors wrote to INIS enclosing the correspondence that had passed between the Mother and the Department of Foreign Affairs between 6 September 2018 and 31 October 2018. The submission was made that "the true and correct position" was that the Mother was at all times of the relevant period of calculation resident in the State owing to her marriage to a Stamp 4 resident in the State. Without prejudice to the Mother and Child's right to challenge the decision of the first respondent, and with specific reference to what was contained in the final paragraph of the letter of 31 October 2018 from the Passport Office, INIS was requested to revert as a matter of urgency confirming that the position was as stated in the Mother's submissions, namely that she was at all times entitled to a Stamp 3 permission in the State, notwithstanding that she had been given a Stamp 2 at the relevant time owing to her particular circumstances, and that, therefore, the period of January 2014 to July 2015 should be reckonable for the purposes of determining the eligibility of the Child to Irish citizenship by birth.

37. Reference was made to the considerable prejudice which the decision to revoke the passport had caused and the belief that the decision should not have been taken by the first respondent without his Department having sought a clear and detailed analysis of the position from the Department of Justice. The second respondent was thus requested to confirm her position with regard to the matter.

38. By the time the judicial review proceedings issued on 13 December 2018, no reply had been received from the second respondent. As a matter of fact, the reply issued on 22 March 2019 (the day on which the Statement of Opposition was filed).

39. The second respondent's response was in the following terms:

"I refer to your correspondence of 21st November 2018 addressed to the Irish Naturalisation and Immigration Service which attached correspondences exchanged with Department of Foreign Affairs and Trade.

With regard to your request to INIS to confirm that your client [the Mother] was at all times entitled to Stamp 3 permission for [the] period when her passport had been stamped in Enniscorthy, I wish to advise I am unable to provide this confirmation for the following reasons:

[The Mother] was issued with a Stamp 3 as a dependent of her husband from 14th April 2010 to 7th July 2010. She maintained the Stamp 3, registering in [G]– 8th July 2010 to 5th March 2011 and 9th March 2011 to 9th March 2012. Her husband notified Immigration that they had separated in March 2011 and on 28th March 2012 she was advised that she should write to INIS to obtain permission in her own right.

[The Mother] does not appear to have done this and her next record is 17th July 2012 at [E] when she registers as a student – Stamp 2, apparently presenting a college letter from [ ] her fees were paid for a Level 1 Cert in ESOL International. She maintained student status, ? Level 2 Cert ESOL Int. from 29th July 2013 to 25th July 2014 and again from 28th July 2014 to 24th July 2015 at which time she changed to a Stamp 3 from 13th July 2015 to 12th June 2018. I trust the above clarifies the matter."

The judicial review

40. Leave to seek judicial review was granted by the High Court (Humphreys J.) on 17 December 2018.

41. The Amended Statement of Grounds pleads that the first respondent:

- Adopted an unfair procedure in cancelling the passport without further referring the Mother's submission to the Department of Justice.
- Acted unreasonably and unlawfully in failing to adjudicate on the substance of the submission that the Mother's residence in the State between 30 January 2012 and 13 July 2015 could be considered reckonable service notwithstanding the permission being described as Stamp 2 in her passport.
- Misinterpreted his power to cancel the passport as mandatory rather than discretionary.
- Breached the requirement to consider the proportionality or reasonableness of cancelling the passport by reference to the fact that by doing so he was depriving the Child of the benefit of citizenship of the EU.
- Acted *ultra vires* s.18 of the 2008 Act.
- Acted unlawfully in relying on the second respondent's description of the Mother's residence and by not establishing the true basis of that residence.

42. The grounds advanced for relief against the second respondent are as follows:

- The second respondent did not clearly or conclusively identify to the first respondent and/or to the Mother and Child – prior to a decision to revoke the Child's passport, or at all – which periods of the Mother's residence had been found to be reckonable for the purposes of establishing whether the Child is a citizen of Ireland by birth, or precisely which periods should be regarded as such.
- In her decision of 22 March 2019, the second respondent failed to address a relevant question at issue, namely whether the Mother's presence in the State during relevant periods may be regarded as "reckonable" within the meaning of the 1956 Act by reason of her personal circumstances (and in particular her

ongoing marriage and the presence in the State of her spouse which had given rise to her Stamp 3 permission) either when she was refused a renewal of that permission or any period in which she was registered as having Stamp 2 permissions.

- The second respondent breached fair procedures by not disclosing to the Mother the evidence upon which the statement that she was advised to write to the second respondent to obtain an independent residence permission was based and/or by failing to set out whether such an application could or would have been granted, and if so, on what basis.

43. As against both respondents, it is pleaded that they acted unlawfully and in breach of fair procedures in considering and acting in reliance upon the purported and incorrect description "former husband" in relation to the Mother's spouse and any alleged misrepresentation by the Mother in June 2017 which said issues were, in any case, not relevant to the nature of the Mother's residence in the State during the requisite reckonable period, March 2012 to July 2015.

44. The Statement of Opposition denies that the first respondent breached fair procedures. The following pleas are advanced:

- It was open to the Mother to raise with the second respondent any issue relating to the grant to her of a Stamp 2 permission, and/or challenge any decisions in that regard she believed were unlawfully made, but she failed to do so.
- The substance of the Mother's and Child's representations were fully considered, following which the first respondent informed them that he had no discretion in the matter as the child was not entitled to citizenship under s.6A and/or s.6B of the 1956 Act.

- There was no obligation on the first respondent to refer the Mother to the second respondent: the onus was on the Mother to substantiate her assertion that certain visa permissions were issued to her in error.
- The first respondent had no lawful power to vary, amend or substitute the designation or grant of the Mother's Stamp 2 permissions, such power being vested in the second respondent pursuant to s.4 of the 2004 Act. No legal basis has been set out upon which the first respondent could be directed "to carry out all actions necessary" to permit the lawful use of the passport.
- The first respondent had no power to "deem" periods of Stamp 2 residence reckonable as such an action would be contrary to the statute.
- The first respondent was not obliged to carry out a proportionality assessment when deciding to cancel the Child's passport: as the passport was issued in error, the Child was never an Irish citizen and therefore never entitled to the benefit of EU citizenship.
- The first respondent did not act *ultra vires* s.18 of the 2008 Act in revoking the passport by reason of identification of an error.
- The decision to cancel the passport was made on 19 September 2018. Any reliance placed on the second respondent's letter of 22 March 2019 is misconceived as same post- dated the decision to cancel the passport.
- For the purpose of the issuing of a passport, it is the first respondent who considers whether or not a person such as the Child is or is not an Irish citizen, and who therefore applies the provisions of the 1956 Act. Any period of residence of the Mother based on Stamp 2 permission is not reckonable as a matter of law. The second respondent had no power to determine what is regarded as "reckonable".

- The first respondent was entitled to rely on the terms of the permissions as recorded on the Mother's passport.
- The judicial review proceedings were wholly unnecessary in circumstances where the Mother was informed in the decision dated 31 October 2019 that if she substantiated her claim there had been an error in the calculation of her reckonable period of residence, the first respondent would accept a further application on behalf of the Child for a passport for consideration.

45. The second respondent's grounds of opposition can be summarised as follows:

- The proceedings should be dismissed *in liminie* as no cause of action or ground has been set out to entitle the Mother and Child to succeed.
- The Court has no entitlement to adjudicate on or vary the Stamp 2 permission granted to the Mother from March 2012 to July 2015 as the decisions of the second respondent granting those permissions have not been challenged.
- The letter of 22 March 2019 was not a "decision" and did not ever purport to be such.
- The relief by way of *certiorari* sought in respect of the letter of 22 March 2019 is wholly misconceived and manifestly unstateable given that the letter was no more than a reply to the Mother's and Child's letter of 21 November 2018.
- The second respondent has no power or function in relation to the issue of passports or the reckonability of residence in connection with the grant or cancellation of a passport.

The judgment of the High Court

46. The High Court refused the relief sought as against the first respondent. The trial judge found that "the Minister for Foreign Affairs was and is (correctly) not satisfied that the requisite reckonable residence presents at this time for [the Child] to enjoy citizenship."

He considered that the first respondent had gone beyond the call of duty by steering the Mother in the direction of the Department of Justice. He found no unreasonable procedure or breach of fair procedures in the manner in which the decisions of 19 September 2018 and 31 October 2018 were reached.

47. As already outlined, the trial judge granted the Mother and Child relief as against the second respondent. He rejected the argument that the letter of 22 March 2019 was not a decision, stating:

> "It seems to the court that it can only be read as reflecting a decision to refuse to accede to all that was sought in the letter of 21.11.2018."

48. The trial judge did not accept the second respondent's argument that what the Mother sought (or the proceedings) constituted an impermissible collateral attack on the decisions made regarding her residency permission following her separation from her husband in 2012. He went on to state:

> " If it remains open to the Minister to vary the issued permissions under s.4 of the Immigration Act 2004, and, the court having raised this issue by way of question at hearing, there was common agreement in this regard between counsel for both sides to this application that the Minister can do so… then it does not seem to the court that it can reject as impermissible an application which in its substance seeks to achieve what statute (s.4(7) of the Act of 2004) recognises as (and all of the counsel before the court accept is) permissible, and which the Department of Foreign Affairs in its letter of 31.10.2018 clearly accepts is open to [the Mother] to make"

49. The trial judge addressed the letter of 22 March 2019 in the following terms:

> "…there is a fundamental error presenting in the decision of 22.03.2019 in that the Minister has failed to engage with the key issues raised by the solicitors for [the Mother] in their letter of 21.11.2018. In that letter the solicitors are clearly making

> the point 'My client ought to have been given Stamp 3 permission despite being separated' and the reply in effect is 'Your client was given Stamp 2 permission because she was separated'
>
> Unaddressed are the consequences that flow from [the Mother's] particular separation and, in particular, whether or not a variation should issue such that [the Mother] can return to the Department of Foreign Affairs with the type of letter contemplated by that Department in the closing paragraph of its letter of 31.10.2018 (and to which the attention of the Minister for Justice was expressly drawn in the letter of 21.11.2018). In this regard, the court finds for the applicants under point E(ix) of the amended statement of grounds, though noting that (as was correctly contemplated by the Department of Foreign Affairs in its letter of 31.10.2018) reckonability can only arise if the impugned Stamp 2 permissions are varied to Stamp 3 permissions."

The second respondent's appeal

50. I propose firstly to deal with the second respondent's appeal. Arising from the appeal notices and the parties' submissions, the following issues arise for consideration:

(i) Did the second respondent's letter of 22 March 2019 constitute a decision amenable to judicial review?

(ii) If so, was it a decision made pursuant to s.4(7) of the 2004 Act, and, as such, subject to the requirements of s.5(1) of the Illegal Immigrants (Trafficking) Act 2000 (as inserted by s.34 of the Employment permits Act 2014) ("the 2000 Act")?

(iii) If the response of 22 March 2019 was a decision, and the appeal from the Order of the High Court is properly before this Court, did the trial judge err in quashing the decision?

Was the 22 March 2019 letter a decision amenable to judicial review and, if so, was a certificate required?

51. Section 5(1) of the 2000 Act provides, in relevant part:

> "A person shall not challenge the validity of …
>
> > "(e) a refusal under section 4 of the Immigration Act 2004
>
> …
>
> otherwise than by way of judicial review proceedings brought under Order 84 of the Rules of the Superior Courts…"

Pursuant to s.5(6)(a), the determination of the High Court as to the validity of a refusal under s.4(7) of the 2004 Act is final and no appeal will lie to the Court of Appeal unless the appropriate certificate has been granted by the High Court.

52. In her notice opposing the appeal, the Mother asserts that as the High Court quashed the decision of 22 March 2019 on the basis that the second respondent had not lawfully exercised her powers under s.4(7) of the 2004 Act, it must be that the High Court therefore found that the impugned decision was necessarily made pursuant to s. 4(7) of the 2004 Act. Accordingly, the decision fell within the class described at s.5(1) of the 2000 Act in respect of which a certificate pursuant to s.5(6) of the 2000 Act was required in order to appeal the judgment of the High Court. It is argued that in the absence of a certificate, the appeal must be struck out *in liminie.* Moreover, the plea that no justiciable decision was taken "does not obviate the need for a certificate…"

53. Without prejudice to the contention that the appeal should be struck out in *liminie*, the Mother's position is that the trial judge was correct to find that the letter of 21 November 2018 was in substance an application under s.4(7) to vary the Stamp 2 permission: what was being asked of the second respondent was that she would confirm that the Mother had a better residence status than Stamp 2 in the period 2014- 2015. It is

argued that the second respondent cannot rely on the fact that the Mother did not specifically ask for a variation of residence permission pursuant to s.4(7) as a basis to defeat the requirement for a certificate in order to appeal.

54. The second respondent denies that leave to appeal was required. She maintains that insofar as the trial judge construed the letter of 21 November 2018 as an "application" which was "in its substance" an application under s.4(7) of the 2004 Act, that was in error. While it is acknowledged that the second respondent has a power under s.4(7) of the 2004 Act to vary or alter residence permissions, the second respondent's position is that no application was in fact made by the Mother in that regard.

55. Emphasis is placed on the fact that the Mother's letter of 21 November 2018 did not give any indication that it was intended to be an application, let alone of the kind of formal application required if a person seeks to renew or vary a permission under s.4(7) of the 2004 Act. There was no mention or request made in that letter to vary the Stamp 2 permission to Stamp 3. The second respondent's position is that what was requested in the letter of 21 November 2018 was that she would look behind the Stamp 2 permissions granted in the period 2014-2015 and then confirm that the Mother was entitled to Stamp 3 permission, essentially that second respondent would confirm a historic entitlement of the Mother to a Stamp 3 permission. This, the second respondent was unable to do. It is argued that the letter of 22 March 2019 simply refused confirmation of a certain interpretation of historical facts being alleged by the Mother.

56. It is contended that the letter refusing "confirmation" was not a decision which had any effect on the Mother's legal rights: she remained in exactly the same position as she was before the writing of the letter. Citing *Ryanair v. Flynn* [2000] 3 I.R. 240, counsel contends that there was *"no decision susceptible to being quashed in the sense that no legal rights of the applicant are affected…"*. Counsel also points out that albeit the trial

judge quashed, what he styled, as the decision of 22 March 2019, at no stage did he characterise it as a decision under the 2004 Act.

57. Firstly, in my view, there is no reality to the second respondent's argument that the letter of 22 March 2018 did not constitute a decision. The import of the Mother's letter of 19 November 2018, taken together with the correspondence between the Mother and the first respondent that was enclosed therewith, could not have left the second respondent with any impression other than that the Mother was seeking a decision that would remedy a state of affairs which she was contending was not the legal or factual reality as far as her status in the State from 2012 to 2015 was concerned. While the Mother did not receive the confirmation of her residence status she had sought from the second respondent, I agree with the trial judge's assessment that the letter of 22 March 2019 "can only be read as reflecting a decision to refuse to accede to all that was sought in the letter of 21.11.2018".

58. The next question is whether the provisions of s.5 of the 2000 apply to the decision.

59. Before addressing whether a certificate was required, it is apposite to refer to Article 34.4.1 of the Constitution. Article 34.4.1 provides:

"The Court of Appeal shall:

(i) save as otherwise provided by this Article, and

(ii) with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

60. Article 34.4.1 was considered in *X.X. v. The Minister for Justice and Equality* [2018] IECA 124. In that case the Refugee Applications Commissioner had refused to accept an asylum application on the basis that because of an earlier (abandoned) asylum application,

the Minister's consent was required under s.17(7) of the Refugee Act 1996 in order for the applicant to re-enter the asylum process. The issue in the judicial review was whether the Minister had previously "refused to grant a declaration [of refugee status]" when the previous asylum application was withdrawn. In the High Court, Humphreys J. upheld the refusal to accept the asylum application in the absence of the Minister's consent, finding that the earlier asylum application had been "refused" by the Minister. The refusal was thus captured by s.5 of the 2000 Act. Humphreys J. refused to grant a certificate under s.5 of the 2000 Act to the applicant.

61. The applicant duly appealed. It fell to the Court of Appeal to consider whether an appeal lay at all in the face of the Minister's position that the appeal should be dismissed for want of jurisdiction.

62. Writing for the Court, Hogan J. observed (at para. 33) that the case law dealing with the old Article 34.4.3, which had previously regulated the right of appeal from the High Court to the Supreme Court, *"is applicable, mutatis mutandis,"* to Article 34.4.1. In the same paragraph, he cited the *dictum* of Walsh J. in *The People v. Conmey* [1975] I.R. 341 that any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of the Supreme Court *"would of necessity have to be clear and unambiguous",* a statement which had been quoted with approval by Hardiman J. in *Minister for Justice v. Connolly* [2014] IESC 34. Hogan J. also cited Clarke J. (as he then was) in *Stokes v. Christian Brothers High School, Clonmel* [2015] IESC 13, [2015] 2 I.R. 590:

> *"in the light of the constitutional status of the right to appeal, this Court has consistently expressed the view that the wording of any statute which is said to restrict that constitutional right of appeal must be very clear."*

63. Hogan J. also considered *AB v. Minister for Justice, Equality and Law Reform* [2002]1 I.R. 296, where the Supreme Court concluded that an appeal lay against a refusal to extend time in a case otherwise coming within the ambit of s.5 of the 2000 Act. In *AB*, Geoghegan J. found "*it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time."* Hogan J. then went on to consider *A. v. Minister for Justice and Equality* [2013] IESC 18, where it was held that a motion to strike out proceedings did not come within the enumerated categories of excluded appeals otherwise requiring a certificate contained in s.5 of the 2000 Act.

64. Hogan J.'s review of the case law led him to conclude as follows:

> *"41. In the light of this jurisprudence- and, frankly, an abundance of other case-law all consistently to the same effect-there is simply no basis at all for the fundamental argument advanced by counsel for the Minister to the effect that this Court could not go behind the conclusion of Humphreys J. that s. 5 of the 2000 Act applied to the decision in question and that, absent the grant of a certificate, this Court lacked jurisdiction to entertain the appeal. If that were so, it would mean that the High Court could by a ruling which was erroneous in law as to the scope of s.5 of the 2000 Act effectively deny an appellant an otherwise perfectly valid constitutional right of appeal granted to him by Article 34.4.1 of the Constitution and which has never been validly excluded by a law duly enacted by the Oireachtas…"*

65. In essence, as noted by Hogan J. in *X.X*. (at para. 43), for the exclusion of the High Court determination from the appellate jurisdiction of the Court of Appeal to take effect, the determination must be was one "to which [s.5] applies". Hogan J. went on to state that if the Court of Appeal determined that the High Court was correct regarding the

application of s.5 of the 2000 Act to the case, then in the absence of a certificate no appeal would lie. He further stated:

> *"Conversely, were this Court to hold that the High Court's determination on the application of s.5 to the present case was wrong in law, then, as the Supreme Court's decision in AB itself illustrates, an appeal would lie, the absence of a certificate notwithstanding."*

66. The above quoted jurisprudence underscores the principle that the ouster of the right to appeal must be clear and unambiguous.

67. Of course, here, it is not the case of a refusal by the trial judge to grant a certificate. The second respondent has simply appealed the Order of the High Court. Notwithstanding that no application for a certificate was made (and refused) by the High Court, to paraphrase Hogan J. in *X.X.*, it remains the case that the real question for the purpose of establishing whether a s.5 certificate was required is whether the trial judge made a determination "as to the validity of a refusal under Section 4 of [the 2000 Act]"?

68. Turning, therefore, to the judgment under appeal. At para. 13 of his judgment, specific reference is made by the trial judge to the power vested in the second respondent pursuant to s.4(7) of the 2004 Act to grant, refuse or vary a residence permission. This was in the context of his opining that the first respondent has no powers under the 2004 Act. At para. 17, he found that it was open to the second respondent to vary the issued permissions. He opined that the documentation sent in by the Mother "in its substance seeks to achieve" a variation of residence status under s. 4(7) of the 2004 Act. He referred to the Mother's application as one that "seeks to achieve what statute (s.4(7) of the Act of 2004) recognises as…*permissible*" (emphasis in original).

69. It is largely on these bases that counsel for the Mother contends that as the premise behind the quashing of the decision of 22 March 2019 by the High Court is to be found in

the statutory power of the second respondent under s.4(7) of the 2004 Act to vary a residence permission, it follows that in order for the second respondent to be entitled to appeal, she was required to obtain the leave of the High Court, which was not done in this case.

70. Notwithstanding the submissions advanced on behalf of the Mother, I find no basis upon which to find that the appeal should be dismissed for want of jurisdiction on the part of this Court to entertain the appeal. Fundamentally, I am not persuaded by the argument that the trial judge in fact determined the validity of a decision made under s.4(7) of the 2004 Act.

71. In my judgment, the conclusions reached by the trial judge do not equate to an unequivocal determination as to the validity of a refusal under the specific provisions of s.4(7) of the 2004 Act. It is, I believe, noteworthy that what the trial judge was addressing in para.17 of his judgment, when referring to s.4(7) of the 2004 Act, was the second respondent's assertion that what was being sought by the Mother constituted an impermissible attack on the decisions made in the period 2012 -2014 to grant Stamp 2 permissions and which were not challenged at the relevant time. In my view, the trial judge was not there pronouncing with any recognisable degree of clarity that he understood the second respondent's letter of 22 March 2019 to constitute a refusal under s.4(7) of the 2004 Act, albeit, he refers to the Mother's application as one that "seeks to achieve what statute (s.4(7) of the Act of 2004) recognises as…*permissible*".

72. Indeed, the trial judge's inability to spell out with any recognisable clarity that he considered the decision as a refusal of an application under s.4(7) of the 2004 Act is not surprising. The first reference in the case to s.4(7) was in the submissions made to the High Court on behalf of the Mother and Child. There is no reference in the Mother's letter of 21 November 2018 to s.4(7) and no claim is made in the Amended Statement of Grounds that

the Mother had applied pursuant to s.4(7) to the second respondent to vary her Stamp 2 permissions, or that the letter of 22 March 2019 constituted a refusal to that specific application. Furthermore, the Mother's solicitor, Mr. McGuigan, in his affidavit sworn 24 May 2019 in these proceedings, describes the purpose of the letter sent to the second respondent on 21 November 2018 as seeking to elicit from the second respondent "their actual view" of the submissions which the Mother had previously made to the first respondent, with no reference to s.4(7) of the 2004 Act.

73. At para. 19 of his judgment, the trial judge found that there was a "fundamental error" present in the decision of 22 March 2019 in that second respondent failed to engage with the key issue raised by the Mother's solicitors, namely that she ought to have been granted Stamp 3 permissions in the relevant years despite being separated from her husband, and that the decision left unaddressed the consequences which flowed from that separation "in particular, whether or not a variation should issue such that [the Mother] can return to the Department of Foreign Affairs with the type of letter contemplated by that Department in the closing paragraph of its letter of 31.10.2018." Crucially, in so concluding, the trial judge does not specifically set out that lack of engagement in the context of an application by the Mother pursuant to s.4(7) of the 2004 Act albeit, as I have said, there is reference in para. 19 to "whether a variation should issue". Notably, at para. 23, the trial judge answers the question **"[s]hould the decision of the Minister for Justice be quashed as a failure to exercise a relevant power or perform a relevant function?"** (original in bold), as posed by him, by referring back to the reasons he identified earlier (at paras. 19 and 20) as the basis for quashing the decision. None of those reasons, to my mind, gives a clear and unambiguous indication that the trial judge had determined that the contents of the letter of 22 March 2019 in fact constituted a refusal of an application made under s. 4(7) of the 2004 Act. Even accepting, as I do, that the request for clarification of

the Mother's residence status was construed by the trial judge as an application "which in its substance seeks to achieve what statute (s.4(7) of the Act of 2004) recognises as…*permissible*" (para. 17 of the judgment), the trial judge could hardly be found to have determined the validity of a refusal under s.4(7) of the 2004 Act given that the application to the second respondent was not made in those terms, or indeed sought to be impugned in the pleadings by reference to s.4(7).

74. It is also noteworthy that the ground which the trial judge found made out against the second respondent for judicial review was that at ground E (ix) of the Amended Statement of Grounds, namely that "[the second respondent] has failed to address a relevant issue, namely whether [the Mother's] presence in the State during relevant periods may be regarded as "reckonable" within the meaning of [the 1956 Act]…, by reason of her personal circumstances (and in particular her ongoing marriage and presence in the State of her spouse which had given rise to her prior Stamp 3 permissions) either when she was refused a renewal of that permission or any period in which she was registered as having Stamp 2 permissions". While the Mother, effectively, wishes this Court to translate ground (ix) into a determination by the trial judge on the validity of a refusal by the second respondent under s.4(7), in aid of her submission that a s. 5 certificate was required, it ill-behoves her to do so given the conspicuous absence of a reference to s.4(7) either in the letter of 21 November 2018 or the Amended Statement of Grounds.

75. Accordingly, for the reasons set out above, and being cognisant of the requirement that the ouster of this Court's jurisdiction should be clear, including from the contents of the judgment being appealed from, the argument that the second respondent required the leave of the High Court before appealing the decision of 22 March 2019 is rejected. It follows that this Court's jurisdiction to hear the second respondent's appeal is not ousted by the absence of a certificate under s.5 of the 2000 Act.

Did the trial judge err in quashing the decision of 22 March 2019 on the basis that the second respondent failed to engage with the request made in the Mother's letter of 19 November 2018?

76. The trial judge's rationale for quashing the decision on 22 March 2019 was that the second respondent had failed to engage in any substantive regard with the Mother's letter of 21 November 2018 and the other material enclosed therewith.

77. It is submitted on behalf of the second respondent that the trial judge erred in holding (at para. 19) that "… the Minister has failed to engage with the key issues raised by the solicitors for [the Mother] in their letter of 21.11.2018". She contends that contrary to the finding of the trial judge, the letter of 22 March 2019 engaged directly with the exact request made by the Mother and that the reasons for the refusal of the confirmations sought are clear in the letter. It is argued that what was being sought by the Mother was confirmation of a particular state of affairs, which could not be given for the reasons set out in the letter. It is further submitted that neither the argument that there was a failure to "engage" with the request nor the complaint that the Mother's submissions were not "substantively" considered are recognised grounds for judicial review.

78. On the other hand, counsel for the Mother contends that the trial judge was correct to find that the second respondent failed to address the key issue raised in the Mother's suite of correspondence between 6 September 2018 and 21 November 2018. He submits that the second respondent should have decided what the Mother's actual Stamp status was in 2014-2015 or assisted the first respondent in resolving the matter.

79. While I reject the implicit suggestion that it was part of the second respondent's statutory remit to involve herself in the exercise by the first respondent of his statutory functions under the 2008 Act, I am nevertheless satisfied to accept the Mother's

submission that the trial judge did not err in concluding that the second respondent failed to engage with the request set out in the letter of 21 November 2018.

80. My reasons for so concluding are as follows. At the heart of the Mother's letter was a request that the second respondent would revisit the question of her residence status in the State from 2015-2015, on the basis that her status as a separated spouse should not have debarred the grant of Stamp 3 residence permission for the relevant years. The purpose of her letter was to elicit from the second respondent a decision that would allow her to return to the first respondent so that he could then reconsider the grant of a passport in respect of the Child, as contemplated in the first respondent's letter of 31 October 2018. Obviously, the second respondent had no function in determining the reckonable residence for the purpose of the grant of a passport to the Child, but she did have the sole function under the 2004 Act to consider whether the state of affairs as presented by the Mother's solicitors in the letter of 21 November 2018 could lead to the retrospective grant to the Mother of a Stamp 3 status for the relevant years. There was no engagement by the second respondent with the request being made of her.

81. In advocating that there was such engagement but that the Mother's submissions did not require to be "substantively" considered, the second respondent cited *K. v. Refugee Appeals Tribunal & Anor* [2010] IEHC 438 ("*T.B.K.*").

82. In *T.B.K.*, the challenge was that the Refugee Appeals Tribunal (RAT) had not engaged with the primary claim of the applicant, namely that he was of Bhutanese nationality and that the reason he was outside that country was that he had been expelled from Bhutan for reasons which constituted persecution on grounds of ethnic origin. The Office of the Refugee Applications Commissioner (ORAC) had earlier found that the applicant was to be treated as a person fearing persecution in his former country of habitual residence (Nepal)-the claim actually made to ORAC by the applicant-rather than as a

national of Bhutan fearing persecution if returned to that country. The applicant appealed ORAC's finding to the RAT. Immediately prior to the appeal hearing, the applicant furnished additional submissions to the RAT which referred to a well-founded fear of persecution in his country of origin Bhutan, as well as a well-founded fear of persecution in Nepal. He did not succeed before the RAT. Leave for judicial review was granted on the basis that the RAT dealt with the applicant only as a person who was stateless and was outside his country of residence (Nepal) and thus could only claim refugee status if he established a well-founded fear of persecution if returned to Nepal.

83. Ultimately, Cooke J. refused judicial review. He found that the applicant's notice of appeal had not challenged ORAC's finding that he was to be treated as someone fearing persecution in Nepal and that the appeal to the RAT had been taken based on that explicit finding. In respect of the additional submissions which had been lodged with the RAT in respect of a fear of persecution in Bhutan, Cooke J. was of the view that this claim owed more to a retrospective reconsideration of the case that might have been made as opposed to any logical appraisal of the case actually made to the RAT on appeal. In any event, by reference to the content of the RAT decision, Cooke J. found that the Tribunal member was fully aware of the variety of submissions that had been made on behalf of the applicant, including the claim based on the applicant's Bhutanese nationality. He was of the view the finding of the RAT that the applicant was stateless could only be interpreted as a rejection of his claim to Bhutanese nationality. Accordingly, Cooke J. found that there was no failure on the part of the RAT to "engage" with the applicant's claim.

84. As far as the present case is concerned, undoubtedly, the Department official who replied on behalf of the second respondent to the Mother's letter of 21 November 2018 had clearly reviewed the Mother's immigration history. He advised the Mother that she had permission to remain in the State on Stamp 3 conditions as a dependant of her husband up

to 28 March 2012. She was further advised that in March 2011, her husband had notified Immigration that the parties had separated in March 2011. There was also reference to the advice which had been given to her on 28 March 2012 that she should write to INIS to obtain permission in her own right. It was noted that the Mother did not do so, instead she had registered as a student under Stamp 2 conditions commencing 17 July 2012 and which pertained until July 2015 when her residence status changed to a Stamp 3 permission from 13 July 2015 to 12 June 2018.

85. It is by reason of the foregoing that the second respondent argues the trial judge erred in finding that the submissions contained in the Mother's letter of 21 November 2018, and the letters to the first respondent enclosed therewith, were not considered.

86. I find, however, that I cannot agree with the second respondent's contention that the trial judge erred. There is no sense from the letter of 22 March 2019 that the second respondent engaged in any substantive regard with the primary point (as found by the trial judge) being made by the Mother, which was that despite being separated from her husband at the relevant times she was still entitled to a Stamp 3 permission. As stated by the trial judge, the reply of the second respondent was to the effect that the Mother had been given a Stamp 2 permission *because* she was separated. To my mind, nothing in that reply suggests any consideration having been afforded to the claim that the fact of her separation should not have precluded the grant of a Stamp 3 permission, which was the salient issue the second respondent had been asked by the Mother to address. Therefore, unlike the RAT decision in *T.B.K. v. Minister for Justice*, the contents of the 22 March 2019 decision do not reflect any real engagement with the substance of the Mother's claim. Accordingly, I am not persuaded that there is any merit in the second respondent's reliance on *T.B.K.*

87. Before the High Court, it was also argued on behalf of the second respondent that the reference in the letter of 22 March 2019 to the second respondent having received the Mother's letter of 21 November 2018, and the accompanying attachments, indicated that all of the correspondence had been considered. Counsel cited the *dictum* of Hardiman J. in *G.K. Minister for Justice* [2002] 2 I.R. 418 as authority for the proposition that *"[a] person claiming a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence…of that proposition"*. It was argued that the Mother had not adduced such evidence. The trial judge addressed this submission by stating that the *dictum* of Hardiman J. "is not authority for the proposition that having read what has been received, a decision-maker can then be excused when …her/his decision sidesteps the substance of the application before that decision-maker, as happened here."

88. Before this Court, the second respondent maintains that the trial judge erred in his interpretation and application of *G.K. Minister for Justice,* and that he conflated the duty on the second respondent to consider representations with the duty to give reasons. I cannot accept that submission. While, as counsel for the second respondent properly submits, that there is ample Supreme Court authority to the effect that discursive reasons are not generally required to reject a claim (see *F.P v. Minister for Justice* [2002] I I.R. 164**)**, in this case, what the trial judge was addressing was not an alleged failure by the second respondent to give reasons: rather he was simply making the point that the fact that the decision of 22 March 2019 explicitly references the Mother's letter cannot excuse the failure of the second respondent to actually engage with the case that was put to her, a failure which is evident from the tenor of the second respondent's decision of 22 March 2019.

89. Thus, for the reasons set out above, I am satisfied that the trial judge was correct to quash the decision of 22 March 2019 on the basis of the second respondent's failure to engage with a key issue raised by the Mother, namely that the fact of her separation should not have precluded the grant to her of a Stamp 3 permission for the relevant years. It was by reason of that failure that the matter was remitted to the second respondent.

Alleged lack of candour as a ground for refusal of relief?

90. At para. 21 of the Amended Statement of Opposition, the second respondent pleads that the Mother renewed her permission to be in the State as a dependant of her husband on or about 13 June 2017 "at a time when she was aware that her marriage had ended and/or was about to end." It is pleaded that the June 2017 permission was obtained on the basis of a misrepresentation as to the Mother's circumstances and that "the said permission is either voidable or void ab initio as Stamp 3 permission would not have been granted to [the Mother] on that date had she been truthful about her marital status". Further or in alternative, the second respondent asserts that the Mother "has not acted in good faith with the Respondents herein and is barred from relief".

91. It is the case that in June 2017, when her Stamp 3 fell to be renewed, the Mother was in a relationship with the father of the Child, as evident from the application made by the father to the second respondent for residence based on his parentage of an Irish citizen Child, and the Mother's affidavit sworn 31 July 2018 in immigration proceedings concerning the father. In that affidavit, the Mother described the Child's father as her "partner" and "the sole provider" for her and the Child. She also described herself as being on "maternity leave" despite at the time being on a Stamp 3 permission which does not permit a person to be engaged in employment.

92. The second respondent's deponent, Ms. Eileen O'Reilly, Higher Executive Officer in INIS, in her affidavit sworn 26 March 2019, avers:

> "I say that if it is the case that [the Mother] has been in a relationship with [the Child's father] since January 2017, then she procured her permission to remain in the State… in or about the 13th June, 2017, on foot of a misrepresentation as to her relationship with her former husband. In those circumstances, the said permission is invalid at law."

93. In her affidavit sworn 17 May 2019, the Mother's response to the above was as follows:

> "I say that when I attended the Garda Station in June 2017, I was not asked anything about my husband or my marriage, and that my permission was simply renewed at my request."

94. In a supplemental affidavit sworn 15 July 2019, Ms. O'Reilly states:

> "(3) I say that where a non-EEA spouse/dependant of the employment permit holder presents for a Stamp 3 renewal, it is the [the Minister's] policy not to renew the Stamp 3 permission unless there is in place a continuing marriage/dependency relationship, which is in fact subsisting at the time a person presents at INIS seeking a permission renewal."

95. In the High Court, the second respondent, having drawn the trial judge's attention to the affidavit sworn by the Mother on 31 July 2018, contended that if the Mother was to be found by the Court to be entitled to the relief, same should be declined on grounds of lack of candour.

96. The trial judge extrapolated from the Mother's affidavit evidence that although still married to her husband, she was dependent on her partner as of 31 July 2018. He stated, however, that it did not necessarily mean that the Mother could not have been dependent on her husband in June 2017 notwithstanding that she was by then pregnant with her partner's child. He opined that "the court has no idea when [the Mother's] dependency on

her husband (who is still her husband) ceased, save to note it must have ceased on or before (presumably before) 31.07.18". He went on to note that the reference in the Mother's affidavit to "maternity leave" suggested that "she has (or had) employment in breach of her Stamp 3 permission".

97. Ultimately, the trial judge rejected the argument that relief should be refused on grounds of candour, with reference to the reasons he found for the quashing of the second respondent's decision, and on the basis that "while [the Mother] may perhaps have some explaining to do…when matters go back to the Minister for Justice…there is not enough in the alleged want of candour to justify the court refusing to exercise its discretion…"

98. In this Court, counsel for the second respondent repeatd the submission that relief should be refused for want of candour, and what was described as the Mother's breathless flouting of the immigration laws of the State. The second respondent asserts three bases upon which relief should be denied.

99. Firstly, it is alleged that the Mother has been entirely lacking in candour in relation to her dealings with the second respondent in 2012. It is asserted that it was only after receipt of the second respondent's letter of 19 March 2019 did the Mother, in her affidavit sworn 17 May 2019, allude to the fact that she had been told in 2012 that she could apply for Stamp 3 permission in her own right. Counsel describes the Mother's affidavit as "underwhelming" and asserts also that she has not given any evidence of the circumstances surrounding her application for a student permission which was granted on 17 June 2012. It is further asserted that it was the Mother's husband and not the Mother who advised the immigration authorities in 2011 that the couple had separated.

100. Secondly, while it is the case that the Mother went back on a Stamp 3 permission in 2015 on the basis of a reconciliation with her husband, by June 2017, when her Stamp 3 fell to be renewed, the position was entirely different as she was by then clearly in a

relationship with the father of the Child, as evident from the application made by the father of the Child to the second respondent for residence based on his parentage of an Irish citizen Child and the Mother's affidavit sworn 31 July 2018 for that purpose. It is submitted that the contents of the latter affidavit show that the Mother was not dependent on her spouse in 2017 when she received a Stamp 3 permission and that the Mother had not been forthcoming in relation to these matters.

101. Thirdly, the second respondent contends that the Mother failed in her duty of candour to the court. It is asserted that information material to the grant of permissions in 2012 and 2017 only came to light after the first affidavit of Ms. O'Reilly and that the response of the Mother to Ms. O'Reilly's affidavit was wholly inadequate.

102. It is further contended that the Mother's failure in June 2017 to advise INIS that she was separated from her husband was, as described by Ms. O'Reilly, a misrepresentation of her circumstances, particularly where the Mother's own submissions to the first respondent on 6 September 2018 refer to the fact that there was no subsisting marriage between her and her husband as of June 2017.

103. Counsel for the Mother denies any lack of candour in the context of the Mother's engagement with INIS in June 2017. It is asserted that it cannot be said that the Mother misrepresented her position since the fact of the matter was that as of June 2017, there remained a subsisting marriage between the Mother and her husband, albeit they were no longer together. Counsel further submits that no lack of candour is alleged regarding the period 2012 – 2015, which is the period at issue for the purposes of the present proceedings. He also points to the fact that there was no suggestion in the decision of 22 March 2019 that the Mother was flouting immigration law.

104. It seems to me that the premise of the second respondent's argument on candour rests on the proposition that cohabitation is the requisite test for the purpose of a spouse

obtaining a Stamp 3 residence on foot of a marriage to a Stamp 4 resident. Clearly, in her affidavit, Ms. O'Reilly deposes to the second respondent's policy "not to renew the stamp 3 permission unless there is in place a continuing marriage/dependency relationship, which is in fact subsisting at the time a person presents at INIS seeking a permission renewal". At para. 16 of his judgment, the trial judge observed that it was not entirely clear what the "/" was meant to convey in the text just quoted. He further opined that just because a husband and wife separate does not mean that they are not married "and does not lead to the inexorable conclusion that the wife (assuming she has previously been a dependent) is no longer a dependent", a sentiment he repeats at para. 25 of the judgment when considering the question as to whether relief should be refused.

105. In my view, in circumstances where Ms. O'Reilly's affidavit evidence is somewhat ambiguous on this issue, the grounds being advanced by the second respondent for refusal of relief cannot suffice. Effectively, there is no evidence that the requirement to prove financial dependency was ever made clear or ever required as a matter of fact in the Mother's immigration history. Moreover, the second respondent did not rely on any particular definition of a "subsisting marriage" in any part of the pleadings or in argument. Insofar as the concept of a "subsisting" marriage is referred to in the second respondent's 2016 Policy Document (in place at the time the Stamp 3 permission was granted in June 2017), it is in the context of the *validity* of a marriage and not in the context of any cohabitation requirement or to any emotional or intimate dimensions of the marriage.

106. I agree with the view taken by the trial judge that there is not enough in the alleged want of candour to decline relief in this case. In arriving at this conclusion, I am mindful that to deny relief on candour grounds is, in the words of McKechnie J. in *P.N.S. v. Minister for Justice* [2020] IESC 11, *"a jurisdiction to be used sparingly and in a cautious manner"* and which requires a high threshold to be met, such as abuse of a *"serious and*

flagrant" kind. That being said, I concur with the view of the trial judge that when the matter goes back before the second respondent it may well be that the Mother may be asked to explain how it is that she was "on maternity leave" (suggestive of a status of being in employment immediately before such leave) when she was on a Stamp 3 permission that did not permit employment.

107. In summary, therefore, for all the reasons outlined above, I find no basis to interfere with the Order of the learned trial judge quashing the decision of 22 March 2019 and remitting the matter to the second respondent for further consideration.

The Mother's appeal

108. At para. 21 of his judgment, the trial judge found that in reaching his decisions of 19 September 2018 and 31 October 2018 to cancel the passport which had issued to the Child in April 2018, the first respondent did not adopt an unreasonable procedure or otherwise breach fair procedures. At para. 22, he concluded that in light of other findings made, he was not required to address the question of whether the first respondent was required to consider the proportionality or reasonableness of cancelling the Child's passport. The Mother and Child have appealed against the findings of the trial judge.

109. Arising from the appeal notices and the parties' submissions, the issues which arise for determination are:

(i) Did the process adopted by the first respondent in cancelling the passport breach the requirement for fair procedures?

(ii) Did the first respondent have an obligation to consider the proportionality of his decision to cancel before so doing?

Alleged absence of fair procedures

110. To put the Mother's appeal in context it is useful to recall the relevant powers of the first respondent under the 2008 Act. The Act empowers him to grant a passport and, in

certain circumstances, cancel a passport. The meaning of s.18(1)(a) is clear. It entitles the first respondent to cancel a passport in circumstances such as those which occurred in the present case i.e. where the passport was issued on the basis of a mistake as to the entitlement to Irish citizenship. In *Gao v. Minister for Foreign Affairs and Trade* (Unreported, Peart J., July 2014), Peart J. confirmed that the power to cancel a passport could be lawfully exercised for an initial error in calculating the period of reckonable residency in issuing a passport (see para. 32). I do not understand the Mother to take issue with the powers vested in the first respondent under s.18, or that a passport may be cancelled if issued on the basis of a mistake as to entitlement to citizenship.

111. She does however challenge the process which led to the cancellation of the passport. She asserts that the seeds of the alleged procedural unfairness are to be found in the first respondent's proposal letter of 2 August 2018. She submits that it is through the prism of this document that the procedures adopted by the first respondent should be analysed.

112. It is alleged that that when writing to the Mother on 2 August 2018, the Passport Office did not disclose the precise nature of the communication between it and the second respondent. Counsel for the Mother points to the reference in the letter to advice having been received from the second respondent following which the Passport Office, in its letter of 2 August 2018, stated that "it is legally required to cancel" the passport. It is submitted that the first respondent patently misrepresented the position by stating that in cancelling the passport it was acting on the advice of the second respondent in circumstances where, in the within proceedings, the second respondent pleads that she has "no powers or functions" in respect of the reckonability of residence for the purposes of the grant of a passport.

113. Counsel contends that it is axiomatic that the procedures adopted by the first respondent from 2 August 2018 onwards were flawed if based upon such a material factual

error. It is submitted that this error rendered the decision-maker blind to the possibility of any further submissions from the Mother being of any avail. Accordingly, insofar as the first respondent invited further submissions from the Mother on the issue, this was in form rather than substance. Counsel emphasises that prior to the cancellation of the passport the Child was *prima facie* an Irish citizen and asserts that this is an important factor particularly in light of the clear misrepresentation of fact on the part of the Passport Office, as set out in its proposal letter of 2 August 2018, namely that it had received advice from the second respondent. It is said that this material factual error directly bears on the first respondent's failure to allow adequate opportunity to the Mother to obtain the clarification he himself believed was required.

114. In my view, there is no merit in this complaint and altogether too much is made by the Mother in contrasting Ms. O'Donoghue's email (wherein she merely queries how the Mother's Stamps were sufficient for a passport to be granted to the child) with the reference in the letter of 2 August 2018 to the second respondent having "advised" the Passport Office. I note that in his affidavit sworn on behalf of the first respondent, Mr. Walzer avers that "it is not uncommon for the Department of Justice and Equality, which is responsible for citizenship and immigration matters, to raise a query regarding the issue of a passport to a person." He goes on to state:

> "In July 2018, a query was raised by the Department of Justice and Equality regarding the basis for which the passport was issued to [the Child]. The Department of Foreign Affairs and Trade was reminded that Stamp 2 permissions are not reckonable for the purposes of section 6A(1) of the 1956 Act, as amended, as they are granted for the purposes of studying in the State. Following a review carried out by my office, it was found that this period of residence had been

incorrectly included in the calculation for the purposes of s.6A (1) of the 1956 Act, as amended." (emphasis added)

115. The fact of the matter is that the Passport Office was alerted to a potential frailty in how the Mother's residence in the State was calculated in respect of the passport issued to the Child. In my view, it matters not whether that alert came about by queries raised or advice given by the second respondent. Once the first respondent's Department was alerted to the matter they were entitled to pursue it. The second respondent's intervention, in the words of Humphreys J. in *Islam v, Minister for Foreign Affairs* [2019] IEHC 559, *"simply triggered a process which had to be triggered somehow. In and of itself that… did not constitute a breach of anybody's rights"* (at para. 34).

116. I turn now to the gravamen of the Mother's case, which is that the first respondent breached fair procedures in failing to carry out the requisite reckonability analysis based on the information she supplied on 6 September 2018, and again on 2 October 2018. Alternatively, she submits the first respondent breached the requirement for fair procedures by failing to await the intervention of the second respondent prior to cancelling the passport. It is alleged the first respondent should have awaited receipt from the second respondent of documents and proofs which would have corroborated the Mother's contention that she had sufficient reckonable residence in the requisite period notwithstanding the Stamp 2 permissions on her passport. Counsel also submits that no reason has been given as to why the matter was not referred by the first respondent to the second respondent prior to the cancellation of the passport.

117. It is further submitted that the unfairness of the procedures adopted by the Passport Office was compounded by the fact that although the letter of 31 October 2018 invited the Mother to procure documentation from the second respondent, the decision to cancel the passport had already issued before this could be achieved: the first respondent's actions

thus excluded any input from the Department of Justice into the cancellation decision and rendered any action subsequently taken by the second respondent as having been undertaken in a factual vacuum.

118. It is this lack of fair procedures, arising, it is said, from the lack of any joined-up thinking on the part of the first respondent and the second respondent, that counsel contends is at the heart of the Mother's appeal.

119. As a matter of first principles, I agree with the Mother's submission that in the absence of any statutory appeal from the cancellation decision (per s.19(2) of the 2008 Act), the obligation on the first respondent in this case to provide for fair procedures before cancelling the passport was a high one, particularly so when the context in which the issue arose did not stem from any wrongdoing by the Mother in respect of her application for a passport for the Child, but rather as a result of an error made by the first respondent in granting the passport, as openly acknowledged by him in the impugned decision. That being said, I am not, however, persuaded that the trial judge erred in finding that the first respondent did not breach the requirement for fair procedures.

120. In the first instance, I am not convinced that the first respondent accepted, without more, the contents of Ms. O'Donoghue's email of 25 July 2018 and thereafter proceeded to cancel the passport without himself carrying out any further reckonability analysis. Clearly, following Ms. Donoghue's email, the Passport Office was alert to the fact that certain of the permissions on the Mother's passport, which had been counted in the reckonability assessment previously conducted by the first respondent, were in fact not reckonable. As is obvious from the schedule set out in the 2 August 2018 letter, the Passport Office very clearly re-assessed the matter by looking again at the records it had of the stamps on the Mother's passport.

121. It is common case that the Mother's passport records that she resided in the State from 30 January 2014 to 24 July 2015 on foot of permissions given for the purpose of engaging in a course of education or study in the State. As a matter of fact, she was engaged on a course of study during those periods. It is also common case that these were erroneously included by the first respondent in the calculation of her reckonable residence.

122. Based on the reassessment undertaken by first respondent, the Mother's passport disclosed insufficient reckonable residence and, *on the face of it*, the Child should not have been issued with a passport in April 2018. On foot of the reassessment, the Passport Office wrote to the Mother on 2 August 2018 and provided her with an opportunity to make any submissions that may be relevant to the proposal to cancel the passport. I perceive no unfairness in that approach.

123. The Mother patently took up the opportunity to make submissions, as is clear from the contents of her solicitors' letter of 6 September 2019. They were detailed submissions which, again, the first respondent had regard to, as is evident from the first decision letter of 19 September 2018. Notwithstanding the merits of the Mother's case as put forward by her solicitors, the principle of procedural fairness did not require the first respondent to adopt those submissions in the absence of documentary proof of an entitlement to Stamp 3 permission for the relevant time periods. In his later letter of 31 October 2018, the first respondent again clearly engages with the Mother's submissions of 2 October 2018 but, again, explains that certain periods of the Mother's residence as evidenced on her passport were not reckonable for the purposes s.6A of the 1956 Act. There is, therefore, no merit in the claim that the Child's passport was cancelled without a reckonability assessment having been conducted by the first respondent.

124. I turn now to the second limb of the alleged procedural unfairness. It is asserted that albeit that the Mother was afforded the opportunity to provide information or evidence

relevant to the proposal to cancel the passport, the cancellation decision nevertheless issued on 19 September 2018, a time when the decision-maker was aware that adjudication by the second respondent was required. It is also said that first respondent wrongly failed to refer the matter to the second respondent despite the cancellation proposal having been triggered by the email sent by Ms. O' Donoghue to the Passport Office and it having been advised to the Mother in the letter of 2 August 2018 that she could revert to the Passport Office with submissions (and not that she had to engage with any division of the second respondent's Department). It is submitted that in those circumstances, the approach ultimately taken by the first respondent was unfair and that this unfairness arose irrespective of the fact that issue of reckonablility of residence for the purpose of the grant of a passport was a matter for the first respondent.

125. Firstly, I cannot accept the argument that the Mother was taken by surprise by the decision of 19 September 2019 or that she was not previously afforded time to figure out how to process an application to the second respondent. Were she minded to address with the second respondent her claimed entitlement to Stamp 3 residence for the relevant periods, she was on notice of the claimed deficiencies in her residence status from the contents of the first respondent's correspondence of 2 August 2018. Indeed, as is evident from the contents of their 6 September 2019 letter, her own solicitors acknowledged that her Stamp 2 residence was not reckonable. It cannot have escaped her attention that she would have to have recourse to the second respondent, in order to try and remedy the situation. Effectively, she was on notice of from 2 August 2018 that an issue arose as regards her residence status, which was a matter to be addressed with the second respondent. There was, accordingly, no frailty in fair procedures of the type considered by Humphreys J. by in *Islam* (see para. 21). Here, the cancellation of the passport did not occur until 19 September 2018.

126. Secondly, I find the argument that the first respondent was obliged to liaise with the second respondent, or await her intervention before a decision was made to cancel the passport, to be misconceived. The second respondent has no power under the 2008 Act to decide on the issue or cancellation of a passport, no more than the first respondent has power under the 2004 Act to regulate the Mother's immigration status.

127. In the absence of providing the first respondent with corroborative documentary evidence of her entitlement to Stamp 3 residence status for the requisite time periods, it was not for the Mother to present to the first respondent and assert that she had been granted Stamp 2 permissions in the requisite reckonable period when in fact she should have been granted Stamp 3 permissions, in circumstances where those permissions remained extant. For the Mother to argue, as she did in her submission of 6 September 2018, that the first respondent should ignore the Stamp 2 permissions on her passport, or else regard her as present in the State at the relevant times under a Stamp 3, was manifestly misconceived in circumstances where there were insufficient Stamp 3 permissions evident on her passport, and where the grant of residence permission, be it under s.4 of the 2004 Act, or otherwise, was a matter solely for the second respondent. Thus, insofar as the submissions made by the Mother to the first respondent on 6 September 2018 and 2 October 2018 were urging him to accept she had the requisite residency status in the State, she was entirely mis-informed as to the first respondent's statutory remit under the 2008 Act, which involves no function in respect of the grant or variation of residence status.

128. In summary, therefore, there is no basis for the Mother to argue that the first respondent did not engage in a reckonability assessment for the purposes of satisfying himself that the criteria set out in the 2008 Act for the exercise his statutory function were met. The letters of 2 August 2019 and 19 September 2018 make it clear that that exercise was in fact carried out. In the exercise of his statutory function under the 2008 Act, the first

respondent engaged with the submissions made by the Mother on 6 September 2018 and 2 October 2018 which, in effect, were asking him to ignore the significance of the Stamp 2 permissions on her passport in circumstances where taking account of such permissions for the purpose of the issuing of a passport is expressly excluded pursuant to s.6B(4)(b) of the 1956 Act, as indeed acknowledged by the Mother.

129. For the first respondent to take a different view and thus accept the Mother's submissions, the corroboration of the authority which issued the Stamp 2 permissions was required. As permissions within the meaning of s.5 of the 2004 Act are granted under s.4 by Immigration Officers, or by the second respondent herself, the retrospective alteration of the record of the Mother's residence in the State could only come about by action taken by the second respondent. That was a matter for the Mother herself to address with the second respondent, having been alerted on 2 August 2018 by the first respondent to the deficiencies in her residency (as appeared from her passport), as far as the question of a passport for the Child was concerned. Time was afforded to her to seek to have the deficiencies rectified, with the proviso that a request for extra time would be considered. There is no evidence, however, of engagement by the Mother with the second respondent between 2 August 2018 and 19 September 2018, or any request made to the first respondent for additional time. Accordingly, absent any documentary evidence from the second respondent corroborating the Mother's position having been furnished by the Mother, when it came to the decision to cancel the Child's passport, the permissions on the Mother's passport in the four years immediately preceding the Child's birth included Stamp 2 permissions, which, as we see, had unfortunate consequences for the Child since the first respondent was thereby alerted to a fact (per s.18(1)(a) of the 2008 Act) "that would have required or permitted him to refuse under section 12 to issue the passport". As observed by Humphreys J. in *Islam* (at para. 27), *"if a person is not entitled to Irish*

citizenship, which is fundamentally a question of fact, the Minister for Foreign Affairs and Trade is not entitled to grant that person a passport". The unfortunate consequences for the Child cannot, however, vitiate the first respondent's decision to cancel the passport absent any breach of fair procedures or other unlawfulness on the part of the first respondent, which has not been established here, in my view.

130. It is also worth recalling that albeit having cancelled the passport, in his letter of 31 October 2018, the first respondent expressly stated that if the Mother were to re-present to the Passport Office with a letter from the Department of Justice and Equality approving changes in her immigration history, he would reconsider the issue of a passport to the Child.

131. In all of those circumstances, the Mother and Child have not established that the trial judge erred in finding that the first respondent did not breach fair procedures.

Was a proportionality assessment required to be undertaken?

132. The next issue is whether the first respondent was required to consider the proportionality or reasonableness of cancelling the passport.

133. The primary argument advanced by the Mother in this regard is that, *prima facie*, the Child was an Irish citizen and, thus, an EU citizen. She submits that, accordingly, the cancellation of the Child's passport engaged EU law in a way which the process of acquiring it in the first place did not.

134. The first respondent disputes that a proportionality assessment was required and asserts that EU law was not engaged by his decision to cancel the Child's passport. It is submitted that the question of whether the Child is an Irish citizen is solely a matter of national law and, accordingly, the Mother's reliance on the jurisprudence of the CJEU is misconceived.

135. As conceded by the Mother, EU law is not engaged in the context of the acquisition of citizenship. In *Mallak v. Minister for Justice* [2011] IEHC 306, Cooke J. rejected the claim that an application for naturalisation engaged EU Law, stating:

> *"24. ...Although the Treaties create the concept and status of citizenship of the Union, that status can only be acquired by means of citizenship in one of the Member States. Neither the Treaties nor any legislative measures of the Union institutions have sought to encroach in any respect upon the sovereign entitlement of the Member States to determine the basis upon which national citizenship will be accorded, not even to endeavour to harmonise to any extent the conditions or criteria for the grant of national citizenship."*

136. This has also been made clear by Clarke C.J. in *A.P. v. Minister for Justice & Equality* [2019] IESC 47:

> *"6.8…Union law confers no entitlement to citizenship on any particular category of person, other than to recognise that everyone who is, in accordance with the national law of any Member State, a citizen of that State is also a Union citizen. It is thus strongly arguable that the sole competence in the grant of citizenship remains with the Member State."*

137. The position adopted by the Irish courts is consistent with Case C-369/90 *Micheletti* [1992] ECR 1-04239, where the CJEU held that under international law it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. That position was reaffirmed in *X.P v. Kaur (Case C-192/99)* [2001] ECR 1-01237, where the CJEU again stated that it is for Member States to determine who their nationals are for EU law purposes.

138. The Mother, however, relies on the decisions of the CJEU in Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR 1-01449 and *Tjebbes and Others v Minister van*

Buitenlandse Zaken (Case C-227/17) in aid of her argument that the first respondent's decision invoked EU law. It is necessary therefore to consider what was at issue in these cases.

139. *Rottmann* concerned a man who was originally an Austrian national but who obtained German nationality in a process that required him under German law to renounce his Austrian nationality. It duly transpired that his German nationality was obtained by way of a fraud. The fraud was discovered. The German authorities sought to withdraw his German nationality claiming it was void *ab initio* owing to the fraud. The question referred to the CJEU was whether the revocation was proportionate or permissible under EU law. Before the CJEU, Germany's position was that it was a case of *"non-acquisition of citizenship"* by retrospective decision rather than a case of *"loss of prior citizenship"*. The CJEU considered that rights under Article 20 TFEU were at risk of being lost by the loss of Mr. Rottmann's German naturalisation and a non-automatic right to another nationality. At para. 42 it stated:

> *"It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation,, adopted by the authorities of one Member State, and placing him, after he had lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law."*

140. It went on to state, at para.56:

> *"56. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails*

for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality."

141. The CJEU's pronouncements in *Rottmann* were considered by Clarke C.J. in *A.P. v. Minister for Justice & Equality*. *A.P.* concerned the refusal of an application for naturalisation. Albeit counsel for the applicant in that case conceded that, ordinarily, the conditions for the acquisition and loss of nationality are, as a matter of international and EU law, a matter for each Member State, it was argued that as Article 20 TFEU conferred EU citizenship on a person holding the nationality of a Member State, *any* issue concerning citizenship of a Member State thereby engages EU law.

142. This argument was addressed by Clarke C.J. in the following terms.

"6.2 Similar issues were considered by the CJEU in Rottmann v. Freistaat Bayern (Case C-135/08), EU:C:2010:104, [2010] ECR I-1449. In that case, Mr. Rottmann, who had formerly been an Austrian national and had become a naturalised German national, had had his German citizenship revoked. The CJEU undoubtedly considered that, in the circumstances of the case in question, Union law was engaged.

6.3 However, it is important to analyse the reasoning of the CJEU which led to that conclusion. First, the Court identified certain general propositions at para. 39 of its judgment:-

> *‘39. It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (Micheletti and Others, paragraph 10; Case C 179/98 Mesbah [1999] ECR I 7955, paragraph 29; and Case C 200/02 Zhu and Chen [2004] ECR I 9925, paragraph 37).’*

6.4 In so doing, the Court distinguished cases such as The Queen v. Secretary of State for the Home Department ex p. Manjit Kaur (Case C 192/99), EU:C:2001:106, [2001] ECR I 1237, stating at para. 49 of its judgment:-

> *‘49. Unlike the applicant in the case giving rise to the judgment in Kaur who, not meeting the definition of a national of the United Kingdom of Great Britain and Northern Ireland, could not be deprived of the rights deriving from the status of citizen of the Union, Dr Rottmann has unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto.’*

6.5 Importantly, the Court went on to comment on the principle of international law that Member States have the power to lay down the conditions for the acquisition and loss of nationality. In that context, the Court drew attention in its judgment to Declaration No. 2 on Nationality of a Member State, which is annexed to the Final Act of the Treaty on the European Union and which involves a declaration that ‘...wherever in this Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State should be settled solely by reference to the national law of the Member State concerned’.

6.6 However, the Court in Rottmann indicated that, in the circumstances of the case in question, what was engaged was not the sole entitlement of Member States to determine the conditions for the acquisition and loss of nationality but rather, what was described as a principle, deriving from the respect of citizens of the Union, that the exercise of any power which affects rights conferred and protected by the legal order of the Union engages Union law in an assessment of the legality of any measures adopted.

6.7 The position was, of course, that Mr. Rottmann was, at all material times, a citizen of the Union and the measure proposed by Germany involved, by depriving him of German citizenship, the removal of his Union citizenship, because he had already lost his Austrian citizenship by becoming naturalised in Germany. It follows that Mr. Rottmann was a citizen of the European Union and the CJEU considered that he therefore had rights in that capacity, such that a measure which would deprive him of those rights necessarily involved the engagement of Union law."

At para. 6.8, Clarke C.J. concluded that *"there was nothing in Rottmann which suggests that Union law has any role in the decision to grant citizenship as opposed to its removal.".*

143. Before commenting further on the pronouncements of Clarke C.J. in *A.P.,* I will consider what was in issue in *Tjebbes.* The case concerned the refusal by the Dutch authorities to process the passport applications of four applicants in circumstances in which the three of the applicants, who had enjoyed citizenship of the Netherlands by birth or acquisition, had lost their right to citizenship in accordance with Dutch law. This was owing to their factual residence outside of the Netherlands and the EU for ten years. The fourth applicant had acquired Dutch nationality by birth on account of the dual nationality of her mother, who was naturalised as a Dutch citizen, as well as the Swiss nationality of

her father. She was never issued a Dutch passport although she was named on her mother's passport. She had lost her Dutch citizenship, while a minor, owing to a rule which deprived a child of Dutch nationality if their parent loses their Dutch nationality. The question referred to the CJEU was whether the national rule, which prescribed the loss of nationality of a Member State by operation of law, and which entailed, in the case of the four applicants, who were not nationals of another Member State, the loss of their citizenship of the EU, was compatible with EU law, in particular the principle of proportionality.

144. At para. 30 of its judgment, the CJEU repeated its view (as expressed in *Rottmann*) that while it was for each Member State to lay down the conditions for acquisition and loss of nationality, *"the fact that a matter falls within the competence of the Member State does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to [EU law]"* At para. 32, it opined that *"the situations of citizens of the Union who, like the applicants in the main proceedings, are nationals of one Member State only and who, by losing that nationality, are faced with losing the status conferred by Article 20 TFEU…falls…with the ambit of EU law."* Thus, *"the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law".*

145. At para. 39, it held that EU law does not preclude, in principle, laws providing for loss on nationality *"even if that loss will entail, for the person concerned, the loss of his or her citizenship of the Union."* At paras. 40-41 it went on to state:

> *"40. However, it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the*

consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law…

41. The loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law."

146. Notwithstanding the reliance placed by counsel for the Mother and Child on the CJEU jurisprudence quoted above, I am not persuaded that either *Rottmann* or *Tjebbes* apply to the circumstances of the present case. *Rottmann* concerned the revocation of German nationality which had previously being conferred by the national law of Germany. As explained by Clarke C.J. in *A.P.*, it was the action of the German State in depriving Mr. Rottmann of his established German nationality, and where the revocation took place against a backdrop whereby the acquisition by Mr. Rottman of German nationality had meant the renunciation of his Austrian nationality, that led the CJEU to conclude that EU law was engaged and a proportionality assessment was required to be conducted by the Member State in question. As can be seen, prior to his ever having acquired German nationality, Mr. Rottmann was a citizen of the EU by virtue of his Austrian nationality. He had to cede his Austrian nationality on acquiring German nationality. The ultimate loss of his German nationality led to the removal of his EU citizenship. It was in those circumstances that the CJEU found that EU law was engaged. To paraphrase Clarke J.in *A.P.*, what was not engaged was the sole entitlement of the Member State to determine the conditions for the acquisition and loss of nationality.

147. In *Tjebbes*, EU proportionality was found by the CJEU to be engaged in circumstances where the individuals concerned had lost their Dutch nationality (and hence their EU citizenship) by operation of law, no issue having ever arisen as to their prior

entitlement to Dutch nationality. As in *Rottmann,* the focus of the CJEU was on the deprivation of the applicants' EU citizenship: no issue arose regarding their acquisition of Dutch nationality.

148. However, in the present case such issue does arise. The issue here was, in the words of the CJEU in *Kaur*, the Child *"not meeting the definition of a national*, as set down by Irish law. As the applicant in *Kaur* could not meet the definition of a national of Great Britain and Northern Ireland, the CJEU opined that she *"could not be deprived of the rights deriving from the status of citizen of the Union".* In other words, Ms. Kaur could not lose what she never had in the first place. That is the position of the Child in the present case. As the CJEU pointed out in *Rottmann* (at para. 48), *"the proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court…that Member States have the power to lay down conditions for the acquisition and loss of nationality"* (emphasis added). I find nothing in *Tjebbes* to suggest that the CJEU has resiled from the foregoing pronouncement. While a proportionality assessment was necessary in *Tjebbes,* it was in circumstances where the applicants' Dutch nationality, which had arisen by either birth or acquisition, was never in doubt, unlike the position in the present case.

149. The distinction between the acquisition of citizenship and deprivation of citizenship has been recognised in the case law as critical, as evidenced by the judgment of Clarke C.J. in *A.P.* and, indeed, in *Rottmann* where, as I have already said, the CJEU itself specifically distinguished *Kaur* on this basis. What is at issue here are the conditions for the acquisition of citizenship – a matter governed solely by the laws of this State.

150. In *Gao*, where reliance had also been placed on *Rottmann,* Peart J. held that EU law was not applicable stating:

"I do not consider that the Rottmann case is relevant to the present case. The present applicant, unlike Rottmann, was never an Irish citizen. She is therefore never someone entitled to benefit from EU Treaty rights by virtue of being a citizen of a EU Member State. The revocation of her Irish passport did not withdraw citizenship before she never was an Irish citizen. She should never have had it in the first place, and giving it to her in error did not make her an Irish citizen. The only basis on which a person can be an Irish citizen is if he or she comes within the specific provisions of the Irish Nationality and Citizenship Act, 1956, as amended, and it is not contended that this applicant did so. There is nothing within that Act which provides that the giving of an Irish passport confers the status of citizenship on the holder of such a passport."

151. I am satisfied that the decision of Peart J. in *Gao* is relevant to the present case. I do not accept the Mother's argument that *Gao* was wrongly decided, or that it has been superseded by the decision of the CJEU in *Tjebbes.* Accordingly, I am satisfied that the trial judge, in following *Gao,* properly concluded (at para. 13) that the first respondent *"was and is (correctly) not satisfied that the requisite reckonable residence presents <u>at this time</u> for [the child] to enjoy citizenship"* (emphasis added)

152. The question for the first respondent, when the review of the Child's passport was being carried out, was not whether citizenship ought to be cancelled or revoked (thereby withdrawing rights conferred by EU law). Rather, it was solely a question of whether the Child was entitled to Irish citizenship (and consequently a passport) in the first place.

153. On the facts of this case, the passport was cancelled because the absence of an entitlement to Irish citizenship, a decision reached by the first respondent following a review, where the information he was presented with, insofar as the Mother's reckonable residence in the State was concerned, did not meet the requirements of s.6A of the 1956

Act, and from which he concluded that the Child's passport had accordingly issued in error. In cancelling a passport issued in error, the Minister was not withdrawing citizenship from the Child. The entitlement to citizenship is an anterior status which is separate from the cancellation (and indeed the issue) of an Irish passport. The conferral of citizenship is, as required by Article 9 of the Constitution, determined by the Oireachtas. While it so happens that the entitlement to citizenship is relevant to the applicability of s.18(1)(a) of the 2008 Act in this case, the fact of the matter is that the first respondent did not confer citizenship on the child by the issuing of a passport as citizenship is conferred by the operation of law pursuant to the 1956 Act. The consequences of the operation of s.6B(4)(b) of the 1956 Act, as recognised by the first respondent, precluded the entitlement to citizenship for the Child, and consequently the entitlement to an Irish passport pursuant to s.12 of the 2008 Act.

154. Unlike in *Rottmann* and *Tjebbes*, where no issue arose relating to the acquisition of citizenship of which the applicants in those cases were later deprived, the fundamental issue in the present case was whether the Child was an Irish citizen in the first place, a matter to be determined pursuant to Irish law. In those circumstances, the claim that the first respondent breached EU law in failing to address the proportionality of the cancellation of the passport is misconceived.

155. In summary, what occurred here was the invocation by the first respondent of his powers under s.18 of the 2008 Act to cancel the Child's passport following a reckonability assessment undertaken by him. For the purposes of exercising his power under the 2008 Act, including his power under s.18, the first respondent had to satisfy himself as to whether or not a person is entitled to Irish citizenship. In this regard, it was incumbent on him to have regard to the provisions of the 1956 Act, as explained in the letters of 2 August 2018, 19 September 2018 and 31 October 2018. In so doing, the first respondent was not

exercising any power under the 1956 Act: he was merely considering the antecedent issue of whether or not the Child was Irish citizen, relevant to the exercise of his statutory powers under the 2008 Act, which are powers separate to the conferral or withdrawal of citizenship.

156. Even if the case could be said to come within EU law (which I am satisfied it does not), in any event, the Mother's submissions have not demonstrated how the concept of proportionality as referred to in *Rottmann* and *Tjebbes* would be breached given that the first respondent has specifically stated that he will reconsider a fresh application for a passport for the Child if the Mother adduces sufficient corroborated documentary proof that she was entitled to a Stamp 3 permission at the relevant times. As indicated earlier in this judgment, that is a matter for the Mother to pursue, an opportunity she now has, this Court having upheld the trial judge's Order quashing the decision of the second respondent and remitting the matter for further consideration by the second respondent. If the Mother succeeds in her claim that she had an entitlement to Stamp 3 residence for the relevant years, she can then apply to the first respondent to reconsider the grant of a passport for the Child.

157. Accordingly, for the reasons set out, I would dismiss the Mother's appeal.

Summary

158. The second respondent has not succeeded in her appeal. Accordingly, it follows that the Mother and Child should be entitled to their costs of this appeal.

159. The Mother and Child have not been successful in their appeal against the first respondent. It follows that the first respondent should be entitled to the costs of this appeal.

160. If, however, any of the parties wishes to seek different costs orders to those proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be

scheduled. If no indication is received within the twenty-one-day period, the orders of the Court, including the proposed costs orders, will be drawn and perfected.

161. As this judgment is being delivered electronically, Whelan J. and Power J. have indicated their agreement therewith and the orders I have proposed.