THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 126 J.R.]

BETWEEN

MAHELET GETYE HABTE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2017 No. 569 J.R.]

BETWEEN

MAHELET GETYE HABTE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 4th day of February, 2019

1. Writing in October, 2017, John Stanley stated in *Immigration and Citizenship Law* (Dublin, 2017) p. 904 n. 155 that "*an online search of Iris Oifigiúil yields no indication that naturalisation has ever been revoked*". The present cases, heard together, therefore appear to be the first proceedings in which such a proposed revocation has given rise to litigation.

2. The subject matter of the case turns on interesting divergences between different calendars currently in use. The Gregorian calendar, being the one applicable in the State, is so universal internationally that one can overlook the fact that there are numerous other calendars used in other contexts and other places. Some background context will therefore be necessary.

3. While some calendars, such as the Hebrew, go back to the borders of pre-history, others are relatively modern. The Gregorian calendar has its origins in the Roman calendar, which came into use following the foundation of the City, conventionally by Romulus and Remus in 753 BC, or year 1 AUC (*ab urbe condita*) (David Ewing Duncan, *The Calendar* (London, 1998) p. 40). The Roman calendar was reformed by Julius Caesar in 46 BC, in his role as Pontifex Maximus, the pontiff or chief priest of pagan Rome, with effect from 1st January 45 BC (see Hiram Morgan, "The Pope's new invention': the introduction of the Gregorian calendar in Ireland, 1583-1782", paper at 'Ireland, Rome and the Holy See: History, Culture and Contact', UCC History Department symposium at the Pontifical Irish College, Rome, 1st April, 2006). The reform was announced during Caesar's "*first months back in Rome"* after subduing Egypt (Duncan, p. 39), leaving *"the pregnant Cleopatra [with] three Roman legions to protect her*" (p. 38).

4. This Julian calendar is still in use in some jurisdictions for some purposes. It involved moving the start of the year from March to January, reorganising the lengths of the months into alternating periods of 30 and 31 days (apart from February which had 29 days) in order to extend the year to 365 days, and adding leap years (February thus having 30 days in a leap year). The Senate named the month of July in his honour as a result (Duncan, p. 46). Further complication was then introduced when the Senate named the month of August in 8 BC for the Emperor Augustus, which had the knock-on effect that, to ensure that August did not have fewer days than the month named for Julius, a day was "*snatched from February*" (Duncan, p. 47) reducing it to 28 days, and the month lengths varied in a manner that "*wrecked Caesar's convenient system of alternating 30- and 31-day months*" (Duncan, p. 47).

5. The dating of years as AD (and in due course BC) (later alternatively CE or BCE) was introduced by St. Dionysius Exiguus in AD 525 (Duncan, p. 100), in the process of creating a table of Easter dates at the request of Pope John I.

6. In 1514, in the context of the Fifth Lateran Council, Pope Leo X established a commission on reform of the calendar (Duncan, p. 247), which sought views from interested parties, including Nicolaus Copernicus, who records his endeavours to assist in the dedication for *De revolutionibus orbium coelestium* (Nuremberg, 1543) (Duncan, p. 249). While that commission "*sputtered out*" (Duncan, p. 250), the process came to fruition six decades later with Pope Gregory XIII's calendar commission, established in the mid-1570s (Duncan, p. 261). The commission proposed a further adjustment of the Julian calendar, principally by modifying the dates of leap years, as well as eliminating ten days at the commencement of the calendar. The new system was introduced by Pope Gregory in the bull *Inter gravissimas*, signed on 24th February, 1582 and coming into effect at the end of 4th October, 1582. It is this Gregorian calendar that is universal today, as it was gradually adopted around the world in the following centuries. It took until 1752 for the Gregorian calendar to be adopted here, under the Calendar (New Style) Act 1750. Duncan comments that as regards the calendar being named after him, "*Gregory deserved this honour for the sheer bureaucratic feat of pushing through the reform when so many others had failed*" (p. 287).

7. The Ethiopian calendar, used where the applicant was born, derives from a much more ancient Egyptian solar calendar dating from around the reign of the Pharaoh Shepseskaf, approximately 2510 BC, which had twelve months of thirty days each and an intercalary month of five additional days representing the birthdays of the gods Osiris, Horus, Seth, Isis and Nephthys (Duncan, p. 20). This in turn followed from the earliest Egyptian calendar going back to 4241 BC, supposedly the first date in history (Duncan, pp. xx, 21). Likewise, the Ethiopian calendar has twelve months of thirty days each plus five or six additional days, added as a thirteenth month each year. The first calendar month is Mäskäräm which roughly starts on the 11th or 12th of September in Gregorian terms rather than in January. The Ethiopian calendar continues to add a leap year every four years, as did the Julian calendar, unlike the more accurate Gregorian calendar which does not count centuries as leap years unless they are divisible by 400. The Ethiopian calendar is currently approximately seven years behind the Gregorian calendar. According to the applicant's submissions, this is in part because the Ethiopian calendar is based on calculations made by Annianus of Alexandria in the fifth century which placed the date of the

incarnation of Jesus Christ at what would be in Gregorian terms 29th August, AD 9, whereas the earlier calculations of Dionysius Exiguus dated the incarnation as approximately eight years earlier.

8. The applicant's Ethiopian birth certificate states her date of birth as "24/01/75" in Ethiopian terms (although I note here that what month exactly is meant by "01" is still unclear) and "04/10/82" in Gregorian terms.

9. The applicant commenced working for an Irish family in Saudi Arabia as an au pair and then returned with the family to Ireland in 2003. In 2005 she was sponsored to work in a call centre. On 20th May, 2011, she was granted an Ethiopian passport which states her date of birth as "24 Sep 75". She applied for naturalisation as an Irish citizen and inserted her date of birth as "24/09/1975" on p. 1 of the relevant form, Form 8. The Form 8 application contains a section headed "*detailed guidance on filling out the application form*", in which it states the that identification details should include "*your date of birth as recorded on your Birth Certificate".* The date on the applicant's birth certificate it should be said is not 24/09/1975; it is "24/01/75" and "04/10/82" as noted above. However, the applicant did also enclose a letter dated 31st May, 2014 setting out differences between the Ethiopian and Gregorian calendars.

10. She married her husband in Ethiopia in 2014 and on 23rd January, 2015 was granted Irish citizenship on the basis of residence in the State for five years out of the previous nine years. She then applied for an Irish passport, which was issued on 12th March, 2015. Her first child was born on 23rd June, 2016. In August, 2016, she became concerned that to obtain a driving licence and car insurance she would need to have the correct date of birth stated on her identity documents. She corresponded with the Passport Office to seek an amendment of the passport, and that office indicated that she would need to seek an amendment of the certificate of naturalisation first. She wrote to INIS on 31st August, 2016, asking that the certificate of naturalisation be amended. INIS replied on 31st August, 2016, asking the applicant to submit the original naturalisation certificate and a copy of her Ethiopian birth certificate and a translation together with a brief explanation of the query. Ultimately the Department replied on 6th September, 2016, noting that the details on the certificate were as sworn to by the applicant and that *"once a certificate of naturalisation has issued it is not our policy to issue an amended certificate at a later date*". She queried this response and was told on 15th September, 2016 that her query had already been addressed. Following further correspondence, INIS replied again on 10th October, 2016, indicating that the position was unchanged. On 16th November, 2016 solicitors on her behalf wrote to INIS in this connection but the reply of 22nd November, 2016 reiterated the policy not to issue an amended certificate. Leave in the first judicial review challenging the refusal to amend her certificate of naturalisation was granted on 15th February, 2017.

11. A consultation in the case on the respondent's side occurred on 9th May, 2017. Mr. Kevin Clarke, principal officer in the Department at the time, averred that "*a decision to set in motion the internal procedures leading to a proposal to revoke had already been made prior to the consultation*". No documents regarding that internal decision appear to exist. On 10th May, 2017, Mr. Clarke sent an email recording that following the consultation on the previous day *"from my understanding of the case and discussions with the CSSO and counsel, the general consensus was that the case should be put up for revocation".* A decision memorandum was prepared to initiate the process of a proposal to revoke the certificate and that was approved by the Director General on 9th June, 2017.

12. On 22nd June, 2017, the applicant was notified of the proposal to revoke the certificate of naturalisation. The applicant then sought to amend the statement of grounds in the first judicial review proceedings to challenge this decision. That endeavour does not seem to have been hugely facilitated by the respondent in those proceedings, although some disagreement seems to have broken out as to what exactly happened in that regard. I will deal separately below with that issue. The result in the event was that the applicant did not proceed in the teeth of what seemed to her to be the State's opposition but rather instituted separate proceedings.

13. Leave was then granted in the second judicial review proceedings on 17th July, 2017, the primary relief sought in that challenge being *certiorari* directed against the proposal to revoke the certificate.

14. A second child was born on 17th October, 2018 and the applicant's husband has now joined her in Ireland. The Ethiopian authorities have granted the applicant an identity card reflective, she says, of the position that she loses Ethiopian citizenship on acquiring another nationality. Very recently the applicant has responded to the prosed revocation with a "*without prejudice*" application for an inquiry but obviously that does not detract from the present challenge. The applicant's passport has not been revoked so far, notwithstanding that she is now saying that the date of birth stated in that passport is not correct in Gregorian terms. I have received very helpful submissions from Mr. Mark Harty S.C. (with Ms. Julie Maher B.L.) for the applicant and from Ms. Siobhán Stack S.C. (with Mr. Alexander Caffrey B.L.) for the respondents.

Application to amend the statement of opposition

15. It emerged that there was an error in paras. 9 and 17 of the statement of opposition due to the inadvertent inclusion in the filed version of notes from counsel directed to the attention of their instructing solicitor. That happens all the time, and while it inevitably gives counsel a sinking feeling it should not normally be regarded as a big deal; and I granted liberty to amend the statement of opposition to rectify that error.

The State's attitude to the amendment of the first judicial review

16. As noted above, there is some disagreement as to what exactly the attitude of the respondent to the amendment of the first judicial review was and I will therefore not finally determine that issue now as it is can more conveniently be addressed in the context of the question of costs. Having said that, as matters appear at present, one could at least take the provisional view that the State was not hugely facilitative of the proposed amendment, but that *prima facie* view is very much subject to any further evidence or submission that may be put forward in due course in relation to costs. The net outcome was that the applicant decided that a second judicial review should be put in motion.

17. The question of amendment of pleadings is unfortunately one of the more inconsistent areas of the law and there are decisions on the issue of amendment that conflict and even overlook important authorities. One can only put out the hope that drawing continuous attention to that situation might possibly encourage a refocus on the key principles involved. The primary principle applicable to the amendment of pleadings – and one that could be obscured by endless barnacles of caselaw - is the interests of justice. It is in the interests of justice to ensure that the state of the pleadings and any decision on a proposed amendment to those pleadings promotes a resolution that determines the real issues in question: see the discussion in Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed. (Dublin, 2018) at p. 283 ff., *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21 (Unreported, Supreme Court, 5th March, 2015). In *Moorehouse*, at paras. 39 to 42, MacMenamin J. endorsed the point that the interests of justice and fair procedure were central, relied on the judgment in *Croke v. Waterford Crystal Ltd.* [2004] IESC 97 [2005] 2 I.R. 383 [2005] 1 I.L.R.M. 321, to the effect that the power to amend was intended to be "*liberal*" and to ensure that the real matters in controversy were determined, and emphasised that pleadings were not to be a snare and that it was not the function of the court to punish parties for mistakes.

18. In that regard, the interests of justice would preclude any approach whereby reliefs, as opposed to grounds, were immune from amendment (notwithstanding the observation in *Dowling v. Galway County Council* [2018] IEHC 50 (Unreported, Ní Raifeartaigh J., 1st November, 2018)).

19. As discussed in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725 [2015] 11 JIC 1703 (Unreported, High Court, 17th November, 2015) (an approach to amendment upheld on appeal, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56 para. 78) in any application to amend proceedings, it is clear that the interests of justice and the protection of the applicant's right of access to the courts are of paramount importance, as is the need for the court to ensure that the real issues in dispute are determined (see *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 570 [2012] IESC 29 *per* Fennelly J. at paras. 29 and 47 and *O'Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014) *per* O'Donnell J. at para. 14). In addition, the right of access to the court is supplemented by the right to an effective remedy pursuant to art. 13 of the European Convention on Human Rights and art. 47 of the Charter of Fundamental Rights of the European Union.

20. The need to ensure that the real issues in the case were addressed, when considering an application to amend, and also that some prejudice could be dealt with by costs orders, was also stressed by Geoghegan J. in *Croke*, citing the view of Lynch J. in *D.P.P. v Corbett* [1992] I.L.R.M. 674 at 678 that "*the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party".*

21. *B.W.* relied on the fact that in *Keegan*, the Supreme Court gave leave to amend judicial review proceedings to include a legal point that was simply "*overlooked*" by the applicant's lawyers prior to the application for the amendment (para. 39). The amendment was "*an entirely new ground in law*" which "*substantively enlarge*[d]" the application (para. 38). The amendment was sought well outside the time period for application for judicial review. Nonetheless, the Court held that "[t]*he appellant should not, without good reason, be deprived of the right to argue a very significant point of law*" (para. 46).

22. A similar approach was taken by Posner J. in *Reed v. Illinois* (Case 14-1749, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9: "*What is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument*" (see *W.T. v. Minister for Justice and Equality* [2016] IEHC 108 (Unreported, High Court, 15th February, 2016) at para. 23 (under appeal)).

23. O'Donnell J. in *O'Neill* at para. 14 emphasised that "*The High Court, and this Court on appeal, has a very extensive power of amendment where it is necessary to permit the real issues in dispute to be determined."* The Court of Appeal in *B.W.* expressly approved the conceptualisation that on the basis of *Keegan*, there are three elements that an applicant should address. Firstly, that the point should be arguable (para. 38), secondly, that there be an "*explanation*" for the point not having been pleaded (para. 39), and thirdly, that the other party should not be unfairly prejudiced (see para. 32), which, given the court's power to remedy any unfairness, would in practice amount to a test that he or she should not be irremediably prejudiced.

24. Unfortunately, as far as many respondents are concerned, the message that the central question is that of justice seems to have fallen on stony ground. Predictably, respondents have sought to distinguish *B.W.* on the basis that that was a telescoped hearing rather than a post-leave hearing (see *Vonkova v. Criminal Injuries Compensation Tribunal* [2019] IEHC 13 (Unreported, High Court, 21st January, 2019) *per* Allen J. at para. 16). However, the case cannot be credibly distinguished on that basis for multiple reasons. First of all, no argument was raised in *B.W.* that the test for amendment at a telescoped hearing was more generous than that in relation to a post-leave hearing – the only reference to telescoping in the decision is that it is noted that the amendment arose at the trial of the action (para. 30). Secondly, neither of the Supreme Court authorities relied on relate to pre-leave or telescoped cases: In *Keegan*, leave was granted by the High Court on 8th June, 2011 (p. 574) and the amendment (ultimately allowed by the Supreme Court) was sought on 21st December, 2011 (p. 575), while *O'Neill* was a plenary action. Thirdly and most importantly, the logic of the principle that the interests of justice are central is just as valid in a post-leave, substantive hearing situation as it is in a pre-leave or telescoped one. Justice doesn't cease to be vital just because leave is granted. Such is the plasticity of legal doctrine that a judge can, if so minded, "*seize upon almost any factual difference between the previous case and the case before him in order to arrive at a different conclusion*" (as entertainingly put by Glanville Williams, *Learning the Law*, 11th ed., (London, 1982) p. 77), but that is an empirical and not a normative observation. If the law on amendment of pleadings is to aspire to any intellectual coherence, then *B.W.* cannot rationally be distinguished on the basis that it was a telescoped hearing.

25. That principle of the centrality of justice has also possibly been lost sight of in some of the caselaw subsequent to *Keegan*. For example, the judgment of Hedigan J. in *Fleury v. Minister for Agriculture Food and Rural Development* [2012] IEHC 543 (Unreported, High Court, 12th December, 2012) purports at para. 2 to "*summarise*" *Keegan* in a series of numbered points, but a number of those points are not based on an entirely correct reading of *Keegan*, as the subsequent judgment of the Court of Appeal in *B.W.* makes clear. The principal misunderstandings are as follows:

> (i). Point (3) is that "*There should be good reason for allowing the late amendment, e.g. circumstances should be exceptional.*" But in *Keegan*, Fennelly J. said of the exceptionality requirement that while the court can naturally be cautious about amendments, the exceptionality hurdle "*cannot be regarded in itself as providing the test. … the various dicta which I have quoted cannot be regarded as precluding and undoubtedly were not intended to preclude a court from granting leave to amend grounds, when the interests of justice require that such an order be made".* Thus, justice is front and centre, not exceptionality, as might be inferred from Hedigan J.'s judgment, which runs the risk of restoring the pre-*Keegan* approach that was often quite capable of preventing the court from achieving a just solution. A quest for exceptionality would be an unwarrantedly respondent-friendly mind-set that would impair the identification of the real issues and thereby the doing of justice.
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> (ii). Hedigan J.'s next points are "*(4) The Court should consider whether the facts are new facts that arose since leave was granted. (5) The Court should consider whether the proposed amendment would be a significant enlargement of the proceedings already in being*". In one sense these are fair points in that if there are new facts that could not have been known at the time of the leave application, or if the point does not particularly change the case significantly, then the amendment might be allowed more or less for the asking. But if Hedigan J.'s questions are read as suggestive of the notion that if the facts are not new facts, or if there would be a significant enlargement, or both, then the amendment should be refused, then such an interpretation would be a misreading of *Keegan* because in that case there were no new facts and yet a significant enlargement of the case was allowed. Fennelly J. said at para. 35 of *Keegan* that "*There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in* McCormack v. Garda Síochána Complaints Board, *discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him,*

without being necessarily conclusive". On the issue of the significance of the amendment, he said at para. 37 that "*Amendment may be more likely to be permitted where, as in* O'Siodhacháin v Ireland [(Unreported, Supreme Court, 12th February, 2002)], *it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts*". Overall, Hedigan J.'s fourth and fifth questions should not obscure the overall priority of the search for justice that arises from *Keegan* and *O'Neill*. Similarly, even in the refined and special context of public procurement challenges, the Supreme Court has acknowledged that it was not necessary to demonstrate a factor unknown to the applicant, and that the degree of enlargement of the case was phrased in terms suggestive of a factor rather than a hurdle: *Copymoore Ltd. v. Commissioners of Public Works in Ireland* [2015] 2 I.R. 786.

(iii). Hedigan J's sixth question is that *"(6) The Court should consider whether the proposed amendment would prejudice the respondent*". However, this is a slight over-simplification. *Keegan* does not speak only of prejudice but also of unfair prejudice. In this regard, the Court of Appeal has since confirmed that this means irremediable prejudice. If the justice of the case is met by allowing the amendment but compensating the respondent in costs for any extra expense, then there is no irremediable prejudice and accordingly that is not a reason not to allow it. Furthermore, respondents will always claim to be prejudiced. An approach that allows a claim of prejudice to kill an amendment application is simply a far too respondent-friendly tactic that impairs the doing of justice overall.

(iv). The seventh question posed by Hedigan J. is that "*The Court should bear in mind the true nature of judicial review noting that the leave stage of judicial review is a filtering mechanism, the Court should consider the overarching requirement of promptness".* But promptness is not the overarching requirement – justice is. It is hard to see how the seventh question can be described as a summary when it does not appear in *Keegan* as such. *Keegan* does of course refer to the requirements of the rules of court as to time but a significant distinction needs to be drawn between the requirement to commence the action in time, and the possibility of amending or refining the grounds or reliefs once the action is up and running. The major public policy considerations regarding certainty and preventing belated challenges to public law decisions are satisfied once an applicant is prevented from initiating a belated challenge. Refinement of the precise terms of the action poses much less of a threat to public policy than late commencement of the proceedings, because by that stage all concerned have been made aware in a timely manner that the decision is under challenge. That latter point is perhaps central to decisions on amendment such as *Moore v. Dublin City Council* [2017] IEHC 264 (Unreported, Barrett J., 5th May, 2017)) which, incorrectly in my respectful view, do not give particular weight to that distinction in giving effect to the view of Fennelly J. (para. 31 of *Keegan*) regarding the need *"to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them".* This involves a confusion between notions of extension of time and good and sufficient reason with the requirements for allowing an amendment, which requires only explanation (and which as *Keegan* shows can simply be explained by inadvertence). Furthermore, *Moore* places what respectfully seems to be unwarranted emphasis on the fact that a new dimension was sought to be introduced – hardly a huge issue given that a totally new ground was allowed in *Keegan*, and asserts that this would be "*greatly and unfairly to prejudice the position of the respondents*" (para. 14(1)) – but all that the amendment would have meant was that the respondents would have had to answer the applicant's new claim. If they had an answer to it, then any prejudice would be compensatable in costs, so would be neither great nor unfair. That whole erroneous line of thought as to conflation of delay in initiation with delay in amendment was anticipated by Keane J., as he then was, in his illuminating decision in *Krops v. Irish Forestry Board* [1995] 2 I.R. 113 (approved by the Supreme Court in *Smyth v. Tunney* [2009] 3 I.R. 322 and *O'Leary v. Minister for Transport, Energy and Communications* [2001] 1 I.L.R.M. 132), in which he concluded that "*the pleadings which initiate an action in this court carry with them from the time they are issued or delivered the potentiality of being amended by the court in the exercise of its general jurisdiction to allow a party to amend his indorsement or pleadings "in such manner and on such terms as may be just". Where, as here, an amendment, if allowed, will not in any way prejudice or embarrass the defendant by new allegations of facts, no injustice is done to him by permitting the amendment. In that sense, it is true to say that the amendment does not in truth deprive him of a defence under the Statute of Limitations, 1957: since the proceedings were always capable of amendment in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, it cannot be said that the defendant was at any stage in a position to rely on the Statute of Limitations, 1957."* (p. 121). Indeed as far as delay in seeking an amendment is concerned, it is well settled that an amendment can be made at the trial (as the Supreme Court held in *Wildgust v. Bank of Ireland* [2001] 1 I.L.R.M. 24), after judgment has been reserved (*J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, Hogan J., 13th December, 2011), or indeed at any time up to the perfection of the final order.

26. Similarly, in considering the test for amendment in *Word Perfect Translation Services Ltd. v. Garda Commissioner* [2015] IEHC 668 (Unreported, Hight Court, 3rd November, 2015) (followed by Simons J. in *A Foster Mother v. Child and Family Agency* [2018] IEHC 762 (Unreported, High Court, 21st December, 2018)), Costello J. considered only the decisions in *Keegan* and *Copymoore* (para. 4) and set out a number of points which she considered emerged from those cases. Given the limited range of caselaw opened and submissions made to the court in *Word Perfect*, I would very respectfully suggest that some glossing or nuancing of those points seems to be appropriate. One might also note that *Word Perfect* was decided in the special context of public procurement. The relevant points are as follows:

(i). The first point is that the onus is on the applicant to satisfy a court that there were good reasons to explain why the amendment now sought was not set out in the proceedings as originally drafted. That is problematic if it conflates the concept of an objectively "good" reason with an "explanation". After all, "we overlooked the point" was regarded as a sufficient explanation in *Keegan* although it is hard to see that as amounting to "good reasons".

(ii). The second point was that courts are reluctant to introduce what amounts to a claim for an entirely new relief. However, that conclusion was based on a very limited survey of the caselaw, and a broader view supports the position that a new relief can be introduced by amendment if doing so is in the interests of justice; particularly if the alternative is instituting separate proceedings, that may give rise to a saving in costs.

(iii). The next point was that courts are reluctant to introduce what amounts to a challenge to a different decision, and again the same applies. There may be many situations where this is permissible and preferable to separate proceedings.

(iv). The next point was that if the amendment amounts in essence to a question of pure law and if it does not significantly enlarge the case, the amendment is likely to be permitted. I respectfully agree; indeed that is a point I made

in *Carter v. Minister for Education and Skills* [2018] IEHC 539 (Unreported, High Court, 3rd October, 2018) para. 21 (under appeal). However, that does not necessarily mean that a point that does enlarge the case should be refused.

(v). The fifth point is that if the amendment is likely to involve new affidavits and new facts then the courts may be less inclined to allow the amendment sought. That may be so although it may depend on the stage at which the amendment is sought – if an adjournment of a current or imminent trial is required then that would be a factor against (a point I made in *B.W.* at para. 22).

(vi). The sixth point is that an amendment is likely to be permitted if adding the point will assist in the final disposal of the proceedings. Conversely, if it will not, the courts may be less inclined to permit the proposed amendment. That seems to follow from the overriding requirement that the amendment assist in the doing of justice and the resolution of the real issues.

(vii). The next point is that the courts will ask whether the issue arises naturally or by implication out of the existing proceedings. If it does not, the courts may be less inclined to permit the proposed amendment. I would respectfully say that this formulation is unduly restrictive. Amendments that arise naturally or by implication may amount to little more than particularisation of the case made and may thus be had more or less for the asking (see *W.T.* (under appeal)). But simply because an amendment goes beyond what is already implicit does not create any presumption of refusal.

(viii). The next point is that if the proposed amendment is likely to cause delay, the courts may be less inclined to permit the proposed amendment. There is a public interest in the swift disposal of public procurement litigation and there are special and stricter statutory rules applying to this area for that very reason. That is certainly true and again I had emphasised the question of whether the amendment would cause delay in *B.W.*

(ix). The ninth point is that in considering a proposed amendment, the courts will have regard to the prejudice likely to be caused not only to the respondent but also to third parties who may have incurred interests in the intervening period between the impugned decision and the proposed amendment to the existing pleadings. Again that is a valuable observation and frequently relevant to public procurement.

(x). The final point is that if an applicant has acquiesced in the situation arising from the decision he later seeks to challenge, this is a factor a court may take into account in deciding whether or not the plaintiff has established good reasons to justify a court permitting the proposed amendment. That may very much depend on fact-specific issues.

27. The authors of *Delany and McGrath* comment at p. 284 that "*provided that a proposed amendment raises an issue relevant to the proceedings, it is generally not a bar to granting leave [to amend] that it fundamentally alters the nature of the proceedings by introducing a new cause of action or ground for relief*", citing *Wolfe v. Wolfe* [2000] 1 I.L.R.M. 389, *Rubotham v. M. & B. Bakeries Ltd*. [1993] I.L.R.M. 219, *Shell E. &P. Ireland Ltd. v. McGrath* [2006] IEHC 99 [2006] 2 I.L.R.M. 299.

28. In *Rubotham*, Morris J., as he then was, was confronted with an amendment which the defendants characterised on the basis that "*the case now sought to be made was an entirely new one which had not been made before*". Allowing the amendment, Morris J. held that "*the fact that this may be a new and hitherto unpleaded case is not a bar to granting the amendment*".

29. In *Shell*, Laffoy J. was faced with an objection to a proposed amendment on the basis that "*First, it is suggested that what is proposed is not in reality an amendment at all; it is a completely new and expanded case, involving a multiplicity of new causes of action, which have not been previously raised. Further, in the main, these causes of action have not been raised by the other defendants. The radical nature of what is proposed is underscored by the necessity to join [new] State parties*." While she acknowledged that "*the issues which will arise and the reliefs which will be claimed, if the amendment is allowed, will go considerably beyond what was in the case hitherto*" she nonetheless concluded that "*it seems to me that this is very much the type of technical argument which a court will subordinate to the primary consideration of ascertaining whether the amendments sought are necessary for the purpose of determining the real questions of controversy. Apart from that, O. 28, r. 1 speaks of allowing a party "to alter or amend" a pleading. The last passage from the judgment of Geoghegan J.* in Croke v. Waterford Crystal Limited *which I have quoted above, clearly indicates that the rule comprehends an alteration which introduces a new cause of action, even one which would be statute barred if brought by separate action. Accordingly, in my view, this ground [of objection to the amendment] is not made out*."

30. Citing *Clifford v. Minister for Education and Science* [2005] IEHC 288 (Unreported, Budd J., 10th June, 2005), at para. 14, the authors of *Delany and McGrath* go on to state that "*if a plaintiff seeks to add a new cause of action or claim to his or her statement of claim which is not statute barred so that it could be pursued by a fresh set of proceedings, that will be a very significant indicator that the amendment is necessary for the purpose of determining the real questions in controversy between the parties because it will generally save time and expense and is more likely to lead to a just result if all issues are dealt with and resolved in one set of proceedings*" (p. 283).

31. Coming to the question of most direct relevance to what occurred here, at p. 302, the learned authors cite the decision of Clarke J., as he then was, in *Mooreview Development Ltd v. First Active Plc.* [2008] IEHC 274 [2009] 2 I.R. 788 at 829 to 830 to the effect that his tentative view was that the approach of not permitting amendments to a plenary summons in respect of a cause of action which arose after the date of the original plenary summons was "*a rule of practice rather than a rule of law and that there would therefore be a discretion which would permit the court in an appropriate case to depart from the rule"*. He came to that point of view "*primarily because it is well settled that issues concerning remedies (as opposed to the causes of action giving rise to those remedies) can be revised in proceedings, even though the facts relevant to the availability or otherwise of a particular remedy or the extent of same may only have occurred subsequent to the proceedings being commenced."*

30. But however viewed, this "rule" does not amount to very much more than a guide as to what is the most economical approach. The Court of Appeal of England and Wales has recently held in *R. (Spahiu) v. Secretary of State for the Home Department* [2018] EWCA Civ 2604 (28th November, 2018) that while a rolling or evolving judicial review as understood in that jurisdiction is generally not simpler or more cost-effective, there was nonetheless jurisdiction to allow amendments to include challenges to decisions that post-dated the institution of the proceedings (see *R. v Secretary of State (ex parte Turgut)* [2001] 1 All ER 719 and *R. (O.) v Hammersmith and Fulham London Borough Council* [2012] 1 WLR 1057.). The corollary is that if it was simpler and more cost effective to allow such amendments – as it often is in this jurisdiction - then that would be a reason to do so (see paras. 59-64). Indeed the Supreme Court in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109 noted without adverse comment at para. 22 that I had allowed the applicant to amend judicial review proceedings to challenge a decision that had been made subsequent to the issue of the proceedings. That court went on at para. 84 to envisage an application to further amend the

proceedings following a further decision that was then yet to be made. If that is not green-lighting a procedure for incorporating challenges to subsequent but related decisions into the one set of proceedings, I don't know what is.

32. If a central goal of court procedures is to enable matters to be decided speedily and efficiently and at the lowest cost, it frequently makes much more sense if new decisions made in the course of proceedings should be the subject of amendments to those proceedings to allow everything that is related to be challenged together. It is important that rules of law and rules of procedure come into alignment with the ultimate goals of a legal system. The goal of reducing costs is just as valid in relation to the desirability of a single set of proceedings challenging two decisions, where one pre-existed the proceedings and one was made subsequently, as it is in relation to challenging two decisions that both pre-existed the proceedings. Finally, at the risk of engaging in an overly optimistic attempt to reduce legal entropy in this most confused of areas, I would respectfully offer the following summary of the principles emerging from the foregoing discussion:

(i). the jurisdiction to amend is intended to be liberal (*Croke, Moorehouse*);

(ii). in considering the amendment of pleadings in any proceedings, the overriding consideration is the interests of justice, including the right of access to the courts and ensuring that the real issues in the proceedings are addressed (*Keegan, O'Neill, Croke, Corbett*);

(iii). it is not the function of the court in considering an amendment to punish parties for mistakes (*Moorehouse*);

(iv). there are three tests for allowing an amendment: arguability, explanation and lack of irremediable prejudice (*Keegan, B.W.*);

(v). if the point is not arguable then the amendment should not be allowed (follows from *B.W.*);

(vi). explanation of the failure to include the point in the original pleadings is to be distinguished from good and sufficient reason to extend time; an application to amend is not an application for extension of time as such and requires a lower level of explanation rather than good reason as such (*Krops, Smyth, O'Leary, Keegan*);

(vii). simple inadvertence by lawyers acting for the party concerned may be accepted as such an explanation (*Keegan*);

(viii). the fact that the application is based on facts that were there originally rather than new facts is not a bar to the amendment being made (*Keegan*);

(ix). while the other party will virtually always claim prejudice, this is normally not irremediable if it can be remedied by adjournment or in costs terms (*Corbett*, *Moorehouse*);

(x). having to deal with a potentially winning point that was not originally included does not constitute irremediable prejudice (follows from *Keegan*);

(xi). irremediable prejudice to third parties who are affected by an impugned decision may be a factor against allowing an amendment;

(xii). the fact that the proposed amendment introduces an entirely new cause of action or new ground, or even fundamentally alters the nature of the proceedings, or requires the addition of new parties, is not a bar to allowing the amendment (*Rubotham, Shell)*;

(xiii). the fact that the amendment involves a new relief, or challenges a different decision including one made after the institution of the original proceedings, is not a bar to allowing an amendment (*Y.Y.*);

(xiv). if the proposed new claim is one that could otherwise be pursued by separate proceedings, the potential saving in costs and likelihood of a more just and convenient disposition of the issues by dealing with all related matters in the one set of proceedings is a factor in favour of allowing the amendment (*Clifford*);

(xv). while amendments that do not substantially enlarge the proceedings, or merely particularise what is implicit, may be readily granted, the fact that the amendment substantially enlarges the proceedings is not a bar to allowing an amendment (*Y.Y.,* and see the result in *Keegan*); and

(xvi). if an amendment introduces a new evidential contest, that may be a factor against allowing it, especially if made at a late stage such as to derail a hearing and cause significant delay in finalising the proceedings. In such a case the court's assessment of the balance of justice must factor in any harm to the interests of justice by reason of such delay but nonetheless, delay is not a bar to an amendment, and the power to amend can be exercised during the trial, after judgment is reserved, or at any time up to perfection of the final order (*Wildgust, J.K.*).

33. Further consideration of the application of this approach to the procedure actually adopted in this case is best left to the costs stage.

Evidence of Raymond Murray

34. Mr. Murray was tendered for cross-examination. He is currently an assistant principal officer in INIS and has been involved with the citizenship division since in or around January, 2016. The applicant had already been naturalised by that stage and he would possibly have seen correspondence regarding her request for an amendment to her certificate in or around summer 2016. The issue of revocation was the subject of discussion in the office between himself and Mr. Kevin Clarke and other officials in 2017, although it was not clear precisely when. The first reference in the file to the question of revocation was Mr. Clarke's email of 10th May, 2017. Having seen and heard Mr. Murray I accept his evidence in full.

Evidence of Kevin Clarke

35. Mr. Clarke, who was then the principal officer in charge of the citizenship division, and is now retired, was also tendered for cross-examination. He attended the consultation on 9th May, 2017 regarding the first judicial review and had been involved with the applicant prior to that as head of the citizenship division. The first documentary evidence of his involvement in the applicant's case was at the time of the consultation, but he said that he had been involved prior to that but that that was not necessarily noted anywhere. He familiarised himself with the case prior to the consultation. After the meeting he sent an email to Mr. Murray telling him

to proceed with the revocation application, and subsequent to that a submission was made to the Director General. He described this as "*the continuation of the process*". The commencement of the process to consider revocation would not normally be written down. Officials would frequently discuss cases in coming to a decision. The citizenship division was based in Tipperary, whereas he was in Dublin, so he would often talk with colleagues on the phone and there might not necessarily be a note of such conversations. The proposal to revoke he described as "*the start of the process*". Discussion he had in relation to that process was with Mr. Murray and possibly other colleagues. The discussion with Mr. Murray predated the consultation by weeks or perhaps a month, he was not sure. His position was that the Director General made the decision. The normal practice would be for the decision memorandum to be addressed to him as head of the division initially and then to the Director General. The file would travel with the submission and he would have re-examined the file at that stage. The issue as he saw it was that the applicant had provided a date of birth, but now one-and-a-half years after the grant of the certificate had come in with further details of the date of birth, so that was what he was he was looking at. As he saw it, these new details had not been given at the time of the application form and statutory declaration. The gist of his evidence was that he was primarily looking at the application form itself for this purpose rather than any other material that was furnished by the applicant specifically. He did say that he looked at the birth certificate in the examination of the file, that there was some discrepancy between the dates and that he read her explanation, but the basis of the proposal was that the applicant fell under the revocation provisions of s. 19 of the Irish Nationality and Citizenship Act 1956 because of the discrepancies in the date of birth. He formed that opinion subsequent to the letter received from the applicant but in the absence of the file he had difficulty putting exact dates on when this happened. The committee of inquiry envisaged by s. 19 could not sit at the time because it was missing a member. A new member was appointed in March, 2018 and the committee has been sitting since March or April, 2018.

36. Mr. Clarke retired in May, 2018 but he understands that the committee has around 40 cases under consideration at present. He was aware of upwards of 150 cases where information came to him subsequently that the application originally submitted was incorrect. Notice of intention to revoke had been issued in some of those cases, but at the time the Department was not inclined to issue such letters in the absence of a functioning committee.

37. The reason for the policy in relation to amendment was they were not amending certificates if the certificate was correctly based on information provided by the applicant. If, on the other hand, an error had been made by the Minister, the certificate was cancelled and reissued in corrected format. Mr. Clarke's view was that the date of birth on a passport trumped the date on a birth certificate. That appeared to be his explanation as to why the date on the certificate of naturalisation was in accordance with the passport. As he put it "*we accepted the date of birth as stated on the passport*". This also correlated with the applicant's statements on the application. While he did indicate that he read the file at the time, at this remove he did not seem to be in a position to distinguish between different letters at this stage and did not seem to specifically recall the applicant's letter of explanation other than by saying that he would have read it at the time when examining the file. The volume of work being processed through the citizenship division was such that it was very hard to remember every single piece of paper. He said that there were also other discrepancies which he could not now recall. The Director General had the file when making the decision and the information and submissions were on that file. The file was also read when the decision was made to grant the certificate in the first place. He accepted that if there was confusion on the file it would generally not be sent forward for approval but that whatever checks that might be deemed necessary would be conducted. An applicant might not necessarily be asked to provide further information but could be contacted in that regard and it would depend very much on the circumstances.

38. He could not recall why he did not draw more explicit attention to the applicant's position that she had provided information about the discrepancy at the time of the grant of the certificate of naturalisation. The upshot of his evidence appeared to be that his view was that the applicant had provided a combination of both accurate information and incorrect information about her date of birth. He thought that the only appropriate step that could be taken if information provided by the applicant was wrong was to revoke the certificate of naturalisation and referred to s. 19 to the effect that even providing incorrect information innocently would amount to grounds for revocation. Where it comes to the Department's attention that information supplied in the context of an application for citizenship is subsequently found to be false or misleading, that was the test he applied. He said that the consequences for the applicant were a matter for the revocation committee. He could not recall any consideration of the consequences for revocation for the applicant by the Department. He offered what might best be described as somewhat uncertain views as to whether and to what extent the committee of inquiry could make recommendations. Those views were, in fairness, in reply to a series of leading questions, which while of course totally permissible in cross-examination are not always necessarily the most helpful even in that context because they can have, and here did have, the effect of significantly devaluing the meaningfulness of the answers thereby produced and making any possible inconsistencies of considerably less significance. Some advocates may differ on this point. Barrister Iain Morley (as Morley J. then was) in *The Devil's Advocate* (London, 2005) at p. 154 says that in cross-examination one should *"[a]lways ask leading questions*"; Keith Evans aims for the middle ground *in The Golden Rules of Advocacy* (London, 1993) at p. 103, speaking of cross-examination: *"move cautiously in the direction of using non-leading questions as much as you can. It is always better for the evidence to come out of the witness's own mouth"*; although the counsel of perfection is the approach of David Ross Q.C. in *Advocacy* (Cambridge, 2005) at pp. 51-52 that "*Leading questions can be asked in cross-examination. However they should not be asked as a matter of course… ask as many non-leading questions as you can*". In reality Mr. Clarke did not have any meaningful experience of the committee because it did not function or make any findings or recommendations during his time in charge of the division due to absence of membership, and on reflection he ultimately agreed with that position in evidence.

39. Mr. Clarke said that administrative errors by the Department were few and far between. Each certificate had its own number recorded in books in the office. If a certificate was cancelled the Department would issue a new one; often within a day or two of the original issue, when an applicant looked at their certificate and found their name back-to-front, for example. The Department did not wait for the person to make a formal application for a new certificate; rather the reissue in corrected form was simultaneous with the cancellation. If a certificate was revoked under s. 19 the position was different; the person could then reapply for naturalisation.

40. Mr. Clarke stood up very well to a robust cross-examination, and having seen and heard him give evidence, I accept his evidence in full insofar as it relates to factual matters. His views on whether the certificate could be amended or what the jurisdiction of the committee of inquiry might be are not factual matters but matters of legal interpretation, which I will deal with separately.

The jurisdiction of the committee of inquiry

41. There was some discussion and dispute at the hearing as to the contours of the jurisdiction of the committee of inquiry. Both sides agreed that the committee could find that the facts alleged by the Minister as reasons for the proposal to revoke were to be upheld. As regards whether the committee could make findings in relation to any related facts such as what the applicant's date of birth actually is, the applicant said that there was no such jurisdiction, at least on the facts of this case, whereas the respondents said that they were reluctant to pre-empt the committee but that would appear to be a separate issue, as it was put by Ms. Stack. As regards whether the committee could recommend that a certificate should be revoked or not, the applicant denied that the committee could make such a recommendation, whereas Ms. Stack said she was reserving her position, although said that if the committee could make a recommendation one way they could make it the other way. As regards whether the committee could recommend that in lieu of revocation the certificate should be cancelled and reissued in corrected format, both sides denied that

there was any such jurisdiction, although ultimately this is a matter between the committee and the Minister and does not arise now. In the circumstances, it would seem better to let the committee do what they think is best if the matter comes before them, on the basis that whatever outcome emerges from that will be subject to judicial review, so there is no point clarifying the committee's jurisdiction at this stage in the abstract.

The different dates for the applicant's date of birth

42. At least five different formulations were given for the applicant's date of birth. As noted above, the applicant's application for a certificate of naturalisation inserts her birth date as "*24/09/75*". She also submitted an Ethiopian passport showing a date of "*24 Sep 75*". The respondents rely on the International Civil Aviation Authority requirements, 2015, which require the Gregorian calendar or numerical format. The passport having been issued in 2011 predates those requirements so they do not necessarily illuminate the situation, at least not definitively. The applicant contends that the reference to the month 01/75 would translate into September, 1975, but even if this were so it is not clear why 24/01/75 in Ethiopian terms is equivalent to 24th September, 1975 because, as discussed above, the day numbers are not aligned. The birth certificate gives the two alternative dates, as noted above of 24/01/75 in the Ethiopian calendar or 04/10/82 in the Gregorian calendar. An alternative formulation is 24 Mäskäräm 1975 (see para. 10 of Mr. Murray's affidavit). While this multiplicity of dates seems confusing, only one date is now put forward by the applicant as being her date of birth in the Gregorian calendar, namely 4th October, 1982. Having said that, further complication has been introduced because an identity card issued by the Ethiopian authorities more recently reiterates the date on the passport in the manner that the respondent claims is in Gregorian format, although the last-minute nature of the introduction of this document has been such that the respondents have not had an effective opportunity to investigate and respond to that document.

Does the applicant have a legal or constitutional right to have her identity details, such as date of birth, correctly reflected in official documents?

43. The right to registration of birth, and implicitly to an accurate registration, is recognised by art. 24(2) of the International Covenant on Civil and Political Rights and art. 7 of the Convention on the Rights of the Child. The fulfilment of that right is obviously closely related to the enjoyment of a series of socio-economic and other rights, as indeed was noted by the UN Human Rights Council on 17th June, 2014 (see Report of the Office of the United Nations High Commissioner for Human Rights, "Birth registration and the right of everyone to recognition everywhere as a person before the law"). Such a right, including the right to have the details of one's personal identity correctly recorded, must also arise under art. 8 of the ECHR *via* the European Convention on Human Rights Act 2003 (see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child* (2015), pp. 63-64). The applicant's rights therefore are at least to some extent in issue here. She must have a right to have her identity correctly recognised by the State. That is so fundamental that it must be recognised as an unenumerated constitutional right. If I can venture a comment that might displease traditionalists, the tussle between schools of thought that prefer a narrow and restrictive reading of unenumerated rights under the Constitution and those (which I would respectfully favour) that prefer a wide reading, particularly in line with international legal norms, is of limited practical relevance because in most situations an applicant can reformulate a claim by reference to the ECHR, the EU Charter, or other domestic or EU law, in such a way as to simply side-step that whole never-ending clash of perspectives. That being so, one wonders in passing why it is such a problem to have a reading of unenumerated constitutional rights that where possible and appropriate aligns with internationally recognised human rights principles.

44. Such a right is also, to an extent, a corollary of data protection principles, including those in art. 8 of the Charter on Fundamental Rights of the EU, which provides that everyone "*has the right of access to data which has been collected concerning him or her and the right to have it rectified*", which in turn implies a duty of accuracy. Similar rights are included in s. 74(3) of the Data Protection Act 2018 and s. 9 of the Freedom of Information Act 2014. Further, in certain circumstances the right of access to personal data can be derived from the right to respect for private life under art. 8 of the ECHR (see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (Oxford, 2009) pp. 562-564). The fact that rights are provided for by statute or European law does not logically mean that corresponding rights cannot arise at least in certain circumstances under the Constitution. Of course I am not suggesting that data protection law is generally a matter of unenumerated constitutional right, but rather that there is an implied constitutional onus on the State arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution to accurately record and represent central aspects of personal identity.

45. Separately from that, certain explicit constitutional rights depend on the age of the individual, such as the right to vote at 18, to stand in a general election at 21 or in a presidential election at 35. It is clear therefore that there is an implied right for there to be a correct record of the person's age so that such constitutional rights can be exercised. For judges, for example, the age of retirement can be fixed under Article 36.1, which again involves a necessarily implicit constitutional requirement that such age is correctly recorded. Similarly, insofar as Article 45.4.2° provides that citizens should not be forced by economic necessity to enter vocations unsuited to their age, the applicant could not even in theory seek to appeal to such a provision unless it implies a constitutionally necessary mechanism for a correct recording of her age. Nor could she appeal to Article 45.4.1° which refers to the "*aged*" unless when she contends she comes within that category she is in a position to have her age properly recognised. While "*the application of [Article 45] principles in the making of laws"* is not justiciable, that does not mean that the Article is not cognisable by constitutional organs, or even by courts in other contexts; or that it is not constitutional law.

46. Identity is of course not a concept that is easy to define. All that the applicant is asking for at this stage is that her correct date of birth and therefore age on which much treatment of her by the organs of state can potentially depend, particularly in later life, be accurately recorded. Whether the right to have one's identity recognised extends to other issues can safely be left to some other case. One does not need for present purposes to go as far as Kennedy J. who began his opinion in *Obergefell v. Hodges* 576 U.S. __ (2015) by deriving from the right to express one's identity (at slip op. pp. 1 to 2), a basis for holding unconstitutional a statutory provision that precluded same-sex marriage. Scalia J. riposted (slip op. pp. 7 to 8 n. 22) that: "*If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."*

47. In the present context, insofar as the correct recording of the applicant's date of birth is concerned, the State is primarily responsible for recording information in respect of persons born subject to Irish jurisdiction, in particular within Ireland, including her airspace and territorial waters, or on Irish ships and aircraft everywhere, or in Irish diplomatic or consular missions, or to Irish citizens abroad. While the primary onus to have recorded the applicant's date of birth correctly therefore falls on the Ethiopian authorities, that does not absolve this State from recording that date of birth correctly in its own records. I would therefore uphold the argument made by the applicant at para. 60 of her written submissions that "*the right to have a correct official record of one's identity is an aspect of the personal rights of citizens"* under the Constitution, Article 40.3 and art. 8 the ECHR, as applied by the 2003 Act.

48. A similar approach was taken by Kearns P. in *Caldaras v. An tArd Chláraitheoir* [2013] IEHC 275 [2013] 3 I.R. 310 at pp. 319 to 320, a case from which I derived considerable assistance as, despite a different context, it has some parallels with what occurred

here. When registering the birth of her daughter, the applicant provided what she believed to be her real or official name. It subsequently became apparent that the name the applicant had provided was incorrect, and was in fact the name of another woman whose birth certificate she had mistakenly believed to be her own. The applicant applied to the Office of the Registrar of Births, Deaths and Marriages to have her daughter's birth certificate amended to correctly state the applicant's true name. The Registrar General refused to so amend the certificate, indicating that the register was "a *historical record of the correct facts at the time the record was created"*, and that the mother's name, as it had been at the time, was correctly recorded. The respondent's decision made reference to the judgment of McKechnie J. in *Foy v. An tArd Chláraitheoir* (Unreported, High Court, 9th July, 2002), which referred to a birth certificate as a "*snap shot*" of matters on a particular day, rather than a "*continuum record of one's travel through life*" and that as the certificate was, in their view, a correct representation of the applicant's details at the time, amendment would not be permitted.

49. It was held by Kearns P. that the circumstances in Foy were "*altogether different*" as in that case the applicant sought the retrospective amendment of their birth certificate to reflect their sex following gender reassignment surgery, as opposed to the observable biological sex of the applicant at birth. That was not an error of fact, and such an amendment was not permitted by the Civil Registration Act 2004. In *Caldaras*, the applicant was seeking an amendment to reflect the factually correct details at the time of the applicant's daughter's birth, and it was held that the applicant was entitled to have the register amended accordingly.

50. Further, it was held that the applicant's rights were engaged by the process, with Kearns P. stating that "*both a parent and a child have the right to have the correct identity of the parent recorded in a child's birth certificate. In terms of the Irish Constitution, the "double construction rule" requires that statutory provisions be given an interpretation which allows for the personal rights of individuals to be respected. Furthermore, s. 2 of the European Convention on Human Rights Act 2003 provides that in interpreting and applying any statutory provision or rule of law a court shall, insofar as possible, subject to the rules of law relating to such interpretation and application, so in a manner compatible with the State's obligations under the Convention provisions*". Kearns P. held that to allow amendment would not require the respondent to interpret the provisions of 2004 Act in a manner that was "f*undamentally at variance with a key or core feature of the statutory provision or rule of law in question*". It was held that the Registrar General had read into the 2004 Act a test which was not there, *i.e*. a requirement that the mistake must be made by the Registrar General or their staff before a correction could be made.

Should the court make a declaration as to the applicant's date of birth?
51. The first relief sought in the first judicial review is "*an order declaring the applicant's correct date of birth for the purposes of her naturalisation certificate is 4th October, 1982".* It is relatively unusual that an applicant needs a declaration as to what her correct date of birth is, but the applicant submits that this is such a case. Ms. Stack made essentially four submissions as to why such a declaration should not be granted:

(i) that there was no jurisdiction to do so;

(ii) that it is too confusing a situation to allow the court to make a declaration;

(iii) that this could be more appropriate to another State body; and

(iv) that it could be more appropriate to the inquiry or at least that a declaration could pre-empt the inquiry process.

52. As regards jurisdiction, it can be appropriate for the court to grant declaratory relief regarding the personal status of an individual (see for example s. 29 of the Family Law Act 1995). Ms. Stack queries whether such a declaration comes within the High Court's full original jurisdiction over all questions of fact and law. That full original jurisdiction is qualified to the extent that determination of certain matters can be entrusted to other procedures, for example to procedures before the District Court or Circuit Court, as was in issue in *Tormey v. Ireland* [1985] I.R. 289. In such circumstances, the High Court retains jurisdiction "*in one form or another*" (p. 296), in particular by judicial review. There is no real analogy with the present case because the State is not saying that the right to determine the applicant's date of birth is exclusively entrusted to the Minister or anybody else, subject only to judicial review. Ms. Stack is instead saying that maybe the Minister may make a finding about her date of birth, or on the other hand maybe he may not; or that perhaps some other public authority should make that determination. The submission as to what the actual alternative process is, therefore, is nebulous in the extreme and certainly not a basis for the court not to make a declaration.

53. *Tormey* was followed in Gria*nán an Aileach Interpretative Centre Company Ltd. v. Donegal County Council* [2004] 2 I.R. 625. The Supreme Court in that case was influenced by s. 5 of the Planning and Development Act 2000 in holding that the point at issue was within the jurisdiction of the planning authority and the Board. *Kilross Properties Ltd v. E.S.B.* [2016] IECA 207 [2016] 1 I.R. 541 was a case where it was held that the court should not through the mechanism of s. 160 of the 2000 Act engage in a collateral attack on a s. 5 finding by a planning authority. Again, the distinction between that and the present case is that the s. 5 procedure existed as a clear alternative appropriate procedure in that case, whereas here the Minister is not accepting either any duty to make any findings as to the applicant's true date of birth or identifying any other specific procedure by which that could be settled for naturalisation and immigration purposes.

54. As regards whether the situation is too confusing to allow a declaration, the main thing militating against the applicant's case as to what her date of birth is is that both the Ethiopian passport and subsequent identity card say otherwise, and the State is contending that those documents are calibrated on the Gregorian calendar, although that cannot be said to have been sufficiently teased out in evidence by either side as yet. As against that, the applicant has produced an undated letter from the embassy of the Federal Democratic Republic of Ethiopia in Dublin, which states that "*Mrs. Mahelet Getye Habte, holder of an Ethiopian passport [number provided] date of birth 24/101975 (sic) EC is the same with date of birth 04/10/1984 GC as per indicated on applicant's birth certificate"*. While an illegible version of the passport was originally exhibited, the applicant has now put in a legible version, which as noted above refers to 24th September, 1975 rather than 24/01/75. It is not clear that this is necessarily a contradiction, but nor is it clear that this has been totally explained. At the same time, the letter from the Embassy seems to be clear in its intent that the correct date of birth in Gregorian terms is 4th October, 1982. The situation is certainly confusing, although not in principle beyond the scope of examination and determination. However, the fact that further enquiries and examination may be necessary could be a factor militating in favour of allowing some other body to look into this rather than have the court make a declaration at this stage.

55. As regards the matter being more appropriate to another State body, Ms. Stack's basic answer under this heading was that even if the applicant's entitlement to have the State clarify what it thinks her date of birth was might be thought to be all well and good, that was not necessarily a matter for the Minister for Justice and Equality. The problem with that submission is that the State has not identified how precisely the applicant should get a definitive determination by the State as to what it thinks her date of birth is. The submission made on behalf of the respondents could potentially leave the applicant in limbo because it is submitted that the court

should not make a declaration as to the applicant's correct date of birth, but on the other hand that the State should be allowed to keep all other options open. The committee of inquiry or the Minister might not necessarily make such a finding either. There might be other authorities that could resolve the issue, such as for example through the issue of a public services card, but there did not seem to be any guarantee, even if the applicant got a public services card, that the date of birth stated in that document would be accepted by the Department of Justice and Equality. Certainly the ultimate approach to the resolution of this issue should be such as to not leave the applicant in an indefinite limbo on this important question, given that, as I have noted above, her rights are engaged by the process.

56. As regards the submission that to make a declaration now would pre-empt the statutory inquiry process, that is certainly a submission that carries weight. On the one hand, however the Minister can hardly decide whether misrepresentation has occurred without forming some view as to what the correct factual position is, because a finding that correct position was not accurately represented appears to presuppose some understanding of what the correct position in fact is. If the revocation process had not been initiated, I might have given more favourable consideration to making a declaration regarding the applicant's date of birth in the exercise of the full original jurisdiction of the High Court. However, in light of the fact that matters have to some extent been overtaken by the revocation proposal, it appears that the inquiry process is the more appropriate mechanism and that any declaration I could make now would only cut across that process. However, I reiterate the point that the applicant should not be left in limbo, so if by the conclusion of the process the Minister has not clarified what he considers the applicant's correct date of birth to be, the basis for my having declined to make a declaration at the request of the respondents would have been negatived, so the applicant would have to be free to reapply to the court at that stage. Thus the refusal of a declaration would be without prejudice to any point that the applicant might make if she brings a challenge to the ultimate outcome of the process.

Did the Minister have jurisdiction to amend (in practice by cancellation and simultaneous reissue in corrected form) the certificate of naturalisation?

57. At the outset I need to clarify what is meant by the term "*amend*" in relation to a certificate of naturalisation. The evidence establishes that each certificate is numbered, so that if a clerical error is identified the certificate is not "*amended*" in the sense of having the original document adjusted. Rather the particular numbered certificate is cancelled and a fresh and differently numbered certificate is simultaneously issued with the correct details. Reference to "*amendment*" of the certificate in this judgment should therefore be read as amendment by means of the procedure applying to certificates of naturalisation - namely cancellation and simultaneous reissue in corrected form. Mr. Harty somewhat faintly made the argument that simultaneous reissue of a certificate was not equivalent to amendment because terminating a certificate was said to be retrospective. That argument was based on *Nz.N. v. Minister for Justice and Equality* [2014] IEHC 31 (Unreported, Clark J., 27th January, 2014) regarding revocation of an asylum declaration, but that is a totally different situation. A refugee declaration is purely declaratory: see *M.A.M. v. Minister for Justice and Equality* [2018] IEHC 113 [2018] 02 JIC 2607 (Unreported, High Court, 26th February, 2018) (under appeal) and the authority therein cited. The same point arose at para. 48 of *N.A. (Somalia) v. Minister for Justice and Equality* [2017] IEHC 741 (Unreported, Stewart J., 10th November, 2017) where refugee status of the father in that case was revoked. That removed the basis for the child to claim citizenship based on birth to a person with refugee status because the decision that the birth never qualified for refugee status applies *ab initio*. The cancelation and simultaneous reissue of a corrected certificate of naturalisation is not retrospective, nor is it intended to be. It does not diminish any rights of the citizen concerned.

58. The basis of the refusal of the applicant's request for an amendment was that it was not the policy of the Department to amend certificates, save in very limited circumstances. The position at trial was somewhat more nuanced. Ms. Stack says that the Minister's position is that it is not within the Minister's implied powers to amend, even to correct innocent inaccuracies in information provided by the applicant. Ms. Stack does accept that the Minister has implied power in relation to clerical errors made by the Department, or indeed any mistake made by the Minister, but not clerical errors by the applicant. However, the respondent's interpretation of his powers is misconceived because a power to amend is expressly provided for by s. 22(3) of the Interpretation Act 2005: *"A power conferred by an enactment to make a statutory instrument shall be read as including a power, exercisable in the like manner and subject to the like consent and conditions (if any), to repeal or amend a statutory instrument made under that power and (where required) to make another statutory instrument in place of the one so repealed."* Statutory instrument is defined by s. 2(1) of the Act as meaning: *"an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to 'made' or to 'made under' include references to made, issued, granted or otherwise created by or under such instrument."*

59. Insofar as s. 22(3) of the 2005 Act refers to revocation of the instrument, in the present context and insofar as that relates to revocation without simultaneous replacement, that is impliedly excluded by s. 19 of the 1956 Act. But the power to amend is not excluded, either expressly or impliedly. Such a conclusion is reinforced by considering the need for a constitutional and ECHR-compatible interpretation of the 1956 Act. An interpretation that s. 19 impliedly excludes any power to correct errors by an applicant would be contrary to constitutional norms having regard to the need for only a proportional interference with rights (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 [2010] 2 I.R. 701 [2011] 2 I.L.R.M. 157) and to the extent to which revocation of the certificate would deprive an applicant of rights under the Constitution and the ECHR. Thus an interpretation of the Act that read in an implied removal of the right to amend the certificate in cases of error by an applicant would be a disproportionate interference with a whole suite of rights and interests. The only proportionate, and therefore constitutional and ECHR-compatible, interpretation is that the express power to amend the certificate recognised in s. 22 of the 2005 Act is not impliedly excluded, at least (for present purposes) not in the case of mistakes by an applicant of such a character as would not result in a positive decision to revoke in a given case (even if the Minister might technically have jurisdiction to revoke for innocent error): see by analogy the similar approach taken by Kearns P. in *Caldaras v. An tArd Chláraitheoir* [2013] IEHC 275 [2013] 3 I.R. 310.

Was the Minister wrong to refuse to amend the certificate notwithstanding the jurisdiction to do so?

60. Ms. Stack then falls back on the Minister's entitlement to a policy regarding amendments. She submits that if there is a power to amend, the Minister did consider the application and was entitled to maintain a general policy not to amend. The problem with the argument that the Minister was entitled to have a policy is that the Minister is not entitled to have a policy that does not respect the substance of the applicant's rights. Insofar as the applicant has a right to have her correct identity details recorded in official documents, the State has an obligation to at least give due and reasonable consideration to the applicant's representations before forming a view as to what the applicant's correct date of birth should be recorded as. That is inconsistent with a policy that refuses to amend certificates on foot of errors made by an applicant. Under this heading, however, the initiation of the inquiry process has also overtaken matters to some extent. In the current circumstances, the Minister is entitled to have the question of amendment examined in the context of the committee of inquiry procedure, subject to the issue of whether that revocation inquiry process is a valid procedure. Whether to actually exercise the power to amend is a matter for the Minister provided of course that lawful consideration is given to the application to amend, and a lawful view formed as to whether the amendment would give effect to the duty to record the applicant's personal details correctly. Having regard to the current state of play, it would be appropriate for the Minister to consider the question of amendment in the context of any outcome of the deliberations by the committee of inquiry, depending on what that outcome is of course. The refusal of the application to amend here was unduly influenced by both the view of

the law that incorrectly reads the Minister's jurisdiction as too narrow, and also by a view of the Minister's entitlement to a general policy that does not stand up as being one that adequately respects the rights of applicants. So the appropriate order would therefore be one to require the Minister to consider the amendment application, albeit that having regard to the events that have since transpired, this can be done in the context of the inquiry process. Mr. Harty contended that the Minister would have to logically consider the amendment first and then revocation; but that does not follow. The Minister can legitimately consider the two together when making a final decision.

Should judicial review be granted to quash a mere proposal?
61. Turning to the second judicial review, it is normally inappropriate to grant judicial review directed to a mere proposal (see *Leng v. Minister for Justice and Equality* [2015] IEHC 681 [2015] 11 JIC 0601 (Unreported, High Court, 6th November, 2015) (para. 36), *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016) (para. 98) (under appeal but not in relation to this aspect), *E.E.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 399 (Unreported, High Court, 25th June, 2018), para. 10; *Lin v. Minster for Justice and Equality* [2018] IEHC 780 para. 12). The proposal will be followed by a process that itself protects the applicant's rights, with of course the right to seek judicial review of any ultimate decision: see by analogy comments of Ryan P. in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) at 52, *per* Peart J. in *Stamatov v. Minister for Justice, Equality and Law Reform* [2004] IEHC 377 (Unreported, High Court, 30th November, 2004), *Gritto v. Minister for Justice, Equality and Law Reform* [2004] IEHC 119 (Unreported, High Court, 27th May, 2004).

62. The decision to initiate a procedure is not liable to judicial review in the same way as the outcome of the procedure. As noted in *Ryanair Ltd v. Flynn* [2000] 3 I.R. 240 and *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482, judicial review is directed to an act that must affect some legally enforceable right of the applicant. A mere decision to initiate a process is only exceptionally in that category. The law of alternative remedies is well established: see *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1982] I.L.R.M. 590 per O'Higgins C.J. at 596 to 597, E*.M.I. Records v. Data Protection Commissioner* [2013] 2 I.R. 669 [2012] IEHC 264*, L.O'N. v. Daly* [2016] IEHC 285 (Unreported, High Court, Twomey J., 30th May, 2016).

63. The existence of an alternative procedure is not an absolute bar to relief but a factor to be taken into account: see *Stefan v. Minister for Justice, Equality and Law Reform* [2011] 4 I.R. 203. Here the matter challenged is only the initiation of a process. In that kind of context, the alternative remedy of availing of the process is presumptively relevant. The argument that due consideration was not given to the proposal or that its issue was not proportionate or duly respectful of the applicant's rights, either substantively or to fair procedures, falls flat. The level of consideration that needs to be given to the initiation of a process is less than that which applies to the ultimate decision. The process itself provides a remedy in relation to any infirmities in the proposed case against the applicant. Inconsistency in the information provided by the applicant was a basis for the process to be initiated here even though it might also have been a basis to refuse the certificate in the first place. The fact that the Department did not refuse the certificate initially does not preclude it from considering revocation. One could nonetheless consider prohibiting the continuation of a mere proposal in exceptional circumstances, such as where the proposal is clearly *ultra vires* or was made for an improper purpose, and I will now turn to those aspects.

Was the proposal *ultra vires*?
64. Section 19(1) of the 1956 Act provides *inter alia* that: "*The Minister may revoke a certificate of naturalisation if he is satisfied - (a) that the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances …".* It was argued on behalf of the applicant that even if there was a mis-statement, the grant of the certificate was not procured by that misstatement. I do not think I can *a priori* say that that is the case at this stage. That would be a matter for the inquiry to consider. So the *ultra vires* objection is not made out at this point. That does not mean that it cannot be advanced in the inquiry process. Mr. Harty contended that the revocation process was tainted because it was carried out in circumstances where the Minister had unlawfully failed to consider the amendment in the sense of cancellation and reissue and relatedly wrongly considered that he had no option but to initiate the revocation process. The problem with that submission is that the revocation process is not fundamentally undermined by the failure to consider the amendment because there is a jurisdiction to revoke even in cases of innocent error, and the option of amendment in the sense of cancellation and reissue as now clarified remains open notwithstanding the revocation process. The proposal remains a proposal and the appropriate way to deal with what is thought to be a misconceived proposal is to respond to it rather than to seek judicial review before a decision is made. It was also contended that the correct test was not properly considered when making the proposal to revoke. That submission again brings forward to the proposal stage an issue that is more properly addressed at the stage of substantive decision. It cannot be said that the question of *ultra vires* has been so clearly demonstrated at this stage so as to justify prohibiting the inquiry.

Was the proposal motivated by an improper purpose?
65. Relief 4 of the statement of grounds in the second judicial review seeks a declaration that the so-called "*decision*" to issue a proposal "*was formed* mala fide". Ground 29 alleges that the Minister acted "*for an improper purpose and/or in bad faith*". Ground 35 alleges that "*the true motivation of the proposed revocation is an attempt to prevent the continuance of the first judicial review proceedings and/or to discourage or penalise the applicant for relying on her constitutional right of access to the courts*". The applicant's written submissions refer at para. 123 to bad faith and at para. 124 to "*the use of a public power as a collateral defence of judicial review proceedings".* However, neither of the respondent's witnesses were actually challenged on this basis. Mr. Harty was properly measured in cross-examination and did not actually make any such inflammatory suggestions to the respondent's witnesses. He was also exceptionally careful not to trespass on the area of legal privilege that might attach to consultations on the respondents' side; and indeed despite my misgivings on that issue when directing that the respondents' witnesses appear, the issue of privilege was not touched on even once in the oral evidence. The height of the applicant's suggestions as actually made in cross-examination were that the decision to revoke only came after the first set of proceedings, but even taking that as being so, that does not mean that the revocation was improperly motivated. The proceedings highlighted the issue of the applicant's inconsistent representations which no doubt stimulated consideration of that issue in the Department. It does not follow that such consideration was improper, still less that it was motivated by the desire to defend the first proceedings or to generally make life difficult for the applicant.

66. The email of 10th May, 2017 refers to the consultation and discussion with counsel and the CSSO but does not specify what sparked the proposal to revoke. The affidavit of Mr. Clarke of 20th April, 2018, stated that prior to the consultation, the view had been formed to consider revocation and that good practice dictated that it should be mentioned at the consultation in the context of possible impact on the first proceedings. The decision was not altered in any way by the consultation and was discussed in order to make all parties aware of it. No legal advice was sought or given on the question of whether s. 19 should be triggered at that consultation. He was not effectively challenged on the evidence that the idea to revoke predated the consultation. As I say, the gist of the challenge as I understood it was that the idea only came after the first proceedings were initiated. That may very well be so and probably is so but that does not get the applicant anywhere because that does not make the idea or proposal legally infirm. Having seen and heard the witnesses I entirely reject the suggestion that the proposal to revoke was motivated by an improper purpose and the allegation of wrongdoing or bad faith made against the Department and its officials in the case as pleaded, although in fairness to the applicant she did not pursue the more sweeping aspects of that complaint at the trial. The position under this

heading may nonetheless be a factor to be taken into account in terms of costs.

67. In the light of the foregoing findings on *ultra vires* and improper purpose, it does not seem to me that circumstances arise such as to make it appropriate to grant relief by way of judicial review in relation to a mere proposal at this stage.

Constitutional and ECHR reliefs, damages and injunctive relief
68. In the light of the fact that the applicant has an alternative, more appropriate remedy in the form of the inquiry and that therefore the second judicial review proceedings are essentially premature, the constitutional and ECHR reliefs do not arise at this stage. In any event, the argument that s. 19 of the 1956 Act is unconstitutional because error leads inexorably to revocation is misconceived because error does not inexorably lead to revocation. As the applicant has not established any breach of her rights by reason of the proposal, the question of damages does not arise. In any event it is hard to see how damages could arise even if the proposal was defective as the applicant has not as yet suffered actionable loss. No doubt the affair has caused her stress, which is all the more reason to get on with the inquiry and bring matters to a head one way or the other. But being caused stress is not an actionable wrong that sounds in damages absent psychiatric injury, grounds for exemplary or punitive damages (which do not exist here) or such stress occurring in the context of some other wrong that does sound in damages.

69. Insofar as injunctive relief is sought the applicant has not demonstrated any illegality in the inquiry process at this stage, so the question of injunction restraining that process does not arise. In any event, the claimed basis for the injunction and the allegation of "*irreparable harm*" is overblown. All that is going to happen is that an inquiry will take place into the proposal and a decision will be made that may turn out to be favourable. If it is not favourable, judicial review will be available.

Conclusions on the second judicial review
70. The whole purpose of the second set of proceedings is to spike the guns of an inquiry that is yet to take place. The applicant is seeking an order from the court that would have the effect that she does not have to explain the situation to the inquiry, and an order that cuts the inquiry off at the knees and gives her a guarantee that her citizenship won't be revoked. I cannot give such a guarantee, or at least certainly not at this stage, because that is a matter for the Minister to decide on, at least in the first instance. Any adverse decision would then be liable to judicial review. The applicant's case essentially is that she accepts that the date of birth on her application for a certificate of naturalisation is incorrect. Without too much risk of oversimplification, her argument as to why the certificate should not be revoked can be summarised as follows:

> (i) There was no misrepresentation by the applicant in the sense of s. 19 because taking all the material provided by the applicant together, this included correct information as to her date of birth in the Gregorian calendar even though the stated date of birth is not accurate: see para. (e)20(ii) of the statement of grounds.
>
> (ii) If, which is denied, there was misrepresentation by the applicant, grounds for revocation nonetheless do not exist because such inaccuracy was not material or causative of the grant of the certificate and thus the certificate was not "*procured*" by the misrepresentation.
>
> (iii) If, which is denied, grounds for revocation exist, the Minister is obliged to exercise discretion one way so as not to revoke because revocation would be a breach of the rights of the applicant.
>
> (iv) If, which is denied, the Minister is entitled to exercise discretion to revoke against the applicant, it is appropriate that such discretion should nonetheless be exercised so as not to revoke the certificate, and ideally instead that the certificate should be reissued with the correct date of birth. This submission can be seen in the context that the absolute discretion not to revoke the certificate, even if the conditions for revocation exist, is a necessary corollary of the absolute discretion not to grant a certificate of naturalisation even if the conditions for a grant are otherwise satisfied.

71. It is not possible to say *a priori* and in the abstract before any facts have been found in the inquiry whether or not any one or more of these points is bound to succeed such that the inquiry should be prohibited at this stage. Without in any way pre-empting that inquiry, while the applicant has not obtained relief in the second judicial review proceedings, she has succeeded in highlighting a number of matters favourable to her that she can presumably anticipate will be given due weight and consideration, particularly under the fourth heading above, which it may be helpful to summarise as follows:

> (i) Nothing in the applicant's immigration history is particularly suggestive of abuse of the system above and beyond the confusion regarding dates.
>
> (ii) No apparent motive or benefit to the applicant has been identified in mis-stating her date of birth, so it looks much more like misunderstanding or confusion rather than fraud.
>
> (iii) The applicant did provide at least some information prior to the grant of the certificate about the calendar discrepancy.
>
> (iv) There is a significant objective element to the discrepancy entirely independent of the applicant's representations or lack of them.
>
> (v) In that regard the applicant did not fabricate her personal details; at worst she made the incorrect selection from a number of objectively pre-existing alternative options.
>
> (vi) The matter came to a head because of the applicant's own voluntary contacts with the Department, not because of any detective work by the State. That is possibly the most unnerving aspect of the affair and one which, if the original error is ultimately regarded as innocent, could potentially give a Kafkaesque dimension to the process.
>
> (vii) The Ethiopian authorities do not seem to have a problem with the discrepancies in the sense that they have issued a passport and subsequently an identity card with the same date of birth as stated on the certificate of naturalisation and have also issued a letter confirming the correctness of the two dates on the birth certificate.
>
> (viii) The evidence on behalf of the Minister was that the date on the applicant's passport trumps dates on other documents, such as the birth certificate, and the applicant *did* enter the date on her passport when applying for a certificate. Viewed from that perspective the applicant can be said to have complied with what the Minister is now saying is the correct procedure.

(ix) Finally, the case also highlighted that there is some inconsistency in the procedure applied by the Minister in the sense that the evidence demonstrated that the procedure applied is that the passport trumps the birth certificate as to date of birth, whereas Form 8 specifies that an applicant is to use the date on the birth certificate.

72. One can, I think, properly leave further consideration of these matters to the members of the committee of inquiry and the Minister. Having said that, insofar as highlighting such matters may conceivably assist in deciding on the ultimate merits, that may not be irrelevant to the question of costs.

Order

73. For those reasons the order in the first judicial review proceedings will be:

(i) that there be an order requiring the Minister to consider, if appropriate in the light of any report of the committee of inquiry, whether the applicant's certificate of naturalisation should be amended in the sense of being cancelled and reissued with the correct date of birth; and

(ii) that the remaining reliefs be refused, without prejudice to the applicant's right to raise any point in the event of a challenge to the ultimate decision of the Minister.

74. The order in the second judicial review proceedings will be that the reliefs sought be refused without prejudice to the applicant's right to raise any point in the event of a challenge to the ultimate decision of the Minister.

75. It is understood, and Ms. Stack accepted, that the applicant's application for an inquiry is without prejudice to the entitlement of the applicant to raise any grounds against any ultimate decision including as to jurisdiction if she wishes to make a point under that heading at that stage. Finally I might say that while not formally part of the order because it is not part of the relief sought, if in the end of the day the certificate of naturalisation is reissued with the correct date of birth, one might hope and expect that the Minister for Foreign Affairs and Trade would cancel and reissue the applicant's passport with that correct date of birth so that all relevant official documents are both consistent and accurate. The State's forbearance in not cancelling the applicant's passport to date is certainly a humane gesture in the circumstances.