AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2022:000014

[2023] IESC 10

Dunne J.
Charleton J.
Woulfe J.
Hogan J.
Murray J.

BETWEEN

A, B AND C (A MINOR SUING BY HIS NEXT FRIEND, A)

APPLICANTS/RESPONDENTS

- AND -

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

RESPONDENT/APPELLANT

- AND -

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 9th day of May 2023

1. Section 7(1) of the Irish Nationality and Citizenship Act 1956 (as amended) ("the 1956 Act") provides that a person is an Irish citizen by descent "if at the time of his or her birth either parent was an Irish citizen." I agree generally with the judgment which Murray J. is about to deliver in which he holds that, read in its proper context, this sub-section means that the parent in question must be an Irish citizen *at the time of the birth of the child in question.* The present mandamus proceedings (by which the applicants seek to compel the Minister to grant C an Irish passport) must accordingly fail because A (the Irish citizen) was not C's parent *at the time of C's birth*, even though he *subsequently* became that parent *at a later stage* when the English courts made an order to this effect.

2. As Murray J. will explain in greater detail in his judgment, A and B are a same sex couple who reside in the United Kingdom. They are married to each other. B (who is a British citizen) is the genetic father is C who was born as a result of a surrogacy arrangement. The couple also happen to have another child, E, who was also borne out of a surrogacy arrangement. As A (the Irish citizen) happens in that latter instance to be the genetic father of E, there is no issue regarding E's status as an Irish citizen, as citizenship by descent clearly passes in that situation.

3. As Murray J. explains in his judgment, that order of the English courts regarding the status of A as parent of C is in turn entitled to recognition in this State by the application of our rules of private international law. To anticipate somewhat, this is an absolutely critical consideration because everything I subsequently say in this judgment is predicated upon the recognition by our courts of that parental order by the English courts. It may well be that in other cases and other circumstances orders along these

lines made by courts in other countries would not necessarily be entitled to recognition in this State. Specifically, there may well be instances where such an order would not be recognised applying our notions of public policy in the sphere of private international law.

4. Here it may be recalled that the grant of citizenship is a core feature of the sovereignty of the State in accordance with Article 9 of the Constitution: see *AP v. Minister for Justice and Equality* [2019] IESC 47, [2019] 3 IR 317. The State cannot – and should not – be compelled to grant citizenship by descent in circumstances where the Irish citizen parent has no genetic link with the child and where any foreign parental or parental-style order would not be entitled to recognition within the State having regard to our rules of private international law (including public policy). As I propose now to explain, different considerations obtain, however, where (as here) the status of a foreign order acknowledging the parental status of an Irish citizen parent is in fact entitled to recognition within the State.

5. In view, however, of the fact that the making of that parental order by the English courts is indeed entitled to recognition in this State having regard to the application of our rules of private international law, I cannot say that I reach this conclusion regarding the disposition of the appeal with any enthusiasm. It seems to me, however, that this conclusion is compelled by the actual words of the section which, as I have stated, require that one of the parents must be an Irish citizen at the time of the birth of the child. To hold otherwise would, in effect, be to disregard the plain words of the sub-section ("…if at the time of his or her birth…"). These words are integral to the statutory scheme and this Court cannot simply ignore these words or treat them as dispensable.

6. In these particular circumstances it is clear that for these mandamus proceedings to be successful, it would have been necessary for the applicants to demonstrate that the sub-section is unconstitutional insofar as it contained this condition. If this had occurred these constraining words would accordingly have been excised from the present version of s. 7(1) of the 1956 Act. It is only in those circumstances that the Minister would be under a legal obligation to give C a passport. In passing I should note that I have not overlooked the possibility of the applicants seeking a declaration of incompatibility under s. 5(1) of the European Convention of Human Rights Act 2003. But even if the applicants had succeeded in obtaining such a declaration of incompatibility, it would not enable them to obtain the requisite order of mandamus since the statutory provisions in question containing the limiting words in question would still have remained in force until the Oireachtas changed the law in response to the declaration of ECHR incompatibility: see s. 5(2) of the 2003 Act.

7. One of the particular difficulties in this case is that it has exposed the fault line between the application of the double construction test on the one hand and an actual declaration of unconstitutionality on the other. While the applicants have not actually challenged the constitutionality of s. 7(1) of the 1956 Act - and I make no criticism of that decision - the internal logic of their argument leads (if it were to be judicially accepted) ultimately to the conclusion that the sub-section is constitutionally infirm. This is because they contend that the sub-section discriminates against those Irish citizens who subsequently become the parent of a child on the one hand and Irish citizens who are parents at the time of birth of a child on the other. In the latter case citizenship passes by descent, whereas this is not true of the former case where (as here) only the non-genetic parent is an Irish citizen.

8. The courts cannot, however, use the double construction test to forge a new meaning or construction of the legislation beyond which the words of the legislation may reasonably bear. The double construction test cannot be so expanded that it operates as a form of substitute finding of unconstitutionality beyond any construction of the legislation which is reasonably open in the circumstances. Or, to put it another way, it is only "when there is no construction *reasonably open* which is not repugnant to the Constitution that the provision should be held to be repugnant": see *McDonald v. Bord na gCon (No.2)* [1965] IR 217 at 239, per Walsh J. (Emphasis supplied).

9. In this context I could not hope to improve upon the following words of Charleton J. in *The People (Director of Public Prosecutions) v. Quirke* [2023] IESC 5:

> "Distortion cannot enter into the construction of the primary function under Article 15.2 of the Constitution for the Oireachtas to be the sole and exclusive lawmaking body for the State. It would be contrary to principle, further, to change such plain words into something which they are not. That is outside the scope of the double construction rule. Where two interpretations of a statute are possible, one of which is in conformity with the Constitution and the other of which is not, the courts must opt for the constitutional interpretation: *McDonald v Bord na gCon* [1965] IR 217. An impossible interpretation is not to be forced onto the wording of a statute, however, in order to keep its effect within constitutional boundaries: *Colgan v Independent Radio and Television Commission* [1998] IEHC 117, [2000] 2 IR 490."

10. So far as the present case is concerned, I consider that the double construction test cannot be used so as to erase, so to speak, the critical words of s. 7(1) of the 1956 Act ("….if at the time of his or her birth…") such as would have enabled the applicants to succeed in

their challenge to what in substance was the Minister's refusal to grant their son a passport. To do this would amount, in the words of Charleton J. in *Quirke*, to changing "plain words into something which they are not." If this is to be done, it must be achieved instead by means of a direct challenge to the constitutionality of the sub-section and (as I shall later point out) in proceedings to which the Attorney General is a necessary party. The double construction test cannot be used to achieve a type of quasi-finding of unconstitutionality by radically distorting the ordinary meaning of what the statute actually says.

11. Consider the circumstances of the present claim. In the ordinary way a couple - whether married or otherwise - can pass Irish citizenship by descent if one of them are themselves an Irish citizen at the date of birth of their child. Special rules to similar effect have been provided in the case of adoptive parents since the enactment of the Adoption Act 1952, where at least one of them is an Irish citizen. The current rules regarding adoptions are contained in s. 175(1) of the Adoption Act 2010. Yet a married couple enjoying parental rights in respect of the child by virtue of an order made by a foreign court (and, as I stated at the outset of this judgment, assuming always that such an order would be entitled to recognition here having regard to our rule of private international law) cannot pass such citizenship by descent. This state of affairs raises questions in relation to the application of the equality clause in Article 40.1.

12. In his judgment in *Fleming v. Ireland* [2013] IEHC 2 Kearns P. remarked [at 121] that the Constitution's "commitment to equality of treatment in Article 40.1 is… a normative statement of high moral value." This was complemented by the more recent comments of O'Malley J. in *Donnelly v. Minister for Social Protection* [2022] IESC 31, [2022] 2 ILRM 185 at 240 where she said that the "guarantee in Article 40.1 is grounded upon

the respect due to all human persons." In the context of this particular case this provision is supplemented by two other specific constitutional provisions which may equally be said to be represent normative statements of high moral value.

13. Article 9.1.3 states that: "No person may be excluded from Irish nationality and citizenship by reason of the sex of such person." Article 41.4 also provides that "Marriage may be contracted in accordance with law by two persons without distinction as to their sex." This latter provision (as inserted by the 34th Amendment of the Constitution Act 2015) did rather more than simply authorise the Oireachtas to legislate for same-sex marriage. It has to be seen in practice as amounting to an emphatic rejection by the People of this Court's decision in *Norris v. Attorney General* [1984] IR 36 and, accordingly, read in conjunction with Article 40.1, it reflects a constitutional commitment to homosexual equality at all levels.

14. It is, of course, the duty of this Court to ensure, in the words of O'Byrne J. in *Buckley v. Attorney General* [1950] IR 67, 81, that these constitutional provisions are given "life and reality" in both words and - just as importantly - deeds. The reality, of course, is that the effect of s. 7 of the 1956 Act *in practice* is to disadvantage homosexual married couples by treating them less advantageously than their heterosexual counterparts when it comes to passing citizenship by descent to their children. While, of course, heterosexual couples also have recourse to surrogacy arrangements, one may take judicial notice of the fact that, in the very nature of things, this will be a route more frequently availed of by homosexual couples who seek to have children of their own with a genetic link to one member of that couple. (None of this, of course, is to take from the undoubted right of the Oireachtas to control or to regulate the practice of surrogacy.)

15. It would, I think, be idle to pretend that judicial forays into this general territory of equality and Article 40.1 have heretofore always been the happiest, not least when it touches on issues of citizenship. One of the earliest such cases, *Somjee v. Minister for Justice* [1981] ILRM 324, concerned a challenge to the constitutionality of s. 8 of the 1956 Act. That section as originally enacted provided for the automatic conferral of Irish citizenship where an Irish male married a foreign female, but the converse was not true. (The provision was subsequently replaced by a gender-neutral provision: see s. 3 of the Irish Nationality and Citizenship (Amendment) Act 1986).

16. The constitutionality of this section was nonetheless upheld by the High Court in *Somjee*. With great respect, it is very difficult to see the basis for this conclusion. The original section would seem to have been at odds with the very wording of Article 9.1.3 since it expressly made the exclusion from citizenship dependent on the sex of the applicant. In the circumstances one might have thought that the section was all but unconstitutional on its face. (Had the applicant been female he would have been automatically entitled to citizenship). And so far as an Article 40.1 equality claim was concerned, it is hard to see how it was not an example of gender-based discrimination for which there was no obvious acceptable justification or, to use the words of O'Malley J. in. *Donnelly v. Minister for Social Protection* [2022] IESC 31 at [194], [2022] 2 ILRM 185, 240, how it was not one based on "groundless assumptions" which, as she put it, "have no role in determining the legal rights of the individual." As Doyle has observed, *Constitutional Equality Law* (Dublin, 2004) at 172:

> "….Article 9.1.3 suggests that sex equality applies as strongly to questions of admission to citizenship as it does to the treatment of citizens. *Somjee* is a difficult case to defend."

17. In this vein I suggest that some of the Article 40.1 decisions of this Court from this era - but perhaps not only from this era - may need to be re-considered and even overruled. Many of them seem to exhibit such a degree of deference to actual or hypothesised legislative judgments that the core of the equality guarantee has been almost emptied of real substance. In order to illustrate this point, I propose to mention in passing just two further decisions of this Court, both of which were decided perhaps a generation or so ago.

18. In *Draper v. Attorney General* [1984] IR 277 this Court held that the failure to extend facilities in respect of postal votes to disabled voters who could not otherwise attend the ordinary polling booths did not amount to a breach of Article 40.1, even though such facilities had been extended to other groups such as Gardai, the Defence Forces and diplomats. It would be hard to improve upon Casey's sustained critique of this decision (*Constitutional Law in Ireland*, Dublin, 2000) (at 466):

> "This seems another example of extraordinary deference to legislative judgment. The Constitution establishes a democratic state (Article 5), stresses the principle of voter choice via Dáil and Presidential elections and referenda, and is at pains to secure equal weighting of votes in Dáil elections (Article 16.2). Arguably, in such a context, the ability to vote should be maximized and since a satisfactory scheme of postal voting had been worked out by departmental experts it seems that only legislative inertia prevented progress."

19. The other decision which one may treat as representative of this trend is that of *Lowth v. Minister for Social Welfare* [1998] 4 IR 321. Here the first plaintiff had been deserted by his wife and he was forced to leave employment in order to look after the two children of the marriage. (The children were the other plaintiffs). While he was entitled to

unemployment benefit and (for a period) lone parent allowances, the payments were appreciably less than would have been paid had he been a female claimant in similar circumstances having regard to the (then) provisions of ss. 100 and 195 of the Social Welfare (Consolidation) Act 1981. (The provisions were subsequently rendered gender-neutral by s. 12 of the Social Welfare Act 1990).

20. This Court upheld the constitutionality of the 1981 Act provision on the basis that, statistically, more women than men were deserted by their spouses and that having regard to the various legislative and other discriminations directed against women working in the workplace which had historically been in place, they were as a class more obviously in need of financial support than men. Even allowing for that to have been so, it might be thought that this was but cold comfort to those men who had in fact been deserted by their wives and who were obliged to cease employment in order to look after their children at home. It was even less comfort to those children – they were, let it be recalled, also plaintiffs in the proceedings - who were required to grow up in a family denied key social supports simply because it was their mother rather than their father who had happened to desert them. If Article 40.1 cannot be called in aid in a case of this kind, then one must respectfully wonder whether the principles of "high moral value" (*Fleming*) and "respect" for the individual (*Donnelly*) which underlie this provision are being realised in practice.

21. Returning to the facts of this case, it will thus be seen that the failure of the Oireachtas to allow for citizenship by descent in a case of this kind where the Irish citizen's status as a parent of the child is or would be entitled to recognition under the law (including the private international law) of this State raises a constitutional issue having regard to the combined inter-action of Article 9.1.3 and Article 41.4 when read in conjunction

with Article 40.1. Given, however, that the applicants in these proceedings have not actually challenged the constitutionality of s. 7 of the 1956 Act or sought a declaration that the failure by the Oireachtas so to provide for citizenship by descent in the case of non-genetic Irish parents of such children amounts to a breach of Article 40.1, it would be inappropriate to proceed further. The Court simply cannot proceed to pronounce upon the constitutionality of such a legislative measure without the service of the proceedings upon the Attorney General in the manner required by Ord. 60, r. 1: see, *e.g*., the comments of Carroll J.to this effect in *The State (D.) v. Groarke* [1988] IR 187 at 190 and those of Murphy J. in *Whelan v. Cork Corporation* [1991] ILRM 19 at 28. Fair procedures require no less.

22. While it is true that the Irish Human Rights and Equality Commission sought to raise the question of the constitutionality of s. 7(1) of the 1956 Act in this Court at the first opportunity following their joinder to the appeal, I also agree with Murray J that in the light of the recent decision of this Court in *Dowdall v. Director of Public Prosecution* [2022] IESC 36 (see especially the comments of O'Donnell CJ at [36] to [40]) it is not open to the Commission (or, for that matter, any other *amicus*) to expand the scope of the existing proceedings by advancing constitutional arguments of this nature not otherwise previously advanced by the parties.

Conclusions

23. In conclusion, therefore, I find myself obliged to agree that, in the absence of a direct challenge to the constitutionality of s. 7(1) of the 1956 Act, the appeal should be allowed. I further agree that the appeal should be disposed of in the manner suggested by Murray J. in his judgment.