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Ireland

John Handoll

1 Introduction

Ireland has a fully-fledged citizenship regime befitting its constitutional characterisation as a 'sovereign, independent, democratic state'.

The path to the current regime, which came in effect in January 2005 with some changes introduced in August 2011, has been a rather difficult one, reflecting the need to balance aspirations for a united island of Ireland with the fact that the island has been split, with Northern Ireland continuing to be part of the UK, as well as the need to accommodate the citizenship aspirations of the 'Irish Diaspora' and of immigrants who come to settle in Ireland.

In relation to the acquisition of citizenship, the principles of ius soli and ius sanguinis have both long applied, but in different ways over time. Under the Irish Free State (Saorstát Eireann), the dominant principle was the all-embracing one of ius soli, with ius sanguinis applied to benefit those born abroad of Irish citizen parents. Under the nationality regime created under the 1937 Constitution by the Irish Nationality and Citizenship Act 1956, the ius soli principle was retained, but those born on the island of Ireland of an Irish parent also enjoyed citizenship on the basis of ius sanguinis, as did those born of an Irish parent outside the island.

The 1998 Good Friday Agreement resulted in a constitutional entitlement of every person born in the island of Ireland to be part of the Irish nation. This provision, reflecting the ius soli principle, was really intended to enable people in Northern Ireland to identify themselves as Irish. However, concerns that the entitlement was being 'misused' by children of immigrant parents with no long-term connection to Ireland resulted in a 2004 amendment to the Constitution, limiting the constitutional entitlement to those born of parents who are Irish or entitled to be so. On paper, many will enjoy citizenship on the dual bases of ius soli and ius sanguinis. However, the ius sanguinis rule, contained in legislation, applies to the majority of those having citizenship by descent: in reality, the ius soli provisions are for the benefit of those from Northern Ireland. In addition to the constitutional entitlement, other categories of person are entitled to ius soli citizenship under legislation, in most cases on the basis of a parent satisfying residence requirements.

Irish citizenship may be obtained by means of naturalisation at the 'absolute', if not entirely unlimited, discretion of the Minister for Justice, Equality and Law Reform. In addition to a general category of non-nationals who may apply for Irish citizenship through naturalisation, specific rules apply to the naturalisation of other privileged categories – including spouses of Irish citizens, minor children of naturalised Irish citizens and persons of Irish descent or associations. In particular, the existence of the 'Irish Diaspora' has led to a privileged naturalisation regime for those of 'Irish descent or Irish associations'. However, the operation of a controversial investment-based naturalisation regime based on 'Irish associations' has resulted in a restrictive legislative definition of 'Irish associations' limited to family relations.

Far less attention has been paid to the question of loss of citizenship. The possibility of voluntary renunciation is provided for, as is the possibility of involuntary revocation, with procedural safeguards for the person concerned. In practice, there have been very few cases of revocation.

In the Irish Constitution, the individual member of the state is referred to as a 'citizen' but the membership status itself is referred to as 'nationality and citizenship' (in Irish, *náisiúntacht agus saoránacht*). From the legal perspective, the two terms relate to different facets of the relationship between the individual and his or her state. Nationality relates to the external (international) dimension, whereas citizenship relates to the internal (domestic) dimension. The term 'citizenship' is used generally in the substantive provisions of the Irish Nationality and Citizenship Act 1956. In the domestic context, the term 'nationality' is now largely redundant, though all citizens are constitutionally entitled to be part of the 'Irish Nation'.

2 Historical Background

2.1 General

This section describes the main constitutional and legislative changes in Irish citizenship law from the inception of the Irish Free State (Saorstát Eireann) in 1922 to the entry into force of the Irish Nationality and Citizenship Act 2005.

The period may be divided into a number of phases.

(1) The Irish Free State (1922-1937).
(2) Ireland under the 1937 Constitution (1937-1998).
(3) The Good Friday Agreement and its consequences (1998-2004).

It should be stressed that the focus is on major developments. A large number of relatively minor, if important, changes made over time are not therefore addressed.

2.2 Nationality and the Irish Free State

Although strong feelings of Irish nationhood clearly existed long before the establishment of the Irish Free State (Saorstát Eireann) in 1922, nationality law of the entire island of Ireland prior to that date was that of England and the United Kingdom (Parry 1957: 925).

Underpinning the fight for independence, there was a strong sentiment of an indigenous Irish people, whose 'sovereign and indefeasible' right to 'the ownership of Ireland and to the unfettered control of Irish destinies', had been usurped by a foreign people and government (1916 Proclamation of the Irish Republic). Those at the vanguard of the 1916 Rising saw nationhood as a tradition received from the dead generations of Irishmen and Irishwomen: Ireland's children – the children of these dead generations – were summoned, unsuccessfully for a while, to the flag.

The 1921 Anglo-Irish Treaty provided that Ireland should have the same constitutional status in the 'Community of Nations known as the British Empire' as Canada, Australia, New Zealand and South Africa. It would thus have been open to Ireland to follow the approach elsewhere in the Empire, with an overarching British subjecthood and the introduction of a local citizenship with purely domestic significance (Daly 2001: 378). Instead, Article 3 of the Constitution of the Irish Free State (Saorstát Eireann) provided for the adoption of a scheme of 'citizenship' (Parry 1957: 925), which put Irish citizenship on a problematic footing in relation to British nationality law, in particular concerning the relationship with the Six Counties of the North which had opted to remain in the Union.

There was a divide between those who supported the 1921 Anglo-Irish Treaty, and those who sought a complete break with the UK. Citizenship policy depended on which camp was in power.

After a shattering civil war, the pro-Treaty Cumann nan Gaedhal party (the predecessor of Fine Gael) held office between 1922-1933. Nationality policy reflected the 1922 Constitution and, despite differences with the UK, continued to visualise Irish Free State citizenship in the overall context of the imperial nationality regime.

A more 'independent' approach was taken by the Fianna Fáil government which entered into power in 1932. Nationality and citizenship legislation, supplementing Article 3 of the Constitution, was adopted in 1935. The Irish Nationality and Citizenship Act 1935 as amended by the Irish Nationality and Citizenship (Amendment) Act 1937 – which effectively remained in force until 1956 - contained provisions on 'natural-born' citizens, on naturalisation, on post-nuptial citizenship and loss.

The rupture with British nationality law was seen in provisions of the Act which repealed British nationality legislation, if and to the extent that it was or was ever in force in the Irish Free State. The same applied to the common law relating to British nationality. The possibility of imperial naturalisation was also excluded. This rupture was accepted on the part of the British only in 1948.

Art. 3 of the Constitution addressed the question of the Irish Free State's 'stock' of citizens at the time of its establishment. The territorial extent of the Irish Free State, within which these citizens had to be domiciled at the time the Constitution came into operation, was not defined in the Article. The predominant view at the time appears to have been that Northern Ireland was not included (Ryan 2003: 148), so that there was no question of the Free State's constitutive nationality regime conferring citizenship on those in the North. However, in a 1933 judgement of one of the lower courts, it was held that, at the time of the coming into force of the Constitution, all of Ireland fell within the 'area of jurisdiction' of the Irish Free State.[1] Persons domiciled in that part of Ireland – the 'Six Counties' – that very shortly afterwards decided to remain as part of the UK were, for the purposes of Irish law, therefore treated as citizens of the Irish Free State. The privileges and obligations of Irish Free State citizenship could therefore be enjoyed by those in the North who wished it: it does not appear to have been foisted on those who did not.

2.3 Ireland under the 1937 Constitution and the Nationality and Citizenship Act 1956

The constitutional framework

Art. 9 of the 1937 Constitution as originally worded provided for the acquisition of Irish citizenship by persons who were citizens of Saorstát Eireann. The future acquisition and loss of Irish nationality and citizenship was to be determined in accordance with law. It was made clear that no person might be excluded from Irish nationality and citizenship by reason of the sex of such person.

From the inception of the 1937 Constitution, art. 2 stated that the 'national territory consists of the whole island of Ireland, its islands and the territorial seas'. In turn, art. 3 provided: 'Pending the reintegration of the national territory, and without prejudice to the right of the Parliament and government established by this Constitution to exercise jurisdiction over the whole of the territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like territorial effect.' Concerns that these provisions gave Ireland jurisdiction over Northern Ireland were given some credence by a 1990 Supreme Court judgement holding that art. 3 represented a

[1] *Re Logue* (1933) 67 ILTR 253, Circuit Court.

'legal claim of right' over Northern Ireland and that arts. 2 and 3 envisaged the 'reintegration of the national territory'.[2]

The 1956 Act

Legislation providing for the loss and acquisition of Irish citizenship was adopted only in 1956, with the delay attributed by the Minister for Justice introducing the Bill to 'the war, and its aftermath, and all the attendant problems'.[3] It should be noted that, whilst the 1937 Constitution represented a clean break with the treaty-based concept of the Irish Free State, the Republic was only declared in 1948 and Ireland left the Commonwealth in 1949 after the necessary UK legislation had been passed. Until the passing of the Irish Nationality and Citizenship Act in July 1956, the 1935 Act (as amended in 1937) remained in force.

The 1956 Act brought in a number of important changes to the earlier regime. In terms of acquisition by descent, it was recognised that Irish citizenship could be derived from the mother as well as from the father: former concerns about the possession of dual or multiple nationality had decreased and – in relation to persons born abroad – it was 'determined that our nationality law should not be framed to exclude persons [...] who are of Irish stock'.[4]

A broader definition of Irish citizenship by birth included those born in the 'Six Counties' of Northern Ireland, though a person born in the Six Counties if not otherwise an Irish citizen could 'pending the reintegration of national territory' become a citizen from birth only by means of making a declaration of Irish citizenship. This declaratory procedure was intended to cover the 'limited category born in the Six Counties since 1922 who are of entirely alien parentage without any racial ties'.[5] It should be noted that making such a declaration did not have the effect of losing British nationality.

A new procedure of post-nuptial citizenship by declaration was introduced – in place of the former naturalisation requirement – for alien women on marriage to Irish citizens: no waiting period was required. This change, which reflected constitutional provisions relating to the family[6] did not extend to non-national husbands of Irish citizens, who had to apply for naturalisation, albeit with a reduced prior residence requirement.

In relation to naturalisation, a new requirement that the applicant make a declaration of fidelity to the nation and loyalty to the state was introduced. The scope for granting a certificate of naturalisation on the basis of 'Irish descent or Irish associations' was widened, ostensibly to cover aliens joining the Defence Forces or required to spend part of their working year abroad:[7] however, in anticipation of difficulties which would emerge decades later (see sect. 2.4, below), one Deputy – Mr. Moran – suggested that 'if an Arab in Cairo drinks a glass of Irish whiskey it would qualify him for citizenship under this particular provision'.[8]

In relation to revocation of naturalisation, the absolute discretion of the Minister was removed and replaced by a requirement to give notice with reasons of any decision to revoke and to have the matter referred to a Committee of Enquiry upon application by the person concerned.

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[2] *McGimpsey vs. Ireland* [1990] 1 IR 110, Supreme Court.
[3] Minister for Justice, *Dáil Éireann Debates*, vol. 154, 29 February 1956.
[4] Minister for Justice, *Dáil Éireann Debates*, vol. 154, 29 February 1956.
[5] Ibid.
[6] See art. 41 of the Constitution and Minister for Justice, *Dáil Éireann Debates*, vol. 154, 29 February 1956.
[7] Minister for Justice, *Dáil Éireann Debates*, vol. 154, 29 February 1956.
[8] Deputy Moran, *Dáil Éireann Debates*, vol. 154, 29 February 1956.

The provision in the 1935 Act that Irish citizenship should be lost on the voluntary acquisition of another citizenship was not repeated in the 1956 Act, reflecting reduced concerns about the consequences of dual or multiple nationality and the desire for a country of emigration not 'to disown our own flesh and blood'.[9] New provisions were introduced allowing for the voluntary renunciation of Irish citizenship by making a declaration of alienage where the person concerned had acquired, or was about to acquire, another citizenship.

The 1986 amendments

Reflecting international developments,[10] developments in other EC Member States and different attitudes in Ireland itself,[11] the Irish Nationality and Citizenship Act 1986 eliminated the different treatment of female and male spouses of Irish citizens in the obtaining of a declaration of post-nuptial citizenship. Sect. 8 of the 1956 Act was amended to cover both sexes, allowing men to make such a declaration. However, apparently reflecting concerns about 'bogus' marriages, the 1986 Act introduced a waiting period of three years before a declaration could be made, applying to non-national spouses of either sex. It was provided that the marriage had to be subsisting at the date of lodgement of the declaration and that the couple were living together as husband and wife. Equality between the sexes was also ensured in amended provisions removing the entitlement of married women under full age to renounce citizenship. Ireland was therefore able to delete the reservation it made to the UN Convention upon accession in December 1985.

'Passports for sale'

In April 1989, the Irish government approved a number of naturalisations based on investment and, around the same time, introduced an investment-based naturalisation scheme. An unpublished Statement of Intent was made available to interested persons setting out the conditions for naturalisation of investors. This made it clear that the Minister would regard an investor as having Irish associations and would dispense with the usual residence conditions where the investor had been resident in Ireland for two years, where the applicant had 'established a manufacturing or international services or other acceptable wealth and job-creating project here that is viable and involves a substantial investment by the applicant' and all other requirements of the Act had been complied with. Between 1989 and 1994, 66 investors, and 39 spouses and minor children were naturalised on this basis. Considerable flexibility was given to the Minister to determine whether the two-year residence requirement had been satisfied and whether there had been a 'substantial investment'.

The need for a more formal and transparent approach led to the drawing-up of Terms of Reference of an Advisory Group, advising the Minister on investment-based naturalisation cases, and these, involving property ownership and more stringent residence and investment conditions, were applied to proposals from late 1994. From 1994 to the ending of the scheme, 40 investors, together with 24 spouses and children, were naturalised.

In September 1996, the government decided that no new applications would be accepted, unless and until new legislation was introduced, though existing applications would

[9] Minister for Justice, *Dáil Éireann Debates*, vol. 154, 29 February 1956.
[10] In particular, Resolution (77)12 of the Committee of Ministers of the Council of Europe on the Nationality of Spouses of Different Nationalities and the UN Convention on the Elimination of All Forms of Discrimination Against Women.
[11] See Minister for Justice, *Dáil Éireann Debates*, vol. 364, 21 March 1986.

be dealt with. It appears that some new applications were made and existing ones amended. Finally, in April 1998, the increasingly controversial scheme was abolished.

2.4 The Good Friday Agreement and its Consequences

The Good Friday Agreement and constitutional change

Important changes to the Irish citizenship regime, described as '[a]rguably the most momentous changes to the Constitution' (Hogan & Whyte 2003: 68), resulted from the 1998 'Good Friday' Agreement, consisting of a Multi-Party Agreement between political parties in the North and a British-Irish Agreement between the UK and Irish government. In order to secure political settlement in the North, the Irish government agreed that, subject to a referendum approving the necessary changes, the Irish claim to territorial unity was abandoned. In the words of two eminent commentators on the Constitution, 'the focus of attention in the new provisions shifts from a definition of national territory to an attempt to define the nation by reference to its people' (Hogan & Whyte 2003: 71). Art. 1(vi) of the British-Irish Agreement is of particular importance to Irish nationality policy, providing: 'The birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both governments and would not be affected by any future change in the status of Northern Ireland.'

The term 'the people of Northern Ireland' was defined in the Annex as meaning 'all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence'.

After the Nineteenth Amendment of the Constitution Act 1998, the new art. 2 of the Constitution provided: 'It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.' It should be noted that the constitutional entitlement to ius soli citizenship was not limited, as it might have been, to the 'people of Northern Ireland' as defined in the Annex to the Good Friday Agreement.

Art. 3 of the Constitution was also replaced, with the new art. 3(1) providing: 'It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.'

The 2001 amendments

The Irish Nationality and Citizenship Act 2001 replaced sects. 6 and 7 of the 1956 Act to reflect the changes following the Good Friday Agreement. It also replaced the system of post-nuptial declaration of citizenship for spouses of Irish citizens with special provisions for the naturalisation of such spouses.

In relation to ius soli citizenship, the attribution of Irish citizenship from birth to 'every person born in Ireland' was replaced by a provision stating that '[e]very person born in the island of Ireland is entitled to be an Irish citizen'. The definition of 'Ireland' in the old legislation was replaced by the statement that 'a reference to the island of Ireland includes a reference to its islands and seas'. This approach was designed to respect the position of those in the North who did not wish to exercise that entitlement[12] as established in the British-Irish Agreement. In general, the entitlement could be evidenced by the doing of 'any act which only an Irish citizen is entitled to do', such as applying for an Irish passport or being registered to vote in Irish presidential elections.[13]

In relation to ius sanguinis citizenship, a new and rather clearer provision essentially restated the existing law, but made it clear that the fact that a parent born in the island of Ireland had not at the time of a child's birth done an act that only an Irish citizen was entitled to do did not of itself exclude the child from the entitlement of ius sanguinis citizenship. Citizenship by descent could thus be claimed even where the parent entitled to be an Irish citizen had not obtained such citizenship by doing an act that only an Irish citizen could do.

The system of post-nuptial declaration by non-national spouses of Irish citizens was, subject to transitional provisions which lasted until November 2004, replaced by a naturalisation regime, stated to be in the 'absolute discretion' of the Minister, which required qualifying periods of residence in the island of Ireland, rather less onerous than those required under the ordinary naturalisation regime. This need for closer links with the island reflected the abuse of the declaratory procedure, with 'paid-for' marriages entered into in order to secure the passport of an EU Member State and the consequent rights of free movement.[14]

'Passports for sale': the 2000 Review

As seen above, the investment-based naturalisation scheme was terminated in April 1998. The Minister for Justice initiated a review of the 1956 Act to see how it might facilitate investment and whether additional legislative measures would be warranted. A non-partisan Review Group was set up, consisting of representatives of various government Departments, other public bodies and two independent experts from outside the public sector. The Report of the Review Group on Investment-Based Naturalisation was concluded in April 2000, but published only in August 2002.

Although the Review Group concluded that 'the scheme had a significant impact on employment often in a context in which a high premium was placed on preserving jobs', it recognised that the scheme had attracted largely negative comment in the Oireachtas and the media in relation to individual cases and the whole idea of investment-based naturalisation in the context of the 'contrast between the allegedly unwelcoming attitude of the state to refugees, asylum-seekers and immigrants and its willingness to confer citizenship on wealthy persons who do not wish to reside in Ireland'.

[12] Minister for Justice, *Seanad Debates*, 8 December 1999.
[13] Ibid.
[14] Ibid.

The Review Group concluded that, given the current state of the Irish economy, it was neither appropriate nor necessary to re-introduce an investment-based scheme. The Minister agreed with the majority view that the option of having such a scheme should be kept open should there be a change in the economic or employment situation, stating that Oireachtas approval would have to be obtained and making it plain that he had no plans to reintroduce such a scheme in the foreseeable future.[15] The government followed this approach.

The Review Group had made it clear that it would be legally questionable to use the 'Irish associations' provision in sect. 16 of the 1956 Act as the basis for any possible future scheme since it was 'not clear that the link formed with the country [...] is sufficient to constitute Irish associations within the meaning of that section'. The possibility of re-employing sect. 16(i) was removed by an amendment made by the 2004 Act, which, going far further than was necessary to avoid the re-emergence of an investment-based naturalisation scheme, limited the claim of 'Irish associations' to 'persons related by blood, affinity or adoption' to a person who is, or was at the time of death, an Irish citizen or entitled to be an Irish citizen.

The consequences of immigration and the 2004 Referendum

As seen above, the Good Friday Agreement resulted in a 1999 constitutional amendment making it clear that all those born on the island of Ireland had the entitlement and birthright to be citizens of Ireland. The new provisions were designed to give people born in Northern Ireland the reassurance that they could, if they so wished, be part of the Irish nation. However, with Ireland becoming a country of immigration, the new provisions conferred entitlements on children born on the island of Ireland of non-Irish parents.

Even before the 1998 amendment, the phenomenon of migrants coming to Ireland and obtaining residence rights through their Irish citizen children had been encouraged by a generous reading of the 1990 judgment of the Supreme Court in the Fajujonu case,[16] where it was recognised that, where non-national parents had resided in Ireland for an appreciable time and had become a family unit together with children born in the state, the parents might be entitled to remain in Ireland by virtue of the residence rights of their Irish national children.

For a number of years after the Fajujonu case, non-national parents of Irish-born children were in practice permitted to remain, without much consideration of the individual circumstances. In time, this approach was criticised by the Minister for Justice and others insofar as it appeared to give irregular migrants carte blanche to remain in Ireland where Irish-born children were involved. A more rigorous approach was taken by the Minister and endorsed by the Supreme Court in January 2003,[17] where a majority of the Court held that the constitutional right of the Irish citizen child to the company, care and parentage of his or her non-national parent was not absolute and unqualified, but rather had to be seen in the light of the Minister's obligation to consider whether there were grave and substantial reasons associated with the common good which required the deportation of the non-national parents (such as the fact of illegal residence). A distinction was thus drawn between Irish citizen children of certain third- country nationals and Irish citizen children with at least one Irish

[15] Minister of Justice, Press Release, 10 February 2002.
[16] *Fajujonu vs. Minister for Justice* [1990] 2 IR 151.
[17] *A.O. & D.L. vs. Minister for Justice* [2003] 1 IR 1. (It should be noted that, as regards the position of Irish citizen children born before 1 January 2005 and their third-country national parents, the effects of this controversial judgment have been limited by the 2011 ruling of the European Court of Justice in Case C-34/09 *Zambrano v ONEm* (Judgment of 8 March 2011: not yet reported).

citizen parent, with the latter enjoying unqualified rights of residence in Ireland with the company of their parent.

In April 2004, the government made proposals for the amendment of art. 9 of the Constitution in order to remove the constitutional right to entitlement to Irish citizenship of persons born in the island of Ireland who did not have at least one parent who was an Irish citizen or entitled to be an Irish citizen. The proposals were made to end the 'abuse' which permitted 'somebody with no real connections to Ireland, North or South to arrange affairs so as to give birth to a child in Ireland, North or South': the then Minister for Justice pointed out that '[n]o other country in the world has a situation where citizenship can be acquired through this most tenuous of links with the country of citizenship and which carries with it such a wide range of free movement and other options for the citizen'.[18]

In an Interpretative Declaration issued by the UK and Irish governments in April 2004, the two governments gave the legal interpretation that it was not their intention in making the 1998 Agreement that it should impose on either government any obligation to impose citizenship on persons born in any part of the island of Ireland whose parents did not have sufficient connection with the island of Ireland. They therefore declared that the proposal to amend art. 9 accorded with the intention of the two governments in making the 1998 Agreement and that the proposed change was not a breach of the Agreement or the continuing obligation of good faith in its implementation.

It also became relevant that, in May 2004, Advocate General Tizzano had delivered his Opinion in the Chen case, concluding that a child of non-national parents born in Northern Ireland and hence entitled to Irish citizenship and enjoying, through her parents, sufficient resources to ensure that she would not become a burden on the finances of the host state, was entitled as a matter of Community law to reside in Northern Ireland. The need to give that right useful effect, as well as the prohibition of discrimination on grounds of nationality in art. 12 of the EC Treaty, entitled the non-national mother to a long-term residence permit. It was, to say the least, potentially embarrassing to the Irish government to retain a citizenship regime, with such Community law consequences in another Member State, especially where the right to the company of a parent had been rejected in Irish law. Indeed, as the Advocate General pointed out: '[i]n order to avoid such situations, the criterion [used by the Irish legislation for granting nationality] could have been moderated by the addition of a condition of settled residence of the parent within the territory of Ireland'.

It was argued at the time that the proposed amendment would address the dilemma created by the Supreme Court in 2003 that the rights of Irish citizens depended on the citizenship status of their parents. There were strongly-expressed alternative views that non-citizen parents should not be deported where this limited the full citizenship rights of their Irish citizen children and that the solution did not lie in limiting access to Irish citizenship but rather in accepting the consequences of existing citizenship rules for a relatively small number of persons. These views were advanced by Fine Gael, Labour, the Green Party and Sinn Fein, as well as by a wide range of organisations active in the immigrant, refugee and human rights fields.

In June 2004, the Bill was passed by the people in a referendum. The Twenty-Seventh Amendment of the Constitution Act 2004 and the amendments thereby made to art. 9 of the Constitution represented for the persons concerned a return to the status quo ante the 1998 constitutional amendment reflecting the British-Irish Agreement. Any entitlement to

[18] Minister for Justice, *Dáil Éireann Debates*, vol. 583, 21 April 2004.

citizenship for these persons again became dependent on legislation, rather than constitutional prescription.

The Irish Nationality and Citizenship Act 2004, signed into law on 15 December 2004, entered into effect on 1 January 2005. This amended the 1956 Act and this Act, as amended, largely provides the basis for the current citizenship regime outlined in the next Section.

The 2011 amendments

Part 10 of the Civil Law (Miscellaneous Provisions) Act 2010 amended the 1956 Act in three main respects.

First, civil partners were assimilated to spouses for the purposes of naturalisation and retention of citizenship rights.

Second, in addition to the making of a declaration of fidelity to the nation and loyalty to the state, persons seeking naturalisation were also to undertake to faithfully observe the laws of the state and to respect its democratic values. The possibility of doing such things in a citizenship ceremony was also introduced.

Third, the 1956 Act was amended to provide a statutory basis for prescribing a fee for making an application for a certificate of naturalisation.

3 The Current Citizenship Regime

3.1 Main general modes of acquisition and loss of citizenship

Acquisition of Irish citizenship

The Irish Nationality and Citizenship Act 1956, as it stands from 1 January 2005, prescribes three main modes for the acquisition of Irish citizenship: acquisition by ius sanguinis, acquisition by ius soli and naturalisation. Although the first of these is relatively straightforward, the position in relation to ius soli acquisition is complicated by the existence of a limited constitutional entitlement to ius soli citizenship and the need to demonstrate an appropriate connection with the island of Ireland. The naturalisation has become increasingly more complex.

Ius sanguinis. Applying the ius sanguinis principle, a person is an Irish citizen from birth if at the time of birth either parent was an Irish citizen or would, if alive, have been an Irish citizen. This has become the primary basis for acquisition of most people born in Ireland since 2001 and for many in the North as well. This mode of acquisition, described as ‘citizenship by descent’, applies even where the parent concerned is at the time a person entitled to Irish citizenship but has not yet become one because he or she had not yet done an act that only an Irish citizen is entitled to do. Where the person concerned and the parent(s) from whom citizenship is derived were born outside the island of Ireland, conferment of Irish citizenship on the person concerned is conditional on registration of the person’s birth or on the parent being abroad in the public service at the time of the person’s birth. Entitlement to Irish nationality amongst the ‘Irish diaspora’ can thus continue from generation to generation, provided that the chain is not broken by a failure to register.

The provision that every deserted newborn child first found in the state shall, unless the contrary is proved, be deemed to have been born in the island of Ireland to parents at least

one of whom is an Irish citizen, suggests that foundlings enjoy a form of ius sanguinis citizenship.

Ius soli. The *constitutional* entitlement to ius soli citizenship is now limited to those who have, at the time of birth, at least one parent who is an Irish citizen or is entitled to be an Irish citizen. On its face, this leads to the rather curious result that the constitutional entitlement is limited to those who qualify anyway, under the 2004 Act, for ius sanguinis citizenship. It could, however, be argued that what is meant is different from what is said. There are many born in Northern Ireland (and some in the South and elsewhere) of at least parent who is entitled to be an Irish citizen under the previous regime, but who do not wish to be Irish citizens. For as long as there continue to be parents who are so entitled, the constitution therefore provides, paradoxically, the opportunity for the children of such persons *not* to be regarded as Irish on the basis of the ius sanguinis principle. In this sense, the spirit of the Anglo-Irish Agreement lives on.

As far as the 2004 Act is concerned, a number of different categories of person enjoy ius soli citizenship subject to various conditions:

A. A person born in the island of Ireland who is not entitled to citizenship of any other country (and therefore would otherwise be stateless);

B A person born in the island of Ireland to parents at least one of whom was at the time of the person's birth a British citizen or a person entitled to reside in Northern Ireland without any restriction on his or her period of residence;

C. A person born in the island of Ireland to parents at least one of whom was at the time of the person's birth a person entitled to reside in the state without any restriction on his or her period of residence;[19]

D. A person born on the island of Ireland where at least one parent is entitled to diplomatic immunity in the state, where at least one parent was at the time of birth an Irish citizen or entitled to be one, a British citizen or a person entitled to reside in the state or in Northern Ireland without any restriction on period of residence;

E. A person born in the island of Ireland who has made a declaration of alienage under the Act; and

F. A person born on the island of Ireland on or after 1 January 2005, who does not qualify under A and is born of parents falling within a residual class of non-nationals not falling under B or C.

Detailed provisions apply to each of these categories which cannot be discussed extensively here. However, the differential application of residence conditions for at least one parent to these categories should be mentioned here.

Categories B & C. A person born in the island of Ireland to a British citizen parent or to a (non-Irish citizen or British citizen) parent entitled to reside in Northern Ireland or the state without restriction on period of residence will have ius soli citizenship from birth if he or she does any act that only an Irish citizen is entitled to do. There is no requirement that the parent has satisfied a minimum period of residence requirement.

Category D. A person born in the island of Ireland with at least one parent at that time entitled to diplomatic immunity in the state is entitled to ius soli citizenship only where at

[19] In *BK (A Minor) vs. Minister for Justice* [2011] IEHC 526, Judge Feeney held that this does not cover a parent entitled to stay in the state for the purposes of ensuring a final determination of her application for refugee status even where, after the child's birth, a declaration of refugee status is made..

least one parent was at the time of birth an Irish citizen or entitled to be one, a British citizen or a person entitled to reside in the state or in Northern Ireland without any restriction on period of residence.

Category F. A person born in the island of Ireland after 1 January 2005 of parents falling within a residual class of non-nationals (category G) is entitled to be an Irish citizen only if a parent of that person has, during the four years immediately preceding the person's birth, been resident in the island of Ireland for a period of three years, or periods the aggregate of which is not less than three years (sect. 6A(1) of the 1956 Act). There are specific provisions on establishing such residence, which favour nationals of EU Member States (save the UK), other EEA Member States and the Swiss Confederation over nationals of other states, in that the former are able to make a statutory declaration of residence.

Naturalisation. Irish nationality may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister for Justiceand Equality. All such grants are stated to be in the absolute discretion of the Minister. Specific sets of conditions for the issue of a certificate of naturalisation are set out for the general class of applicants and for spouses/civil partners of Irish citizens. The Minister is empowered to dispense with such conditions in relation to persons of Irish descent or associations, minor children of naturalised Irish citizens, persons who are or have been resident abroad in the public service, refugees or stateless persons.

In relation to the general class of applicants, the Minister may, in his absolute discretion, grant a certificate of naturalisation if satisfied that the applicant satisfies a number of statutory conditions for naturalisation. These conditions are reflected – and to some extent amplified – in the application form prescribed for naturalisation. The relevant form prescribed in 2002 Regulations[20] was substantially amended in 2011 Regulations.[21]

The applicant must be of full age or be a minor born in the state. The applicant must also be of good character. This has been judicially considered as meaning that "the applicant's character and conduct must match up to reasonable standards of civic responsibility as gauged by reference to contemporary values".[22] The existence and outcome of criminal and civil proceedings[23] against the applicant in Ireland or elsewhere must be disclosed and any such information – especially in the case of other than minor criminal offences – will be taken into account in the exercise of the Minister's discretion. It has been judicially recognised that applicants will be denied naturalisation where they have come to the "adverse attention" of the local police (the Garda Síochána), even where no prosecution ensues,[24] but, in the absence of conviction, the applicant must be given the opportunity to comment.[25] Since June 2011, the relevant application form requires more detailed information to be provided on: criminal convictions (including for traffic offences) in Ireland or elsewhere; on criminal charges or indictments; on Irish police investigations; on involvement in war crimes; crimes against humanity and genocide; on involvement with terrorism; and on engagement in other activities suggesting that the applicant may not be of good character.

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[20] Irish Nationality and Citizenship Regulations 2002 (S.I. No. 567 of 2002): Schedule, Form 8.

[21] Irish Nationality and Citizenship Regulations 2011 (S.I No. 569 of 2011): Schedule, Form 8.

[22] Hogan J. in *Hussain vs. Minister for Justice* [2011] IEHC 171, High Court.

[23] In *Hussain vs. Minister for Justice* (n. 22), Judge Hogan held that the issue of a search warrant was not a civil or criminal proceeding, and, even if it were such a proceeding, it was not one "taken against" the applicant: the applicant could not, therefore, be faulted for failure to disclose the matter.

[24] .*B vs. Minister for Justice* [2009] IEHC 449, High Court. I am grateful to the anonymous reviewer who brought this important case to my attention.

[25] *Hussain v. Minister for Justice* (n.22).

The character of adult members of an applicant's family is an irrelevant consideration in assessing the good character of the applicant: however, the position may differ where children are under 18 and can be reasonably expected to be under the control and significant influence of a parent.[26]

Whilst questions of bankruptcy or heavy indebtedness have not in practice gone to the issue of good character, the Minister has frequently exercised his discretion in refusing an application on grounds of long-term dependence on the social welfare system. The application form as amended by the 2011 Regulations contains new questions in relation to the receipt and the reasons for obtaining social assistance or other state support in the three years prior to application.

The applicant must have had one-year's continuous residence in the state immediately before the date of application and, during the eight years before that one-year period, must have had a total residence in the state amounting to four years. The applicant must intend in good faith to continue to reside in thestate after naturalisation and must (before a District Court Justice in open court, in a citizenship ceremony, or in such a manner as the Minister, for special reasons, allows) make a declaration of 'fidelity to the nation and loyalty to the State' and undertake 'to faithfully observe the laws of the State and to respect its democratic values'. There are no requirements of linguistic competence or knowledge about Ireland.

In relation to non-national spouses/civil partners of Irish citizens, the Minister may, in his absolute discretion, grant a certificate of naturalisation if satisfied that the applicant satisfies a number of conditions for naturalisation. The applicant must be over eighteen years of age and of good character. Given the relative novelty of the regime, no real practice on 'good character' has yet developed, but it is thought that much the same approach would be taken as for naturalisation in general.[27] He or she must be married to/be a civil partner of the citizen and have been married to the citizen/been civil partners for not less than three years, and live together. In the case of a spouse, the marriage must be recognised as subsisting under Irish law. The applicant must have had one-year's continuous residence in the state immediately before the date of application and, during the four years before that one-year period, must have had a total residence in the state amounting to two years. The applicant must intend to continue to reside in the state after naturalisation and must (before a District Court Justice in open court, in a citizenship ceremony, or in such manner as the Minister, for special reasons, allows) make a declaration of 'fidelity to the nation and loyalty to the State' and undertake 'to faithfully observe the laws of the State and to respect its democratic values'. The Minister may, in his or her absolute discretion, waive the conditions in relation to the minimum period of marriage/civil partnership, residence in the state and intent to remain in the state 'if satisfied that the applicant would suffer serious consequences in respect of his or her bodily integrity or liberty if not granted Irish citizenship'. There are no requirements in relation to language or knowledge of Ireland.

The Minister enjoys the power, if he thinks fit, to grant an application in a number of cases, even though some or all of the conditions for naturalisation the 1956 Act are not complied with. This is the case where the applicant is of Irish descent or associations, is a naturalised Irish citizen acting one behalf of a minor child, is or has been resident abroad in the public service, or is a refugee of stateless person.

Special comment is called for in the first case, where the applicant is of Irish descent or Irish associations. The conditions most likely to be dispensed with are those relating to residence and the intent to reside in the state after naturalisation. Following the 2004 and 2011

[26] See Judge Edwards in *H vs. Minister for Justice* [2009] IEHC 78, High Court.

[27] The spouse/civil partner must provide the same information as an "ordinary" applicant for naturalisation.

Acts, a person will be of Irish associations if he or she is related by blood, affinity or adoption to, or is the civil partner of, a person who is, or is entitled to be, an Irish citizen, or if he or she was so related to a person who is deceased, who at the time or his or her death was, or was entitled to be an Irish citizen. Notwithstanding this legislative definition, it has been suggested that applications on the basis of Irish associations by parents or siblings of minor Irish children are "routinely refused" on the basis of an insufficient connection.[28]

Whilst 'affinity' is not defined in the legislation, the Minister for Justice has asserted that it covers relationships by marriage, embracing the relationship between a spouse and the other spouse's blood relations.[29] A more generous approach than that adopted in sect. 16(2) may have been inspired by reference to art. 2 of the Constitution, stating that 'the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage'.

The Irish President may grant citizenship as a token of honour to a person, or a child or grandparent of such person, who, in the opinion of the government, has done signal honour or rendered distinguished service to the nation. This mode has benefited foreign sportsmen who have promoted Irish sport, art collectors, philanthropists and foreigners held hostage by terrorists.

Loss of Irish citizenship

Nationality, however ascribed or acquired, may be lost on grounds of renunciation. Nationality obtained through naturalisation may also be lost on grounds of: permanent residence abroad; voluntary acquisition of another nationality; failure in duty of fidelity to the nation and loyalty to the state; the possession of citizenship of a country at war with the state; or the provision of false information in procuring naturalisation. Citizenship may be lost – or rather it will be taken never to have existed – where a foundling first found in the state is subsequently found not to qualify for Irish nationality.

An Irish citizen of full age who is or is about to become a citizen of another country and for that reason desires to renounce Irish citizenship may, if ordinarily resident outside the state, do so by lodging with the Minister for Justice, Equality and Law Reform a declaration of alienage in the prescribed manner: upon lodgement of such a declaration, or if not at that time a citizen of the other country when he or she becomes one, the individual concerned shall cease to be an Irish citizen. In practice, the Department of Justice will, on lodgement, write to the person concerned to advise him or her of the consequences of the action and ask for return of the Irish passport. Such renunciation may not be made, except with the consent of the Minister, during a time of war as defined in sect. 28.3.3° of the Irish Constitution.

A certificate of naturalisation may be revoked by the Minister for Justice, Equality and Law Reform where he is satisfied that one of a number of situations has arisen. It should be stressed that Irish citizenship acquired by birth cannot be withdrawn.

First, that the issue of the certificate was procured by fraud, misrepresentation (whether innocent or fraudulent), or concealment of material facts or circumstances. No revocations on this ground appear to have been made. However, practice in relation to the previous system of declaratory post-nuptial citizenship suggests that the Minister would be prepared to revoke a naturalisation granted under sect. 15A of the 1956 Act if he comes to

[28] The point was made by the anonymous reviewer in 2010, but it is not possible to confirm its accuracy.
[29] Minister for Justice, *Dáil Éireann Debates*, Vol. 593, 30 November 2004. (Since 2011, this observation would have to include civil partnerships.)

believe that the marriage/civil partnership was bigamous or the couple were not at the relevant time living together as a couple.

Second, that the person concerned has, by an overt act, shown him- or herself to have failed in his or her duty of fidelity to the nation and loyalty to the state.

Third, that, save in the case of a certificate issued to a person of Irish descent or associations, the person concerned has been resident outside the state, or in the case of spouses/civil partners of Irish citizens naturalised under sect. 15A resident outside the island of Ireland, otherwise than in the public service, for a continuous period of seven years and without reasonable excuse has not during that period registered annually in the prescribed manner his or her name and a declaration of his or her intention to retain Irish citizenship (with an Irish diplomatic mission or consular office or with the Minister). The form is prescribed by the Irish Nationality and Citizenship Regulations 2002 and partly reflects the condition for naturalisation that the person concerned must intend in good faith to continue to reside in the state. It appears that this mode of loss is of little practical relevance, and no systematic checks on registration seem to be carried out.

Fourth, that the person concerned is also, under the law of a country at war with the state, a citizen of that country.

Finally, that the person concerned has by any voluntary act other than marriage or entry into a civil partnership acquired another citizenship. No revocations appear to have occurred in practice. There is no requirement to report acquisition of another citizenship.

The Act contains specific procedural safeguards for persons whose certificates the Minister intends to revoke. Before revocation, the Minister is to give notice in the prescribed form to the person concerned, stating the grounds for revocation and the right of that person to apply to the Minister for an inquiry as to these reasons. Where application is made for an inquiry, the Minister is to refer the case to a Committee of Inquiry appointed by him, consisting of a chairman with judicial experience and such other persons as the Minister thinks fit, and the Committee is to report its findings to the Minister.

3.2 Institutional arrangements

Constitutional aspects

Some basic principles of Irish nationality law are contained in the Irish Constitution. As seen above, certain provisions of the 2001 and 2004 Acts followed constitutional amendments. Proposals for amendment of the Constitution must be submitted by Referendum to the decision of the people (See arts. 46 and 47 of the Constitution), reflecting the people's 'right [...] in final appeal, to decide all questions of national policy, according to the requirements of the common good'.

The High Court and the Supreme Court each enjoy the jurisdiction to determine the validity of any law having regard to the provisions of the Constitution. The constitutionality of Irish nationality law has been considered by the courts only twice, in relation to sect. 8 of the 1956 Act, as it stood before amendment by the 1986 Act, which differentiated between female and male spouses of Irish citizens in relation to a declaratory procedure for the acquisition of citizenship[30] and in relation to sect. 15 and 16 of the 1956 Act,[3123] and in neither case were the constitutional claims seriously entertained. It should be noted that there

[30] *Somjee vs. Minister for Justice* [1981] ILRM 324, High Court.
[31] *Pok Sun Shun vs. Ireland* [1986] ILRM 593, High Court.

is a presumption of constitutionality for Acts becoming law after the enactment of the 1937 Constitution and a constitutional claim can only be made if it is necessary to the protection of an individual's rights.

Legislation

The Irish Nationality and Citizenship Act 1956, and the 1986, 1994, 2001, 2004 and 2011 Acts amending the 1956 Act, are ordinary Acts of the Oireachtas, passed or deemed to have been passed by both Houses of the Oireachtas and signed and promulgated as law by the President.

Policy

Policy in the area of citizenship is primarily the responsibility of the Minister for Justice and Equality; it has sponsored the major legislative reforms in the area. The current Minister for Justice and Law Reform has been relatively active, sponsoring the important legislative changes in 2011 and introducing streamlined procedures. He also introduced citizenship ceremonies in June 2011, which many persons seeking naturalisation regard as more meaningful than appearing before a District Court Judge.

At the time of writing, the lengthy and complex Immigration, Residence and Protection Bill, 2010, which was reintroduced by the new government in March 2011, was still being considered by the Oireachtas. It is possible that, after this has been completed, the Minister will consider issues such as marriages of convenience and 'opportunistic' marriages, as well as linguistic requirements for naturalisation (see Section 4, below).

Administration

The Minister for Justice, Equality and Law Reform enjoys wide powers under the Irish Nationality and Citizenship Act 1956 (as amended) in relation to naturalisation and, to a lesser extent, the revocation of certificates of naturalisation.

Since 2005, these administrative functions have been administered by the Irish Naturalisation and Immigration Service (INIS) which operates under the aegis of the Minister.

Certain tasks – in particular in relation to the registration of foreign births – are performed by the Department of Foreign Affairs and by embassies and consulates abroad.

It should be noted that applications for naturalisation take some time to process. Until relatively recently, it was officially acknowledged that the average processing time was 25 months, with some cases taking rather longer. Research by the Immigrant Council of Ireland showed that the processing time for applications ranged from 5 to 54 months with many migrants waiting far longer than the official "average wait" times (Immigrant Council of Ireland 2011: 64-65). The Courts have generally accepted such delays and endorsed the "first come, first served" principle.[32] However, in one recent case, the High Court held that an unexplained delay (of three years and nine months) going way beyond the average waiting time, and the absence of evidence that the Minister had in place a fair and rational system for processing applications, justified relief.[33]

In June 2011, the Minister for Justice announced a number of changes to the citizenship application processing regime.[34] Applications would, save in exceptional circumstances, be dealt with within a period of six months. New application forms – replacing the previous "unnecessarily complex and obtuse" forms – were to be introduced, which "should drastically reduce the numbers incorrectly completed and substantially contribute to more efficient and streamlined processing times". Other steps to improve the processing time for applications were to include streamlined and accelerated checking procedures for certain categories of applicants and the recruitment of interns.

The introduction of a standard €950 fee for naturalisation in 2008 (albeit with a lower or no fee applying in some cases), coupled with the economic downturn, has doubtlessly had a dissuasive effect on the taking up of citizenship. This may have been compounded by the introduction, in November 2011, of a fee of €175 for the making of an application for naturalisation.

Ministerial discretion and its limits

The 'absolute discretion' of the Minister for Justice is at the heart of the naturalisation process. Indeed, the explicit message given to would-be applicants is that 'the granting of Irish Citizenship through naturalisation is a privilege and honour and not an entitlement'.

An appeal from a refusal to grant naturalisation is not possible since the courts cannot carry out a substantive review of the merits of the decision. In the absence of a such a statutory right of appeal, it is open to the applicant to make a fresh application, and the courts have recognised that taking such a step is appropriate where an unsuccessful applicant

[32] See, for examples, *Nawaz vs. Minister for Justice* [2009] IEHC 354, High Court and *Matta vs.Minister for Justice* [2010] IEHC 488, High Court.
[33] *Salman vs. Minister for Justice* [2011] IEHC 481, High Court. In June 2012, leave to apply for judicial review was granted to an applicant who had been waiting for over four years.
[34] See Department of Justice and Equality Press Release, 16 June 2011.

considers that the Minister has made a mistake in relation to the first application or where the opportunity can be taken to rectify an omission.[35]

It is, however, possible to challenge, by way of an application for judicial review, a refusal to grant a certificate of naturalisation, as well as a decision by the Minister to revoke a certificate of nationality. It is well established that such an absolute discretion must be exercised in accordance with constitutional justice.[36]

In the 1986 Pok Sun Shun case,[37] it was held that, in considering whether to grant a certificate of naturalisation, the Minister was obliged to carry out the rules of natural justice and to adopt fair procedures. The Minister was, however, not obliged to give the applicant a hearing, in the sense of disclosing information on file and giving him an opportunity to comment on it. Nor was he obliged to give reasons for the decision.

Since the Pok Sun Shun case, a number of judgments have made it clear that a distinction is to be drawn between cases where the Minister of Justice has made a decision purely on grounds of his absolute discretion and cases where the Minister has taken a decision where grounds for refusal have been given. The scope for judicial review is more limited in the former than in the latter. If the Minister has relied on his absolute discretion rather than on the non-fulfilment of one or more of the conditions for naturalisation, no reasons need to be given.[38] The fetters on discretion identified in the Pok Sun Shun case are rather loose. As Judge Clark in the *Abuissa* case[39] stated: if the Minister "chooses to rely on his *absolute discretion*, then in the absence of a demonstrated breach of constitutional justice or manifest unfairness, or a *prima facie* case of *mala fides*, his decision cannot be challenged".

Where the Minister has relied on the non-fulfilment of the statutory conditions for naturalisation, the Courts have applied more general judicial review principles, even though some deference continues to be paid to the role of the Minister in this area.

In the Mishra case,[40] Judge Kelly made it plain that the existence of an absolute discretion meant that the Minister could have regard to considerations of public policy which could have nothing to do with the circumstances of an individual application. Such discretion meant that the Minister did not automatically have to grant a certificate of naturalisation even where the applicant had complied with the statutory criteria. The Minister was allowed to guide the implementation of discretion by means of a policy or set of rules, provided that this did not disable the Minister from exercising his discretion in individual cases. However, it was necessary to ensure that the consideration or application of a policy should not produce a result which was fundamentally at variance with the evidence of an applicant. The Minister had a policy of refusing naturalisation to foreign doctors temporarily registered with the Medical Council on the basis that they would leave the state upon naturalisation to work elsewhere on the basis of their newly-acquired citizenship. Since there was no evidence to support the assumption that the applicant would not continue to reside in the state, principles of constitutional justice and fairness required that the applicant be given an opportunity to clarify his position.

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[35] See *B vs. Minister for Justice* (n. 24).
[36] *East Donegal Co-Operative vs. Attorney-General* [1970], IR 317, Supreme Court.
[37] *Pok Sun Shun vs. Ireland* [1986] ILRM 593, High Court.
[38] *B vs. Minister for Justice* (n. 24), *Abuissa vs. Minister for Justice* [2010] IEHC 366, High Court, *Jiad vs. Minister for Justice* [2011] IEHC 187, High Court, *Mallak vs. Minister for Justice* [2011] IEHC 305, High Court,
[39] See n. 38.
[40] *Mishra vs. Minister for Justice* [1996] 1 IR 189, High Court.

Judge Kelly also confirmed that there was no obligation under the 1956 Act to give reasons for refusal of a certificate of naturalisation, although he suggested (without further explanation) that there might be circumstances where, even where there was no statutory right of appeal, natural justice or fairness required that reasons should be given.

In the 2009 H case,[41] a Chinese national was refused a certificate of naturalisation, apparently on the grounds that, although she had not herself come to the adverse attention of the police (the Garda Síochána), two of her adult sons had convictions. Judge Edwards quashed the Minister's decision on the ground that the Minister was incorrect to have regard to the sons' characters, so that irrelevant considerations were taken into account.

The 2009 B case[42] concerned a refugee who had been refused naturalisation where he had come to the "adverse attention" of the police for a road traffic law irregularity, even though no prosecution ensued, and was hence regarded by the Minister as not being of "good character". The applicant did not seek judicial review of the decision refusing naturalisation, but of a later decision by the Minister refusing to reconsider the earlier decision. Judge Cooke drew a distinction between the exercise of an overriding discretion (which occurred in the Pok Sun Shun case) and the application of the conditions for naturalisation set out in the 1956 Act, including that of "good character". He stated that, in the latter case, a refusal would be amenable to judicial review, and that fair procedures would require the reasons for refusal to be given (which had in fact occurred). He held, however, that the Minister could not be compelled to reconsider his refusal or to reopen the application for fresh determination: the appropriate course of action was for the applicant to make a fresh application. The question whether a decision refusing naturalisation in such circumstances might then be successfully challenged was left open, though Judge Cooke indicated that it was 'for the Minister to determine what criteria fall to be considered in assessing whether the condition as to "good character" is met'.

In the 2010 *Tabi* case,[43] the applicant had been refused a certificate of naturalisation on the basis of four relatively minor driving convictions. Judge Cooke considered that the Minister was entitled to take account of such convictions in deciding whether somebody would make a "good citizen". The Minister was not required to establish "bad character": rather, he could consider generally an applicant's record and conduct while in the state "with a view to assessing whether the applicant is someone who has a responsible attitude to the civic responsibilities of the society in which he or she seeks to be a citizen". Since the Minister's decision did not deprive the applicant of any right, and the Minister was "dealing with a purely unilateral application for the exercise of the Minister's discretion to confer a privilege, the Minister was not required to give the applicant the opportunity to comment on, or make representations in respect of, the convictions. In such circumstances, it "could not in any sense be said that the Minister has acted in a way which is arbitrary, capricious, partial or manifestly unfair".[44]

In the 2011 *Hussain* case,[45] the applicant had come to adverse police attention because he was found on separate occasions with forged bank notes and counterfeit clothing and was refused a certificate of naturalisation on "good character" grounds even though he had never been the subject of criminal charges. Judge Hogan held that, although coming to adverse police attention could be a ground for finding that the applicant was not of "good character",

[41] *H vs. Minister for Justice* (n. 26).
[42] See n. 24.
[43] *Tabi vs. Minister for Justice* [2010] IEHC 109, High Court.
[44] Citing Judge O'Higgins in *O'Brien vs. Bord na Móna* [1983] I.R. 255.
[45] See n. 22.

the fact that the applicant had not been charged with any offence, let alone convicted, meant that the Minister for Justice should have put these matters to the applicant as a matter of fair procedures before reaching an adverse decision.

It should be noted that all of these cases dealt with applications made before June 2011. Since then, the relevant application forms have required more detail in relation to the question of good character. This may reduce the opportunities for judicial review in later cases since an applicant could clearly be faulted for failing to provide the required information or to give the appropriate explanations..

In a 2003 Decision of the Information Commissioner,[46] the Commissioner decided that there was no inconsistency between the Minister for Justice giving a statement of reasons under sect. 18 of the Freedom of Information Acts 1997 and 2003 and the discretion vested in the Minister under the 1956 Act. The unsuccessful applicant was therefore entitled to a statement of reasons for the decision not to grant him a certificate of naturalisation. Although the Minister for Justice did not appeal this decision, it has not been accepted that reasons must routinely be given to unsuccessful applicants. The courts have subsequently made it clear that the operation of the Freedom of Information Acts does not require reasons to be given for decisions taken in the Minister's absolute discretion.[47]

There are no known reported cases in relation to revocation, which reflects the fact that the procedure has not been employed, at least in recent times. The Minister enjoys a more limited discretion in this regard, in that he may revoke a certificate of naturalisation if satisfied of one of a number of matters and he would be bound to take due account of the report of the Committee of Enquiry. The courts would be able to intervene for the same reasons as for refusals to grant certificates of naturalisation.

There have been a number of cases involving the purported withdrawal by the Minister of acceptance of the declaration of citizenship by spouses of Irish citizens under the former post-nuptial declaratory procedure. It was accepted by the High Court in the Akram case[48] that the Minister could determine that the lodging of a post-nuptial declaration was ineffective to confer Irish citizenship, on the basis that the marriage was not subsisting or that the couple were not living together. It was, however, necessary for the Minister to comply with the requirements of natural and constitutional justice. This approach was accepted by the Supreme Court in the 2011 Ezeani case,[49] where Judge Fennelly made it clear that, in what was a purely administrative procedure, the procedures followed by the Minister in establishing whether the parties were living together as husband and wife were "reasonably fair in the context of the nature of the decision and the facts which are relevant to it". The overriding requirement was that the person affected be given reasonable notice of matters which were of concern to the decision maker.

In the 1996 Kelly case,[50] it was made clear that, where a bigamous marriage was being alleged, the first marriage had to be strictly proved and that the Minister had the burden of proving that the marriage forming the basis for post-nuptial citizenship was a sham.

[46] Case 020353 – Mr X and the Department of Justice, Equality and Law Reform.
[47] See, in particular, *Abuissa vs. Minister for Justice* (n. 38).
[48] *Akram vs. Minister for Justice,* 21 December 1999, High Court, unreported.
[49] *Ezeani and Another vs. Minister for Justice* [2011] IESC 23, Supreme Court.
[50] *Kelly vs. Ireland* [1996] 3 IR 537, High Court.

Sanctions

Mention should finally be made of attempts to prevent the making of false or misleading applications or statements by reinforcing the threat of criminal law sanctions. The 2004 Act repealed the provision prescribing relatively light sanctions which could be imposed by the courts for false or misleading statements or information given in relation to applications for naturalisation and replaced it by a more general provision applying to persons knowingly or recklessly making of a declaration under the Act, or of a statement for the purposes of any application under the Act, which is false or misleading in any respect. Summary conviction in the lower courts can result in a fine not exceeding 4,000 euro[51] and/or imprisonment for up to twelve months, whilst more serious breaches resulting in conviction on indictment can result in a 50,000 euro fine and/or a prison sentence of up to five years. The possibility of imposing a five-year prison sentence means that such offences are treated as 'arrestable offences', which enables suspects to be arrested without warrant and questioned. If these powers are properly and effectively used, it should be possible significantly to reduce the cases of fraudulent applications.

4 Current Political Debates and Reform Plans

The last major change in Irish citizenship law occurred in 2004, albeit with some important amendments in 2011, and the regime as it stands looks likely to continue for the time being. Citizenship law (as opposed to the concept of citizenship itself) is not the subject of current political debate and, with one possible exception, does not appear to be the subject of any plans for reform.

The possible exception relates to language and integration requirements. Although there have been no formal plans to introduce such requirements for persons seeking naturalisation, the Immigration, Residence and Protection Bill 2010 (which is currently before the Oireachtas) requires applicants for long-term residence permission to demonstrate a reasonable competence in the English or Irish language and to satisfy the Minister for Justice that they have made reasonable efforts to integrate into Irish society. If this proposal were – as is likely to be the case – retained in the forthcoming Act, it would be surprising if it were not sought to introduce similar conditions for applicants for naturalisation.

Indeed, in the government's 2008 Integration Strategy, the then Minister for Integration – Conor Lenihan – made it clear that citizenship, as well as long-term residence, would be contingent on proficiency of skills in the spoken language of the country.

Mention should be made of an important report issued by the Immigrant Council of Ireland in 2011 on migrants' experiences of applying for naturalisation in Ireland (Immigrant Council of Ireland 2011).

5 Conclusions

Ireland, as an independent state, came into being in the early part of the twentieth century and has been in existence for less than 100 years. It has developed during this period from a state newly broken away from an 'occupying power' to a state that for most of the rest of the twentieth century had a problematic relationship with that power (which still rules over a portion of the island of Ireland) and then to a state that, with membership of the European

[51] As specified in the Fines Act 2010.

Union, increasing wealth and a determination to heal the division between North and South, reached an accommodation with its former 'oppressor' and refocused its energies into creating a successful 'Celtic tiger' economy. Becoming a desirable country of immigration, remedying long periods of emigration and depopulation, it was been confronted with challenges of irregular migration and has took controversial retrograde steps to counter certain of its effects. It has now entered into less prosperous economic times and is again confronted by the possibility of an exodus of significant numbers of its people.

Like all attempts to describe such developments in one short paragraph, the above is something of a caricature. Yet, Ireland has changed in fundamental ways during its brief existence, and its citizenship regime has changed with it. Changing conceptions of Irish citizenship have reflected underlying beliefs in Irish identity. In the Irish case, the history of citizenship is all important to understanding the current regime and prospects for the future.

Rules on the attribution of Irish citizenship have been affected by the existence of territorial claim to Northern Ireland which, with the Good Friday Agreement, was tempered by an acceptance that those in Northern Ireland could be part of the Irish nation if they chose. This gave rise to a constitutional entitlement of all those born on the island of Ireland to ius soli citizenship.

In the event, the constitutional reform went too far, since there was a failure to predict the consequences of Ireland becoming a country of immigration. In June 2004, Ireland had reached one of those turning points when it had a choice either to maintain a generous approach to ius soli citizenship or to restrict it. The coalition government proposed the second approach and the people concurred, with an overwhelming majority in favour of a change which would limit the ius soli entitlement to those born in the island of Ireland of at least one Irish parent. This was not necessarily an anti-immigrant choice. The Courts had created a situation where constitutionally-entitled children of irregular migrants were distinguished from other children: one suspects that many of those who voted in favour of the change did so to remove this constitutional aberration. However, it did mean that the children of immigrants who had formerly enjoyed ius soli citizenship as a matter of constitutional entitlement no longer did so, but could only avail of more restrictive ius soli rights, which denied citizenship to the children of irregular migrants outright and imposed residence requirements for the parents of many others.

Behind all the debate on ius soli citizenship, and the constitutional rhetoric, it is not to be forgotten that the ius sanguinis principle is now the dominant one and is the basis for citizenship of most people born in the state since 1956, and many espousing the 'nationalist' tradition in the North. This importance has been confirmed, and capped, by the 2004 constitutional amendment.

This has been pointedly confirmed by another element of the 2004 citizenship package which made it clear that the possession of 'Irish associations', which enables a person to seek naturalisation without satisfying the usual residence conditions, means that a person must have a family relationship to an Irish citizen or a person entitled to be an Irish citizen.

It seems unlikely, even with the change of government in early 2011, that these developments will be reversed in the short- or medium-term. It seems likely that concerns about integration will result in applicants for naturalisation having to show competence in one of the two state languages as to show that efforts have been made to integrate.

It also seems likely that it will become tougher to satisfy the existing conditions for naturalisation and to challenge refusals. The question of "good character" is being more closely examined, with applicants being asked to provide more information in a broader range

of fields than before. It is already clear that a conviction for a relatively minor traffic offence may result in an application being refused. Applicants for nuptial/civil partnership citizenship may find that their marital/civil partnership arrangements are more closely scrutinised, to ensure that 'opportunistic' marriages/civil partnerships, as well as 'marriages/civil partnerships of convenience', are discouraged. This will add to the difficulties already occasioned by the time taken to process an application and by the cost of a certificate, of nearly EUR 1,000 (which causes huge problems for many in the tough post-Celtic Tiger environment), in addition to an application fee of €175.

The debate would be a better-informed one if there were more information in the public domain. There could, and should, be more comprehensive statistics and they could be published in a more structured and regular way.

There is also a direct link between the existence of 'absolute' ministerial discretion and the opacity in relation to naturalisation and citizenship policy. This stymies a truly well-informed analysis and debate and is an area for future work and discussion.

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