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Citizenship Stripping, Fair Procedures, and the Separation of Powers: A Critical Comment on *Damache* v *Minister for Justice*

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Damache v *Minister for Justice* concerned a constitutional challenge to section 19 of the Irish Nationality and Citizenship Act 1956. This section outlined the statutory process the executive branch, acting through the Minister for Justice, had to follow before revoking a certificate of naturalisation. The appellant successfully argued this process was an unconstitutional breach of fair procedures. The judgement will be of interest both to Irish and other public lawyers for its treatment of fair procedures, which the Supreme Court approached in a regrettably blinkered way – seeing only one constitutional principle when several others were at stake. The judgment is a stark reminder for both Irish and comparative lawyers of the fact that the concrete demands of fair procedures must be balanced with a range of competing institutional goods and principles equally important to constitutional democracies: from administrative efficiency to structural principles stemming from the separation of powers.

INTRODUCTION

Damache v *Minister for Justice*[1] (*Damache* (SC)) concerned a constitutional challenge to section 19 of the Irish Nationality and Citizenship Act 1956 (the 1956 Act). This section outlined the statutory process the executive branch – acting through the Minister for Justice (the Minister) – had to follow before revoking a certificate of naturalisation. There were two grounds of challenge brought before the Supreme Court. First, the appellant argued the revocation of citizenship was a judicial power that could only be constitutionally exercised by the judiciary and not the executive branch. Second, the appellant argued the statutory process by which citizenship is revoked was an unconstitutional breach of fair procedures. Specifically, that it was a breach of the principle of *Nemo Iudex in Causa Sua* – that no one may be a judge in his own case (*Nemo Iudex* principle).

The Supreme Court rejected the appellant's first argument, finding that the revocation of citizenship was an executive and not a judicial function, drawing heavily on Ireland's historical link with UK constitutionalism in the process. The Supreme Court proceeded to find in favour of the appellant's second point, holding that the fact that the Minister both initiated the proposal to revoke and

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1 [2020] IESC 63.

made the final decision to confirm or dismiss the proposal, was contrary to fair procedures.

The judgement will be of interest to Irish and foreign public lawyers for its treatment of fair procedures, which the Court approached in a regrettably blinkered way – seeing only one constitutional principle when several others were at stake. The Supreme Court's treatment of fair procedures effectively demands the diffusion of this executive function to non-executive actors, a resolution which will erode a core textual commitment of the Irish Constitution: the vesting of executive power in the government. The judgment is a stark reminder for both Irish and comparative lawyers that concrete demands of fair procedures must be balanced with a range of competing institutional goods and principles equally important to constitutional democracies: from administrative efficiency to structural principles stemming from the separation of powers. The first part of this case note outlines the factual background to proceedings, the second part outlines the High Court and Supreme Court judgments, and the third offers a critical commentary.

FACTUAL AND LEGAL BACKGROUND

The appellant was born in Algeria and is an Algerian national by birth. He came to Ireland in July 2000 and unsuccessfully claimed asylum. In 2002, the appellant married an Irish citizen by birth and he successfully applied for citizenship in 2006 on the basis of this marriage. In 2008, the appellant became naturalised as an Irish citizen pursuant to section 17 of the 1956 Act and subsequently made a declaration of fidelity to the State in the District Court. While resident in Ireland the appellant became involved with terrorism related activities and was eventually extradited to the US and convicted of terrorist offences in a Federal court. After being convicted he was informed by the Minister for Justice of her intention to revoke his citizenship pursuant to section 19(1)(b) of the 1956 Act.[2]

Article 9.1.2 of the Irish Constitution provides that the 'acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.' Article 9.3 states that 'fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.' The 1956 Act gives concrete effect to these provisions by providing a statutory regime for the acquisition and loss of citizenship. Section 19(1)(b) provides that the Minister may revoke a certificate of naturalisation if she is satisfied *inter alia,* that 'the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State.'

However, section 19(2) provides that before a decision to revoke a certificate of naturalisation is made the Minister shall first give 'notice of her intention to revoke the certificate, stating the grounds therefor and the right of that person to apply to the Minister for an inquiry as to the reasons for the revocation.' Section 19(3) subsequently provides that if an application is made for an inquiry

2 *Damache v Minister for Justice and Equality* [2020] IEHC 444 at [4]-[19] (Damache (HC)).

(2021) 0(0) MLR 1–15

under subsection (2) the Minister 'shall refer the case to a Committee of Inquiry appointed by the Minister consisting of a chairman having judicial experience and such other persons as the Minister may think fit, and the Committee shall report their findings to the Minister.'

Before the Minister decided to invoke these provisions against Mr Damache, they had lain dormant since 1956. Unlike the United Kingdom[3] and United States[4] during various points in the 20th century, Irish authorities did not employ revocation of naturalised citizenship as a legal tool to combat perceived subversion or terrorism. However, similar to other common law countries like Australia[5] and Canada,[6] Irish officials have recently moved to revive these provisions and the prospect of revoking the citizenship of citizens perceived to have been disloyal to the polity; disloyalty being linked to providing support to, or fighting for, designated terrorist groups. While such policies are criticised by some commentators for creating two-tier systems of citizenship (secure for citizens of birth and insecure for naturalised citizens) and a risk of statelessness contrary to international law,[7] many countries clearly see them as a useful means to facilitate the deportation, or prevent the re-entry, of those considered a threat to the polity. The intent to revoke issued to Mr. Damache thus marked the beginning of judicial exploration of what was hitherto uncharted legal territory.

HIGH COURT JUDGMENT

Mr. Damache swiftly issued judicial review proceedings on several grounds to challenge the legality of the revocation process in the 1956 Act and to prevent the process from proceeding to a final decision.[8] Before the High Court the applicant argued that section 19 of the 1956 Act was incompatible with Article 6 of the ECHR, as incorporated into Irish law by the European Convention on Human Rights Act 2003; that it was in breach of Articles 41 and 47 of the European Charter of Fundamental Human Rights and was contrary to the

3 P. Weil and N. Handler, 'Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime' (2018) 36 *Law and History Review* 295.

4 P. Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (Philadelphia, PA: University of Pennsylvania Press, 2012). Weil charts the use of denaturalisation by federal authorities to combat 'unamerican' political activity between 1906-1967. Naturalised citizens could be denaturalised for speaking out against the US government, participating in certain political organisations, or taking any action suggesting a lack of 'attachment' to the US Constitution. Denaturalisation was largely rendered unconstitutional by the Chief Justice Warren-era Supreme Court in *Afroyim* v *Rusk* 387 US 253 (1967).

5 L. Eastbrook, 'Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool' (2016) 37 *University of Pennsylvania Journal of International Law* 1273.

6 A. Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40 *Queens Law Journal* 1. Canadian citizenship stripping legislation was repealed after three years in 2017. See S. Pillai and G. Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada, and Australia' (2017) 41 *Melbourne University Law Review* 846, 871.

7 M. Gibney, 'Should Citizenship be Conditional? The Ethics of Denationalization' (2013) 75 *The Journal of Politics* 646.

8 *Damache* (HC) n 2 above at [19].

principle of proportionality established in the *Rottman* line of jurisprudence.[9] The applicant also advanced two arguments against section 19's constitutionality. First, the applicant argued the revocation of citizenship was a judicial power and, as a result, could only be constitutionally exercised by the judiciary and not the executive branch. The applicant argued that the gravity of a revocation of citizenship was analogous to other core judicial functions, like the determination of criminal liability and subsequent imposition of a penalty. Given its severity, such a decision could only be constitutionally determined and imposed by an actor possessed of the judiciary's impartiality, independence, and adherence to rigorous process.[10] Second, the applicant argued section 19 was in breach of constitutional fair procedures by failing to provide an independent and impartial decision-maker. Counsel for the applicant argued the fact the Minister could make a proposal to revoke, defend his decision before an independent tribunal, and then make the ultimate call on whether to uphold his initial proposal, was a breach of this requirement.[11]

The High Court rejected all the applicant's arguments. In respect of the ECHR claims, Humphreys J held that Article 6(1) did not apply to decisions of a public law nature, but only to 'criminal proceedings and "civil rights" in the European sense, that is private law rights'.[12] Humphreys J concluded that Article 6(1) 'was not intended to govern administrative decision making' but that even if it did apply, same 'would be satisfied in any event by searching judicial review which is available to the applicant if an adverse decision is made at some future point'.[13]

The applicant's Charter arguments were also given short shrift, with Humphreys J finding that Article 41 did not require judicial decision-making in all decision-making process and 'certainly not here', and that Article 47 was satisfied as an 'effective remedy' was 'available here in the form of judicial review'.[14] In respect of the claim that the Minister's decision was a breach of the principle of proportionality, Humphreys J found that the applicant's argument was effectively based on a category error which fundamentally misunderstood the nature of the Minister's action. As Humphreys J put it, what was before the Minister was 'only a proposal, not a decision' with adverse legal consequences and thus not suitable for proportionality review.[15]

Finally, the applicant's constitutional arguments were both rejected. Humphreys J first found that the revocation of citizenship 'is clearly not' a judicial function but 'well within the core of the executive function to decide on the grant or revocation of citizenship and, subject to legislative regulation'.[16] Humphreys J based this conclusion largely on a historical mode of argument, putting considerable weight on the fact there was 'never any judicial involvement in the making of such decisions (as opposed to their review) as a matter

9 *ibid* at [19]-[20].
10 *ibid* at [44].
11 *ibid*.
12 *ibid* at [54].
13 *ibid*.
14 *ibid* at [66].
15 *ibid*.
16 *ibid* at [36].

of Irish or UK legal history.'[17] For Humphreys J, it would be akin to a 'power grab without precedent for the judicial branch of government to arrogate to itself the power to make the decision on as opposed to supervising the legality of such a process.'[18]

Humphreys J also definitively rejected the fair procedures argument partly on the grounds it was premised on the 'fundamental misconception' that section 19 concerned a 'judicial or quasi-judicial function.'[19] Although the authority in section 19 concerned an executive function, it was, Humphreys J accepted, of course still subject to the requirement to act consistently with fair procedures. But this did not mean it was subject to the same panoply of procedural safeguards parties might enjoy in an adversarial judicial process, such as a neutral umpire or right of appeal to an entirely independent appeals body. In respect of the perceived risk of bias stressed by applicant's counsel, Humphreys J found the concerns raised were based on conjecture. There was no reason to suggest, the judge held, that the Committee who would hear submissions on revocation from both the Minister and applicant would be biased in the Minister's favour. Additionally, Humphreys J found that the combination of the presumption of constitutionality,[20] the fact any 'administrative decision-maker had to act in accordance with fair procedures',[21] and the availability of judicial review, were important contextual considerations which should all serve to dispose of the 'fear of actions that would be contrary to due process.'[22] In other words, for Humphreys J the process provided for in section 19 was both structurally sound from the perspective of the level of fair procedures constitutionally required for an executive function, and eminently able to deal with any abusive or capricious retail level applications of the statutory process through judicial review. In effect, for Humphreys J the entire basis of challenge on this ground was premature and based on anxious and pessimistic speculation about how an untested statutory process, one enmeshed in a web of robust public law principles, would function in practice.[23]

The applicant appealed the judgment and was subsequently granted leave to bring proceedings directly before the Supreme Court, bypassing the Court of Appeal.[24] Leave was granted in respect of the appellant's two constitutional arguments. First, on the basis the revocation of citizenship was a judicial power and could not be exercised by the executive. Second, that even if revocation was an executive function, that the process provided for in section 19 of the 1956 Act was a breach of fair procedures. The basis for the fair procedures claims before the Supreme Court again focused on the perceived structural problems of section 19: that it ensured that the Minister was the official who both *initiates* the revocation process and *confirms* whether revocation should proceed.

17 *ibid*.
18 *ibid*.
19 *ibid* at [45].
20 *ibid* at [51].
21 *ibid* at [41].
22 *ibid* at [51].
23 *ibid* at [67]-[68].
24 The Supreme Court issued its determination granting leave to appeal in *Damache* v *Minister for Justice* [2019] IESCDET 254.

Crucially, argued the appellant's counsel, the Minister only had to consider the recommendations of the independent Committee but was not bound by them, and was free to depart from them in deciding whether to confirm or rescind a denaturalisation proposal. The appellant argued the dominant ministerial role at both ends of the statutory process – in initiating the revocation proposal and making the decision to confirm or revoke it – gave rise to structural risks of bias and pre-judgment.

SUPREME COURT JUDGMENT

In relation to the appellant's first point, the Supreme Court held that the revocation of citizenship was not an aspect of the judicial power constitutionally reserved to the judicial branch, but an executive power. In doing so, the Court placed emphasis on the fact this authority has long been considered an executive function in common law systems with a shared understanding of executive power rooted in British constitutional history and the royal prerogative.[25] The leading case for determining whether a power or function constitutes an aspect of the administration of justice is *McDonald* v *Bord na gCon*[26] (*McDonald*). In *McDonald* Kenny J outlined five features said to be characteristic of the administration of justice reserved to the judiciary by Article 34 of the Constitution. These include:

> 1. a dispute or controversy as to the existence of legal rights or a violation of the law;
> 2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
> 3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
> 4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
> 5. The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.[27]

The Supreme Court placed very heavy emphasis on the fifth criteria – whether the kind of order at issue has historically been associated with the judicial branch.[28] The Court accepted the Respondent's submission that as a historical matter, control of the entry, stay, and exit of aliens from the state was a matter for the executive – both in Ireland and the UK. The issue of naturalisation and revocation in the UK was similarly accepted to be a matter for the executive. In the Court's understanding of UK practice, while naturalisation and denaturalisation were issues subject to parliamentary regulation, it was 'never … the role

25 *Damache* (SC) n 1 above at [72]-[73].
26 [1965] IR 217.
27 *ibid*, 230-231.
28 *Damache* (SC) n 1 above at [66]-[69].

of the courts to make such decisions.'[29] The Court also cited[30] with approval *dicta* from the Irish Court of Appeal judgment in *Habte* v *Minister for Justice* (*Habte*) which dealt with revocation in the context of fraud.[31] The Court of Appeal in *Habte* found that the fact 'courts have historically had no role in the decision to revoke citizenship' in the UK constitutional order is consistent with the general dominant 'role of the Executive in relation to the entry, residence and exit of foreign nationals'.[32] The Supreme Court also endorsed the Court of Appeal's subsequent observation in *Habte* that there was nothing in the text of the 1937 Irish 'Constitution to suggest that any aspect of this function, "drastic" in its effect or not had been transferred to the judicial branch.'[33]

In relation to the second argument, the Court began by accepting that due to the severe consequences revocation of citizenship may have for a person – including loss of EU citizenship, loss of access to a passport and consular assistance, the right to vote, and the risk of deportation – a very high standard of procedural safeguards must apply.[34] The Court accepted the State's submission that there was no reason to suggest that the Committee referred to in section 19 would be anything other than independent in considering the appellant's submissions. The Court accepted 'there is nothing to suggest that the members of the Committee have any prior involvement in the matter and there is no suggestion that they have any interest in the outcome of the inquiry.' There was thus no breach of fair procedures on this basis.[35]

However, the Court went on to find the process provided for by section 19 still did not provide the safeguards required to meet the high standards of fair procedures applicable to a person facing such severe consequences, because the Minister *both* initiates the proposal to revoke *and* makes the final decision after hearing from the independent committee, depriving the person subject to the proposal of an 'impartial and independent decisionmaker.'[36] The Court contrasted the process in section 19 unfavourably with the statutory process the UK operated for revocation prior to reforms introduced in 2002.[37] Under this former process[38] a proposal to revoke citizenship originated from the Secretary of State, and arguments for revocation would then be made on his behalf by the Treasury Solicitors before an independent Committee composed of persons with judicial experience. These arguments would be heard along with arguments against revocation from the person concerned. Having heard both sides, the Committee would subsequently issue a recommendation on the proposal. In the Court's understanding of this process, following the hearing of submissions from both sides, the recommendations of the Committee 'were binding on the Secretary of State.'[39] However, the Court also accepted that the

29 *ibid* at [67].
30 *ibid* at [72].
31 *Habte* v *Minister for Justice* [2020] IECA 22 at [129] *per* Murray J.
32 *ibid*.
33 *ibid*.
34 *Damache* (SC) n 1 above at [27].
35 *ibid* at [123].
36 *ibid* at [128].
37 Nationality, Immigration and Asylum Act (2002), ch 41.
38 Outlined in fascinating detail by Weil and Handler, see generally n 3 above.
39 *Damache* (SC) n 1 above at [127].

views of the Committee were not in fact *legally* binding on the Secretary of State. Rather, a 'practice'[40] developed overtime where the recommendations of the Committee were 'considered'[41] to be binding by the executive.

The Court also said it was 'useful to contrast' the process in section 19 to the Irish statutory regime for international protection applicants. Under this regime, applicants are entitled to an examination of their application for asylum at first instance by an independent international protection officer. If they are unsuccessful, there is also a right of appeal to an equally independent Tribunal. If successful at either stage the Minister is 'required to give a declaration of refugee status save in exceptional circumstances provided for in section 47(3) of that Act such as the person being a danger to the security of the State.'[42]

The citizen facing a proposal to revoke a certificate of naturalisation, the Court pointed out, did not enjoy the same level of procedural safeguards as this regime as they critically did not enjoy an 'impartial and independent decision-maker'.[43] As the Court framed it:

> The person who starts the process is the Minister. Where there is a Committee of Inquiry, his representatives present the reasons for the proposed revocation and the evidence to support it. Although the Committee reports its findings to the Minister, the Minister has made it clear that the findings of the Committee are not binding on him. The same person who initiated the process, whose representatives make the case for revocation before the Committee of Inquiry (where it is sought) ultimately makes the decision to revoke.[44]

For failing to provide a kind of binding impartial and independent decision-maker like the above-mentioned regimes, the Court declared section 19 repugnant to the Irish Constitution.

COMMENTARY

Supreme Court's treatment of fair procedures

Much of the Court's treatment of fair procedures was uncontentious. It is now axiomatic in Irish law that the executive is not free to exercise either its inherent or statutory power in an arbitrary manner which would effectively dispense with the duty to respect precepts of fair procedures,[45] an unenumerated constitutional right housed in Article 40.3.[46] This is the case even in the con-

40 *ibid* at [80]
41 *ibid*.
42 *ibid* at [128].
43 *ibid*.
44 *ibid*.
45 D. Kenny, 'Fair Procedures in Irish Administrative Law: Toward a Constitutional Duty to Act Fairly' (2011) 34 *Dublin University Law Journal* 47, 47-48.
46 Art 40.3.1 provides that 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' The Courts have held one of these personal rights is an entitlement to fair procedures. *Mallak* v *Minister for Justice* [2012] IESC 59, [2012] 3 IR 297.

text of immigration decisions which implicate sensitive policy issues, like those pertaining to national security.[47] Finding that the reach of fair procedures extends into the process of citizenship revocation was thus entirely unsurprising. Much more contentious, however, was the Court's translation of the abstract requirement to respect fair procedures into its concrete demands in this case. One can summarise the problem with the Court's treatment of fair procedures with one word: blinkered.

Fair procedures is an amorphous legal concept, whose diverse bundle of entitlements – the right to notice, to be heard, the right to an oral hearing, to have the assistance of legal counsel, and to have an impartial and independent decision maker etc – are typically balanced alongside competing principles and institutional goods by officials; whether it be promoting administrative efficacy in the pursuit of substantive socio-economic goods, respecting democratic choices expressed in legislation, or respect for structural commitments stemming from the separation of powers.[48] Judicial desire to balance and calibrate these kinds of competing principles and goods helps explain why Courts often find the demands of fair procedures cannot be regarded as rigid, but will vary depending on context,[49] including the gravity of the interests or rights at play, and the presence or absence of the above kinds of principles and goods. Indeed, in some constitutional systems, recognition that the demands of fair procedures implicate many other important competing considerations, has even spurred calls for judicial doctrine extending deference to reasonable political branch determinations of what natural justice requires in different administrative contexts.[50]

While Irish law lacks the latter kind of doctrine – of deference to administrators on the question of what fair procedures requires in a given scenario – the Irish Supreme Court has repeatedly emphasised that the demands of due process are deeply contextual, and that its requirements do not require 'perfect, or the best possible justice' but 'reasonable fairness in all the circumstances.'[51] For Irish Courts, the answer to what constitutes 'reasonable fairness' will differ widely depending on the scenario at hand, and it would be a 'mistake to assume that a single one size fits all procedure must be applied' and a 'serious error, to which lawyers are prone' to approach the question of fairness with the 'tacit assumption that only procedures which approximate to a criminal trial are fair, and anything which departs from that is somehow dubious.'[52] In other words, while an important constitutional entitlement, deciding what fair pro-

47 *A.P.* v *Minister for Justice and Equality* [2019] IESC 47.
48 *ibid*, 394.
49 For judicial discussion on the importance of context to the demands of fair procedures in the UK see for example *Russell* v *Duke of Norfolk* [1949] 1 All ER 109, 118; *Lloyd* v *McMahon* [1987] 1 AC 625, 702, For Ireland see *International Fishing Vessels Ltd* v *Minister for the Marine (No 2)* [1991] 2 IR 93, 102; *Shatter* v *Guerin* [2019] IESC 9 at [28]-[32] *per* Charleton J.
50 For a discussion and justification of this possibility in the US see A. Vermeule, 'Deference and Due Process' (2016) 129 *Harvard Law Review* 1890, 1911-1919; for discussion of these issues in Canada see S. Ruel, 'The Review of Procedural Fairness Post-Vavilov: More of the Same?' (2020) 33 *Canadian Journal of Administrative Law & Practice* 159; P. Daly, 'Unresolved Issues after Vavilov III: Procedural Fairness' *Administrative Law Matters* 7 May 2020.
51 *International Fishing Vessels Ltd* v *Minister for the Marine* n 49 above, 101.
52 *O'Sullivan* v *Sea Fisheries Protection Authority and Ireland* [2017] IESC 75 at [46].

cedures demands in a given scenario is a contextual decision made in light of competing considerations.

In stark contrast, *Damache* saw the Court effectively side-step their own prior pronouncements on the need to approach the demands of fair procedures via rigorous contextual analysis. The Court instead took a largely blinkered approach to the right to fair procedures by deciding to focus on protecting a single constitutional principle they felt was threatened by the possibility of executive prejudgment and bias, all while down-playing or ignoring important competing considerations and principles. One consideration given short shrift was the availability of surrogate statutory safeguards already provided by the Oireachtas in section 19(3), including the right to be notified of the reasons for a revocation and right to make submissions to an impartial committee with judicial experience who would issue a recommendation to the Minister on revocation. Crucially, these statutory safeguards are also enmeshed in a dense web of robust administrative law principles which require any decision must be taken in good faith, factually sustainable, and be reasonable in its assessment and weighing of any relevant evidence (including the Minister's acceptance or rejection of the independent committee's recommendations) in light of the gravity of interests at play.[53] As an EU member state, Irish officials are of course also bound by EU jurisprudence on citizenship revocation. Post-*Rottmann*[54] and *Tjebbes*[55] it is clear member states must ensure that deprivation of national citizenship which also results in the loss of EU citizenship and its attendant rights – must be subject to a proportionality assessment.

As a result, any factually unsustainable, or abusive uses, of revocation power under this statutory process could be easily flagged in the recommendations of the independent Committee and open to correction via judicial review for unreasonableness or lack of proportionality. The Court's conclusion that section 19's procedural provisions were systemically unsound from the perspective of fair procedures, due to a risk of bias, impartiality, and prejudgment etc seems oddly detached from this rich jurisprudential context, and its concern at the fact the Minister was not legally bound by the recommendation of the Committee was given undue weight.

Indeed, the Court's comparison between the operation of the pre-2002 UK statutory regime and the process in section 19 could, in fact, be cogently used as the basis for an argument *against* the Court's ultimate decision to strike down the latter provision based on abstract concerns about how the statutory process *might* work. As just noted, the Court ruled against the process in section 19 of the 1956 Act *in abstracto* partly based on the fact the Minister was not legally bound to the views of the independent Committee, all while giving minimal weight to how it might operate in practice. But it was precisely the *de facto* practical operation of the UK regime over time, not its formal statutory provisions, that produced the very process the Supreme Court clearly seemed to favour. As noted above, the Court itself accepted that the views of the independent Committee in the pre-

53 *The State (Keegan)* v *Stardust Victims' Compensation Tribunal* [1986] IR 642, 658; *Meadows* v *Minister for Justice* [2010] IESC 3; [2010] 2 IR 701.

54 Case C-135/08 *Rottmann* v *Freistaat Bayern* ECLI:EU:C:2010:10.

55 Case C221/17 *Tjebbes* v *Minister van Buitenlandse Zaken* ECLI:EU:C:2019:189.

2002 UK regime were *never* legally binding on the Secretary of State, but that a convention grew to the effect that the Secretary of State considered they ought to be regarded as such. Weil and Handler link this convention to the esteem in which its judicial members were held and the perception the Committee was a model of rigorous impartiality and independence whose views ought to carry decisive weight.[56] A similar convention, or presumption, may well have taken root here, given the similar nature of the proposed independent Committee in the Irish regime, had the Supreme Court but stayed its hand and let the statutory process operate for a time.

More unfortunate than the minimal weight given to this rich jurisprudential context, however, was the impact of the Court's approach to fair procedures on core separation of powers principles, which were simply not rigorously analysed. Article 28 of the Constitution emphatically vests 'the executive power of the state' in the government, and only the government or those acting on its authority can exercise it. The Irish Superior Courts have long held that the regulation of immigration – including the entry, immigration status, removal, or the granting of citizenship – is an inherent executive power which can be exercised by the government without a statutory basis.[57] As already noted, the Court's theoretical basis for ascribing this power to the executive is largely based on a historical interpretation of Article 28.2.[58] The Court has reasoned that power to regulate immigration in Ireland pre-independence was one long exercised by the UK executive[59] and that, as post-independence 'the executive power' of the Irish State now vests in the Irish government constituted by Article 28, the latter now exercises this authority on behalf of the former.[60] Despite this constitutional allocation of executive authority, the most straightforward reading of the Court's articulation of the demands of fair procedures in this case means that the Minister cannot now both initiate and confirm a revocation proposal – ensuring that at least one of these executive responsibilities must be vested in another actor.

Reading between the lines, it seems the Court would have been satisfied with the constitutionality of section 19 if the recommendations of the independent Committee were legally binding on the executive, so that her confirmation or dismissal of a revocation proposal became a statutory formality. In other words, what the Court effectively seems to be saying is that to constitute a lawful exercise of this executive function, an independent non-executive actor must take over a substantial portion of its exercise and be responsible for either the

56 n 3 above, 307 and 340.

57 *Bode* v *Minister for Justice* [2008]3 1R 663; *Laurentiu* v *Minister for Justice* [1999] 4 IR 27; *C.A.* v *Minister for Justice* [2014] IEHC 532; *XP* v *the Minister for Justice and Equality* [2018] IECA 112.

58 Which provides that 'the executive power of the state shall, subject to the provisions of this constitution, be exercised by or on the authority of the Government.'

59 Association of authority to regulate immigration with the royal prerogative and executive branch has a long pedigree, with an extensive line of UK case law finding the prerogative extended to the regulation of the entry, stay, and exit of aliens and to the granting and withdrawal of passports to citizens. *See R (Munir)* v *Secretary of State for the Home Department* [2012] UKSC 32; *R (Alvi)* v *Secretary of State for the Home Department* [2012] UKSC 33; *R (Pham)* v *Secretary of State for the Home Department* [2015] UKSC 19.

60 C. Casey, 'Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40 *Dublin University Law Journal* 1.

initiation, or confirmation, of a revocation proposal. This would likely involve the Oireachtas stripping this acknowledged executive function away from the government and vesting it in what looks suspiciously close to judicial tribunal – lawyer led and with high levels of insulation from executive direction. Critically, however, the Court did not grapple with the troublesome question of whether such a move would be within the constitutional gift of the Oireachtas.

The Irish executive's control of immigration policy is, like its UK counterpart, heavily regulated and shaped by statutory provision; and the case law in both systems accepts this area of policy can be regulated by the legislature in a manner which cabins the ability of the executive to exercise its inherent executive/prerogative powers. In both legal systems, it is a bedrock principle of constitutionalism that executive power cannot be exercised in a way which would abrogate or frustrate a statute.[61] The crucial difference between Ireland and the UK in this area, however, concerns the constitutionally permissible *extent* to which statutes can regulate exercises of executive functions. In the United Kingdom, parliament's sovereignty means that as a matter of legal principle it can legislate to displace royal prerogative powers exercisable by the government, and theoretically divvy up these powers by statute and allocate them to whatever actors it sees fit.[62] In contrast, in Ireland the Oireachtas is emphatically not sovereign,[63] and its legislative competence is cabined by both constitutional structure and the requirement to respect constitutional rights. While the courts have held the Oireachtas may certainly structure and regulate exercises of executive power via statute, the fact the control of immigration remains an executive function ensures the Oireachtas must also respect one of the core structural principles flowing from the Constitution's separation of powers: that executive power cannot be alienated from the government and given to another body.[64] As a co-equal branch of state, the Oireachtas simply does not enjoy the same extent of constitutional authority to reorganise the executive and its functions as its British counterpart.

This very different constitutional context and distinction should have been very important in the Supreme Court's attempts to determine the concrete requirements of fair procedures the Minister had to follow to respect the *Nemo Iudex* principle on the one hand, with demands stemming from the text and structure of the Constitution's separation of powers on the other. But the Supreme Court's single-minded focus on the vindication of the *Nemo Iudex* principle meant it failed to grapple with the clear commitments of constitutional text and structure, and the practical impact of this failure may be to

61 It is a bedrock principle in both systems that the executive cannot act in a manner which would frustrate or disapply a statute. For recent affirmations of these principles see *NHV* v *Minister for Justice & Equality* [2017] IESC 35 and *R* v *Miller* [2017] UKSC 5.

62 See M. Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 *Oxford Journal of Legal Studies* 97.

63 Art 6.1 provides that 'All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.' Art 15.4.2 copper fastens this fact by providing that 'Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.'

64 *See Crotty* v *An Taoiseach* [1987] IR 713; *Pringle* v *Ireland* [2012] IESC 47.

mandate the Oireachtas to enact a constitutionally objectionable statutory procedure, one which would de facto remove an acknowledged executive power away from the government. The approach taken by the Supreme Court in this case might be justified by some as a brave and zealous vindication of the procedural rights of a small number of individuals at risk of a very serious, even life-changing, administrative decision. But whatever benign motivations might have spurred the Supreme Court's approach, there is simply no avoiding the conclusion its vigorous protection of an abstract constitutional entitlement like fair procedures comes at the steep cost of disrespect for one of the Constitution's very explicit textual commitments.

Textual commitments aside, the Supreme Court's judgment also likely means diluting accountability for profoundly morally and politically controversial exercises of executive power by requiring them to be hived off to a quasi-judicial body not answerable to the Oireachtas or people. Even more unfortunate is that this lopsided assessment took place in a context where the impugned statutory process already provided for robust procedural guards, whose efficacy was underpinned by a rich vein of administrative, constitutional, and EU jurisprudence that would have severely cabined the risks of capricious abuses of power at a retail level.

Nemo Iudex in Causa Sua – one important principle amongst many

Nothing in this note should be taken as a critique of the *Nemo Iudex* principle. This principle is a bedrock element of fair procedures and constitutionalism; one whose roots run deep in the common law.[65] It is a principle which can be justified on several compelling normative grounds: including respecting individual dignity, protecting the integrity of adjudication and administration, and the fact it is often necessary to respect the substance of constitutional rights if they are at issue in an administrative process.[66]

But the principle, notwithstanding its importance, is rarely treated as having unqualified scope in constitutional democracies. Instead, it is invariably explicitly or implicitly recognised by constitutional regulators[67] that its concrete demands must be balanced and weighed against other, often competing, principles and goods important to constitutional democracy: including principles stemming from the separation of powers, democratic accountability, technocratic expertise, and institutional autonomy.[68] Contemporary examples from

65 For a classic articulation of the principle see *Dr. Bonham's Case* (1610) 77 Eng Rep 638 (P) 652; 8 Co Rep 107a, 118a. Coke, CJ found that a college of physicians given statutory powers to punish unlicensed medical practice could not act as 'judges, ministers, and parties' simultaneously.

66 See C. Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 *Modern Law Review* 1221.

67 By constitutional regulator I adopt Vermeule's description as 'any actors who make constitutional rules, whether at the stage of constitutional design or at the stage of constitutional "interpretation" and implementation.' A. Vermeule, *The Constitution of Risk* (Cambridge: Cambridge University Press, 2014) 3.

68 A. Vermeule, 'Contra *Nemo Iudex in Causa Sua:* The Limits of Impartiality' (2012) 122 *Yale Law Journal* 384, 416.

constitutional democracies abound: legislatures frequently determine their own internal standing rules, salaries, and the boundaries of their electoral districts; judges frequently rule on the scope of their own jurisdiction and powers,[69] if they ought to recuse themselves from a case, or hold parties in contempt; administrative agencies frequently enjoy authority to both make and enforce policies and regulations against private actors; and Attorneys General often provide sensitive legal opinions on the policies of the government of which they are a member or subject to at-will-firing by.[70] Such examples all risk, in one way or another, offending the rule against self-dealing embedded in the *Nemo Iudex* principle, but are nonetheless justifiable calibrations and qualifications on the principle given their critical importance to securing other important goals and principles like institutional autonomy, judicial independence, and administrative efficacy. While impartiality is thus sometimes a very important value in institutional design and setting the bounds of lawful administrative action, it is one which 'constantly trades off against and competes with other values'[71] that should also be given their due.

It goes without saying that making reasonable legislative and executive determinations which give due respect to the important, and often competing principles noted above, is not an easy task. As Vermeule puts it, these kind of 'tradeoffs are hardly amenable to precise analysis' and in such cases constitutional regulators must often 'engage in an impressionistic balancing, with ill-specified weights, under conditions of grave uncertainty.'[72] But notwithstanding this difficulty, it should be relatively easy to reject approaching the *Nemo Iudex* principle, and fair procedures generally, in a manner which allow them to uncritically trump important competing principles and values, instead of being appropriately calibrated and qualified in light of them;[73] just as it is equally important to avoid the converse analytical extreme of permitting concern for democratic accountability or administrative efficacy to jettison consideration of fair procedures.

All of which is to say that it is preferable and sensible for constitutional actors to avoid a blunt approach to fair procedures which neglects to consider appropriate trade-offs or balancing between competing constitutional principles at all. Unfortunately, this is precisely the unqualified approach the Supreme Court opted for through its application of the principle, one which paid insufficient regard to other critically important principles like the separation of powers and democratic accountability in the process. The Court's choice in *Damache* should, in the end, not be regarded as a conflict between fundamental values of due process and an executive entitlement to abandon fair procedures; but between an interpretation of the requirements of due process that is sensitively attuned to and qualified by a wider constitutional context and one which is not.

69 J. Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* (2006) 1400.
70 Vermeule, n 68 above, 387-388.
71 *ibid*, 389.
72 *ibid*, 400.
73 *ibid*, 389.

How the government will respond to what represents, I suggest, an unwarranted incursion into their constitutional domain, remains to be seen.

CONCLUSION

The main takeaway from this critical analysis of *Damache*, for both Irish and comparative lawyers, is this: constitutional regulators ought not to be blinkered when translating the demands of an abstract constitutional principle like fair procedures into concrete determinations. It is an important constitutional principle to be sure, but one whose bundle of entitlements – the right to notice, to be heard, the right to a hearing, and to have an impartial and independent decision maker not prone to engaging in self-dealing etc – must be balanced by and weighed alongside competing constitutional principles and institutional goods, whether it be promoting administrative efficacy in the pursuit of substantive socio-economic goods, respecting democratic choices expressed in legislation, or structural commitments stemming from the separation of powers.[74]

In some systems, this recognition has spurred calls to offer judicial deference to reasonable determinations of what the principle demands in a given context, instead of engaging in *de novo* review of its requirements.[75] Whether Irish Courts should adopt some version of this doctrinal approach, or whether such doctrines are desirable in general, is beyond the scope of this note. But for now, it suffices to conclude by suggesting that regardless of whether judges are debating if they should afford deference to the provision of fair procedures on the basis of reasonableness review, or engaging in *de novo* correctness review, myopia in vindicating fair procedures in either instance may harm other goods and principles equally, if not more important to constitutional democracy, and ought to be resisted.

74 *ibid*, 394.
75 See n 49 above.