Citizenship as Civic Relationship:

U.M. v Minister for Foreign Affairs and Trade [2022] IESC 25

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Citizenship is one of the most important aspects of a person's moral and legal status. It's acquisition or loss "is a matter of profound significance for the individual concerned".[1] In U.M. v Minister for Foreign Affairs and Trade, the Supreme Court was faced with a delicate set of facts that had exceptionally high stakes for those involved. In the course of her judgement, Dunne J recognised this, drawing attention to previous judicial statements that the loss of citizenship "entailing as it does the loss of protection of the full range of constitutional rights conferred upon a citizen, is a matter of grave significance to the individual concerned".[2] This is entirely correct. But it is an incomplete description of what is at stake here.

Citizenship is not simply a collection of rights or entitlements; it is a locus of relationship between an individual and the community to which they belong. To be a citizen is not merely to be a legal subject, expected to obey the legal rules of a given jurisdiction and entitled to the enjoyment of any legal benefits accrued therein.[3] Rather, citizenship is a heightened form of belonging. It encompasses a range of entitlements and duties characterised by one's relationship within and to a civil community that extends beyond minimum notions of respect. Thus, we can speak of what it means to be a good citizen and know that this requires something that is done for the sake of the community itself.[4] Equally, a bad citizen wrongs or harms the community in particular ways. It is impossible to fully describe citizenship without reference to this important connection between the individual and the community. The character of that relationship is central to any claim, entitlement, or duty which flows from citizenship. A community which grossly wrongs or harms its citizens can expect no reciprocal citizenship duties to be met. The question that this case raises is whether citizenship obtained by virtue of a fundamental deceit on the part of the individual can properly give rise to valid and enforceable duties or rights.

Unfortunately, while Dunne J recognises the importance and significance of these complex moral problems, she manages to avoid passing detailed judgment on any of them. In the inferior courts, principles of natural justice and substantive conceptions of residency were centred, the case turning on determinations relating to the character of one's residence and the impact that this has upon reciprocal duties owed by the community to the individual. In contrast, the Supreme Court focused on cannons of statutory construction, emphasising technical presumptions over those grounded in considerations of natural justice. The result is a decision which rests on a highly particular, somewhat artificial distinction between automatic voiding of refugee status triggered *ab initio* by virtue of fraud and a

[1] *U.M. v Minister for Foreign Affairs and Trade* [2022] IESC 25, [35].

[2] Ibid, citing *Damache v MJE & Others* [2021] IESC 6, [27]. See also; Conor Casey, 'Citizenship Stripping, Fair Procedures, and the Separation of Powers: A Critical Comment on Damache v Minister for Justice' (2021) 84 Modern Law Review 1399.

[3] Legal subjecthood is sometimes denigrated in contrast to citizenship. In one sense this is a fair description; subjecthood is the floor blow which no juridical relationship can fall and citizenship connotes more than this, both in terms of entitlements and duties from and to the community. But it is wrong to assume that the relationship between legal official and legal subject, which distinct from that between official and citizen, is somehow marked by oppression rather than a difference, more fundamental kind of respect. See; Lon Fuller, *The Morality of Law* (Revised ed, Yale University Press 1969); Michael Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78 The Cambridge Law Journal 570.

[4] This notion is neatly captured by the concept of civic friendship and it's relation to the common good. See; John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) ch 6. See also; Adrian Vermeule, *Common Good Constitutionalism* (Polity Press 2022) ch 2.

prospective revocation triggered by exercise of executive discretion. The possibility of discretionary revocation with automatic and retroactive legal effect is not discussed in any great depth.

In a case such as this, principles of natural justice may have pulled in both directions, forcing statutory construction to balance the principle that fraud unravels everything against the injustice of depriving a child of citizenship based on the sins of the father. Addressing these concerns head on would have required more engaged moral judgment from the Court, but it would have avoided sanitised construction which fails because it does not address in adequate detail an alternative possible construction, equally defensible on a plain reading of the statutes in question. Dunne J correctly stressed that invalidity is a relative and not an absolute concept, rejecting "a hard and fast approach to the difficult issues in this case".[5] This being the case, the difficult substantive issues themselves deserved more direct engagement as means of resolving technical questions of construction.

Background:

Article 2 of the Constitution, amended pursuant to the 1998 referendum as part of the Belfast Agreement, provides:

> 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.

This appears to contain a *ius soli* entitlement to citizenship into the Constitution, elevating the legislative entitlement contained within s 6(1) of the Irish Nationality and Citizenship Act 1956 to a constitutional basis.[6] This had led to concerns that there was an unsustainable form of "citizenship tourism" as a result of Ireland being the only EU Member State which had retained the entitlement to citizenship *ius soli*. By the early 2000's, large numbers of persons were travelling to Ireland "for the obvious purpose of ensuring citizenship for children subsequently born here" and this "prompted a re-assessment of the desirability of maintaining the [*ius soli*] rule".[7] As a result, the Government proposed amendments to Art 9 of the Constitution in 2004 which were overwhelmingly supported by the People in a referendum. Art 9 now states:

> Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

The effect of this provision is to preclude those born in Ireland from being entitled by right to citizenship unless they have one parent who is an Irish citizen or who is entitled to be an Irish citizen. The phrase "notwithstanding any other provision of this Constitution" serves to ensure that this provision takes precedence over the terms of Art 2 and the phrase "unless provided for by law" allows the Oireachtas to provide for citizenship rights on a statutory basis where the Constitution no longer does so. Thus, s 6A(1) of the Irish Nationality and Citizenship Act 2004 provides that:

> A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been

[5] *U.M. v Minister for Foreign Affairs and Trade* [2022] IESC 25, [125].
[6] See; *Lobe v Minister for Justice* [2003] 1 IR 1.
[7] Kelly: *The Irish Constitution* (5th edn, Blumsbiry Professional 2018), [3.3.02].

> resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.

MM is an Afghan national who arrived in Ireland in 2005, applied for and was granted refugee status. In 2007 he married MJ, also an Afghan national, at a ceremony in Pakistan and in 2012 MJ was granted permission to enter and reside in the State following a successful application for family reunification. In September 2012, MM returned to Afghanistan for two months wherein his permission to remain in the State lapsed. When he returned to Ireland, he was stopped and interviewed by immigration officials in Dublin Airport where it transpired that MM's fingerprints matched those of a Mr. Habibulla Hamidi. Hamidi had entered the UK illegally and then claimed asylum which was subsequently refused. This was concealed by MM when he applied for refugee status in Ireland.

On the 1st June 2013, UM, MM's child was born in County Galway. On the 13th June 2013 MM was informed that his refugee status would be revoked on the 31st August 2013. Before the date of revocation specified in the letter to MM, UM applied for an Irish passport on the basis that, prior to UM's birth, MM has been resident in Ireland for more than three years out of the previous four. The Minister for Foreign Affairs and Trade refused this application pursuant to s 12(1)(a) of the Passport Act 2008 on the basis that he was not satisfied that UM was an Irish citizen by reason of MM's refugee status having been revoked due to its procurement through false and misleading statements. UM sought judicial review to quash this decision and declare them an Irish citizen.

The High Court:

In the High Court, Stewart J refused to issue an order of *certiorari* quashing the initial decision and refused to make a declaration that UM is an Irish citizen. This judgment was based on previous decisions emphasising the natural law maxim that nobody can profit from their own fraud or misrepresentation.[8] As such, the High Court interpreted the relevant statutory provisions setting out residency requirements for reckonable citizenship rights to include an implied principle that residency in this context must be lawful, regular, and *bonna fide* before it can give rise to the accrual of citizenship rights. Stewart J concluded that;

> "Citizenship is a privilege, which is bestowed upon non-nationals that are not entitled to citizenship by birth on behalf of the people. The acquirement of that citizenship must be lawful and bona fide. I cannot accept the proposition that the acquisition of citizenship that has been acquired effectively through the deceit of the applicant minors' fathers can have the effect of conferring citizenship by birth upon the applicants. This flies in the face of both of the constitutional provisions, the statutory provisions and the established authorities cited in the submissions outlined earlier and referred to by the Court".[9]

Here we can see the High Court engage in statutory interpretation based on the presumption that unwritten legal principles can inform legislative construction where there is doubt as to the meaning or application of a given provision in a particular context.[10] In this case, there was a tension between

[8] See; *Roberston v The Governor of the Dochas Centre* [2011] IEHC 24; *G.O. & Ors v Minister for Justice, Equality and Law Reform* [2008] IEHC 190; *A.G.A.O. v Minister for Justice* [2007] 2 IR 492.
[9] *U.M. v Minister for Foreign Affairs and Trade* [2017] IEHC 741, [46].
[10] See; Michael Foran and Conor Casey, "Constitutionalism and the Common Good: On the Role of Unwritten Principles" *LexisNexis Supreme Court Law Review* (forthcoming 2023); TRS Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77 Cambridge Law Journal 269; ibid; DJ Ibbetson, 'Natural Law and Common Law' 5 Edinburgh Law Review 4.

the idea that fraud cannot ground reckonable rights and the idea that an innocent party (UM) should not suffer for someone else's wrongdoing.[11] Thus, while Stewart J was attuned to the sympathy that anyone would feel for UM, she stressed that "the Court must decide this application based on the legal principles that apply".[12] As such, "Citizenship must be acquired in accordance with law and through lawful means. This means that the acquisition of such rights and any associated derivative third party rights must also occur through lawful means".[13] Innocence of wrongdoing might protect you from the infringement of your rights, but it cannot, on its own, generate new entitlements.

If Stewart J is correct to read unwritten principles of lawfulness into residency requirements, then there are unwritten terms of permission and unwritten constrained on refugee declarations which preclude the possibility that an individual can generate citizenship rights via fraud. Citizenship being a privilege bestowed on behalf of the People to non-nationals not independent entitled to it, it's character is such that the relationship between individual and community must be *bonna fide*. As such, MM's physical presence in the State was not sufficient to generate reckonable rights for his child, notwithstanding the sympathy that the Court may have for their situation. The central thrust of this decision is grounded in the character of the relationship between citizens and the community. A fundamental deceit used to begin that relationship therefore undermines any attempt to use one's presence within the State as the ground of citizenship rights.

The Court of Appeal

The Court of Appeal similarly denied the reliefs sought by UM but differed slightly in it's reasoning. While Murray J accepted that unlawful residence is not "residence" for the purpose of many legislative provisions, in some case, for example, where revenue is concerned,[14] unlawful residence will satisfy a residency requirement.[15] For Murray J, whether unlawful residence will be classed as residence in a particular legal context will depend primarily on "the ordinary meaning of the words used viewed in light of the statute as a whole".[16] As such, he adopted an approach to statutory construction which sought to give meaning to all aspects of the statute, thus concluding that "residence" in this context must include unlawful residence because another section of the statute set out criteria where residence would not give rise to citizenship rights and this section does not expressly state that only lawful residence will count as residence.

As such, in order for MM's presence to be excluded for the purposes of section 6 of the Citizenship and Nationality Act 1956, it must contravene the express terms of section 5(1) of the Immigration Act 2004, pursuant to section 6B(4) the 1956 Act which states that residence for the purpose of generating citizenship rights will not be reckonable if "it is in contravention of section 5(1) of the [Immigration] Act of 2004". Section 5(1) states that "no non-national may be in the State other than in accordance with the terms of any permission given to him or her … by or on behalf of the Minister". It also states that this requirement does not apply to "a refugee who is the holder of a declaration (within the meaning of that Act) which is in force".

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[11] *U.M. v Minister for Foreign Affairs and Trade* [2017] IEHC 741, [47].
[12] Ibid.
[13] Ibid.
[14] *Re Abdul Manan* [1971] 1 WLR 859, 861.
[15] *U.M. v Minister for Foreign Affairs and Trade* [2020] IECA 154, [34]. See also; *R (Shah) v. Barnet LBC* [1983] 2 AC 309, 343 '[i]f a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence ….'
[16] *U.M. v Minister for Foreign Affairs and Trade* [2020] IECA 154, [34]. See also; *Chubb European Group SA v. Health Insurance Authority* [2020] IECA 91, [81].

Focusing on MM's situation, Murray J concluded that, because the Oireachtas had set out the precise forms of residence that are not reckonable for the purposes of the Act, no further exclusions could be implied into the statute. Thus we see a clear departure from the High Court when it comes to statutory construction and the role of unwritten principles of natural justice in interpretation of legislation. As such, Murry J concluded that the trial judge erred in presuming that residency must be lawful before it can give rise to cognisable citizenship rights.

On this basis, Murray J then considered whether permission to remain in the State procured by virtue of fraud is a "permission" for the purposes of Section 5(1) and whether a declaration of refugee status which was revoked due to fraud was, properly understood, "in force" in the period prior to revocation. Citing McKechnie J. in *Dunnes Stores v. Revenue Commissioners*, he stressed the importance of context and purpose in the interpretation of statutory text:

> "… the focus of all interpretative exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cs. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that."[17]

With this in mind, Murray J turned to consider whether the declaration of refugee status was "in force" for the relevant period. Focusing on what he took to be the most likely intention of the legislature, he concluded that;

> "As a matter of principle, it seems counter-intuitive that the withdrawal of a status on the basis that it was obtained by intentional misrepresentation would, without a clear legislative statement to that effect, operate only prospectively. Generally, as I have already observed, fraud unravels everything."[18]

Similarly, the fact that the decision to revoke MM's refugee status stated that it would "take effect" on 31st August 2013 did not affect the matter one way or another. Whether revocation took effect prospectively or retroactively is a question of law.[19] As such, and given the above principles, Murray J concluded that "revocation of a declaration of refugee status operates to invalidate that declaration *ab initio*" and that this means that, once the revocation had been issued, the declaration of refugee status could not have been considered to be "in force" at the relevant time.[20] Therefore, MM was not covered under Section 5(3)(b) of the Immigration Act 2004 exempting refugees (holing a declaration of refugee status which is in force) from the requirement to obtain permission to be in the State. As such, if he did not have permission, his presence in the State could not be used to ground UM's claim to citizenship rights.

[17] [2019] IESC 50, [63].
[18] U.M. v Minister for Foreign Affairs and Trade [2020] IECA 154, [67].
[19] Ibid, [79].
[20] Ibid, [80].

In answering this question, Murray J drew upon several features of what constitutes "permission" for the purposes of Section 5(1) read in conjunction with Section 6B(4) of the 1956 Act. In the Supreme Court, Dunne J summarises them in paragraph 22:

1. A person who requires permission to be in the State but does not have it is unlawfully in the State.
2. The period of residence required under Section 6A is "a concept of lawful residence" (per O'Donnell J in *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63).
3. "Permission" as it appears in Section 5(1) must be given a practical interpretation.
4. Section 5(1) also envisages a breach where the terms of the permission granted by the Minister are contravened.
5. The permission granted is necessarily conditioned by any representations made to the issuing authority. This is clearly contemplated by Section 4(10) of the Refugee Act 1996, which states that "*an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her*".
6. The meaning of Section 5(1) must be determined in accordance with the principle identified by Hogan J in *Roberston v The Governor of the Dochas Centre* that a person may not benefit from their own wrongdoing.[21]
7. The starting point of any examination of permission must be that permission that is obtained via fraudulent or misleading information is a nullity. It confers no rights or entitlements of any kind.[22]

Taking all of this into account, Murray J then concluded that "the 'permission' granted to MM to reside in the State was not a 'permission' at all as that term is used in its ordinary or natural sense and was certainly not a 'permission' as was intended in that section".[23] A determination as to whether permission given on the basis of fraud has legal effect therefore must look behind the formal permission to the deceit that it is grounded on. Thus, while Murray J focused on notions of the plain language and legislative intent, his determination of the legal meaning of the relevant provisions hinged upon natural law presumptions which he attributed to the Oireachtas.[24] Curiously, while Murray J was adamant that courts should not presume requirements of natural justice when interpreting residency requirements, he was perfectly happy to do exactly that when it comes to interpreting provisions such as "permission" and "in force".

The Supreme Court

The judgments of the High Court and Court of Appeal differ slightly in their reasoning, each focusing on different aspects of the legislative landscape. Yet, each draws upon unwritten principles of natural law to inform their assessment of the proper construction of statute, including presumptions about

[21] *Roberston v The Governor of the Dochas Centre* [2011] IEHC 24

[22] On Fraud unravelling all, see; *Takhar v. Gracefield Developments* [2019] UKSC 13, [2019] 2 W.L.R. 984, [43]; : *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 at 345, [1956] 1 QB 702, 712; *Walsh v. Minister for Justice* [2019] IESC 34, [3]; *M.K.F.S v. The Minister for Justice and Equality* [2018] IEHC 103, [16]; *R. v. Home Secretary ex parte Zamir* [1980] AC 930.

[23] *U.M. v Minister for Foreign Affairs and Trade* [2020] IECA 154, [91].

[24] See; TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221; TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 Oxford Journal of Legal Studies 58; Stéphane Sérafin, Kerry Sun and Xavier Foccroulle Ménard, 'The Common Good and Legal Interpretation' (2021) 30 Constitutional Forum 39.

what the Oireachtas intended when legislating in the context of the citizenship referendum. In contrast, the Supreme Court confined it's analysis primarily to a technical construction which carefully avoided passing judgement on many of these contentious moral principles. Indeed, much of Dunne J's judgment is tellingly thin in its exercise of judgement. A more detailed engagement with the moral arguments underpinning the presumptions made by the lower courts was needed in this case.

After setting out the background facts, the legislative framework, and the previous arguments before and judgments of the inferior courts, Dunne J begins her discussion by reiterating the importance of citizenship to the individual involved, stressing that, given this importance, "it goes without saying that the circumstances in which a person may acquire Irish citizenship must be the subject of careful consideration".[25] But there are also communal concerns here that Dunne J recognises, including an unsustainable rise in "citizenship" tourism which prompted a constitutional amendment removing the *ius soli* entitlement and implementing an expanded statutory scheme for determining who has the requisite connection to the community and nation to warrant citizenship entitlements.[26]

It is thus worth bearing in mind when assessing the Court's engagement with the detailed requirements of the statutory scheme that Dunne J began by recognising that there are important moral considerations underpinning this case and that the constitutional amendment and revised statutory scheme were implemented in response to concerns that persons who had no real connection to Ireland were claiming citizenship in unsustainable numbers. That background tension between the hardship suffered by an innocent third party denied citizenship and the clear desire by the Irish people and their representatives to address an issue of "citizenship tourism" must be relevant for the interpretation of the statutory scheme in question. Yet, Dunne J does not return to this tension or address its implications for statutory construction in the rest of her judgment.

Instead, she identifies the central issue of this case to be "the effect of revocation of MM's declaration of status on UM".[27] In particular, whether revocation dated back to the date of grant of refugee status, or at the date nominated by the Minister. In this, Dunne J agreed with the Court of Appeal that one cannot decide this case by reference to an interpretation of "residence", because the Oireachtas must have intended "residence" to include "unlawful residence" in this context. Here, both Dunne J and Murray J in the Court of Appeal considered and rejected arguments, advanced *Goertz*, that a requirement of residency for a period of time "refer to the character, as well as the duration, of residence" and so "is designed to help an alien who has come to the country legally and is taking part in the life of the community".[28] In *Goertz*, the Court adopted a substantive conception of what constitutes good, normal, or ordinary residence. In so doing, it focused on what it took the purpose of residency requirements to be: to provide a means for those who are not otherwise entitled to some legal benefit but who nevertheless contribute to the life of the community, to be afforded that benefit as recognition of their contribution and, in this case, the hardship that would be entailed by their swift expulsion. The requirement that residence be lawfully obtained is a part of this, but it is not exhaustive. Similarly, in *Roberston*, the Court concluded that a statutory reference to "ordinary residence" must refer to "a residence which is lawful, regular, and *bona fide*" but also, drawing upon natural law maxims, that "legislation should be understood and interpreted by reference to certain well-understood general principles of law, one of which is that a person cannot be allowed to profit from their own wrong".[29] This approach to statutory interpretation, drawing upon natural law maxims and unwritten legal

[25] *U.M. v Minister for Foreign Affairs and Trade* [2022] IESC 25, [36].
[26] Ibid, [41]-[42].
[27] Ibid, [52].
[28] *The State (Goertz) v Minister for Justice* [1948] IR 45, 56.
[29] *Roberston v The Governor of the Dochas Centre* [2011] IEHC 24, [20]-[21].

principles to resolve ambiguities or to avoid an overly literalist interpretation at odds with the intention of the legislature, is a central feature of both the common law tradition and the classical legal tradition upon which the Irish legal system is based.[30]

Dunne J rejected this approach, agreeing with the Court of Appeal that "Courts must strive to avoid an interpretation of legislation that renders provisions of the Act in question otiose".[31] Given that the legislative scheme expressly set out circumstances where residency cannot be reckonable to give rise to citizenship rights which did not expressly state that unlawful residence is precluded, both Courts concluded that it must have been included. More precisely, Section 6 of the Citizenship and Nationality Act 1956 sets out the requirement that a person shall not be entitled to citizenship unless one of their parents have been resident in the State for 3 of the past 4 years. Murray J argued that "if the only 'residence' referred to in s.6A(1) was a residence that was *bona fide*, lawful and regular, there would have been no need to exclude from reckoning a residence in contravention of s.5(1) of the 2004 Act, as it is none of these".[32] Dunne J agreed, that "there is no general requirement that presence be "*lawful*" in respect of the definition of "*residence*" in s.6A(1)".[33]

This line of reasoning is extremely flawed. It rests on a privileging of some unwritten principles of statutory construction (the need to avoid rendering provisions redundant) while ignoring other, perhaps more fundamental ones which bare direct relation to the background context that led to the constitutional change and later amendment to the citizenship rules themselves. Dunne J does not provide any reasoning here for how she balanced these competing approaches to statutory construction beyond stating that she agrees with the analysis of Murray J. Why she does so is not immediately evident.

What's more, this approach serves to invert the traditional common law approach of reading in unwritten principles to avoid counter-intuitive results. Ordinarily counter-intuitive readings of statute would require such requirements to be expressly set out. On this view, it is only if the legislation specifically stated that unlawful residence would count as residence that a court should include it. Here, both Murray J and Dunne J presume, on the basis of very little, that the Oireachtas intended residence to include unlawful residence merely because it did not explicitly preclude unlawful residence in drafting the relevant statutory scheme. Similar reasoning would be very unlikely to withstand scrutiny in other contexts. For example, imagine a scheme setting out that one is entitled to compensation for breach of contract caused by the actions of an administrative agency. Suppose an individual or corporation contracted with an agency on the basis of fraudulent misrepresentation and the agency then acted in breach of contract. If the fraud was discovered and the contract voided, it is inconceivable that they would be entitled to compensation under the scheme unless the scheme expressly stated that void contracts were capable of giving rise to actionable claims for compensation. It would be absurd to assume that a contract, rendered voidable by the fraudulent actions of an individual, and then duly voided could give rise to any enforceable rights unless expressly stated in statute. The presumption ordinarily is that legal terms such as contract, residency, and so on do not include unlawful or legally invalid/void manifestations.

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[30] See; Conor Casey, "Common Good Constitutionalism: Lessons From the Irish Constitutional Order" *HJLPP* (forthcoming); Ibbetson (n 8); John Laws, *The Common Law Constitution* (Cambridge University Press 2014); RH Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Harvard University Press 2015).

[31] *U.M. v Minister for Foreign Affairs and Trade [2020] IECA 154*, [54]. See also; *Cork County Council v Whillock* [1993] 1 IR 231; *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, [66].

[32] *U.M. v Minister for Foreign Affairs and Trade* [2020] IECA 154, [54].

[33] *U.M. v Minister for Foreign Affairs and Trade* [2022] IESC 25, [61].

Dunne J then proceeds to address the second strand of argument adopted by the Court of Appeal; whether MM's presence within the state, although classed as residence, was nevertheless excluded from consideration for the purposes of grounding citizenship rights because it is in contravention of s 5(1) of the 2004 Act. Here, Dunne J agreed with Murray J that the central questions were whether "permission" to remain in the State, obtained through fraud, counts as permission for the purposes of s 5(1) and secondly, whether a declaration of refugee status which has been revoked due to fraud was "in force" in the period prior to revocation. Summarising these questions, Dunne J stated that "Another way of teasing out these questions would be to ask if the effect of revocation of the declaration of refugee status on the basis of false information having been provided in order to obtain the declaration, is such as to render the declaration of refugee status void *ab initio* for all purposes and in all respects?"[34] Note that this framing is considerably broader than that of the inferior courts, who focused on whether the effect of revocation was such that it could not give rise to reckonable citizenship rights, rather than being void for all purposes and in all respects.

Dunne J begins the substance of her analysis on this point by noting that she finds it "difficult to disagree with the proposition that a declaration of refugee status obtained on the basis of false or misleading information means that the declaration would never have been granted but for the false or misleading information".[35] The question for Dunne J, therefore, is whether this means that the declaration is a nullity from the day it was granted or whether it remains effective until it is revoked?[36] Here, she stresses that she has "no issue with the concept that "an order obtained by fraud is a mere nullity".[37] Nevertheless, she rightly refers to the legislative scheme to show that, given the discretion afforded to the Minister to decide whether or not to revoke, it cannot be said that refugee status obtained by fraud is a complete nullity, void *ab initio*.[38] But this merely raises a more foundational question: what is the legal effect of a revocation of refugee status *once the declaration has been made*? Discretion to issue an order doesn't necessarily imply discretion as to it's legal effects, as Murray J rightly concluded in the Court of Appeal. The fact that a declaration of refugee status obtained by fraud is not void *ab initio*, given the discretion afforded to the Minister to choose whether or not to revoke once discovering the fraud, does not tell us anything about the legal effect of revocation once the Minister chooses to revoke. An order revoking refugee status may be withheld by the Minister for many reasons, including reasons of mercy or reasons relating to the affect revocation might have on MM's family. But that doesn't mean that, once revocation has been chosen by the Minister and duly ordered, there remains a question of whether, at that point, fraud unravels everything. Further, even if fraud does not unravel everything, that does not mean that fraud can give rise to reckonable rights. More by way of argument is needed to establish this, given the natural law presumptions at play here.

Dunne J, having accepted that the discretion afforded to the Minister must mean that the declaration of refugee status cannot have been void *ab initio*, then correctly states that "the critical question in this case is whether revocation of the declaration of refugee status must be viewed as being retrospective in effect, and, if so, what effect, if any, does revocation have on those who, but for the revocation, would have enjoyed derivative rights by reason of the apparent refugee status of the person

[34] Ibid, [62].
[35] Ibid, [80].
[36] Ibid.
[37] Ibid, [94].
[38] Ibid, [105].

from whom they derived their rights, such as the appellant in this case".[39] So, the options open to the court in this case are to conclude one of the following:

1. The declaration of refugee status was void *ab initio*, thus removing any discretion from the Minister to choose not to revoke.
2. The effect of revocation occurs prospectively only. Any rights which could derive from refugee status and residency prior to revocation can so derive.
3. The effect of revocation, because it derives from fraud, invalidates or voids the refugee status in its entirety for all purposes, *ab initio*, should the Minister choose to revoke.
4. Revocation occurs prospectively but no rights can derive from the period in which the refugee status was in force, because it was induced through fraud.

This final possibility was not considered by any of the courts in this case, although the principles which underpin it are discussed at length. Importantly, these are each distinct possible ways of resolving this case. The fact that option 1 has been dismissed by the Supreme Court tells us nothing significant about how to choose between the other options.

This is a point which is lost on Dunne J, given that her rejection of option 3 in favour of option 2 rests on the fact that the Minister had discretion over revocation. Thus, she notes that "if the Minister had chosen not to revoke the declaration of refugee status, notwithstanding that he was entitled to do so, the position would be that, far from being a declaration of refugee status which was void *ab initio*, the declaration would remain in being to all intents and purposes".[40] Here we see a reiteration of her previous rejection of option 1. The refugee status, once granted, "was valid, binding and of effect until revoked".[41] This is equally the case with respect to the presumption of innocence; one is innocent until proven guilty, at which point what was previously taken to be innocence is retroactively changed to reflect the guilt that was there all along. It is thus entirely correct to state that "until a declaration is set aside, it enjoys a presumption of validity, and will be regarded as binding".[42]

The question that remains is what is the legal effect of a revocation due to fraud? Again, here Dunne J relies on the fact that the declaration remains valid until revoked (so not void *ab initio*) to argue that a revocation therefore cannot have retroactive effect. So, she stresses again that "the language used in s.21 is discretionary. Thus, it is clear, it seems to me, that even if the Minister is of the view that a declaration of refugee status was made on the basis of information furnished by the applicant which was false or misleading, the Minister is not obliged to revoke the declaration".[43] But, again, the fact that the minister had a choice as to whether or not to revoke the declaration tells us only that option 1, which she already rejected, is not sustainable. It tells us that fraud renders the refugee declaration voidable and not void. But the question she is supposed to be addressing, at this point, is whether revocation converts a voidable declaration into a void one, or whether is merely ceases the future validity of the refugee status, or whether it serves to prevent the grounding of derivative rights from the status, regardless of whether revocation operates prospectively or retroactively.

Dunne J correctly stresses that "invalidity is a relative and not an absolute concept".[44] Yet, she relies on an almost absolutist view here which runs the options set out above into one another,

[39] Ibid, [106].
[40] Ibid, [123].
[41] Ibid, [125].
[42] Ibid, [123].
[43] Ibid, [124].
[44] Ibid, [125].

presuming that, if the refugee status was valid and in effect up until it was revoked, then it must always be considered to have been in effect during the time prior to revocation and must always enable the reckoning of citizenship rights that rely on residency during that period. It is not the case that the refugee status was never in force. None of the inferior courts seem to have claimed as such. Rather, their argument was either that revocation of refugee status serves to retroactively invalidate what was, up until the point of revocation, considered to be a declaration that was in force, or that unlawful residency cannot give rise to reckonable citizenship rights, even if the refugee status was in force at the time.

The central issue is whether reckonable rights can derive from a fraudulently obtained declaration. As Humphreys J notes in *M.K.F.S v The Minister for Justice and Equality*, "where it is determined that the applicant's relationship is based on fraud, no 'rights' can arise from such a relationship".[45] If citizenship is a form of civic relationship, then arguably that relationship must be a sincere one and rights to it cannot obtain by virtue of fraud. Yet, it may be incredibly unjust to punish a child for the sins of their father. The principles of natural justice may have pulled in both directions in this case, forcing a court to balance competing concerns in their reasoning. That simply cannot be done if these considerations are never addressed at all. Having said this, a further complicating factor in this case is the constitutional background and the fact that the Irish People voted overwhelmingly to remove the *ius soli* entitlement to citizenship precisely on the basis that there was an issue of "citizenship tourism".

Dunne J did not address these kinds of arguments and, in that sense, she demonstrated consistency in refusing to read in any underlying natural law presumptions here. Murray J in the Court of Appeal is in the difficult position of refusing to do so for "residence" but not for "permission" or "in force". We can thus see significant disagreement throughout the various judgments in this case, all centred on the interpretation and construction of statute. Dunne J ended up tying her judgment in knots by trying to rely on under-determinate statutory language to resolve complex issues of statutory construction. Nothing in the statutory text can tell us what the legal effect of revocation is. That is a question which requires an interpretation of the point and purpose of the statutory and constitutional landscape as a whole, bearing in mind all of the relevant considerations, including considerations of natural justice. Addressing these moral issues head on would have helped resolve some of these seemingly more technical textual issues and would have resulted in a judgment which demonstrated significantly more judgment.

[45] [2018] IEHC 103, [16].