Citizenship, Sovereignty and the Limits of Equality
Delivered by Mr. Justice Maurice Collins at the Immigration, Asylum & Citizenship Bar Association on 24th November 2023

Introductory

1. Since independence, citizenship has been a fundamental constitutional status in this jurisdiction. Article 3 of the Constitution of the Irish Free State ordained who would be the citizens of the new Irish Free State and declared that such citizens would, within the limits of its jurisdiction, "*enjoy the privileges and be subject to the obligations of such citizenship*." Those citizens – or such of them who had reached the age of twenty one – constituted the "*we the people of Eire*" who adopted, enacted and gave to themselves (and to us) the Constitution that governs us today[1] and, by doing so, constituted themselves as the citizens of Ireland by virtue of Article 9.1.1 of the Constitution.

2. It is from "*the people*" – the citizens of Ireland – that "*all powers of government, legislative, executive and judicial .. derive*" and it is the people "w*hose 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."* (Article 6). Only with the approval of the "*the people"* in a referendum may the Constitution be amended (Articles 46 and 47).

3. It is, no doubt, banal to observe that citizenship is the essential building block of the sovereign State constituted by the 1937 Constitution. As the

[1] Section 4 of the Plebiscite (Draft Constitution) Act 1937 provided that *"[e]very person who is entitled to vote at the general election (and no other persons) shall be entitled to vote at the plebiscite."* Article 14 of the Free State Constitution gave the franchise to *"all citizens of the Irish Free State .. without distinction of sex, who have reached the age of twenty-one years…"*

Chief Justice recently observed "*[s]overeignty, territory and citizenship ('we the people') are essential elements of a state, without which it might be said that a state cannot exist*." [2]

4. There is, as you know, a large body of caselaw addressing different aspects of citizenship in different contexts.

- **One** strand of that caselaw addresses the important issue as to the extent to which the fundamental rights provisions of the Constitution - most of which are in express terms applicable only to citizens - apply to non-citizens. As I shall explain, that issue is now, I think, largely settled and the decision of the Supreme Court in *NHV v Minster for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246 provides a framework – based on the guarantee of equality in Article 40.1 of the Constitution - within which future disputes may be analysed and resolved.

- A **second** strand of that caselaw is concerned with situations where the distinction between citizen and non-citizen remains hard and sharp. It is clear that citizens cannot, for instance, run for election to the Dáil (though non-citizens may be permitted to *vote* in Dáil elections as a result of the Ninth Amendment of the Constitution Act 1984), vote in Presidential elections or in referendums to amend the Constitution. With the limited exception of the franchise in Dáil elections – which has now been extended by statute to British citizens – non-citizens are essentially excluded from the "*political community*" that constitutes and governs the State. So much is clear from the decision of the Supreme Court in *In re Electoral (Amendment) Bill 1983* [1984] IR 268.

  However the distinction between citizen and non-citizen is hugely consequential in many other circumstances. As a general rule – and there are important exceptions, not least in respect of nationals of

[2] *Odum v Minister for Justice and Equality (No 2)* [2023] IESC 26.

other EU Member States – non-citizens have no *right* to enter or to reside or remain in the State. Non-citizens require permission to enter the State and they may remain only as long as they are permitted to do so. In contrast to citizens, they are liable to deportation from the State. Control over the entry, residence and removal of non-citizens is, it is generally (though not universally) accepted, a basic incident of state sovereignty. But conflict may arise between the undoubted right of the State to control immigration on the one hand and, on the other hand, rights or interests that non-citizens may have (or assert) under the Constitution itself particularly under Articles 41, 42 and 42A. Citizens may be involved, as spouses, partners and/or children but such conflict can arise even in the absence of any citizen, as in the very recent decision of the Supreme Court in *Odum v Minister for Justice and Equality (No 2)* [2023] IESC 26. While there has been substantial litigation in this area which has produced important guidance as the balancing of these rights/interests, it cannot sensibly be suggested that these issues are settled.

- A **third** strand of caselaw involves the acquisition and loss of citizenship itself. Article 9.2 of the Constitution provides that the "*future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law*." While the distinction between nationality and citizenship is not immediately obvious in this context, it is notable that Article 9.2, at least on its face, seems to permit the Oireachtas to provide for the loss of citizenship, however acquired. Section 15 of the Irish Nationality and Citizenship Act 1956 provides for the granting of citizenship to non-nationals by way of certificates of naturalisation which may be issued by the Minister for Justice "*in his absolute discretion*" (subject to first being satisfied of the matters referred to in section 15(1)(a) – (e)). Section 19 of that Act provides for the revocation of such certificates of naturalisation by the Minister in certain circumstances, including 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."* That language

obviously picks up on Article 9.3, which provides that *"[f]idelity to the nation and loyalty to the State are fundamental political duties of all citizen."* I emphasise the characterisation of these duties as "*political*".

The caselaw relating to the *acquisition* of citizenship has, on any view, travelled a considerable distance. The decision of the High Court (Costello J) in *Pok Sun Shum v Ireland* [1986] ILRM 593 and the later decisions of the Supreme Court in *Mallak v The Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297 and *AP v The Minister for Justice and Equality* [2019] IESC 47, [2019] 3 IR 317 appear to me to involve very different understandings of the power to grant citizenship and the extent to which it can truly be said to be in the "*absolute discretion"* of the Minister.

As for the loss of (naturalised) citizenship, the Supreme Court's decision in *Damache v The Minister for Justice and Equality* [2020] IESC 63 & [2021] IESC 6, [2022] 1 IR 669 is a dramatic intervention that effectively excludes the Minister from any involvement in revocation decisions, which the Court held must be entrusted to an "*impartial and independent decision-maker*."

Underpinning the recent jurisprudence relating to both acquisition and loss of citizenship is an appreciation of citizenship's significance (see the observations of Dunne J at paras 28 - 30 of *Damache,* which refer back to statements made by O' Donnell J in *AP*). There is also, perhaps, another factor at work, namely an underlying scepticism of any conception of the power to grant and revoke citizenship as essentially *political* rather than *legal* in its character.

5. I will say something about each of these strands, though I will not have the time to engage in a detailed discussion of individual decisions. I appreciate that acquisition and loss of citizenship potentially engages EU and ECHR law, particularly where loss of national citizenship results in the loss of EU

citizenship and/or in statelessness. [3] But, this paper focuses on the nature and incidents of citizenship in domestic Irish law and, in particular the issue just mentioned, the constitutional character of citizenship and, in that context, whether there is any tension between the approach that has been taken by the courts in immigration cases (which appear to locate citizenship within a broader context of *political* sovereignty) and that taken in cases such as *Mallak*, *AP* and *Damache* (which are arguably see citizenship as an essentially *legal* status).

The First Strand

6. As to the first strand, all of you are aware that many of the rights conferred by the Constitution are, in terms, guaranteed to citizens. Thus Article 40.1 provides that "*[a]ll citizens shall, as human persons, be held equal before the law"* and Article 40.3 commits the State to respect, and by its laws to defend and vindicate "*the personal rights of the citizen*". Article 40.4.1 provides that "*[n]o citizen shall be deprived of his personal liberty save in accordance with law."* Article 40.5 provides for the inviolability of "*[t]he dwelling of every citizen*" and Article 40.6 guarantees liberty for the exercise of the "*right of the citizens to expressly freely their convictions and opinions" "to assemble peaceably and without arms"* and "*to form associations and unions."* Article 44.2 then guarantees "*to every citizen*" "*[f]reedom of conscience and the free profession and practice of religion"*. In contrast, Article 38 (trial of criminal charges "*in due course of law*") and Article 40.4.2-4 (inquiry into detention) and Article 40.4.5 (refusal of bail) refer to "*person*". Other fundamental provisions of the Constitution – Articles 41, 42 and 42A - refer to neither citizen nor person.

7. This "*variable usage*" is puzzling but it was also a feature of the language used in the Constitution of the Free State. Many of its rights provisions were also framed by reference to citizens. In his seminal work, *The*

[3] See for instance, the discussion in O' Leary, "Acquisition and Loss of Nationality: Irish and European Perspectives" [2019] 22 (1) *IJEL* 1.

Constitution of the Irish Free State (1932), Leo Kohn expressed the view that it was "*inconceivable*" that the framers should have intended to limit the protections of the Constitution to citizens and that it was only in certain limited instances that the terms citizen was used "*to connote membership of the political community*" (page 120). The reference to citizens in the fundamental rights articles was, he suggested, derived from a misunderstanding of comparative constitutional texts. Speaking of Article 7 (the forerunner of Article 40.5 and, like its successor, couched in terms of the dwellings of citizens), he stated that any interpretation of that provision that deprived non-citizens of its protection *"can hardly be maintained in the light of the general purpose of those declarations*"(162). There was, he said, "*[n]o ground of principle or policy*" why the security of the dwelling should "*not be accorded in equal measure to persons not members of the political community"* (*ibid*).

8. The framers of the 1937 Constitution learned a great deal from the deficiencies of the Constitution of the Free State. For whatever reason, however, they replicated its framing of rights as rights of the citizen.

9. In *Nicolaou,* the prosecutor – a Greek Cypriot resident in London – sought to rely on Articles 40.1 and 40.3 in his challenge to an adoption order that had made in respect of his son without any notice to him. His right to do so was not challenged by the respondents. Even so, two member of the Divisional Court, Murnaghan and Henchy JJ, expressed scepticism (and, in the case of Henchy J, more than scepticism) at the proposition that a non-citizen could invoke provisions limited on their face to citizens. The Supreme Court did not decide the issue, expressly reserving it "*for another and more appropriate case*".

10. Since *Nicolaou*, there have been many decisions addressing that issue. *State (McFadden) v Governor of Mountjoy Prison (No 1)* [1981] ILRM 113 (Article 40.3 guarantee of basic fairness of procedure not limited to citizens); *Finn v Attorney General* [1983] IR 154 (Article 40.3 duty of the State to protect the life of *"every citizen"* extends to non-citizens, including the unborn child); *In re Electoral (Amendment) Bill 1983* [1984] IR 268

(where, in holding that the references in Articles 16, 12 and 47 of the Constitution to "*citizens*" meant citizens *stricto sensu*, the Supreme Court stated that there was a clear distinction between those provisions, "*which provide the mechanism by which the people may choose and control their rulers and their legislators",* and Articles such as Article 40 and 44 "*which grant to individuals particular rights within society and in relation to the organs of State*"); *In re The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 381 (it would be "*contrary to the very notion of a state founded on the rule of law, as this State is .. if all persons within the jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights";* similar considerations apply to a non-national's right to fair procedures and natural and constitutional justice); *Nottinghamshire County Council v KB* [2011] IESC, [2013] 4 IR 662 (non-national entitled in principle to rely on Articles 41 and 42, with O' Donnell observing that, while the caselaw had not articulated any "*unifying theory*", a "*modus vivendi appears to have arrived at in which non-citizens have been permitted to invoke some provisions of the Constitution*" while it is accepted that some aspects of the Constitution relating to voting and representation are "*nevertheless properly limited to citizens*"); *Omar v Governor of Cloverhill Prison* [2013] IEHC 579, [2013]] 4 IR 186 (Article 40.5 guarantee applies "*to every home in the State, irrespective of the nationality or status of the occupants of the dwelling"* on the basis that in *In re Electoral (Amendment) Bill 1983* the Supreme Court had "*made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State*.") are some of the principal waypoints in the journey from *Nicolaou* to *NHV*.

11. This caselaw is rather *ad hoc* and unsatisfactory.[4] Writing extra-judicially, the current Chief Justice referred to "*decisions which, however instinctively*

[4] See the discussion in Dewhurst, "Exclusionary or Inclusionary Constitutional Protection: Protecting the Rights of Citizens, Non-Citizens and Irregular Immigrants under Articles 40-44 of the Irish Constitution" 49 *The Irish Jurist* 98 (2013).

attractive, have been achieved almost by default" and which, as a result, lacked coherence.[5]

12. Turning to *NHV,* it involved a challenge to section 9(4) of the Refugee act 1996, which excluded applicants for asylum in the State from the employment market before the final determination of their application. The Applicant (a Burmese national) challenged the prohibition on the basis that it violated the right to earn a livelihood (or, as O' Donnell J characterised it, the freedom to seek work) protected by Article 40.3 of the Constitution. Reversing the Court of Appeal, the Supreme Court (per O' Donnell J) considered that the freedom to work or to seek employment was part of the human personality. Article 40.1 mandates that individuals as human persons are required to be held equal before the law and that meant that rights which were part of the human personality could not be "*withheld absolutely from non-citizens*" (para 18). While there were clear differences between citizens and non-citizens which justified significant distinction in the area of employment, the absolute exclusion from employment violated the constitutional right to seek employment (paras 20-22).

13. The Supreme Court's decision in *NHV* does not settle all issues around the entitlement of non-citizens to invoke constitutional rights that are framed in terms of the rights of citizens. However, it provides a coherent framework for the resolution of such issues, based on the guarantee of equality in Article 40.1 (which, while it guarantees the right to equality of *citizens*, founds that right on the essential equality of "*human persons*"). Non-citizens may rely on Article 40.1 to access and enforce other rights (in *NHV*, the Article 40.3 right to work), provided that those rights being "*part of the human personality*". While that approach differs from that taken by Hogan J (dissenting) in the Court of Appeal – he would have allowed the Applicant to rely directly on Article 40.3 as conferring a right to work on him – the endpoint was the same, a finding that section 9(4) was unconstitutional.

[5] O' Donnell, "International Aspects of the Constitution: Skibbereen Eagle or a Shaft of the Dawn for the Despairing and Wretched Everywhere?" 59 *The Irish Jurist* 1 (2019).

14. The fundamental rights protected by the Constitution – the personal rights within Article 40.3, the right to liberty, to security of the dwelling, property rights, rights to expression, assembly and association and family rights are all intimately bound up with human personality. *Prima facie*, such rights apply equally to citizens and non-citizens. However, differences in treatment may still be justified by considerations rationally related to the distinction between citizens and non-citizens. That is illustrated by *NHV* itself: the right to work that the Applicant could rely on was significantly more circumscribed than the right to work enjoyed by Irish citizens. As a non-citizen, his right to work was liable to regulation in a manner not applicable to a citizen. It is also illustrated by *Odum*, which is discussed below.

15. The key point, however, is that with the exception of those provisions of the Constitution concerned with constituting and governing the "*political community"* brought into existence by it, non-citizens are presumptively entitled to rely on the rights and protections afforded by the Constitution, though they may not always be able to do so in precisely the same way and to the same extent as citizens. Apart from the distinction between citizen and non-citizen, other factors may be relevant in this context, including immigration status, duration of residence, family connection with the State and so on.

The Second Strand

16. However, there are limits – hard limits - to the equality analysis. A basic incident of Irish citizenship is that the citizen is free to come and go to the State, free to reside in the State and free to work. In contrast, the State exercises close control over the entry, residence and removal of non-citizens, including the ultimate power of forcible expulsion from the State by way of a deportation order.

17. Non-citizens may form relationships in the State. They may have a spouse or partner who is an Irish citizen. They may have children here, who may or may not be Irish citizens. Such relationships may give rise to rights and interests recognised by the Constitution, particularly under Articles 41, 42 and 42A. Decisions around entry into the State, but most especially, deportation decisions, clearly may have a very significant impact on those rights and interests.

18. In a series of cases – this is the second strand of the caselaw – our courts have grappled with how to reconcile the undoubted right of the State to control immigration on the one hand and, these constitutionally recognised rights and interests on the other. Again, any detailed discussion of these cases is beyond the scope of this paper but they include *AO and OJO v Minister for Justice* [2003] 1 IR 1; *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *IRM v Minister for Justice and Equality* [2018] IESC 14, [2018] 1 IR 417; *Gorry v Minister for Justice and Equality* [2020] IESC 55 and, most recently, *Odum v Minister for Justice and Equality* which I have mentioned already.

19. These cases are complex and do not lend themselves to convenient summary, not least because of the different fact patterns involved. *AO* and *Oguekwe* both involved married families, where the parents were non-citizens but where they had an Irish citizen child, and thus engaged Articles 41 and 42 (and the Supreme Court had no difficulty in finding that the applicants constituted an Article 41 family) as well as Article 40.3 (because the Irish born child enjoyed personal rights under that article). However, while the Supreme Court made it clear that these constitutional rights and interests had to be given weight by the Minister when considering whether to make a deportation order in respect of the non-citizen parents, they did not necessarily exclude the exercise of such power. The Minister could proceed to make a deportation order if he or she considered that there was a "*substantial reason associated with the common good*" which required such order and, in making that assessment, was entitled to have regard to the interests of the State in the maintenance of an effective and consistent immigration system (*Oguekwe*, per Denham J at para 85). *IRM* involved a

non-marital relationship where the Irish citizen partner was pregnant. There the court held that the Minister was obliged to take account of the fact of the pregnancy and of the fact that, on birth, the unborn child would acquire significant constitutional rights (including the right to the care and company of both parents) which would be affected by deportation. However, but it was not the case that these factors necessarily precluded deportation (at paras 108-113).

20. *Gorry* involved a different set of permutations again – a married couple, without children, where one spouse was an Irish citizen. A majority of the Supreme Court (per O' Donnell J) held that, while Article 41 was clearly engaged, neither it nor Article 40.3 gave rise to any entitlement, even presumptively, to cohabit in the State. But a decision affecting the lives of a married couple in a fundamental way "*demands close scrutiny and requires justification under the Constitution*" (para 25) and the Minister had to have regard to the right of the Irish citizen to reside in the State and to marry and found a family, the obligation on the State to guard the institution of marriage with special care and the fact that cohabitation is a natural incident of marriage and that deportation would prevent cohabitation in the State and might have the effect of making it burdensome or even impossible anywhere else (at para 75). [In dissent, McKechnie J agreed that Mr Gorry did not have any automatic right to cohabit with his spouse in Ireland but considered that the couple's decision to live in the State was one which they had the right to take and which the State guaranteed to protect under Article 41].

21. Finally, *Odum* involved a non-national who had had three children with another non-national. The children were born in the State and resided here but were not Irish citizens. His relationship with the mother of the children had terminated. The Minister ordered his deportation and the order was challenged on the basis (*inter alia*) that deportation would interfere with the constitutional rights of the children to the care and company of their parents, including the applicant. The Supreme Court (per O' Donnell CJ) considered the whole issue of the application of constitutional rights to non-citizens. In the area of immigration law, the distinction between citizens

and non-citizens was fundamental: an "*essential attribute of sovereignty, which enable states to adhere to international agreements, guarantee rights, and provide for the status of citizenship, is the ability to maintain borders , and to control entry to and removal from state*". The state was "*the vehicle for the protection of rights*". Sovereignty, territory and citizenship are essential elements of a state. Citizenship therefore remained an "*essential status*" and it "*necessarily follows that there will be permissible distinctions, particularly in relation to entry to and removal from the State, based upon that status*" (at para 25).

22. There are (the Chief Justice continued) a number of circumstances in which a non-citizen with a sufficient connection with the State is the same as a citizen and where, therefore, Article 40.1 entitles them to rely on the same rights as a citizen. The Preamble's reference to securing the dignity of the individual added force to that conclusion. The children in *Odum* would therefore be able to rely *"through the mechanism of Article 40.1 on the constitutional guarantees in respect of family life and education and rights to liberty, free speech and fair procedures and more*". However, they could not "*rely on their essential equality as human beings, to argue that they should be treated in the same way as Irish citizens children would in respect of an Irish citizen parent when it comes to attributes of citizenship, such as voting, the right to enter and remain in the State, and receiving the assistance of the State when abroad*." In those respects non-citizens were different to citizens and Article 40.1 did not require that they be treated in the same way (para 27).

23. Ultimately, while the children did have constitutional rights to the care and company of their parents which must be respected in the deportation decision, it would require "*exceptional considerations of particular weight*" to prevent the State from deporting a non-citizen whose presence in the State was unlawful, having regard to the fundamental interests of the State in controlling entry to and exit from the State (para 29). However, it might be that, on the facts of a particular case, an otherwise lawful deportation order might breach the constitutional rights of the children involved but that

would require something "*wholly exceptional*" factors, none of which were arose on the facts in *Odum*.

24. All these cases therefore involve considerations and circumstances which, in varying degrees, and on a case by case basis, potentially operate to *constrain* the exercise of the State's powers over immigration but which do not, in any circumstance, *a priori exclude* the exercise of such powers. A balancing exercise must be undertaken and how the balance to be struck will depend on many factors. But, as a matter of principle, the presence of a non-citizen in the State will always be fundamentally precarious.

The Third Strand

25. That brings us to the third strand in the caselaw which I have identified, namely those cases concerned with the acquisition and loss of citizenship itself. In light of the discussion above, the advantages of citizenship are obvious and it is perhaps unsurprising that unsuccessful applicants for naturalisation have increasingly turned to the courts.

26. This caselaw is, once again, extensive and – or so it seems to me - gives rise to acute issues about the nature of citizenship and the nature and scope of the Minister's decision-making power under section 15 of the 1956 Act. The discussion here merely seeks to identify some of those issues.

27. The starting point here is the decision of the High Court (Costello J) in *Pok Sun Shum v Ireland* [1986] ILRM 593. Rejecting claims by a disappointed applicant for naturalisation that the processes followed by the Minister had been flawed in that he had not been given a hearing and had not been told the Minister's reasons for refusing his application, Costello J emphasised the fundamentally discretionary character of the Minister's statutory function. Naturalisation was a benefit or privilege and no question of any entitlement to it arose, even where the applicant complied with the conditions in section 15(1): page 599. Similarly, in *Osheku v Ireland* [1986] IR 733 the High Court (Gannon J) characterised naturalisation as a privilege rather than a right: page 748.

28. *Mallak* took a different approach to the issue of whether the Minister should be required to give reasons for a refusal to grant naturalisation without (as I read the judgment of Fennelly J) disputing Costello J's characterisation of naturalisation as a "*privilege*" rather than a legal right. However, in adopting the approach that he did in *Mallak*, Fennelly J effectively assimilated naturalisation decisions under section 15 with administrative decisions generally, going so far as to suggest that, where a refusal was based on the discretion of the Minister (which, it will be recalled, is expressed in terms of an "*absolute discretion*"), the decision could be reviewed to the same extent as a refusal based on the Minister's view that one or other of the conditions in section 15(1) had not been complied with (para 52).

29. *AP* followed on *Mallak*. In *AP*, the Court quashed the decision of the Minister to refuse naturalisation on the basis that he was not satisfied that the applicant was "*of good character*" (a condition of naturalisation under section 15(1)(a)). Allowing that it was the Minister that must make the final decision on naturalisation (per Clarke CJ at para 67), the Court nonetheless held that the Minister had not adequately discharged his duty to provide reasons for his decision (which the Minister said was based on highly sensitive information concerning the applicant provided to the Minister by a foreign state) and directed the Minister to put in place measures to ensure that the entitlement of the applicant to reasons was impaired only to the minimum extent, involving an independent assessment of the information available to the Minister for the purpose of determining whether some version of that information could be provided to the applicant.

30. While, on one level, *Mallak* and *AP* were concerned only with the giving of reasons – a point emphasised by O' Donnell J in his judgment in *AP* – they undoubtedly have a wider significance in terms of the role of the courts in reviewing naturalisation decisions taken by the Minister under section 15. In his judgment, O' Donnell J observed that the origins of the naturalisation procedure, and the "*extremely broad discretion*" conferred on the Minister, "*lies in some fundamental conceptions of sovereignty. It is a basic attribute of an independent nation that it determines the persons entitled to its*

citizenship. A decision in relation to the conferral of citizenship not only confers the entire range of constitutional rights upon such a person, but also imposes obligations on the State, both internally in relation to the citizen, and externally in its relations with other states" (para 86). That, if I may so,, seems entirely correct. But one may wonder whether *Mallak* and *AP* are ultimately consistent with that conception of the naturalisation power. It is an aspect of sovereignty involving, it might be thought, a *political* rather than *legal* judgment. The Minister is empowered by statute to determine who should be admitted to the "*political community*" of the State ("*the People*") and it is clear that the Oireachtas intended that the Minister should have significant discretion in making that determination. The naturalisation function is one clearly entrusted to the executive, in the person of the Minister (and the power to grant and revoke citizenship has historically been seen as an executive power). It is not entrusted to the judiciary and, arguably, *Mallak* and *AP* trench too far on the Ministerial power.

31. Similar considerations arguably arise in relation to the *loss* of citizenship. Again, only the most superficial survey of the caselaw is possible. *Habte v Minister for Justice and Equality* [200] IECA 22, [2021] 3 IR 627, a decision of the Court of Appeal, concerned revocation under section 19(1)(a) and the applicant contended – unsuccessfully – that the revocation decision was so drastic and far-reaching in nature that it had been made by a judge. The same conclusion was reached by the Supreme Court in respect of revocation under section 19(1)(b) in *Damache v The Minister for Justice and Equality* [2020] IESC 63 & [2021] IESC 6, [2022] 1 IR 669. However, the Court went on to conclude that the process provided for in section 19 (involving a Ministerial decision taken after an "*inquiry as to the reasons for the revocation*" by a Committee of Inquiry appointed by the Minister and reporting to him or her) was invalid because it did not provide for an independent and impartial decision (the Minister was not independent and impartial in the Court's view and, while he or she had to have regard to the Committee's report, was not bound by it).

32. In reaching that conclusion, the Court attached substantial weight to the significance of citizenship and the benefits of it and the adverse consequences that would follow for a naturalised citizen if their citizenship was revoked (paras 28-30 and 117 & 118). But it might be said that, in holding that the Minister had to be excluded from the revocation process, the Court did not pay sufficient weight to the fact that the revocation power was an important aspect of the sovereignty of the State, engaging significant State (and community) interests and historically one exercised by the executive and explicitly conferred on the Minster by the Oireachtas. Again, that appears to reflect an understanding that the decision to revoke is, at least in part, political in character (though one which has important legal consequences). That, it might be thought, is particularly true of revocation under section 19(2)(b) which involves an assessment of whether the naturalised citizen has "*failed in his duty of fidelity to the nation and loyalty to the State*", duties which Article 9.3 of the Constitution expressly characterises as "*political duties*". The effect of *Damache* is that such revocation decisions must, henceforth, be taken by a quasi-judicial body, an outcome that might be thought to give rise to separation of powers questions.[6]

33. The Oireachtas has yet to respond to *Damache* and, effectively, the revocation machinery in section 19 is currently incapable of operation. That is rather surprising, given that more than 2½ years have elapsed since the decision in *Damache*.

Conclusions

34. The analysis I have offered of the caselaw involving citizenship is no doubt simplistic but I hope it may have some utility in imposing some coherence on it.

[6] See in this regard Casey "Citizenship Stripping, Fair Procedures, and the Separation of Powers:A Critical Comment on Damache v Minister for Justice" (2021) 84 *MLR* 1399. See also the discussion of *Damache* by McMahon, "Revoking a naturalisation certificate and the short waking life of Section 19" (2021) 26 *The Bar Review* 14.

35. As I have said, the issues arising in the first strand are, I think, largely settled. That is true – though perhaps not to precisely the same extent – as regards the issues raised in the second strand and doubtless litigation will continue to arise in which it is said that the Minister has wrongly balanced the interests involved. As regards the third strand – acquisition and loss of citizenship – in my view the issues that arise here cannot be regarded as settled. Fundamental questions remain as to the nature of citizenship and whether it is essentially political or legal in character and how, accordingly, decisions to grant (or revoke) citizenship ought to be characterised and how they should be reviewed by the courts. Given the significant practical benefits that citizenship confers, it can be anticipated that the tide of litigation in this area will continue unabated.