THE COURT OF APPEAL
CIVIL

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Record No. 2018/117
High Court Record No. 2015/184 JR

Donnelly J.
Ní Raifeartaigh J.
Murray J.

BETWEEN

UM (A MINOR SUING BY HIS FATHER AND NEXT FRIEND MM)

APPLICANT/APPELLANT

- AND -

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE AND PASSPORT APPEALS OFFICER DAVID BARRY

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 11th day of June 2020

Background

1. The effect of s.6A of the Irish Nationality and Citizenship Act 1956 ('the 1956 Act'), as amended, is that certain persons born on the island of Ireland are not entitled to Irish citizenship unless one of their parents has been resident in the island for specified periods of time. In this case the applicant, UM, was born in the State at a time when his father and next friend, MM, had been physically present in the jurisdiction for the period required by the section. That presence was based on a declaration of refugee status which has since been revoked. The reason the declaration was revoked was that it had been given following the provision by MM of information which was false and misleading in a material particular. Stewart J. ([2017] IEHC 741) held that residence procured in this way could not be taken into account in reckoning presence in the State for the purposes of the derivative citizenship provided for in s.6A. This is an appeal against that decision.

2. MM is an Afghan national. He arrived in the State on 22 April 2005 and applied for refugee status for reasons of religion and political opinion. He claimed that he was at risk of persecution in Afghanistan because he had been born in Russia and because he was not a Muslim. He said that in 1998 his father had been killed by a Mujahedin Commander, who had for a time taken control of the area in which they lived and had been responsible for extorting money from his family and burning down their business. MM claimed at the time of his application that he had lived in Ghazni, Afghanistan for the previous five years and that during the winter of 2004/2005 he had been shown a newspaper article by his aunt's husband which contained an announcement for his arrest. He said that as a result he decided to leave the country. In the course of his application he stated that he had never applied for asylum before.

3. MM's application was refused in the first instance but was subsequently granted following an appeal to the Refugee Appeal Tribunal. He was advised of the decision on 14 July 2006. On 18 July 2006 MM was granted a 'Stamp 4' permission to remain in the State. That permission was thereafter renewed from time to time.

4. MM married UM's mother, MJ (also an Afghan national) in Peshawar, Pakistan on 15 February 2007. On 26 June 2012, MJ was granted permission to enter and reside in the State with MM on foot of a family reunification application. In September 2012 MM left Ireland and returned to Afghanistan.

5. On 19 October 2012 MM's permission to be in the State lapsed, having been renewed on seven occasions since it was first granted on July 18 2006. He was still out of the jurisdiction at that time. MM travelled back to Ireland on 5 November 2012 with MJ. On that date, MM was stopped by Immigration Officials in Dublin Airport. It emerged in the course of questioning that MM had been in Afghanistan, having travelled there on a single visit travel document issued by the Afghan embassy in Tehran. Thereafter the Department of Justice, Equality and Law Reform ('DJELR') learned that MM's fingerprints matched those of a "Habibullah Hamidi" who had claimed asylum in the United Kingdom on 4 April 2002. That application had been refused by the relevant authorities in that jurisdiction on 23 September 2004 - at which point MM appeared to have been still in the United Kingdom. Following the exhaustion of his appeal rights in respect of that decision "Mr. Hamidi" failed to report to the UK authorities as required and was recorded as an absconder by the UK Border Agency.

6. On 27 February 2013 the Irish Naturalisation and Immigration Service, an agency of DJELR, wrote to MM advising him that Minister of Justice, Equality and Law Reform ('MJELR) proposed to revoke MM's declaration as a refugee. That proposal was based on two provisions of the Refugee Act 1996 as amended ('the 1996 Act') – s.21(1)(a) (arising where the refugee has voluntarily re-availed himself or herself of the protection of the country of his or her nationality) and s.21(1)(h) (arising where the declaration has been given on the basis of information which was false or misleading in a material particular). The letter also purported to base the proposal upon s.11(2)(b) of S.I. 518 of 2006. That provision refers to revocation of a declaration given to a person who misrepresented or omitted facts that were decisive for the granting of the declaration.

7. The letter identified amongst the reasons for the proposed revocation that MM had travelled to Afghanistan and stayed there for two months, that he had falsely stated in his original asylum application that he had left his country in January 2004 and had never applied for asylum in any other country before, and that he had claimed that in 2004/2005 he was handed a newspaper by his aunt's husband which prompted his departure from Afghanistan (he having seemingly been in the United Kingdom at that point). It recorded that he applied for asylum in the United Kingdom on 4 October 2002, that that application was refused, and that he had provided a different name and date of birth to the authorities in that jurisdiction. MM was advised that he could make

representations in writing to MJELR within fifteen days. No such representations were made by him or on his behalf.

8. On 15 March 2013 MM's permission to be in the State was renewed on a temporary basis. UM was born in Galway on 1 June 2013.

9. On 10 June 2013, DJELR advised MM that MJELR had decided in accordance with s.21 of the 1996 Act (as amended) to revoke MM's declaration as a refugee '*with effect from 31/08/2013*'. This letter advised that the Minister was '*invoking Section 21(1)(a) and (h)*'. It recorded the same essential facts as grounding the determination as were set forth in the letter of 27 February. On 13 June, MM's Stamp 4 permission to remain was again renewed, expiring on 15 September 2013.

10. On 4 February 2014, an application was made on behalf of UM for an Irish passport. On 11 June 2014, the first respondent ('the Minister') informed UM that he intended to refuse his application pursuant to s.12(1)(a) of the Passports Act 2008 because the Minister was not satisfied that UM was an Irish citizen. This was based upon the revocation of MM's declaration of refugee status. No representations having been received in response to that letter, the application was refused by letter dated 25 July 2014. MM says that he and his wife were unaware of this refusal, and a review of that decision was requested by letter dated 15 October 2014. The Minister conducted a review, affirming the decision by letter dated 17 November 2014. This decision was affirmed on appeal by the second named respondent on 21 January 2015.

11. UM's mother, MJ, was granted a declaration of refugee status on 24 February 2015. A declaration of refugee status issued in respect of UM on the same day. UM was included in MJ's application for refugee status on the express basis that this was without prejudice to his submission that he is an Irish citizen. Shortly before the hearing of the case in the High Court, UM's younger sister was issued with an Irish passport and MM was granted permission to remain in the State following an application for family reunification. That application was based upon MJ's refugee status.

The claim and the decision of the High Court

12. Section 6(1) of the Passports Act 2008 ('the 2008 Act') provides that a person who is an Irish citizen is, subject to that Act, thereby entitled to be issued with a passport, and may apply on that behalf to the Minister in accordance with that section. Section 7(1)(a) of the 2008 Act states that before issuing a passport to a person, the Minister '*shall be satisfied*' that the person is an Irish citizen. Section 12(1)(a) is as follows :

> *'The Minister shall refuse to issue a passport to a person if –*
>
> *(a) The Minister is not satisfied that the person is an Irish citizen.'*

13. In these proceedings, UM seeks orders of *certiorari* quashing both the decision of the Minister of 17 November 2014 refusing his application for an Irish passport, and the decision of the second named respondent of 21 January 2015 refusing his appeal from the Minister's determination. A declaration is also sought that UM is an Irish citizen. There is

no challenge brought to the decision of the Minister of 25 July 2014. The critical claim underlying the relief sought is the contention that the respondents erred in deciding that UM was not an Irish citizen in circumstances in which MM had resided in the State for an aggregate of more than three years out of the four immediately preceding his birth. Leave to seek that relief by way of Judicial Review was granted on 1 December 2017.

14. The affidavit grounding the proceedings was sworn by MM. There, he averred that he left Ireland in September 2012 to visit his mother in Afghanistan, who died shortly afterwards. He accepts that he failed to disclose in his application for asylum in this jurisdiction that he had previously applied for asylum in the United Kingdom. He says that this was because he feared that if he disclosed this information he would be returned to the UK and deported to Afghanistan. He says that his application in Ireland was the same as that made in the UK, but that he had changed '*certain dates*' to conceal the fact that he had been in the UK.

15. The replying affidavits delivered on behalf of the respondents detailed the revocation process, and averred to the basis for the decision, as well as recording the opinion that trust in the Irish passport would be undermined by the issue of a passport to *UM in the circumstances. Mr. Walzer of the Department of Foreign Affairs averred that 'the 'residence' of the Applicant's father in the State was not regular and bona fides but was obtained on a false and/or fraudulent basis*'. Mr. Cremins of DJELR similarly referred to MM's permission to reside as being '*obtained on a false and/or fraudulent basis*'. Mr. Carroll of INIS averred that MM:

> '*… obtained residency in the State on the 14th July 2006 on a false and/or fraudulent basis and continued to request permission to remain in the State on the same basis for almost six years.'*

16. None of these assertions were denied, and none of the deponents were cross-examined in respect of their affidavits.

17. The case was heard at the same time as another application for Judicial Review raising a similar issue (*NA v. Minister for Justice, Equality and Law Reform*). A single judgment was delivered in both proceedings. The essential basis on which the High Court Judge refused the relief sought is summarised at paras. 46 and 47 of her judgment. There she expressed the view that in order to be entitled to acquire Irish citizenship under the Irish Nationality and Citizenship Act 1956 (as amended), the residence upon which such an application is based must be lawful in the sense of being both *bona fide* and regular before it can give rise to such derivative citizenship rights. Thus, she held that residence that has been obtained or was based upon fraud, misrepresentation or deceit could not amount to residence within the meaning of Part 2 of the Irish Nationality and Citizenship Act 1956 (as amended). She emphasised that citizenship is a privilege, which is bestowed on behalf of the people upon non-nationals who are not entitled to citizenship by birth. The acquisition of that citizenship must, she accordingly held, be lawful and *bona fide*. She said that she could not accept the proposition that the acquisition of

citizenship that has been acquired effectively through the deceit of UM's father could have the effect of conferring citizenship by birth.

18. At para. 47 of her judgment, the trial Judge explained:

> *'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. Although the minor applicants concerned in these proceedings are themselves not the perpetrators of any wrongdoing, nevertheless the unfortunate consequence of the unlawful actions of their respective fathers is that each of them is not entitled to Irish citizenship and/or an Irish passport on foot of their fathers unlawfully obtained declaration of refugee status.'*

UM's case

19. UM's case is based upon a close reading, and strict application, of s.6B(4)(a) of the 1956 Act. To put that provision in context, s.6(1) of that Act provides that, subject to s.6A, '*every person born in the island of Ireland is entitled to be an Irish citizen*'. Section 6(6) has the effect that s.6(1) does not apply to a person born on or after the commencement of the Irish Nationality and Citizenship Act 2004 where *inter alia* neither of that person's parents was at the time of the person's birth an Irish citizen or entitled to be an Irish citizen, a British citizen, a person entitled to reside in the State without any restriction on his or her period of residence, or a person entitled to reside in Northern Ireland without any restriction on his or her period of residence.

20. Section 6A(1) is in the following terms:

> *'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 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.'*

21. UM's case starts from the proposition that he falls within the terms of this provision because in the four-year period prior to his birth, MM was physically present and (UM says) '*resident*' in the State for a period of not less than three years.

22. Section 6B makes provision over the course of six subsections for the proper calculation of reckonable residence for the purposes of s.6A(1) in a variety of different circumstances. Section 6B(4) specifically addresses certain types of residence of which account may be *not* taken in calculating the period of residence under s.6A. Three categories of residence are so referenced. These include residence in accordance with permission for the purposes of engaging in a course of study (para. (b)) and permission to remain granted to an asylum seeker pending determination of their application for protection (para. (c)).

23. The provision relevant to these proceedings is s.6B(4)(a). It is as follows:

'A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if –

(a) It is in contravention of section 5(1) of the Act of 2004 …'

24. Central to UM's submission is the proposition that this provision exhaustively defines the circumstances in which the unlawful presence in the State of a parent falls to be excluded from the periods of residence used in the determination of their child's entitlement under s.6A(1). From that premise, UM proceeds to contend that MM's residence was not at the relevant time '*in contravention of*' s.5(1) of the Immigration Act 2004 ('the 2004 Act').

25. At the times relevant to these proceedings, 5(1) and (2) of the 2004 Act stated:

'(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given to him or her after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.'

26. UM says that at all relevant times MM had a permission granted to him by an immigration officer pursuant to s.4 of the Act of 2004. Therefore, it is contended, he was never in the State other than '*in accordance*' with such a permission.

27. Furthermore, he says that s.5(1) did not apply to MM. Thus, s.5(3) provides:

'This section does not apply to –

(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force.'

28. This section reflected the fact that the holder of a declaration within the meaning of the Refugee Act 1996 was, by reason of s.3(2)(a) of that Act, entitled to reside in and travel to and from the State without any further permission. MM, UM contends, was at all times the '*holder*' of such a declaration, and it was at the relevant times '*in force*'. It is said that the fact that the declaration was subsequently revoked pursuant to s.26(1)(h) of the Refugee Act 1996 does not render it other than in force at the relevant time, because – UM contends – such a revocation operates prospectively, and not so as to render the declaration invalid *ab initio*.

29. Thus, UM stresses, there is no ambiguity in the statutory language. MM was at the relevant times resident in the State on foot of a permission granted under the 2004 Act, he held at the relevant times a declaration of refugee status, and therefore his residence does not fall out of reckoning pursuant to s.6B(4). The construction urged by the Minister, UM says, requires the implication of words into the statute which are not there. The scheme and words of s.6A and s.6B are, he contends, clear and unambiguous and must be given their plain and ordinary meaning, citing *Kadri v. Governor of Wheatfield*

Prison [2012] IESC 27. Therefore, he argues, there is no basis for denying UM his asserted entitlement to an Irish passport.

30. In support of this contention, UM points to other features and - if construed as the Minister contends – effects, of the legislative scheme. It cannot be assumed, he says, that the Oireachtas would provide in legislation that Irish citizens by birth who are the children of refugees must go through their lives worrying that their citizenship might be revoked on account of their parent's actions, while citizens by birth with Irish parents can rest assured that this is not possible in their case. His submissions pose the question whether, if UM had been 25 years old when his father's declaration of refugee status was revoked, the Minister could then refuse him a passport. The submissions delivered on his behalf point to the fact that in the United Kingdom the courts have agreed with the position ultimately adopted by the executive in that jurisdiction that nullification of citizenship is appropriate only where the person in question did not themselves have the characteristics required for citizenship, but who had fraudulently applied using the identity of a real person who did have those characteristics. In that jurisdiction, it has been held that other cases of misrepresentation or fraud fall to be dealt with by means of the statutory process for deprivation of citizenship under the relevant legislation there (*Kaziu, Bakijasi and Hysaj v. Secretary of State for the Home Department* [[2017] UKSC 82). That legislation, it is noted, did not have the effect that citizenship should be seen as having never been granted.

31. In a related vein UM's counsel say that the contention advanced by the Minister, if well placed, would result in an incongruity because it would mean that providing false information to obtain refugee status is seen as worse than providing false information to obtain Irish citizenship. Revocation of citizenship obtained by naturalisation does not affect the citizenship of others derived from the citizenship so revoked, as the 1956 Act provides (s.18(1)) that a person to whom a certificate of naturalisation is granted shall, from the date of issue and for as long as the certificate remains unrevoked, be an Irish citizen.

32. I will address these various arguments of supporting policy in due course. However, at the core of the case lie a number of issues arising from a single question: does the 1956 Act, as amended, and properly construed have the effect that a residence status conferred by the State on a parent on the basis of information that was false and misleading falls to be included or excluded in the calculation of the period required to confer an entitlement to citizenship? To answer that question it is necessary to place s.6A(1) in context, and to examine the meaning of the term '*residence*' as it is understood in immigration and citizenship law.

Residence and the 1956 Act

33. It goes without saying that where the term 'residence' (or common variations thereon such as '*ordinary residence*' or 'habitual residence') is used in a statute, it should be interpreted by reference to the ordinary meaning of the words used viewed in light of the statute as a whole (see *Chubb European Group SA v. Health Insurance Authority* [2020] IECA 91 at para. 81). It is also clear that for the purposes of many statutory provisions,

unlawful residence is not '*residence*' at all. As Lord Scarman said in *R (Shah) v. Barnet LBC* [1983] 2 AC 309, at p. 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 ….'*. This, of course, is merely a general proposition – a specific statutory context may compel a different outcome. So, a person unlawfully resident in the State may nonetheless be ordinarily resident for the purposes of revenue legislation (see Re Abdul Manan [1971] 1 WLR 859, 861) or indeed for the purposes of private international law rules based on residence (*Robertson v. Governor of Dochas Centre* [2011] IEHC 24 at para. 12). The critical consideration is that '*residence*' may have different meanings in different legislative contexts, and that the structure, text and purpose of the legislation in which the phrase is used presents the initial point of reference for any analysis of the specific meaning of the term.

34. When the 1956 Act was enacted the concept of residence intruded into the acquisition of citizenship only within the process of naturalisation, governed in turn by s.15 of that Act. Section 6(1) of the 1956 Act originally provided that every person born on the island of Ireland was an Irish citizen from birth, s.7 providing a process enabling persons born in Northern Ireland after the 6 December 1922 to declare themselves as such. Residence was, however, a precondition to the grant of naturalisation: s.15(1)(c) identified as a requirement of such a grant that the applicant had a period of one year's continuous residence in the State immediately before the date of his application and, during the eight years immediately preceding that period, a total residence in the State amounting to four years. As I explain shortly I do not believe that there can be any doubt but that 'residence' as used in s.15(1)(c) - at least until the enactment of the Irish Nationality and Citizenship Act 2001 ('the 2001 Act') - referred to lawful residence, and that a residence based upon or procured by intentional misrepresentation did not fall within the term.

35. In November 2002, the 2001 Act commenced. It inserted into the Act of 1956 a new s.16A which dealt with the calculation of periods of residence for the purpose of naturalisation. The provision excluded certain periods from reckoning of the residence requirement in s.15(1)(c) of the 1956 Act and, in particular, removed from the calculation of residence periods in respect of which a non-national was required to have the permission of the Minister to remain in the State under the Aliens Act 1935 but did not have such permission, and periods in respect of which the person had the permission of the Minister to remain in the State for the purposes of study or while seeking to be recognised as a refugee under the Refugee Act 1996.

36. The law governing the acquisition of citizenship by birth first incorporated a requirement of parental residence in the State in 2004. Thus, following the 27th Amendment to the Constitution in 2004, Article 9.1.2 and Article 9.2.1 provide (respectively):

> *'The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.*
>
> *…*

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 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.'

37. These amendments were implemented by the Irish Nationality and Citizenship Act 2004. It replaced s.6 of the Act of 1956 with a series of new provisions. As I have noted earlier, s.6(1) now states that subject to s.6A, every person born in the island of Ireland is entitled to be an Irish citizen, and s.6A(1) limits the entitlement to citizenship to certain persons whose parent has, during the period of 4 years immediately preceding the person's birth, been 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.

38. Section 6A(2) excludes a range of persons from s.6A(1) (which is, of course, itself a limitation). These include persons born before the commencement of the Irish Nationality and Citizenship Act 2004, persons born in the island of Ireland at least one of whose parents was at the time of the person's birth an Irish citizen or entitled to be an Irish citizen, and a person born in the island at least one of whose parents was at the time of the person's birth entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Irish Nationality and Citizenship Act 2004).

39. Section 6B(4) reflects the terms of s.16A as introduced by the Act of 2001 by, in particular, excluding from the calculation of '*residence*' periods spent without a required permission under the extant immigration legislation. At the same time the original s.16A was replaced with a new text identical to the new s.6B(4). The effect is that the residence condition for an application for naturalisation, and the residence condition for acquisition of citizenship through a parent, are subject to precisely the same exclusions. In particular, both expressly exclude from reckoning residence "*in contravention of*" s.5(1) of the 2004 Act.

The case law

40. While ultimately dependant on the specific legislative context in which the issue arises, the general principles applied in determining the meaning of '*residence*' or (insofar as there is any material difference) '*ordinary residence*', are clear. They have been recently summarised in *Chubb Insurance SA v. Health Insurance Authority* at para. 98. Residence cannot be simply equated to physical presence. The critical distinction between the two is defined by the fact that '*residence*' is directed to whether the subject has a settled and usual place of abode in the place in question. To that end, his or her residence there must be neither casual nor uncertain. In determining whether the subject has established such a residence, the focus is properly on the question of whether the person has adopted an abode in the jurisdiction for settled purposes and as part of the regular order of his or her life for the time being, whether of short or long duration. That purpose, while settled, may be for a limited period, it may be a limited purpose and it may be contingent. All that is required is that there be a sufficient degree of continuity to

be properly described as settled. As I have said, these general principles are dependent on the specific legislative context which may by its terms or necessary implication modify or exclude some or all of them.

41. Many of these principles derive from the leading decision in this jurisdiction on the issue, that of the Supreme Court in *The State (Goertz) v. Minister for Justice* [1948] IR 45. There, the Court addressed the meaning of the term '*ordinary residence*' as it appeared in s.s.5(5)(c) of the Aliens Act 1935, a provision which conferred upon an alien so resident for five years the entitlement to three months' notice of deportation.

42. In *Goertz,* the prosecutor had arrived unlawfully in the State as a member of the German armed forces and to assist that country in its war effort. That was in May 1940. He was subsequently interned for five years, following which an order was made for his deportation. The Court held he was not '*ordinarily resident*' in the State for the purposes of. s.5(5)(c). Maguire CJ. (with whom Murnaghan, Geoghegan and O'Byrne JJ. agreed) said that these words should be interpreted according to their ordinary meaning and with the aid of such light as is thrown upon them by the general intention of the legislation in which they occur and with reference to the facts of a particular case (at p.50). The purpose of the facility for notice prior to deportation was to allow time for a person who had '*come to the country* ***legally***' and was '*taking part in the normal life of the community*' and upon whom it would be a hardship to be forced to summarily uproot himself (at p.56) (emphasis added). UM was not resident in the State in that sense. To construe the phrase so that mere physical presence in the State would suffice would produce an absurd result.

43. Similarly, Murnaghan J. emphasised (at p.57) the need to look at the nature of the residence in a manner that clearly out-ruled an unlawful presence:

> *'A person who came here and who remained in hiding, or who lived here under various disguises, could not reasonably be held to be ordinarily resident, although physically in the country. The phrase should, I think refer to the character, as well as to the duration, of the residence.'*

44. *Goertz* has been consistently interpreted in the context of immigration legislation as demanding the conclusion that '*residence*' or '*ordinary residence*' when used in that legislation refers exclusively to residence obtained lawfully, with (in particular) residence that has been procured by fraud or misrepresentation excluded from that calculation. That is, in my view, the inevitable consequence of the majority decision in the case.

45. Thus, in *Robertson v. The Governor of An Dochas Centre* the applicant sought to avail of a statutory entitlement to notice of deportation as provided for by s.3(9)(b) of the Immigration Act 1999, a provision which (as with the section of the Aliens Act considered in Goertz) operated only where the recipient of the notice had been '*ordinarily resident*' in the State for five years. The applicant was given permission by the Minister to reside in the State following her marriage to a Latvian national, she having been granted an earlier permission to enter as a student. At the time of that earlier entry to the State she had

failed to disclose that she had been previously deported from the State, having made an application for asylum under an alias.

46. Hogan J. based his conclusion that the applicant there did not have the required residence for the purposes of the legislative entitlement to notice of a deportation order on two closely related grounds. First, he held that the applicant, by reason of her misrepresentation, was not ordinarily resident within the State. Having reviewed *Goertz*, he explained (at para. 17):

> *'If the applicant's residence in Ireland from 2004 onwards was unlawful, she cannot on that account be said to have established an ordinary residence in the State.'*

47. Noting that Ms. Robertson had received a permission from the Minister to reside in the State for the purposes of s.5 of the Act of 2004, stressing that that had not been set aside or declared invalid, and observing that generally speaking a person who was the beneficiary of such a permission could be said to be ordinarily resident in the State, Hogan J. adopted the position that the requirement that residence not be based on deception as determined in *Goertz* cut through any necessity for that permission to be formally impugned or declared invalid. The residence was enabled by, and permission obtained as a consequence of deception, so there was no residence, irrespective of whether the permission was formally valid and in effect. He explained (at para. 20):

> *'Her failure to make such a disclosure is tantamount to entering the State through deception and disguise. As Murnaghan J. pointed out in Goertz, the concept of "ordinary residence" also involves an assessment of the character of that residence. Moreover, as Black J. noted in that case, the presumption against surplusage means that the word "ordinarily" was "intended to have, and must be given, some effective meaning." To my mind, in this statutory context, the phrase "ordinary residence" connotes a residency which is lawful, regular and bona fide. As Goertz itself illustrates, mere physical residence in the State is not in itself enough, since a residence which is irregular, covert or unlawful is not an "ordinary residence" in this sense.'*

48. It might in passing be noted that Black J. delivered a separate judgment in *Goertz*: in *Quinn v. Waterford Corporation* [1990] 2 IR 507 McCarthy J. appears to have adopted the view that, in fact, the addition of the adverb 'ordinarily' was not significant. He described the Court in *Goertz*, as deciding that '*ordinary residence*' (at p.511):

> *'.. involved no more than that the residence was not casual and uncertain, the addition of the word 'ordinarily' to 'resident' making little difference ...'*

49. The second ground for Hogan J.'s decision was based upon a broader principle. Ms. Robertson was seeking to obtain a benefit by reason of her own wrongdoing. The law generally leans against such an outcome, and he adopted the view that the provision should be interpreted to reflect that principle. Hogan J. thus explained (at para. 21):

'It should also be recalled that legislation must 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 by their own wrong. If Ms. Robertson's contention were to be accepted, it would mean that this court would have to avert its eyes to this acknowledged deception and deceit and that she would thereby be allowed to claim the benefit of a statutory entitlement to which she is not justly entitled.'

50. The rationale in *Robertson* was applied by Hogan J. in *Toidze v. Governor of Cloverhill Prison* [2011] IEHC 395 in holding that the applicant in those proceedings was similarly not entitled to the notice specified in s.3(9)(b) of the Immigration Act 1999 prior to deportation. The applicant had entered the State and unsuccessfully claimed asylum under both his actual name and an alias, being refused a declaration of refugee status. A deportation order having been made, he failed to attend as required for that purpose and was classified as an evader. After leaving the State, he returned and remained here unlawfully, having in the meantime married and had two children in the State. It was decided that his residence, being unlawful, was neither regular nor *bona fide*: to hold otherwise, Hogan J. said, would '*require this Court to ignore the fact that the applicant had engaged in a fundamental deceit by providing an alias*' to the relevant authorities (para. 10).

51. Finally, it is important, if unsurprising, that the interpretation of the term *ordinary residence* as it appears in immigration legislation has been readily applied to the construction of the 1956 Act and, in particular, to the meaning of '*residence*' as it appears in s.15(1)(c) as a condition to naturalisation. In *Simion v. Minister for Justice, Equality and Law Reform* [2005] IEHC 298 MacMenamin J. held that a period spent in the State while making and awaiting a decision on an application for asylum did not have the character of '*residence*' for the purposes of that provision. The conclusion was based inter alia on the analysis in *Goertz*, and a decision of Peart J. (*Sofroni v. Minister for Justice Equality and Law Reform*, Unreported, High Court, 9th July 2004) in which the same view was reached in respect of an asylum seeker's presence in the State for the purposes of notification prior to deportation under the Immigration Act 1999. In *Roberts and Muresan v. Minister for Justice, Equality and Law Reform* [2004] IEHC 348, Peart J. had reached the same conclusion in construing the 1956 legislation. That reflects the position adopted by the English courts: in *R. v. Home Secretary ex parte Margueritte* [1983] QB 180, the reference to *'ordinary residence'* in s.5A(3) of the British Nationality Act 1948 was held to exclude an unlawful residence partly by reference to case law there similarly construing the phrase as it appeared in immigration legislation, and partly because it would involve granting a benefit to a person who had breached that state's immigration laws.

52. In *Rodis v. Minister for Justice, Equality and Law Reform* [2016] IEHC 360, Humphreys J. was presented with the question of whether the presence in the State of a member of the staff of a diplomatic mission constituted '*residence*' for the purposes of s.15(1)(c). In deciding that it did, Humphreys J. expressed the view that having regard to the

introduction of s.16A of the 1956 Act, decisions construing '*residence*' prior to that were of limited relevance. There, the respondents had relied upon the decisions in *Sofroni*, *Roberts and Muresan* and *Simion*, to contend, by analogy, that the presence in the State of a member of the staff of a diplomatic mission was for a limited and specific purpose and thus outside the scope of '*residence'*. Rejecting this argument Humphreys J. said (at para. 50) '[*b]y expressly setting out types of persons in the State to which the concept of 'residence' does not apply, the Oireachtas has essentially superseded the jurisprudence on what does and does not count as such residence*'. Nonetheless, *Goertz* was clearly viewed by the Court as relevant to an understanding of the essential features of '*residence*' as that term is used in the 1956 Act, and it was referred to in analysing the essential features of such a presence. *Rodis* was not appealed by the respondents and in my view it presents a clear and convincing consideration of the relevant provisions.

Expressio unis exclusio alterius

53. The analysis in *Rodis* is important in addressing the first question that seems to me to arise in construing s.6A(1). If the approach adopted by Hogan J. in *Robertson* is applied to that provision in the manner suggested by the respondents and, on one view, accepted by the trial Judge, it is unnecessary to examine whether MM acted in contravention of s.5(1) of the 2004 Act or indeed to address whether the declaration of refugee status granted to him was '*in force*'. Instead, the issue can be resolved by simply positing that MM's residence was obtained by misrepresentation and therefore outside the definition of 'residence' in the first place.

54. I do not believe that, so stated, this approach to the provisions can be correct. The legislature has put in place a specific statutory structure addressing the circumstances in which residence can and cannot be taken into account for the purposes of the calculation of the relevant period. These include presence in the jurisdiction other than in accordance with a permission obtained under s.5 of the 2004 Act. The Oireachtas having thus defined the zone within which physical presence characterised by illegality should operate to preclude reckonable residence from accruing, I do not see how it can be said to have, at the same time, left room for the implication of any other exclusion on the ground of illegality. Were the provision to be construed so that there was a residual category of excluded presence arising where presence in the State was unlawful, s.6B(4)(a) would be surplusage, as all presence in breach of s.5 of the Immigration Act 2004 is itself unlawful. 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. The Courts must strive to avoid an interpretation of legislation that renders provisions of the Act in question otiose (see *Cork County Council v. Whillock* [1993] 1 IR 231); '*every word or phrase, if possible, should be given effect to*' (*Dunnes Stores v. Revenue Commissioners* [2019] IESC 50 at para. 66).

55. The usual application of the *maxim expressio unius* would support this conclusion. In *Rodis* Humphreys J. said (at para. 30) :

` *'It is clear that these applicants were not present in the State in contravention of the 2004 Act because that Act does not apply to them (see s. 2(1) of the 2004 Act). Neither were they present in the State for the purposes of education or study or while awaiting a refugee decision. Thus it is entirely clear that they fell outside of the terms of s. 16A, which is the express statement by the Oireachtas of the types of presence in the State which do not constitute 'residence' for the purposes of s. 15. The principle of expressio unius clearly has a significant relevance here.'*

56. Applying the same analysis, it appears to me that the proposition that there is now a general and implicit requirement that presence be '*lawful*' overhanging the definition of '*residence*' in s.6A(1) cannot be sustained having regard to the decision of the Oireachtas to expressly enumerate periods which will be excluded from reckoning for that purpose and, in particular, to include within that exclusion a specific category of unlawful presence.

The proper construction of s.5 of the 2004 Act

57. Thus, in this case, the issue reduces itself to the point correctly identified by UM: the only basis on which MM's physical presence in the State can be excluded from consideration for the purposes of s.6A(1) is if it is '*in contravention*' of s.5(1) of the 2004 Act. The core question is what this means.

58. This can be refined further. First, is a permission to remain in the State obtained on the basis of false information a '*permission*' as that term is used in s.5(1), and second is a declaration of refugee status which has been revoked as having been obtained on the same basis, '*in force*' in the period prior to revocation? If the answer to both of these is in the negative, MM was at the relevant time in contravention of the provision.

59. In approaching this exercise in interpretation of those words as they are used in the statute, the principles are clear. They have been summarised recently by McKechnie J. in *Dunnes Stores v. Revenue Commissioners* as follows (at para. 63) :

> *'… 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.'*

60. In this case, the context to which McKechnie J. referred to in this passage is important : if UM is correct the consequence is that the Oireachtas has taken a definition of residence clearly applied in the context of immigration law for over sixty years, thereafter readily applied to citizenship legislation, and stripped that definition of an essential feature – that it not be obtained by deceit and misrepresentation – while at the same time continuing to use in the relevant provisions that very same term.

61. Moreover, the claim that there had been a consequent re-defining of the word in this fundamental respect, if correct, would produce some extraordinary consequences. It would mean that the child of a parent who was in the State for the requisite period without any permission under s.5(1) of the Act of 2004 could not claim citizenship, while the child of a parent who had obtained permission on a false and fraudulent basis, could. The child of an applicant for refugee status who makes an honest application for asylum and remains in the jurisdiction after that application is refused would, on this construct, have no right to claim Irish nationality, while the child of a person who makes a fraudulent application on the basis of which asylum is granted and is present for the same period, would have such an entitlement.

62. When the fact that s.6B(4) and s.16A are identically worded is taken into account, the position becomes even more anomalous. These sections must mean the same thing. It must follow that if the applicant is correct in the construction urged of the former provision, it means that MM could seek naturalisation (as in fact he initially sought to do) on the basis of residence even though that residence had been obtained by the provision of false and misleading information. If he can do this, it means that the Oireachtas has not merely removed the pre-existing requirement that residence not be obtained by fraud or deception, it has decided to enable a person to rely upon their own wrongdoing to ground the entitlement to apply for a benefit. As Henchy J. explained in *Minister for Industry and Commerce v. Hales* [1967] IR 50 at 76:

> *'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended.'*

63. If the word '*permission*' and phrase '*in force*' inevitably have in their natural and ordinary sense the meaning contended for by UM, and if that meaning is not displaced by the context in which they appear, then clearly effect must be given to them. However, in resolving both of these questions, account must be taken of the consequences to which I have referred, and the resulting issue of whether it can be plausibly said that the Oireachtas intended in the language it used, to bring them about.

Was the declaration of refugee status 'in force'?

64. The power to revoke a declaration of refugee status is conferred by s.21(1) of the Refugee Act 1996 . The provision enables the revocation of such a declaration on eight

grounds. Six of these arise can by definition arise only from events that post-date the grant of the declaration of refugee status such as voluntary re-availing of the protection of country of nationality (para. (a)), voluntary re-acquisition of nationality (para. (b)), acquisition of a new nationality and enjoying the protection of that country (para. (c)), voluntarily re-establishing in the country the refugee has left (para. (d)), becoming unable to continue to refuse to avail of the protection of the country of nationality (para. (e)) or where the refugee is a person who has no nationality but who is able to return to the country of his habitual residence (para. (f)). One of the grounds (being a person whose presence in the State poses a threat to national security or public policy) refers to a state of affairs which could arise after the grant of the declaration but could also have pre-existed it. Section 21(1)(h) then states:

> *'Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given ….'*
>
> *(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Appeal Board which was false or misleading in a material particular,*
>
> *the Minister may, if he or she considers it appropriate to do so, revoke the declaration.'*

65. UM identifies four features of this power which his counsel contends dictate that a revocation operates only prospectively. If the revocation operates only prospectively, they say, then it remains the case that there was a declaration '*in force*' during the relevant period, for the purposes of s.5(3). If that is so, the argument goes, s.5(1) did not apply to MM, and he could not accordingly be in contravention of it.

66. First, they emphasise that the power is one of revocation. The term '*revocation*' itself, they suggest, implies a prospective operation. In that regard, they contrast the term with '*cancellation*' which, the UNHCR '*Note on the cancellation of Refugee Status*' of 22 November 2004 ('the UNHCR Note") identifies as the appropriate term to describe the imposition of invalidity *ab initio*. Second, they note that the same word is used to describe a variety of different grounds on which a declaration may be withdrawn, many of which could not give rise to invalidity *ab initio*. The word revocation, they urge, cannot have different meanings in different parts of the same section. Third, at the hearing of this appeal some emphasis was placed on the fact that the power is discretionary. Fourth, and finally, they attach significance to the fact that the correspondence advising MM of revocation advised him that the revocation took effect from 31 August 2013.

67. 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: it was on that basis that Clark J. said in *Adegbuyi v. Minister for Justice and Law Reform* [2012] IEHC 484 at para. 37 that where evidence emerges that invalidates a declaration of refugee status so that the person

should never have been granted refugee status '*the declaration becomes void ab initio'*. While UM here is correct in contending that Clarke J.'s remarks were *obiter*, that assumption reflects international practice in this specific context. The UNHCR Note records the position as follows (at para. 19):

> *'The notion that an administrative decision obtained by fraudulent means is vitiated by this very fact and may be cancelled at any time is a generally accepted principle. It is widely reflected in national refugee laws, legislation on general administrative procedures, jurisprudence and doctrine as well as UNHCR policy documents. It is also generally accepted that a decision obtained by fraudulent means cannot form the basis of legitimate expectations or acquired rights.'*

68. The UNHCR Note distinguishes between three different grounds for the withdrawal of refugee status. The first is '*cancellation*' which is described as invalidating refugee status which should not have been granted in the first place. That, the Note explains, has the effect of rendering refugee status null and void from the date of the initial determination. The second is '*revocation*' which arises where the refugee engages in certain conduct after the grant. That is said to operate for the future. The third is cessation, which arises where the ending of refugee status is no longer justified. It also operates into the future. Each of these categories which are classified separately by UNHCR are amalgamated by the Oireachtas within the same heading, the act of withdrawal applicable to each being described by the same term – *revoke*.

69. Of course, the Oireachtas is free to provide that withdrawal of a status on the basis of misrepresentation will only operate prospectively. As noted earlier, it has done so in respect of revocation of a certificate of naturalisation. However, there is nothing in s.26(1)(h) to indicate that this was its intention. Leaving to one side the proposition that the very nature of a false misrepresentation is such that one might expect a legislative intention that it only operate *in futuro* to be clearly expressed, and leaving to one side the general principles applicable to the obtaining of declarations of refugee status on foot of misrepresentation to which I have referred, the very nature of such a declaration is such that the determination that it has been obtained on the basis of false information is hard to reconcile with its being given any effect at any point in time.

70. Thus, as the Minister has emphasised in his submission, the giving of a declaration under the 1996 Act merely declares a pre-existing status (see *HLD (A Minor) v. Refugee Applications Commissioner* [2011] IEHC 33 at para. 58; *Danqua v. Minister for Justice, Equality and Law Reform* [2015] IECA 118 at para. 38). The discovery that that status has been declared on the basis of false and material information means the declaration should never have been given. It is impossible to identify any theory by which a legal system treats that declaration of pre-existing status obtained by deception as having been in force for some period and not for another. The declaration either correctly determined a pre-existing status or it did not. If it incorrectly did so, the status ought never to have been declared. It cannot be the case that it was properly declared for

some of the time after it was wrongfully given, but not the rest. It is, classically, a case of all or nothing.

71. Turning in this regard to the four specific arguments advanced by UM, the use of the term '*revocation*' can in an appropriate case operate to invalidate ab initio. Black's Law Dictionary (4th Ed. at p.1485) defines "*revocation*" as "*an annulment, cancellation or reversal*" and defines "*revoke*" to mean "*to annul or make void by taking back or recalling; to cancel, rescind, repeal or reverse*" (and *see* for a consideration of when a statutory power to *revoke* will render a measure invalid *ab initio R v. Eddie* [2017] BCSC 341). Thus, the use of the word '*revoke*' is not itself inconsistent with a decision which invalidates *ab initio* the withdrawn measure. In fact, Council Directive 2004/83/EC uses the term revocation in the very context of a refugee status obtained by a misrepresentation that was decisive for the granting of that status.

72. UM places considerable reliance on the fact that the UNHCR Note uses the term *revocation* in one particular sense. Assuming (without deciding) that it is admissible to this end, UM cannot have this both ways. He cannot both rely upon the Note to suggest that '*revocation*' means prospective withdrawal and that the term '*cancellation*' is that used to describe invalidation *ex tunc*, while at the same time failing to acknowledge that the Note also proceeds on the basis that – whatever it is called – a withdrawal arising because recognition of refugee status ought never to have been given in the first place, operates *ab initio*. I have quoted one extract of the Note in that regard: the definition of cancellation itself similarly assumes that a declaration that should not have been granted is rendered void *ab initio*:

> '***Cancellation*** *: a decision to invalidate a refugee status recognition which should not have been granted in the first place. Cancellation … has the effect of rendering refugee status null and void from the date of the initial determination …'*

73. Ultimately, I do not believe that the Court can or should attribute to the Oireachtas the intention that by using the term '*revoke*' it applied the verb in the precise sense in which it appears in the UNHCR Note. Obviously, the Oireachtas elected to use one word to describe each of the acts of withdrawal described in the UNHCR Note, even though UNHCR uses three terms (cancellation, revocation and cessation) to describe what UNHCR views as three different processes. Provided the specific word it chose for the purpose was not inapposite to any of these processes, the Oireachtas was entitled to do this. Its choice to do so is as consistent with the view that the use of a single word was permissible to describe one act (withdrawal) with different effects (*ex tunc* or *ex nunc*) as it is with the view that it was using a single word to enable one act with the same effects.

74. This is relevant to the second proposition advanced by UM – that the construction urged by the Minister involves the word '*revoke*' having different meanings in different subparts of the same section. Thus, revocation because of events arising following the grant cannot invalidate the declaration *ab initio*. Therefore, the argument runs, the word '*revoke*' cannot invalidate the declaration *ab initio* where it is obtained by the provision of

false and misleading information, but not invalidate it *ab initio* where based upon an event post-dating the grant.

75. However, I think that is to conflate the description of an action, with the identification of its effect. '*Revoke*' marks out what the Minister does with the declaration of refugee status when the various grounds identified in s.21 of the 1996 Act are established. The word itself does not mandate any particular consequence of that action. The consequence depends on the ground of revocation. Where the ground cannot reach back in time, the revocation cannot logically render the declaration void *ab initio*. However, that does not mean that where the ground of revocation arises at the point of grant, the use of the verb '*revoke*' precludes invalidation from that point. Instead, whether it is intended to invalidate from grant depends on the true construction of the provision, the interpretation of which must take into account the recognised principle that a fraudulently obtained declaration is a nullity.

76. Thus, in summary, the objection raised by UM is not in fact to the word 'revoke' having different meanings within the same section of the Act, but instead to the word having one meaning with different effects within that single provision. It is not apparent to me that there is anything wrong with this. The verb refers to the act of the Minister in withdrawing the declaration: the effects are different as between the various grounds of revocation because the grounds are different.

77. Nor is the fact that such a decision is discretionary relevant. The UNHCR Note, for example, records both that cancellation consequent upon fraud is often discretionary (para. 39), and that it operates to invalidate an incorrect refugee status determination, with effect *ab initio* (para. 44). It explains:

> *'The original recognition of refugee status is deemed never to have been made: the applicant was not a refugee at the time of the original status determination.'*

78. It also notes (para. 47) :

> *'Cancellation of refugee status regularly results in the cancellation, as a consequence, of derivative status, particularly that of family members. In such cases, those concerned must be given an opportunity to apply for asylum, if they so wish, and show that they should be recognised as refugees in their own right.'*

79. Finally, I agree with Stewart J. when she concludes that the fact that the original decision referred to the revocation '*taking effect*' from 31 August does not affect the matter one way or another. The effect of revocation is a matter of law. The argument that this statement in some sense affects the legality of the decision either because MM might have challenged it had he known of the true position, or because the decision might have been different had the decision maker understood that the decision operated *ab initio*, is not relevant in this case which does not present a challenge to the validity of the revocation decision.

80. My conclusion that revocation of a declaration of refugee status operates to invalidate that declaration *ab initio*, means that the declaration was not '*in force*' at the relevant time. Therefore, s.5 did apply to UM, and he required a '*permission*' to be in the State at the relevant time. Without such a permission, his presence cannot be brought into reckoning in determining UM's asserted entitlement to citizenship.

Permission to be in the State

81. It appears common case that MM obtained a Stamp 4 permission because and only because he had obtained a declaration of refugee status. Even though the refugee status was obtained by misrepresentation, and notwithstanding the fact that the legislation clearly provides that s.5 does not apply to a person holding such a declaration, UM nonetheless contends that MM was not '*in contravention*' of s.5(1) because he had obtained that permission. The argument depends on the meaning of s.6B(4) and of s.5(1) of the Act of 2004.

82. As I have noted earlier, the former excludes from reckoning residence '*in contravention*' of the latter which, in turn, provided at all times relevant to these proceedings:

> *'No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given* ***under this Act*** *after such passing, by or on behalf of the Minister.'*
>
> (Emphasis Added)

83. The provisions of s.81(c) of the International Protection Act 2015 amended this provision by replacing the words emphasised above with the phrase '*given to him or her'*.

84. Seven features of the provisions when viewed together merit emphasis. First, a person who requires to permission to be in the State but does not have it is unlawfully in the State. However, while s.5(1) expresses itself in terms of a prohibition it is not an offence to breach the provision (see *Sulaimon v. Minister for Justice, Equality and Law Reform* [2012] IESC 63 at para. 9). This is important, because the formalistic interpretation of '*permission*' in the sense of a documented authority, valid until quashed or otherwise retrospectively revoked that might be appropriate to a provision creating criminal liability is not necessarily applicable here.

85. Second, and following from this, and as O'Donnell J. also explained in *Sulaimon v. Minister for Justice, Equality and Law Reform* at para. 4, the period of residence required under s.6A is '*a concept of lawful residence*'. That what was thus intended was a broad concept of legality (rather than a narrow interpretation of '*permission*') is clear in particular from s.6A(5) which defines the equivalent requirement of residence in Northern Ireland as residence that is '*not lawful*' under the law of that jurisdiction. This must mean that the Oireachtas intended a similarly broad concept of legality to apply within the State. I have already held that having regard to s.6B(4)(a) that the term '*residence*' in s.6A(1) cannot be subject to a blanket qualification of residence as a presence that is

lawful, *bona fide* and regular. However, when construing the words used in s.6B(4) itself, it is appropriate to seek to give effect to this evident parliamentary intent.

86. Third, and following again from this, '*permission*' as it appears here must be given a practical, rather than unduly narrow, interpretation. This was explained by O'Donnell J. in *Sulaimon* at para. 17 in terms that '*… it is clear that the word 'permission' in s.5 did not have a special meaning derived from s.4 but rather was used in a more general and ordinary sense …'* . Thus, in that case (decided before s.5(1) was amended by the International Protection Act 2015 by the deletion of a requirement that the permission granted after the passing of that Act be granted under it) the Court decided that a permission given by the Minister (as opposed to by an immigration officer as envisaged by s.4 of the 2004 Act) was nonetheless a permission for the purposes of s.5(1) even though there was no particular procedure identified in the legislation for seeking such a permission, nor for how an application for Ministerial permission would be approached and even though no particular formality was prescribed for such a permission. The word, it was emphasised, must be given its '*ordinary natural meaning*' (para. 18).

87. Fourth, in determining whether a person's presence in the State is or is not in breach of s.5(1), the focus is not merely upon whether there is a '*permission*' in this sense, but upon '*the terms*' of that permission. Even if a person is within the jurisdiction on foot of an extant permission, the provision still envisages a breach of '*the terms*' of the permission rendering the presence a contravention of the section.

88. Fifth, such a permission is, and therefore its terms are, necessarily conditioned by any representations made to the authority issuing it. This follows not merely as a matter of common-sense, but also from the terms of s.4(10), which specifically mandate the officer granting a permission under that provision to have regard to '*all of the circumstances of the non-national concerned … represented to the officer by him or her'*.

89. Sixth, the meaning and effect of the provision must be determined in accordance with the principle, identified by Hogan J. in *Robertson*, that a person may not benefit from his or her own wrongdoing.

90. Seventh, and finally, the starting point must be that a fraudulently obtained permission is a nullity. It confers no rights or entitlements of any kind. Fraud, as it is often said, '*unravels all*' (*Takhar v. Gracefield Developments* [2019] UKSC 13, [2019] 2 W.L.R. 984 at para. 43 and following). Fraud '*vitiates judgments, contracts and all transactions whatsoever'*: *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712. There are many examples of this in the general law, amongst them court orders (*'an order obtained by fraud is a nullity*' (*Walsh v. Minister for Justice* [2019] IESC 34 at para. 3)), marriages (*M.K.F.S v. The Minister for Justice and Equality* [2018] IEHC 103 (at para. 16): *'[w]here it is determined that the applicants' relationship is based on fraud, no 'rights' can arise from such a relationship'*) and in the United Kingdom, leave granted to a non-national to enter the jurisdiction (*R. v. Home Secretary ex parte Zamir* [1980] AC 930, '*an apparent leave to enter which has been obtained by deception is vitiated as not being 'leave [given] in accordance with this Act*').

91. When these seven factors are taken into account, it appears to me clear 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. The appellant has asserted in his submissions that it is the practice of MJELR to grant (through Immigration Officers in the Garda National Immigration Bureau) a permission under s.4 of the 2004 Act to those who hold declarations of refugee status. This practice is said to occur even though those holding a declaration of refugee status that is in force do not need such a permission, they being exempt from the provisions of s.5 of the 2004 Act. That being so, it is impossible to see how a declaration of refugee status which is found to have been obtained through the provision of false and misleading information, can lead to a '*permission*' within the meaning of the Act. It must be repeated that the undisputed evidence in the case was, as deposed by the respondent's witnesses, that the residence was obtained on a '*false and/or fraudulent basis*'. If the Minister had sought declaratory relief that the permission was a nullity, there is no basis on which that relief could be refused.

92. Once that is understood, it becomes evident that the question presented by UM's case around this issue is in truth one of procedure rather than of substance. Because the Stamp 4 permission has not been quashed or revoked *ab initio* by an act of the Minister, the fact that it was obtained by the provision of false and misleading information should, on his construct, be disregarded and effect be given to the permission as if it were wholly lawful and regular. I cannot accept that this interpretation reflects the proper meaning of the word '*permission*' as it appears in s.5(1).

93. A similar issue was addressed in *Robertson* to which I have earlier referred. There, the applicant was in the State on foot of a permission. That permission was granted on the basis of deceitful misrepresentations. As Hogan J. observed (para. 18), Ms. Robertson was given permission to reside which was ostensibly valid and had not been set aside or quashed in judicial review proceedings. That permission would, in normal course, have been sufficient to qualify his presence as '*residence*'. However, that did not prevent the Court from looking behind the permission to determine that it had been obtained by deception and that her presence in the State was – by reason of that deception – unlawful. Hogan J. explained why the Court could, in the circumstances that presented themselves there, cut through the '*ostensibly valid*' permission (at para. 21):

> *'It should also be recalled that legislation must 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 by their own wrong. If Ms. Robertson's contention were to be accepted, it would mean that this court would have to avert its eyes to this acknowledged deception and deceit and that she would thereby be allowed to claim the benefit of a statutory entitlement to which she is not justly entitled.'*

94. As I interpret these comments, they go to the construction of the provision in issue rather than the entitlement of any particular person to rely upon it. In other words, the principle

that a person cannot benefit from their own wrong, conditions the meaning of the section, and the meaning thus attributed to it is that a permission obtained by fraud and deception is irregular, whether or not it is set aside. While UM seeks to contend that these comments are inapplicable to him because he has not been responsible for wrongdoing of any kind, this ignores the fact that the Oireachtas has predicated his entitlement on the conduct of the parent upon whose residence he relies for the purposes of s.6A(1). The legislation fixes him with the consequences of his parents' actions: he cannot therefore advance a case which they cannot advance. If there were any doubt about this, and I do not believe that there is, it is allayed by the symmetry between the terms of s.6B(4) and s.16A. The sections must have the same meaning. Therefore, MM is either resident for the purposes of both provisions, or he is resident for the purposes of neither. He could not rely upon his own misrepresentation so as to ground an application under s.15(1)(c). Therefore, he is without the terms of s.6B(4).

95. *Robertson* differs from this case, because the Court was there concerned with the construction of the term '*ordinary residence*' in a statutory context that was unfettered by the restriction imposed by s.6B(4). However, I believe the same conclusion to be appropriate. To construe '*in accordance with the terms of any permission given to him*' as that term appears in s.5(1) of the 2004 Act as excluding a physical presence based upon a permission obtained by false representation reflects its '*general and ordinary*' meaning, and enables s.6A of the 1956 Act to be interpreted in a way that reflects the presumption that the Oireachtas did not intend to change the clear and fundamental principle predating the provision that a residence obtained by deceit is not a representation at all. As I have previously noted, the House of Lords reached a similar conclusion in construing leave granted by an immigration officer to enter that jurisdiction in *R. v. Home Secretary ex parte Zamir*.

Further arguments advanced by UM

96. I think it important at this point to stand back from the conclusion I have suggested and to consider whether viewed in the light of UM's rights and entitlements, a different interpretation should follow. UM's rights, clearly, represent a critical component of the process of construction in this context, a consideration evident from the passage from the judgment of Henchy J. in *Minister for Industry and Commerce v. Hales* I have quoted above.

97. Here, it is necessary to digress. The point is repeatedly made throughout the respondents' submissions that UM errs in predicating his arguments on the incorrect assumption that he was entitled to Irish citizenship upon birth without having to satisfy the conditions set out in s.6A(1) of the 1956 Act. The criticism appears to me to be misconceived: UM's point is that MM was resident in the State for the requisite period and that in consequence UM enjoyed what is, on any version, a critically significant legal and constitutional entitlement. The effect of the revocation of MM's declaration of refugee status was to prevent UM from relying on that residence. Because the definition of residence is central to that right, UM is correct in suggesting that a statutory exclusion

from a period of physical presence that would otherwise accrue so as to generate that entitlement, must be carefully scrutinised.

98. I have outlined earlier some of the arguments he advances in this regard arising from the unfairness in his being refused citizenship because of the wrongful acts of his father, from the potential disruption caused by its being contended many years after the event that in fact a citizenship he believed he enjoyed is a nullity, and from the possible distress and anxiety caused by the very prospect facing the child of non-national parents who believes himself to be within s.6A that this entitlement could in the future be unravelled. Aside from the policy considerations presented by these arguments it might also be said that, in particular, when they are combined with the fact that the effect of the provisions introduced into the 1956 by the new s.6 was to reverse a pre-existing regime in which all persons born in the island had the right to Irish citizenship, the provisions of s.6B(4) should be construed strictly and narrowly, so that *permission* should refer to a permission no matter how or why it was granted and that in the absence of a clear legislative stipulation to the contrary, a declaration of refugee status should be treated as operative unless and until it is withdrawn.

99. However, I think that the force of these objections diminishes when they are viewed in the light of two features of the legal position of a child born in the island of Ireland to non-nationals. The first is that the entitlement to citizenship is entirely dependent upon the actions of their parents. Thus, the prospect of an expectation of an entitlement to citizenship being defeated by it subsequently emerging that the child's parents were not in fact resident for the required period, or by their being resident for any one of the purposes excluded by s.6B(4), is an inevitable consequence of the legislative scheme. Leaving aside entirely the specific issue in this case, this could arise because in fact a parent was not in the State for the period asserted, or because they were in the State on the basis of a permission which was not reckonable or indeed because they had no permission at all to be here. The unavoidable fact is that these issues can arise at any time and can potentially arise at some time after the child is born. That is not, of course, an argument for adding to them. However, it does mean that the essential objection underlying this aspect of UM's case, is ill founded.

100. The second is that the Oireachtas has made the decision that at least one type of unlawful presence in the State of a parent (that in breach of s.5(1) of the 2004 Act) operates so as to render the child ineligible to claim citizenship. Thus, the issue in this case is not whether it is right or wrong that the unlawful actions of a parent should impede the claim of their child to citizenship: the only issue is when, precisely, that unlawful presence arises. Here, unlike the position that presented itself in *Kadri*, the answer to that question is not dependent upon whether one implies language into the Act that is not there. Instead, the answer is dependent on the meaning and effect of two phrases that are used in the legislation – *permission* and *in force*.

101. A number of things follow. The prospect of facts emerging after many years which negate an entitlement to citizenship assumed by a person, is built in to the legal requirement. A

distinction between persons claiming citizenship through parents who are citizens and parents who are not, also flows inevitably from the provisions of the Act. For similar reasons it does not avail UM to say that he is in a worse position than a person whose parent has their certificate of naturalisation revoked: the Oireachtas has delineated different processes for these distinct situations. It follows that the position adopted by the courts in the United Kingdom in respect of vitiation of citizenship is irrelevant: here, the conclusion that citizenship cannot be predicated upon the unlawful residence of a parent has been stipulated by the Oireachtas. That policy decision has been made.

102. Nor do I believe that an approach of close construction – even if this is appropriate to this issue – affects this conclusion. The unavoidable terminus of such an approach – the conclusion that the legislature intended that a permission or declaration which is obtained by false representation should confer legal entitlements on anyone – produces a construction which is not merely strict, but which is contrary to general principle and – as I have explained earlier – potentially anomalous.

103. The respondents are, however, correct when they say that UM misconceives the character of the process leading to the revocation of MM's declaration of refugee status and the subsequent refusal of UM's application for a passport. Neither comprised, as UM has contended, revocation of citizenship or anything akin to it. The latter presented an inquiry as to whether UM was a citizen at all. The former revoked nothing from UM. Insofar as it is suggested that UM's interests ought to have been considered in connection with that process, that if anything would have afforded only a basis for challenging the revocation decision, which is not in issue in this case.

Directive 2004/83/EC and SI 518 of 2006

104. Directive 2004/83 ('the Directive') established rules during the first phase of the Common European Asylum system so as to ensure the integrity of the Geneva Convention system then being incorporated into European law. To that extent the Directive establishes uniform minimum standards as regards cessation of, and exclusion from, refugee status. It was adopted on 29 April 2004, entered into force on 20 October 2004 and was required to be transposed into national law by 10 October 2006. By then, MM had acquired a declaration of refugee status.

105. On 10 October 2006, the European Communities (Eligibility for Protection) Regulations 2006 ('the Regulations') were adopted. Regulation 11(2)(b) of these Regulations states that the Minister shall revoke a declaration that a person is a refugee where the person to whom the declaration has been granted misrepresented or omitted facts '*and this was decisive for the granting of the declaration*'.

106. Neither the Directive nor Regulations featured in the High Court pleadings, submissions or decision. Although reference was made to Regulation 11 in the initial letter advising MM of the proposal to revoke his declaration, the decision did not purport to be based upon it.

107. The possible relevance of the Regulation was raised by counsel for UM in the course of the hearing of this appeal. Specifically, a point was made that the Minister made no finding

that UM's father had misrepresented or omitted facts and (as Regulation 11(2) requires) '*that this was decisive for the granting of refugee status*'. In the light of his referring to the provisions, the Court requested the parties to deliver written submissions addressing the Regulation. Having done so, UM has adopted the position in his additional submissions that, in fact, given that the Minister has stated (as his counsel did in his submissions to the Court) that the Minister's decision was based solely upon s.21 of the 1996 Act, the issue was '*of limited relevance*'. I agree. In those circumstances, I do not believe it necessary to address further the various issues around the interpretation of the Directive and Regulations raised in the course of the oral hearing.

Conclusion

108. The 'permission' upon which UM relies as grounding his claim of citizenship was on the undisputed evidence in this case obtained by MM through the provision of false and misleading information. It was not, therefore, a permission within the meaning of s.5(1) of the Immigration Act 2004. The revocation of MM's declaration of refugee status meant that that declaration was not '*in force*' during the time MM was physically present in the State. It follows that s.5(3) of that Act did not accordingly operate to dis-apply the former provision insofar as his residence was concerned. Therefore, MM's presence in the State is not reckonable for the purposes of UM's claim of citizenship. That being so UM's appeal must be dismissed.

109. Both Donnelly J. and Ni Raifeartaigh J. are in agreement with this judgment and with the Order I propose. That is an Order dismissing UM's appeal. Having failed in his appeal, costs will normally follow that event. It is the intention of the Court to so order fourteen days from the date of this judgment unless either party applies within that time to request that the Court should otherwise order. If so applying, UM must first notify the office in writing of his intention to object within that period and should file short written submissions within one further week of his so notifying the Court. The respondent will then have a further week to file his submissions.