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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY CAOIMHE NÍ CHUINNEAGAIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BRITISH NATIONALITY ACT 1981

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Ronan Lavery QC and Mark Bassett (instructed by Brentnall Legal) for the applicant
David Blundell QC and Yaaser Vanderman (instructed by the Crown Solicitor's Office) for the proposed respondent

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review by which the applicant, who was born and lives in Northern Ireland, seeks to challenge certain provisions of the British Nationality Act 1981 ('the 1981 Act') as incompatible with her Convention rights and certain provisions of EU law. When the proceedings were commenced, the applicant was under 18 years of age, although she has recently attained the age of majority. The focus of the challenge is the fact that, at birth, the applicant had British citizenship automatically conferred upon her and that, although she is able to renounce that citizenship, she was not able to do so until having attained the age of 18 and, even then, has to pay a fee for so doing. The applicant wishes (and wished) to be, and be recognised as, an Irish citizen only.

[2] The proposed respondent to the proceedings is the Secretary of State for the Home Department, who is the Minister of the Crown with responsibility for citizenship and immigration matters, including the 1981 Act.

[3] The applicant was represented by Mr Lavery QC and Mr Bassett; and the proposed respondent was represented by Mr Blundell QC and Mr Vanderman. I am grateful to all counsel for their helpful written and oral submissions.

Factual Background

[4] The factual background to this application may be briefly stated. The challenge centres upon issues of law rather than any complex or contested factual context. The applicant has provided a brief grounding affidavit, in which she describes her birth, her social development and her reasons for bringing these proceedings.

[5] The applicant was born in Belfast and lives here. She is an Irish citizen and has an Irish passport, on which she has previously travelled abroad on a number of occasions. Her parents are also Irish citizens and she has a number of relatives who live in the Republic of Ireland, as well as in the border area. She lives in Belfast and attends an Irish-medium school. She has described in her affidavit evidence that she has a keen interest in Gaelic and Irish culture, and believes that she is "fully immersed in all aspects of Irish national culture." Irish is her first language and she is a player of traditional Irish music.

[6] The applicant also avers that she has never presented herself as a British citizen in any context or for any reason and says that she would not do so. She objects to the notion of 'British citizen or subject' being applied to her.

[7] Although the applicant accepts that it is open to her (particularly now that she has attained the age of 18) to renounce her British citizenship, she has averred that she does not wish to do so as she considers that doing so would represent an acceptance that she was born a British citizen, in addition to having to pay the administrative cost involved.

Relevant statutory provisions

[8] It is unnecessary to recount in detail all of the statutory provisions which are relevant to this application; but it may be helpful to set out the principal provisions which are at issue. The source of the applicant's complaint is section 1(1) of the 1981 Act, which is in the following terms:

> "A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom or that territory."

[9] On the respondent's case, an adequate remedy to the applicant's complaint is contained in section 12(1) and (2) of the 1981 Act, which are in the following terms:

> "(1) If any British citizen of full age and capacity makes in the prescribed manner a declaration of renunciation of British citizenship, then, subject to subsections (3) and (4), the Secretary of State shall cause the declaration to be registered.
>
> (2) On the registration of a declaration made in pursuance of this section the person who made it shall cease to be a British citizen."

[10] Section 12(3) is also relevant. It provides an exception to the Secretary of State's duty to register a declaration of renunciation of British citizenship and is in the following terms:

> "A declaration made by a person in pursuance of this section shall not be registered unless the Secretary of State is satisfied that the person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship; and if that person does not have any such citizenship or nationality on the date of registration and does not acquire some such citizenship or nationality within six months from that date, he shall be, and be deemed to have remained, a British citizen notwithstanding the registration."

Summary of applicant's challenge

[11] The applicant challenges section 1(1) of the 1981 Act, which automatically conferred (or "imposed", as the applicant would have it) British citizenship upon her in light of the circumstances of her birth in Northern Ireland. She also challenges section 12 of the 1981 Act which allows her to renounce her British citizenship insofar as it prevented her from doing so until the age of 18 and requires that, to do so, she pay a fee of £372. The requirement to pay a fee arises pursuant to article 3 of the Immigration and Nationality (Fees) Order 2016 ('the 2016 Fees Order') and regulation 10 of, and Schedule 8 to, the Immigration and Nationality (Fees) Regulations 2018 ('the 2018 Fees Regulations').

[12] The applicant relies on five broad grounds of challenge, which may be summarised as follows:

> (a) The impugned provisions are contrary to her right of effective enjoyment of citizenship of the EU, which she enjoys by virtue of her

status as an Irish citizen ('**ground 1**'). The applicant contends that this is contrary to articles 12 and 13 of the agreement concluded between the United Kingdom (UK) and the European Union (EU) in relation to the UK's withdrawal from the EU in accordance with Article 50 of the Treaty of the European Union ('the Withdrawal Agreement').

(b) The impugned provisions are contrary to the UK's obligations under Article 1(3) of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement ('the NI Protocol'), in particular the UK's undertaking to protect the Belfast Agreement (also known as the Good Friday Agreement) in all its dimensions ('**ground 2**'). A key feature of this aspect of the applicant's argument is that the Belfast Agreement has now been rendered justiciable, in a way which it was not previously, by a combination of the NI Protocol and the European Union (Withdrawal) Act 2018, as amended, which implements the Withdrawal Agreement in domestic law through section 7A.

(c) The impugned provisions are contrary to the UK's obligations under Article 2(1) of the NI Protocol, that is to say that there should be no diminution of rights, safeguards or equality of opportunity resulting from the UK's withdrawal from the EU ('**ground 3**').

(d) The impugned provisions are contrary to her right to respect for her private life under Article 8 ECHR ('**ground 4**').

(e) The impugned provisions represent unlawful discrimination in violation of Article 14 ECHR (taken together with Article 8), in that they treat Irish citizens born in the jurisdiction of Northern Ireland in a less favourable manner than British citizens born there or Irish citizens born elsewhere but now resident in Northern Ireland (by requiring them to renounce a citizenship of which they do not wish to avail) ('**ground 5**').

[13] For reasons which are outlined in further detail below, the proposed respondent submits that all of the applicant's proposed grounds of judicial review are unarguable. In addition, the proposed respondent also submits that this application has been brought out of time.

Discussion

[14] As noted above, this application does not involve contentious facts. It can be determined on the basis of the legal propositions outlined in each party's submissions, applied to the factual context set out in the applicant's grounding affidavit (indeed, taking those averments at their height). I have received detailed written submissions from each party, particularly from the applicant's side, supplemented by helpful oral submissions. I propose therefore to address the issue

of the grant of leave on the basis of whether the applicant's grounds are arguable and have a realistic prospect of success. This formulation of the test for the grant of leave was adopted by the Court of Appeal in this jurisdiction in *Re Omagh District Council's Application* [2004] NICA 10 at paragraphs [5] and [43]. In *Sharma v Antoine* [2006] UKPC 57, at paragraph [14](4), Lord Bingham suggested that it was now "the ordinary rule" that the court would refuse leave to apply for judicial review "unless satisfied that there is an arguable ground for judicial review *having a realistic prospect of success* and not subject to a discretionary bar such as delay or an alternative remedy" [emphasis added].

[15] For my part, I consider that this somewhat enhanced test – rather than a threshold of simple arguability – is likely to be appropriate in many cases in this jurisdiction, where leave cannot be refused without providing the applicant an opportunity of being heard (see RCJ Order 53, rule 3(10)) and where it is the almost invariable practice of the court to invite the proposed respondent to attend any leave hearing and make submissions. In any event, I am satisfied that the present case is an appropriate case in which the enhanced threshold ought to apply for the reasons mentioned above.

The applicant's EU law grounds

[16] I accept the proposed respondent's basic objection that much of the applicant's case, indeed a fundamental premise which underlies many of the arguments presented on her behalf, is that the conferral of British citizenship upon her undermines the effective enjoyment or restricts the effects of her Irish citizenship; or that it in some way prevents her Irish citizenship from being recognised or acknowledged, or negates the status of her EU citizenship; and further accept the respondent's submission that this is misconceived.

[17] The applicant is entitled to, and enjoys, Irish and EU citizenship. The evidence establishes that she has made use of both, including through the use of her Irish passport for travel throughout the EU. As an Irish citizen, she enjoys the benefits of EU citizenship set out in Article 20(2) of the Treaty on the Functioning of the European Union. Practically speaking, her use and enjoyment of her Irish citizenship, and related EU citizenship, is not in any way affected by the fact that she also holds British citizenship. No evidence has been provided of any concrete impediment to the exercise of her rights as an Irish or EU citizen as a result of her also holding dual British citizenship for the moment. Using the language of the *Garcia Avello* case on which the applicant relies (*Garcia Avello v État Belge* [2004] 1 CMLR 1), the fact that the applicant has British citizenship does not "restrict the effects of the grant" of her Irish citizenship, nor does it impose "an additional condition for recognition" of her Irish nationality. She is an Irish citizen; and her additional British citizenship takes nothing away from this in terms of the rights, benefits and privileges which she enjoys as an Irish citizen. When this is appropriately recognised, much of the applicant's case falls away. In particular, I

consider the applicant's reliance on ground 1 – that the impugned provisions are contrary to effective enjoyment of her EU citizenship – to be unarguable.

[18] The proposed respondent raised three objections to the applicant's first ground of challenge: first, that Treaty rights do not apply in the UK after its withdrawal from the EU; second, that, in any event, the applicant's situation is one which is wholly internal to the UK, notwithstanding her dual citizenship, on the basis of the CJEU's decision in *McCarthy v Secretary of State for the Home Department* [2011] 3 CMLR 10, because the applicant does not reside in the UK in the exercise of (or having exercised) EU law free movement rights, so that her present claim is not within the scope of EU law; and, third, that, in any event, there is no breach of her rights for the reasons set out above. It seems to me that there is much force in the Secretary of State's first two points and that they are likely to be fatal to the applicant's case. Logically, they fall to be considered first but, given that I am satisfied that there would in any event be no breach on the facts of this case, assuming the applicant could persuade the court that she is able to rely on Treaty rights, it is appropriate for leave to be refused on ground 1.

The applicant's reliance on the Belfast Agreement

[19] The real issue raised by this case is not whether the applicant's Irish citizenship is in some way diminished but, rather, whether there is something legally offensive in her having British citizenship conferred upon her and having to both wait until she is 18 and then pay to renounce that citizenship.

[19] In this regard, the applicant relies heavily on that portion of the Belfast Agreement dealing with constitutional issues and, in particular, the section which says that the participants endorsed the commitment made by the British and Irish Governments that, in a new British-Irish Agreement, they would:

> "… recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland."

[20] This wording is replicated in Article 1(vi) of the related British-Irish Agreement. From this, the applicant extrapolates a right to be an Irish citizen only and contends that this right, contained in the Belfast Agreement, is now both justiciable and directly enforceable as a matter of both domestic and EU law.

[21] There are significant issues with both aspects of this argument. First, the Agreement 'recognises' the birthright of the people of Northern Ireland to "identify themselves and be accepted" as British, as Irish, or both. I accept that, as a matter of

international law, this recognises a right to identify oneself and be accepted as Irish only; and, relatedly, that it entails a right to be accepted by each Government which was a party to the agreement (including the UK Government) as British or Irish only. How precisely this right is to be given effect, however, is another matter. It plainly requires a choice (which is apparent from the words "as they may so choose") but does not specify how or when that choice should be made.

[22] In addition, it seems to me unlikely that this commitment, even as a matter of international law, entailed any obligation on the Government of the United Kingdom to amend domestic provisions in relation to citizenship. That is because this particular portion of the Belfast Agreement does not purport to require new legislation (as several other parts of the Agreement expressly do), nor to confer any *new* rights. Rather, it is a 'recognition' of a pre-existing 'birthright.' In short, it is an express political acceptance that people in Northern Ireland are entitled to view themselves as British only, as Irish only, or as both, and that each choice is entirely legitimate. Insofar as this portion of the Belfast or British-Irish Agreements refers to citizenship provisions, however, it merely 'confirms' that there is a right to hold both British and Irish citizenship (which would remain unaffected in the event of future change in the status of Northern Ireland). Had the provision been intended to require any change to the UK's domestic legislation on citizenship one would have expected that to have been spelt out and to have been the subject of a clear obligation. This analysis is also entirely consistent with that of the Upper Tribunal (Immigration and Asylum Chamber) in *De Souza (Good Friday Agreement: nationality)* [2019] UKUT 355 (IAC) ('the *De Souza* case') at paragraph [39].

[23] In any event, and more importantly for present purposes, it is a matter of well-established law that the Belfast Agreement (or the British-Irish Agreement), as an international agreement, is not enforceable as a matter of domestic law, unless and until (and only insofar as) it is incorporated into domestic law. That legal orthodoxy was recently underscored by the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at paragraphs [76]-[78] of the judgment of the court. In relation to the Belfast Agreement, it was specifically addressed by the Upper Tribunal in *De Souza*: see paragraphs [28]-[32]. In this respect, the applicant contends that the legal position has changed – rendering the Belfast Agreement directly enforceable – as a result of the Withdrawal Agreement (and, in particular, the NI Protocol) and the Westminster legislation which gives effect to it. I also find that proposition to be unarguable for the reasons given below.

[24] It is clearly an objective of the NI Protocol that the Belfast Agreement should be protected (see the recitals and Article 1(3) of the Protocol); but the Belfast Agreement is not set out in the Protocol. The protection which is to be afforded to the Agreement is to be achieved through the substantive articles of the Protocol. That is evident from Article 1(3) which provides that, "*This Protocol sets out* arrangements necessary… to protect the 1998 Agreement in all its dimensions" [underlined emphasis added]. Thus, protection of the Belfast Agreement is the *aim* of the Protocol (although it is a matter of considerable political contention whether

and how this aim has been achieved); but the Protocol does not seek to give independent legal effect to the provisions of the Belfast Agreement. When this is understood, the applicant's reliance on Article 1(3) of the Protocol can be seen not to avail her. The United Kingdom is bound in law to comply with, and give effect to, the provisions of the Protocol, which has been implemented in Westminster legislation; but is not obliged, as a matter of domestic law, to comply with the provisions of the Belfast Agreement in the same way. No provision of the NI Protocol has that effect.

[25] The above analysis is entirely consistent with that set out in the judgment of Colton J in *Re Allister and Others' Application* [2021] NIQB 64, at paragraph [319]. Although the applicant challenges the correctness of this finding, I would only decline to follow it if persuaded that it was clearly wrong. In my view, it is not even arguably so; but, instead, represents an entirely orthodox application of well-known legal doctrine and a proper reading of the relevant provisions of the Protocol.

[26] Similarly, Article 2(1) of the NI Protocol provides that the UK shall "ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the [European] Union." That particular part of the Belfast Agreement concerns protection of human rights (including by a commitment on the part of the UK Government to incorporate the European Convention on Human Rights into the law of Northern Ireland); the establishment of new bodies such as the Human Rights Commission and a Victims Commission; and a range of provisions on economic, social and cultural issues, including in particular the Irish language and Ulster-Scots. There is nothing in that portion of the Belfast Agreement which relates to citizenship rights (nor, more particularly, a new right to avoid having citizenship conferred in accordance with the provisions of the 1981 Act). In addition, this case does not concern anything which has been lost or diminished as a result of the UK's withdrawal from the EU. The applicant's position now in respect of her Irish citizenship remains just as it was prior to the UK's withdrawal. It is true that she no longer enjoys EU citizenship as a result of her British, as well as her Irish, citizenship; but that is not a matter protected by the relevant portion of the Belfast Agreement referred to in Article 2(1) of the Protocol in any event.

[27] In summary, the portion of the Belfast Agreement upon which the applicant relies does not clearly provide her with the right for which she contends, namely a right *not* to have renounceable British citizenship conferred upon her. It does confer a right to be accepted as Irish only *as she so chooses,* but without defining how and when that choice may be exercised. For the reasons mentioned in paragraph [22] above, it does not appear to me that this provision of the Belfast Agreement was designed or intended to require amendment of the 1981 Act. In any event, even if I were to be wrong in that, the relevant provision of the Belfast Agreement cannot be directly relied upon and enforced by the applicant in domestic law (notwithstanding the provisions of the NI Protocol and the Withdrawal Act). I accordingly find the applicant's grounds 2 and 3 to be unarguable.

The applicant's Convention grounds

[28] Of the pleaded grounds, potentially the most fertile soil in which the applicant might seed her claim is Article 8 ECHR. That is because the nature of her claim, at heart, is an objection to being considered as a British citizen in circumstances where, albeit that gives rise to no practical difficulties for her, it is an assault on her own beliefs as to her identity.

[29] The difficulty with this argument for the applicant is two-fold. First, as Mr Lavery accepted, there is no authority – either from the Strasbourg Court or domestically – which addresses the question of the conferral of citizenship being considered a violation of Article 8 rights. Second, it is yet a further argument which has been considered and rejected by the Upper Tribunal in the *De Souza* case.

[30] I am prepared to accept that it is arguable that the conferral of citizenship, against their wishes, upon a person who enjoys citizenship of another State may be an interference with their rights under Article 8 ECHR. I do so because it is arguable that citizenship can have an important impact upon a person's social identity: see, for instance the authorities cited in paragraph [58] of *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98. Mr Blundell relied on this authority for the proposition that Article 8 ECHR was not engaged at all in respect of citizenship matters. I do not consider that the case goes that far. The Court of Appeal in England and Wales was sceptical that Article 8 was engaged by a refusal to confer citizenship, but also considered the case on the basis that it may be engaged: see paragraph [63]. In my view, the conferral of citizenship against an individual's wishes is more likely to give rise to an interference, since (as a matter of law) a status is assigned to them against their wishes. This might be thought to be a curious 'interference' since, as Davis LJ observed at paragraph [61] of *Williams*, having the status of citizenship of a country usually brings a number of advantages. Nonetheless, I accept it is arguable that this represents an interference with the applicant's Article 8 rights. However, I cannot accept that there is any realistic prospect of the applicant succeeding on this ground when it is properly analysed.

[31] The proposed respondent raises the question of what the concrete detriment is to the applicant, if any, of having had British citizenship conferred upon her. In my view, there is very little. She is not required to apply for a British passport. She is not required in everyday life to in any way identify herself as a British citizen; and her evidence confirms that she has not done so. She is free, as the evidence suggests this applicant has, to entirely ignore the legal fact of her British citizenship and to identify herself as Irish. Although there might perhaps be limited instances where there may be some obligation on the applicant or her parents, for instance in the completion of some official form, to give details of her nationality or citizenship, no such instances have been identified or relied upon in the evidence (save for the renunciation procedure discussed below). Indeed, in the normal course it is perfectly open to someone in Northern Ireland to identify themselves as British, as

Irish, as Northern Irish, or some combination of the above when, on the rare occasion, one is asked formally about these matters.

[32] No evidence has been presented in the course of this application as to any material prejudice or practical instance of detriment which has arisen for this applicant by virtue of her current British citizenship. That is, of course, not to call into question either her genuineness or strength of feeling on the matter on the basis of her own sense of identity. The *Williams* case suggests, however, that the court ought to maintain an appropriate focus on the *practical* consequences of the citizenship decision of which complaint is made. As discussed above, these seem to be minimal, with the real-life impacts of the applicant having British citizenship being negligible. She is effectively free to ignore it. On the evidence in these proceedings, the applicant's case is also weaker than that of the claimant in the *De Souza* case. In that case, there was some concrete detriment to the claimant in his wife being considered a British citizen because, by that token, she did not fall within the definition of an 'EEA national' in circumstances where, had she done so, the claimant would have been entitled to the issue of a residence card.

[33] The applicant's skeleton argument also accepts that "many will see the automatic conferral of British citizenship as a benefit rather than a detriment." Although that is not the case for this applicant, it is also said in the skeleton argument filed on her behalf that she "has no animosity with" British identity (albeit also having no affinity with it).

[34] Although the applicant has averred that she has "no family concept of partition" and "an all-Ireland outlook in every regard", the Belfast Agreement, upon parts of which the applicant strongly founds her claim, clearly recognises and affirms the present constitutional position, namely that Northern Ireland remains part of the United Kingdom (on the basis of the principle of consent), a necessary corollary of which is that the Government of the United Kingdom has legal responsibility for nationality and citizenship within this jurisdiction (which remains an excepted matter: see paragraph 8 of Schedule 2 to the Northern Ireland Act 1998). The proposed respondent is then to be permitted a margin of discretion as to the statutory scheme set up to deal with these matters.

[35] Importantly, insofar as the applicant wishes to rid herself of her British citizenship, she is free to do so at the age of 18. The provisions of section 12 of the 1981 Act make clear that a British citizen of full age and capacity may renounce their British citizenship and that, subject only to concerns about statelessness, the Secretary of State shall give effect to that renunciation (by causing the declaration to be registered which, in turn, means that the person who made it shall cease to be a British citizen): see section 12(1) and (2). This is subject to section 12(3), which provides that the declaration made by such a citizen shall not be registered unless the Secretary of State is satisfied that the person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship. That plainly would not be an issue in the present case.

[36] However, it is apparent on the face of section 12 that the automatic conferral of citizenship on those who fall within its purview is designed, at least in part, to meet a concern about possible statelessness. As the Upper Tribunal explained in *De Souza* (see paragraphs [36]-[40]), it is also designed to avoid concerns about unworkability if citizenship was determined only by choice or consent on the part of those who are newly born or very young. That would be inimical to the need to have a clear and coherent mechanism for establishing whether a person is, or is not, a citizen. The concern about statelessness on the part of young children in any 'opt-in' system of citizenship based on consent was considered to be real even for those born in Northern Ireland (with a right to dual citizenship) given that, if the applicant was correct that it was unlawful for the UK authorities to confer citizenship in the absence of an election, so too must that be the position for the Irish authorities.

[37] I have no hesitation, therefore, in concluding that the statutory scheme – on its face – pursues legitimate aims. Equally, it provides a facility for those such as the applicant who do not wish to maintain British citizenship to renounce it. The fact that this may only be done once the individual has become an adult is another obvious safeguard designed to ensure that the choice is not made for the individual by another and that the individual concerned is only faced with the choice at a time when they are old enough to make a fully informed decision, weighing the benefits and disadvantages of dual citizenship for themselves.

[38] In light of these factors, it is unsurprising that the Upper Tribunal in *De Souza* found that there were "profound difficulties" with the claimant's submission in that case that the statutory scheme was in contravention of his or his wife's Convention rights and that the scheme operated in a proportionate way in the pursuit of legitimate public ends: see paragraphs [52]-[54] and [57].

[39] As with the claimant's wife in the *De Souza* case, the applicant in the present proceedings objects to having to acknowledge that she is a British citizen in order to renounce that status. That involves ticking a box on the form when seeking to renounce citizenship in order to identify the status it is which one wishes to renounce. I do not consider that this can seriously be suggested to represent an unlawful infringement of Article 8 rights. The facility to renounce citizenship, once an adult decision has been taken to do so, obviously involves an identification of what it is which is being renounced. The 'acknowledgement' required for this purpose is simply a recognition of a legal fact which arose by operation of law, for the sole purpose of bringing that status to an end.

[40] As to the requirement that a fee be paid, that was also held to be proportionate in the *De Souza* case: see paragraph [56]. The maximum amount of a fee chargeable under the 2016 Fees Order is £400: see item 7.3 in Table 7 set out at article 10(2). The actual amount payable is £372: see item 20.3.1 in Table 20 of Schedule 8 to the 2018 Fees Regulations. Although it appears that the fee may have

increased from that quoted in the *De Souza* decision, it remains less than the maximum fee permissible and is, the Secretary of State has affirmed, merely to recover the administrative cost of processing the application. There is also no evidence before me that the fee represents a material barrier to the applicant now exercising her right of renunciation. Moreover, in the *Williams* case (*supra*) the requirement to pay a much higher fee (£673), in circumstances where it was clear that neither the claimant nor his parents could pay and he was seeking to *avail* of citizenship, was held to be Convention compliant in light of the legitimate and proportionate aim on the part of the Secretary of State in having a robust and administratively efficient self-funding scheme.

[41] Turning to the applicant's challenge grounded on Article 14 ECHR, in my view that is also bound to fail for similar reasons to those expressed above. The applicant complains that the impugned provisions treat Irish citizens born in the jurisdiction of Northern Ireland in a less favourable manner than British citizens born there or Irish citizens born elsewhere but now resident in Northern Ireland (by requiring them to renounce a citizenship of which they do not wish to avail). As to the second of these comparators, I consider it clear that they are not in an analogous position to the applicant. The fact that they were born outside Northern Ireland places them in a materially different situation. As to the first comparator, whilst such a person is in principle in an analogous situation to the applicant, they are treated by the 1981 Act in precisely the same way as she is. Her complaint is therefore one of indirect discrimination, or *Thlimmenos*-type discrimination, which is capable of justification. For the same reasons why I consider her Article 8 claim is bound to fail, I also consider that her discrimination claim would fail, since the approach adopted by the 1981 Act, which allows for renunciation in due course, is justified. In addition, the applicant's reliance on Article 14 in this case seems to me to fall squarely within the realm of cases referred to in paragraph [162] of the judgment of the Supreme Court in *SC* where the courts must be wary of failing to respect the boundaries between legality and the political process.

[42] Accordingly, I accept that the applicant's Convention grounds, unlike grounds 1-3, are arguable; but it seems clear to me that they do not enjoy a realistic prospect of success and I therefore refuse leave on grounds 4 and 5 also.

Delay

[43] Finally, the proposed respondent also urged me to refuse leave on the grounds of delay. This objection was founded on three recent decisions of the Court of Appeal of England and Wales: in *Badmus v Secretary of State for the Home Department* [2020] EWCA 657; *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 119; and *R (AK) v Secretary of State for the Home Department* [2021] EWCA Civ 1038. In particular, Mr Blundell relied upon the court's assessment in *Delve* that standing to challenge an impugned Act of Parliament arose as soon as the Acts in question were passed and that "unlawful legislation is not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial

review rolls forward for as long as the legislation continues to apply" (see paragraphs [124]-[127]).

[44] I do not need to reach a concluded view on this issue in light of my conclusions in respect of the merits of the applicant's case. Plainly, where a challenge is made to legislation, an appropriate balance has to be struck between legal certainty on the one hand and effective access to the courts on the other. Mr Blundell sensibly did not go so far as to say that the applicant became precluded from challenging the 1981 Act when she was three months old. He did, however, validly make the point that this challenge could have been brought earlier than it was, at a time when the applicant's objection to the conferral upon her of British citizenship crystallised. For my part, I would not have been inclined to refuse leave on the basis of delay had I considered that the applicant's case should be permitted to proceed on its merits. The analysis set out in the *Delve* case seems to me to represent a significantly more strict approach to limitation in judicial review, where a statutory provision is under challenge, than has customarily been adopted by the High Court in this jurisdiction; nor was any authority relied upon by the proposed respondent in this regard which is binding on me. It may well be that this issue may have to be grappled with more directly in this jurisdiction in due course. However, particularly in light of the applicant's still young age at the time when these proceedings were commenced, I would have been inclined to grant an extension of time to allow the case to proceed in the event that this was necessary.

Conclusion

[45] The grounds advanced in this application are largely an attempt to re-run arguments decisively rejected by the Upper Tribunal in the *De Souza* case. I accept that I am not bound by the decision of the Upper Tribunal in that case but it is nonetheless entitled to considerable respect, representing (as it does) the judgment of a tribunal having the status of a superior court of record and, at that, a tribunal with specific expertise in the law of nationality and citizenship. In any event, on the issues material to those raised in this application, I consider the Upper Tribunal's reasoning to have been correct. The applicant's reliance on asserted EU law rights is obviously unsustainable; and her reliance on the NI Protocol adds nothing material in my view.

[46] For the reasons given above, I dismiss the application for leave to apply for judicial review.