THE HIGH COURT

(1)

Record No. 2018/891JR

Between/

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Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL, IRELAND

Respondents

– and –

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION (No.2)

Notice Party

(2)

Record No. 2017/915JR

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THE ATTORNEY GENERAL, IRELAND

Respondents

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THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION (No.2)

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JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2019.

I. Introduction

1. In its principal judgment in the above-titled proceedings (see [2019] IEHC 547), the court held that the exclusion of post-flight marriages from the right to family reunification, pursuant to s.56 of the International Protection Act 2015, was unconstitutional. It now falls to the court to determine the form of the final orders to be made following on that judgment.

2. Two initial points might be made:

> (i) the court enjoys a discretion to fashion the appropriate remedy in light of the outcome of its judgment (see *e.g., Sinnott v. Minister for the Environment, etc.* [2017] 2 IR 570 and *Walker v. Leonach* [2018] IECA 132).
>
> (ii) it is useful also to recall in this regard Article 15.4.2° of the Constitution which provides that:
>
> *"Every law enacted by the Oireachtas, which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."*

3. Counsel for the applicants contends that having regard to the foregoing and to the substance of the principal judgment, the appropriate declaration for the court to make (the 'Proposed Declaration') is as follows:

> *"That s.56(9)(a) of the International Protection Act 2015 is repugnant to the Constitution insofar as it defines a sponsor's spouse as confined to the spouse of a marriage which is subsisting on the date the sponsor made an application for international protection in the State."*

4. The respondents object to the proposed wording on the grounds that it would amount to the court usurping the legislative function.

II. Excision

5. The current edition of *Kelly: The Irish Constitution* (5th ed., 2018), under the general heading "*Partial unconstitutionality, severance and judicial review of constitutional lacunae*" and the sub-heading "*The doctrine of severability/linguistic severance"* states, *inter alia*, as follows:

> *"As Article 15.4 limits the invalidity of a successfully challenged law to 'the extent only of such repugnancy', and Article 50 limits the non-continuance of a previously existing law to the extent of its inconsistency with the Constitution, the courts are obliged to keep the operation of declaring either sort of law unconstitutional within a minimum extent. This means that, in some cases, only a portion of a particular section is treated (so to speak) as 'deleted', on its being found to be unconstitutional, while the rest of the section is permitted to stand. However, these partial 'deletions' are carried*

out when this can be done cleanly and without violence to the presumed legislative will; the courts will not patch or mend a provision which a simple excision would render futile, or turn into something which the legislature had never envisaged. They will also not sever language where this would result in greater financial liability".

6. A couple of historical examples of severance in play might usefully be given:

– in *Deaton v. Attorney General* [2963] IR 170, the Supreme Court held that s.186 of the Customs Consolidation Act 1876 was unconstitutional insofar as it purported to give the Revenue Commissioners the right to elect, on the hearing of a criminal charge, for punishment by way of penalty or otherwise, Ó'Dálaigh CJ stating, at 184:

> *"The Constitution invalidates the section only to such extent as it is inconsistent with, or repugnant to, the Constitution….The section therefore remains intact but with the words, 'at the election of the Commissioners of Customs' (now, Revenue Commissioners), deleted therefrom."*

– in *Maher v. Attorney General* [1973] IR140, a case in which the plaintiff succeeded in having the provisions of s.44(2)(a) of the Road Traffic 1968 declared unconstitutional on the ground that the judicial function had been usurped thereby by rendering a certificate of blood alcohol level conclusive evidence, FitzGerald CJ, in a lengthy excursus on the application of what he styled "*the doctrine of severability or separability*", observed, *inter alia*, that what is at play "*is essentially a matter of interpreting the intention of the legislature in the light of the relevant constitutional provisions*". The segment of the then Chief Justice's judgment in which this observation appears is worth quoting at some length:

> *"The application of the doctrine of severability or separability in the judicial review of legislation has the effect that if a particular provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid. The question is one of interpretation of the legislative intent. Article 15, s. 4, sub-s. 2, of the Constitution lays down that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid; therefore there is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted if it can be shown that, after a part has been held unconstitutional, the remainder may be held to stand independently and legally operable as representing the will of the legislature. But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity. It is essentially a matter of interpreting the intention of the legislature in the light of the relevant constitutional provisions, and it must be borne in mind in all cases that Article 15, s. 2, sub-s. 1, of the Constitution provides that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.' If, therefore, the Court were to sever part of a statutory provision as unconstitutional and seek to give validity to what is left so as to produce an effect at variance with legislative policy, the Court would be invading a domain exclusive to the legislature and thus exceeding the Court's competency."*

7. The learned authors of the current edition of *Kelly: The Irish Constitution* also note (i) at para.6.2.329, that the courts will not engage in severance "*where the result would be to expose the Exchequer to an unanticipated financial burden*", and (ii) preface their commentary on, *inter alia*, the judgment of the Supreme Court in *Desmond v. Glackin (No. 2)* [1993] 3 IR 67, "[t]*he most elaborate application of the doctrine of severance…now to be found"* (at para.6.2.330 *et seq*.) with the succinct title "*Court will perform a sophisticated analysis to sever flaw*", which neatly captures a key aspect of the role of the courts in this regard.

8. *Desmond v. Glackin (No. 2)* concerned the interaction of two sub-sections of s.10 of the Companies Act 1990, the learned authors of *Kelly: The Irish Constitution* observing, *inter alia*, as follows, at para.6.2.331, in respect of the Supreme Court's approach to the interpretation of those two-sub-sections:

> "[T]*he Supreme Court, having examined the two subsections in conjunction, concluded that they embodied two separate legislative objectives – one constitutional and the other unconstitutional. The Court excised so much of both subsections as contained the constitutional flaw, thus leaving intact the remainder of the subsections which embodied the constitutionally acceptable legislative objective."*

9. Is it possible to reduce the above judicial observations and academic commentary to a set of guiding principles. Perhaps the following principles might be stated with some confidence:

(a) The courts are obliged to keep the operation of declaring a law unconstitutional within a minimum extent (Kelly).

(b) If a provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid (*Maher*).

(c) It must be borne in mind in all cases that Art.15.2.1° of the Constitution provides that "*The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State" (Maher).*

(d) Partial 'deletions' are carried out when this can be done cleanly and without violence to the presumed legislative will (Kelly).

(e) The courts will not (i) patch or mend a provision which a simple excision would render futile, (ii) by way of partial deletion turn a provision into something which the legislature never envisaged, (iii) sever language where the result would be to expose the Exchequer to an unanticipated financial burden (Kelly).

(f) What is at play is essentially a matter of interpreting the intention of the legislature in the light of the relevant constitutional provisions (*Maher*).

III. Application of Principle to Case at Hand

10. When it comes to applying the principles considered above, four observations might usefully be made:

(1) the declaration most consistent with those principles and with the principal judgment in the above-titled proceedings is one that severs the unconstitutional portion of s.56(9)(a) of the Act of 2015, i.e., the portion that restricts the definition of "*member of the family*", in the case of a married sponsor, to a spouse whom the sponsor had married prior to making his international protection application, so to read s.56(9)(a) as follows: "(a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State)". That is a severance which leaves s.56(9)(a) in a sensible and operable condition.

(2) as regards the contention of the respondents that so to sever is to undermine the intention of the Oireachtas, in fact quite the contrary position pertains. Were the court to proceed as the respondents have contended and strike down the entirety of s.56(9)(a), that would nullify the clear intention of the Oireachtas in s.56(9)(a) of the Act of 2015 to allow for spousal reunification, an intention that, the court notes, is consistent with Art.41 of the Constitution and with the State's international legal obligations.

(3) the court has concluded in its principal judgment that it was unconstitutional for the Oireachtas to limit the statutory reunification right by excluding 'post-flight' marriages. Hence the most appropriate remedy is to excise what is unconstitutional and leave intact the right to spousal reunification. To remove entirely the right to spousal reunification for beneficiaries of international protection would be to do more violence to the intention of the Oireachtas than the mere excision of the offending portion of s.56(9)(a) in accordance with the judgment of the court.

(4) in its principal judgment, the court noted, inter alia, at para.8, that "[T]*he Minister is always free under s.56 to undertake as careful a consideration as he wants, having regard to such concerns as he may have, e.g., regarding marriages of convenience, human trafficking (both of which raise clear public policy issues), and to ensure that only genuine family members get into Ireland.*" The Proposed Declaration will not interfere with the power of the Minister to investigate applications under s.56(2) and to refuse applications under s.56(7) if satisfied that that is necessary on grounds of national security or public policy.

IV. Conclusion

11. The court will grant a declaration in the form of the Proposed Declaration, *i.e*. the form of declaration sought by the applicants.