Neutral Citation [2015] IEHC 497

THE HIGH COURT

[2014 No. 512 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO S. 60(8) OF THE CIVIL REGISTRATION ACT, 2004

BETWEEN

SERGEY CHESNOKOV

APPELLANT

AND

AN tÁRD-CHLÁRAITHEOIR

RESPONDENT

JUDGMENT of Mr. Justice Hedigan on the 24th day of July, 2015

Introduction

1.1. The appellant herein appeals a decision of the respondent made on 12th September, 2014, refusing to register the appellant's birth pursuant to the Civil Registration Act 2004 ("the Act of 2004"). The appellant issued these proceedings pursuant to s. 60(8) of the Act of 2004. In the present application, the appellant is seeking the following reliefs:-

> "1. An Order setting aside the refusal by the Respondent to register the Appellant's birth;
>
> 2. An Order of this Honourable Court that the Appellant is entitled to have his birth registered and replacing the decision of An tÁrd-Chláraitheoir with that of this Honourable Court;
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> 3. An Order directing An tÁrd-Chláraitheoir to register the Appellant's birth;
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> 4. A declaration that such refusal to register the Appellant's birth is ultra vires the powers of the Registrar General under the Civil Registration Act, 2004 and in particular such power as contained in s. 19 thereof;
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> 5. A declaration that the continued failure to register the Appellant's birth is unlawful;
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> 6. A declaration that the Plaintiff has provided sufficient evidence of his birth for the purposes or registration under the Civil Registration Act 2004 and that An tÁrd-Chláraitheoir erred in concluding that the Plaintiff has not provided sufficient evidence of his birth for the purposes of registration under the Civil Registration, 2004;
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> 7. A declaration that An tÁrd-Chláraitheoir has erred by fettering his discretion by imposing a rule that statements which are not supported by documentary evidence are not acceptable;
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> 8. A declaration that An tÁrd-Chláraitheoir erred in imposing a legal requirement that is not provided for by the Civil Registration Act;
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> 9. A declaration that An tÁrd-Chláraitheoir erred in imposing an unfair and unlawful standard of proof on the Applicant in all the circumstances;
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> 10. A declaration that An tÁrd-Chláraitheoir erred in failing to accept that the Appellant's aunt is a qualified informant and/or treating her accordingly and/or invoking his powers under section 19 of the Civil Registration Act, 2004;
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> 11. A declaration that An tÁrd-Chláraitheoir erred in requiring that information provided by a qualified informant must be supported by independent documentary evidence;
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> 12. A declaration that An tÁrd-Chláraitheoir erred in finding that there was no independent documentary evidence;
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> 13. A declaration that An tÁrd-Chláraitheoir erred in imposing a requirement that in the absence of documentary evidence, a birth may only be confirmed by medical and/or nursing personnel;
>
> 14. A declaration that An tÁrd-Chláraitheoir failed to take any or any adequate account of the difficulties presented the passage of time;
>
> 15. A declaration that An tÁrd-Chláraitheoir failed to take any or any adequate account of the information provided by and on behalf of the Appellant."

The Parties

2.1. The appellant claims the following: he was born on 28th September, 1940, in a dwelling house at 5 Henrietta Street in the city of Dublin. His aunt was present at the birth. Shortly after his birth, he returned to Moscow with his mother and his birth in Dublin was registered with the authorities of the then USSR. The appellant resides in Russia. The appellant is now retired but was employed for over 30 years as a mechanical engineer. The appellant's grandson is an Irish citizen and resident in Ireland with his father, the appellant's son. The appellant stated that he applied to the respondent for late registration of his birth on 21st June 2010 to enable him to be involved in his grandson's life and visit his family in Ireland.

2.2. The respondent is responsible for managing and controlling the system of registration in Ireland. The respondent's principal functions are set out under s. 8 of the Act of 2004 and include the maintenance of a system of registration in respect of, inter alia, births and marriages. The respondent is charged with the responsibility of registering all births which occur within the State.

The Factual Background

3.1. The appellant made an application pursuant to s. 19(5) of the Act of 2004 for the late registration of the appellant's birth on 21st

June 2010. The appellant submitted a number of documents in support of his application including, *inter alia*, a declaration made by the appellant's aunt, Nadezhda Iljinichna Zhirnova, dated 29th April, 2010, a medical certificate confirming her fitness to make the declaration, and declarations made by Mr. Vladimir Gribkov and Mr. Alexey Chesnokov, regarding the execution of Ms. Zhirnova's declaration. Correspondence was exchanged between the parties, in respect of the late registration of the appellant's birth, over a period of approximately three years.

3.2. The respondent's office was concerned about the lack of independent evidence of the events asserted. In the initial reply dated 12th July, 2010, the respondent indicated that other than the declarations of relatives and persons known to the family, there was no evidence to prove that this birth occurred in Ireland as stated. The Office also advised that the circumstances under which the appellant's mother was in the UK and Ireland, her occupation and other details required to be expanded upon.

3.3. Further documentation was submitted by the appellant on 25th May, 2011, including a copy of the appellant's birth certificate issued in Russia on 14th October, 1940, which records his place of birth as having been Dublin, Ireland, and a copy of the appellant's marriage certificate which also records his place of birth as having been Dublin, Ireland, along with a copy of his passport which contains a similar record. A request had been made to the Registry Office in Russia in order to access the original information submitted in connection with the registration of the appellant's birth, but it was confirmed that such information was not available. The statement from the Russian Registry Office, dated 26th January, 2011, stated:-

> "For your request the Department of ZAGS (civil registration office) at Balashikha town of Head Office of ZAGS (civil registration office) of Moscow City, would like to inform you that the archive does not contain the original of the medical birth certificate of Chesnokov Sergey Anatolievich, born in Dublin, Ireland, date of birth 28.09.40, as the period while such papers are being stored is one year. Birth registration notice No. 545 was made by Nickolsko-Arkangelsky Village Council or Reutovsky District of Moscow Province on the 14th of October 1940."

Efforts had been made to obtain some information on the circumstances of the appellant's mother and aunt being present in Ireland in 1940. Correspondence was sent to the Red Cross main office and its office in Ireland in order to establish the possibility that the appellant's mother and aunt were part of a group of individuals who were transferred from the UK to Ireland by a charitable organisation. The Red Cross, however, did not have a record of the appellant's mother.

3.4. The respondent claims that there was no response to this letter. Mr. Feely, the Registrar General, averred at para. 8 of his replying affidavit that:-

> "given that the section 19(5) application had run its course, my office instigated the enquiry procedure pursuant to Section 65 of the Civil Registration Act 2004. The decision was taken as it was considered fair to the Appellant to provide for further consideration of the application under a provision that that was conferred explicit powers of enquiry and was more extensive in its scope."

The appellant stated that the decision to instigate the enquiry procedure was not communicated to the appellant at this time.

3.5. The appellants wrote again to the respondent on 23rd June, 2011, stating that original documents could be submitted and seeking acknowledgment of the letter of 25th May, 2011. The appellant's solicitor followed this with a telephone call on 5th July, 2011, and spoke with Ms. Mary Atkins in the respondent's office. During the course of that conversation, it was suggested by Ms. Atkins that the appellant's solicitor contact the Department of Foreign Affairs to ascertain whether any records had been kept by the Department.

3.6. The appellant's solicitor wrote to the respondent by letter dated 22nd August, 2011. The letter outlined, *inter alia*, that the Department of Foreign Affairs and Department of Justice and Equality was unable to provide any information and also enclosed an undertaking by the appellant not to access any public funds in Ireland notably by way of social welfare payments.

3.7. The appellant's solicitor wrote again on 5th October, 2011, which referred to all documents previously furnished to the respondent's office and seeking a response. A letter was sent by Ms. Mary Egan of the respondent's office on 11th October, 2011, which stated:-

> "the evidence presented to date is insufficient to allow the Registrar General to authorise the registration of his birth at the present time. While the aunt in this case, who was present at the birth could be regarded as a qualified informant, the difficulty is that there is no independent documentary evidence to support the assertions made.
>
> On receipt of further information, this application can be examined again but there must be some evidence in addition to the documents from the Registry Office in Russian Federation that the birth actually took place in Ireland."

3.8. The appellant's solicitor wrote again to the respondent on 22nd June, 2012, claiming that the appellant's aunt was a qualified informant and that this was sufficient for the purpose of the 2004 Act. The qualified informant was now deceased and the solicitor requested the respondent to review the case. Mr. Pat Canning of the respondent's office sent a letter dated 25th July, 2012, outlining that having reviewed the evidence, there was insufficient evidence and specifically "insufficient independent documentary evidence to support the assertions made on behalf of Sergey Chesnokov."

3.9. By letter dated 9th August, 2012, the appellant's solicitor sought an appeal of the respondent's decision pursuant to s. 60(2) of the Act of 2004. Mr. Con Connolly of the respondent's office by letter dated 20th September, 2012, stated that there was no appeal of a decision made pursuant to s. 65 of the Act of 2004. The letter stated:-

> "Obviously your client is disadvantaged by the passage of time since 1940 but the fact remains that this office cannot accept uncorroborated statements, whether sworn or otherwise.
>
> The fact that the Russian authorities have recorded your client as having been born in Ireland is certainly circumstantial evidence but, without sight of the supporting evidence, which may have been furnished to them, or details of the procedures that were followed at that time of registration, this evidence remains insufficient for the purposes of registering your client's birth.
>
> I regret that this office cannot be of further assistance to your client but please appreciate that under the provisions of section 65 of the Act, the Registrar General must be satisfied beyond doubt that a birth has occurred in Ireland before he can authorise a registration under the said section."

3.10. The appellant appealed, by letter dated 16th October, 2012, the decision of the appeals office dated 20th September, 2012, pursuant to s. 60(3) of the Act of 2004, the result of this review being that the original decision was upheld as no new evidence had been submitted. Mr. Feely spoke with the appellant's solicitor by telephone on 30th November, 2012. Given a reference to other witnesses in the letter of 16th October, 2012, Mr. Feely asked the solicitor to obtain an affidavit from a witness who should have contemporary knowledge and not be connected to the family, other documents showing the appellant's place of birth and further detail regarding the circumstances of the travel of the appellant's family.

3.11. On 4th March, 2013, the appellant's solicitor wrote to the respondent and provided further documentation including the appellant's trade union membership card, driving licence and two further statements, from Leizers Dumess and Vladimir Ivanovich Gribkov, both friends of the appellant and/or his family, and neither containing direct knowledge of the circumstances of the appellant's birth. The letter also referred to the fact that the Registry Office in Russia only retains documents for one year after the registration of the birth.

3.12. A further letter issued from Mr. Connolly of the respondent's office on 10th July, 2013 which stated that there was nothing additional of substance contained in the enclosures to authorise the late registration of the appellant's birth. The letter also enclosed a copy of the letter dated 20th September, 2012, which Mr. Connolly stated "comprehensively outlines the position of this office in relation to your client and as regards late registrations in general." The respondent contended this was the date on which the final decision was communicated to the appellant's solicitor.

3.13. By letter dated 7th March, 2014, the appellant sought confirmation from the respondent that, in making the decision, he had considered the evidence of the Russian Registry Office and to deliver a final decision in the matter. By letter dated 12th September, 2014, Ms. Marie Egan of the respondent's office replied and stated:-

> "we have reviewed your client's application in detail and taking into account all documentation submitted including the letter from Registry Office in Russia dated 26 January 2011. Regretfully, the Registrar General has concluded that there is insufficient evidence to authorise the late registration of your client's birth."

The Legislative Framework

4.1. Section 8(1) of the Act of 2004 sets out the principle functions of An tÁrd-Chláraitheoir as follows:-

> "The principal functions of an tArd-Chláraitheoir are—
>
> (a) to maintain, manage and control the system of registration (which shall be known as the Civil Registration Service) established by the repealed enactments of births, stillbirths, adoptions, deaths and marriages, wherever occurring in the State, and of births to which *section 26* or *27* applies and deaths to which *section 38* or *39* applies,
>
> (b) to extend the Civil Registration Service to decrees of divorce, and decrees of nullity, wherever granted in the State,
>
> (c) where appropriate, to modify and adapt the Civil Registration Service so as to provide for changing needs and circumstances (including the use of electronic or other information technology) in relation to the Service,
>
> (d) for the purposes of the Civil Registration Service, where appropriate, to maintain, adapt, modify and enlarge the registers, indexes and other records established and maintained under the repealed enactments,
>
> (e) to establish and maintain registers and indexes for the purposes of the registration of decrees of divorce and decrees of nullity,
>
> (f) to monitor the operation of this Act,
>
> (g) to make recommendations to the Minister on any measures that are estimated to cost in excess of such amount as may be specified by the Minister from time to time and are, in the opinion of an tArd-Chláraitheoir, necessary to achieve and maintain appropriate standards of efficiency in the Civil Registration Service and, subject to the consent of the Minister, to implement those measures or, instead of or in addition to them, such measures as the Minister may specify in relation to those standards,
>
> (h) to publish guidelines to registrars (within the meaning of section 17) on the operation of this Act,
>
> (i) to initiate and prosecute proceedings in relation to summary offences under this Act or any of the repealed enactments, and
>
> (j) to perform any other functions conferred on him or her by the Minister under *subsection (3)*."

4.2. Part three of the Act of 2004 deals with the registration of births and stillbirths. Section 19 provides:-

> "19.—(1) Subject to the provisions of this Part, when a child is born in the State, it is the duty of—
>
> (a) the parents or the surviving parent of the child, or
>
> (b) if the parents are dead or incapable through ill health of complying with this subsection, each other qualified informant, unless he or she reasonably believes that another qualified informant has complied with it in relation to the birth,
>
> not later than 3 months from the date of the birth—
>
> (i) to attend before any registrar,
>
> (ii) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the

birth, and

(iii) there, to sign the register in the presence of the registrar.

…

(3) Where, owing to non-compliance with subsection (1), a birth is not registered and, having made reasonable efforts to do so, the authority in whose functional area the birth occurred is unable to contact either parent of the child concerned, the authority may give a qualified informant a notice in writing requiring the informant—

(a) to attend before a registrar in the functional area of the authority, at the office of the registrar or at such other (if any) convenient place as may be specified by the authority on or before a day so specified (not being less than 7 days from the date of the notice nor more than 12 months from the date of the birth),

(b) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and

(c) there to sign the register in the presence of the registrar,

and, unless the birth is registered before the date of the attendance aforesaid, the informant shall comply with the requirement.

(4) Where paragraphs (i) to (iii) of subsection (1) or, as the case may be, paragraphs (a) to (c) of subsection (3) have been complied with in relation to a birth, the registrar concerned shall register the birth in such manner as an tArd-Chláraitheoir may direct.

(5) Where, in relation to the birth of a child—

(a) the parents of the child are dead or incapable through ill health of complying with subsection (1), or

(b) neither the parents nor another qualified informant can be found after all reasonable efforts to do so have been made,

an tArd-Chláraitheoir may cause the birth to be registered on production to him or her of such evidence as he or she considers adequate for the purpose which, in the case referred to in paragraph (b), shall include, if the place where the birth occurred is known, evidence that the Superintendent Registrar of the authority in whose functional area the birth occurred made all reasonable efforts to find the parents or a qualified informant.

(6) In this section "qualified informant", in relation to the birth of a child, means—

(a) the parents or the surviving parent of the child,

(b) a guardian of the child,

(c) a person present at the birth,

(d) if the birth occurred in a building used as a dwelling or a part of a building so used, any person who was in the building or part at the time of the birth,

(e) if the birth occurred in a hospital or other institution or in a building or a part of a building occupied by any other organisation or enterprise the chief officer of the institution, organisation or enterprise (by whatever name called) or a person authorised by the chief officer to perform his or her functions,

(f) a person having charge of the child, or

(g) a man who duly makes a request under paragraph (c) or (d) of section 22 (2)."

4.3. Part eight of the Act of 2004 deals with appeals and provides for a system of internal appeals and ultimately an appeal to the High Court. Section 60 provides:-

"60.—(1) Where—

(a) a registrar fails or refuses to register in the appropriate register specified in section 13 a birth, stillbirth, death or marriage or to enter in such a register one or more of the particulars required by this Act to be so entered, and furnished to him or her by a person pursuant to this Act, or

(b) an tArd-Chláraitheoir or an authorised officer fails or refuses to comply with a request of a person under section 63 ,

the registrar, an tArd-Chláraitheoir or the authorised officer, as the case may be, shall notify the qualified informant (within the meaning of Part 3 or 5, as may be appropriate) concerned, the parties to the marriage or the person in writing of the reasons for the failure or refusal.

(2) If a person ("the appellant") affected by a failure or refusal by a person under subsection (1) is dissatisfied with it, he or she may appeal against it by lodging a notice of appeal in writing in a form standing approved by an tArd-Chláraitheoir

or in a form to the like effect with the authority concerned, not later than 28 days from the date of his or her receipt of the notification under subsection (1), and the appeal shall be referred by the authority to such officer of the authority (not being the person in relation to whom the appeal is brought) as the authority may determine ("the appeals officer"), and the appeals officer shall determine the appeal.

(3) If an appellant is dissatisfied with the decision of an appeals officer under subsection (2), he or she may appeal against it by lodging a notice of appeal in writing in the form standing approved by an tArd-Chláraitheoir or a form to the like effect with an tArd-Chláraitheoir not more than 28 days after his or her receipt of the decision and an tArd-Chláraitheoir shall determine the appeal and, subject to subsections (6) to (8), the decision shall be final.

(4) The Minister may by regulations make provision in relation to notices of appeal under this section and the procedure to be followed on appeals under this section.

(5) In relation to an appeal under this section, the appeals officer concerned or an tArd-Chláraitheoir, as the case may be —

(a) shall notify the parties concerned in writing of his or her decision in relation to the appeal and of the reasons therefor, and

(b) may give such directions in relation to the registration or correction concerned to the registrar or authorised officer concerned as he or she considers appropriate, and any such direction shall be complied with by the person to whom it is given.

(6) An appeals officer ("the officer") may revise a decision of another appeals officer under this section if it appears to the officer that the decision was erroneous having regard to evidence first given to the officer, or a fact first made known to the officer, since the date of the decision.

(7) An tArd-Chláraitheoir may revise a decision (including a revised decision under this subsection) of an tArd-Chláraitheoir or an appeals officer if it appears to him or her that the decision was erroneous by reason of a mistake of law or fact.

(8) A person who is dissatisfied with a decision (including a revised decision) of an tArd-Chláraitheoir may appeal against it to the High Court.

(9) A revision under subsection (6) by an appeals officer shall be deemed, for the purpose of subsections (2) to (5) and (7) of this section, to be a decision under subsection (2), and those subsections shall apply and have effect accordingly, with any necessary modifications, in relation to the revision.

(10) A decision or a revision under this section—

(a) shall be in writing and be signed by the person by whom it is made, and

(b) shall, subject to any appeal under this section, have effect in accordance with its terms.

(11) A document purporting to be a decision or a revision of an tArd-Chláraitheoir or an appeals officer shall be deemed to be such a decision or revision and to have been signed by the person purporting to have signed it unless the contrary is shown and shall be prima facie evidence of the decision or revision and it shall not be necessary to prove that that person was an tArd-Chláraitheoir or, as the case may be, an appeals officer."

4.4. Order 84C of the Rules of the Superior Courts governs the procedure to be adopted in statutory appeals where the relevant statute does not set out the procedure. It provides:-

"1.(1) In this Order, 'enactment' has the same meaning as in the Interpretation Act 2005.

(2) Where any enactment provides for an appeal to be made to the High Court or to a judge of the High Court from a decision or determination made or direction given by a person or body, other than a court, which person or body is authorised by any enactment to make such decision or determination or give such direction (in this Order referred to as "the deciding body"), and provision for the procedure applicable is not made either by the enactment concerned or by another Order of these Rules, the procedure set out in the following rules of this Order shall apply, subject to any requirement of the relevant enactment.

2.(1) The appeal shall be commenced by way of originating notice of motion (in this Order hereinafter called "the notice of motion"). The notice of motion shall be entitled in the matter of the provision of the enactment pursuant to which the appeal is made. The notice of motion shall name the person making the appeal as appellant and any person who the relevant enactment provides shall be a respondent to the appeal shall be named as a respondent.

(2) The notice of motion shall contain the names and addresses of the appellant and of each respondent. The notice of motion shall specify the relief sought, and the particular provision or provisions of the relevant enactment authorising the granting of such relief.

(3) Where the relevant enactment provides only for appeal to the High Court on a point of law, the notice of motion shall state concisely the point of law on which the appeal is made.

(4) Where the relevant enactment provides that the Court may grant relief consequential upon or in addition to determining the appeal, the notice of motion shall state concisely the consequential or additional relief sought.

(5) Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued -

(a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or

(b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

4.5. Section 65 permits the respondent to conduct enquiries as follows:-

"65.—(1) An tArd-Chláraitheoir may conduct or cause to be conducted such enquiries as he or she considers necessary to ascertain—

(a) whether a birth, stillbirth, death or marriage required to be registered under this Act or the repealed enactments in the register maintained under paragraph (a), (b), (d) or (e), as may be appropriate, of section 13 (1) has occurred and if it has—

(i) whether it has been so registered, and

(ii) if it has been, whether the particulars in relation to it in the entry in the register concerned are correct and complete.

(2) An tArd-Chláraitheoir may, by notice in writing served on a person whom he has reason to believe may be able to provide him or her with information relevant to an inquiry under subsection (1), require the person to provide the information to him or her within such time (not being less than 28 days) from the date of the giving of the notice and in such manner as may be specified in the notice.

(3) If an tArd-Chláraitheoir is satisfied that an event referred to in subsection (1) has occurred and that it has not been registered in the appropriate register referred to in that subsection or, if so registered, that the particulars in the entry in the register concerned in relation to it are incorrect or incomplete, he or she may register the event, or cause it to be registered, in the appropriate register or, as the case may be, correct or complete, or cause to be corrected or completed, the entry aforesaid."

Submissions of the Appellant

Is the Appeal Out of Time?
5.1. The appellant argues that the date of the decision herein was 12th September, 2014. If this is wrong, he wishes to apply for an extension of time. If an extension is required, the 3-stage test in *Éire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] 1 I.R. 170 is the fundamental test to be applied but both the decisions of *Goode Concrete v. CRH plc & Ors.* [2013] IESC 39 and *Little v. Financial Services Ombudsman* [2011] IEHC 137 indicate that the Court has a discretion which it should exercise in the circumstances of the case. The affidavit evidence of the appellant and his solicitor, Ms. Elizaveta Donnery, both affidavits having been sworn on 15th May, 2015, indicates that there was a *bona fide* intention to appeal and this they argue brings the appellant within the test as set out in Éire Continental.

5.2. Even if the appellant is wrong on that point, then something akin to a stay existed, in that Ms. Donnery was concerned that the document from the Russian Registry Office had not been considered and she wished to explore this.

5.3. Further, during the course of the correspondence between the appellant's solicitor and the respondent's office, the respondent's office had been open to the appellant reverting back with further information. It was thus understandable that the appellant and his solicitor formed the view that it was still open to go back to the respondent and that if they were mistaken, this falls within the test set out in *Éire Continental*. In response to the respondent's submissions, the applicant argues that the letter of July 2013 is expressly linked back to the letter of September 2012, which itself had left the door open for further information to be provided.

5.4. The applicant argues that there would be no prejudice caused to the respondent by the Court deciding to extend time to appeal and there is no prejudice by an appeal being brought out of time, if it was brought out of time.

5.5. With respect to the respondent's submissions regarding *Goode Concrete* and the public interest in finality of the proceedings, the appellant noted that the decision was in the context of a *lis inter partes* rather than an appeal from a statutory decision-maker and that those were the interests which are being protected by Clarke J.

The Scope of Appeal
5.6. The scope of appeal is to be determined by the construction of the particular legislative provision and legislative context (see *Orange Communications Ltd. v. Director of Telecommunications Regulation & Anor. (No. 2)* [2000] 4 I.R. 159, *Dunne v. Minister for Fisheries* [1984] I.R. 230, *Glancré Teoranta v. Cafferkey* [2004] 3 I.R. 401). That approach was endorsed by Clarke and McKechnie JJ. in the Supreme Court decision of *Fitzgibbon v. The Law Society* [2014] IESC 48. Clarke J. stated at para 2.2:-

"Within that broad spectrum of appeals, there are, in reality, very many differences both at the broad level of principle and in relation to detail between the types of appeal which may be contemplated. In the vast majority of cases, there is no overarching legal reason why any particular form of appeal may be required. The form of appeal allowed will, in most cases, therefore, be a question of the proper interpretation of the relevant legal measures whether private or public. If those legal measures are sufficiently clear, then it is unlikely that any difficulty will arise. Any court called on to review the actions of relevant bodies or to consider the scope of a right of appeal to or within the courts system itself will simply consider what the rules or statute concerned actually says. However, regrettably, it is all too frequently the case that such rules or statutes are far from clear and often leave any court charged either with reviewing the decisions of outside bodies or considering the scope of its own jurisdiction with a difficult task of interpretation."

Counsel for the appellant also relied on paras. 48 and 50 to 53 of McKechnie J.'s judgment. Paragraph 48 states:-

> "With the utmost respect I am not at all sure that 'consistency' should be the yardstick in determining what the relevant test should be, as deserving and all as that end result obviously is. Essentially what the Court is involved in is an exercise in statutory interpretation which must be assessed in accordance with the relevant and well established canons of construction. If the results should differ as between one appeal provision and another, the approach cannot be altered simply to avoid this. If inconsistency, as to the nature and format of appeals should arise, it will do so only because of the variable statutory framework in place."

At para. 51, he stated:-

> "As Costello J. pointed out in *Dunne v. Minister for Fisheries* [1984]1 I.R. 230, 'in every case the statute in question must be construed'(p.237). Barron J. in *Orange* said 'the test for competition cases cannot be a guide for other cases' (p. 238): certainly, without much concordance on many other important factors, this surely must be right. This therefore being the situation, it then becomes necessary to consider each legislative framework in its own right."

The appellant states that this deals with the reason of consistency, one of the reasons on which Finnegan J. came to a different conclusion in *Ulster Bank Investments Fund Limited v. Financial Services Ombudsman*.

5.7. Thus, the appellant contended that the tests applied in cases such as *Orange* Communications are a guide as to the scope of a statutory appeal provision but the Court must ultimately determine the type of appeal provided for by the particular legislative code, taking into account the language, legislative context, subject matter and the nature of the decision maker and tribunal involved (see *Orange Communications, Dunne v. Minister for Fisheries Glancré Teoranta v. Cafferkey, M.J. Gleeson v. Competition Authority* [1999] 1 I.L.R.M. 401, *Carrickdale Hotel Ltd. v. Controller of Patents* [2004] 3 I.R. 410, *Ulster Bank Investments Fund Limited v. Financial Services Ombudsman)*.

5.8. The appellant acknowledged that the respondent plays an important role in Irish society and public life but the function he was performing in relation to the matter the subject of these proceedings is not one of specialist expertise or knowledge which is beyond the expertise of the courts. Indeed, the decision of the respondent involved nothing more than the consideration of evidence, the weight to be given to it and the inferences or conclusions to be drawn therefrom. It was submitted, therefore, that the legislative language and context and the particular function in question does not require the deference or restrained approach which these authorities mandate in the case of appeals against decisions of specialist decision-makers or the limited type of appeal countenanced by M.J. Gleeson, *Orange Communications, Carrickdale* and *Ulster Bank Investments*. In reply to the respondent's argument, the appellant asserted that exercising care does not equate to speciality or expertise. McKechnie J. warned against this approach in *Fitzgibbon*, where he described it as freewheeling and at the risk of being attenuated through overuse. In relation to *Langley*, relied upon by the respondent, Kearns P. expressly accepted that a statute must be construed in its own terms in order to establish and determine the scope of appeal. An entirely different registration regime was being considered under the Teaching Council Act. Further, as was conceded by counsel for the respondent, the Teaching Council Act referred to the power of the redress from the High Court as an annulment rather than an appeal, which Kearns P. regarded as a judicial review type remedy. As it did not come within the ambit of judicial review, Kearns J. imposed the *Orange Communications* test which is in the territory of judicial review.

5.9. In *Fitzgibbon*, Clarke J. set out the four types of statutory appeals at para 3.3:-

"Subject to those caveats, it seems to me that one convenient way of categorising appeals is the following:-

> (a) A de novo appeal;
>
> (b) An appeal on the record;
>
> (c) An appeal against error, and
>
> (d) An appeal on a point of law."

5.10. The appellant argues that this is an appeal on the record. Clarke J. described this form of appeal as follows at para 5.1:-

> "While the term 'de novo appeal' has a certain broad currency, the term 'appeal on the record' is less widely used. However, it seems to me to be an appropriate term to describe a recognised form of appeal which shares one, but not both, of the fundamental characteristics of a de novo appeal which are identified in the preceding section of this judgment. In an appeal on the record, the appellate body must come to its own conclusions as to the proper result of the issues before it without regard to the decision made by the first instance body. However, and in contrast to a de novo appeal, the default position in respect of an appeal on the record is that the evidence and materials which are properly relied on by the appellate body are the same as those which were before the first instance body."

5.11. The second type of appeal at issue between the parties is that it may be an appeal against error. Clarke J. states at paras. 6.1 and 6.2:-

> "6.1 The critical distinction between an appeal against error and either a de novo appeal or an appeal on the record is that the appellate body does have regard to the determination of the first instance body and must, in order for the appeal to be allowed, be satisfied that the first instance body was in some way in error.
>
> 6.2 The default position is, therefore, that the appellate body considers the record of the proceedings at first instance (and in the absence of any rules permitting further evidence or materials to be produced only that record) and considers whether the first instance body came to a correct or sustainable decision on the basis of that record. So far as facts involving an assessment of the credibility of witnesses are concerned, then the role of the appellate body is to decide whether there was a sufficient basis disclosed on the record for such findings of fact. The appellate body cannot, of course, reassess questions of pure credibility for it will not, ordinarily, have had the opportunity to assess evidence given by witnesses."

5.12. The correct interpretation of s. 60(8) of the Act of 2004 is that the appeal provided for is unrestricted and is a re-hearing/reconsideration of the merits with the court entitled to reach its own conclusions as to the proper result of the issues before it without regard to the decision made by the respondent. Thus, the appellant submitted that this is an appeal on record but in any event, it does not matter whether it is an appeal on record or an appeal against error as the evidence favours registration but also satisfies the Court that there is such a serious or significant error in the adjudicative process as to vitiate the decision of the

respondent.

Appeal on Merits
5.13. The preponderance of the evidence supports the appellant's application to have his birth registered in Ireland. Thus, the respondent decided the case incorrectly on the merits. The respondent's decision was that there was insufficient evidence because there was no independent documentary evidence corroborating the statements and declarations that were submitted. There was an eyewitness statement from the appellant's aunt, being such statement from a qualified informant. In addition, the appellant's application was accompanied by statements from people who were told of the events by people involved. In relation to the respondent's contention that the appellant could have got evidence about what happened from people of a similar age to his mother and father, it is difficult to see what individual not connected to the family would be in a position to give contemporary evidence if they were not present at the birth. Further, the appellant also submitted his official documents – birth certificate, marriage certificate and passport – which recorded his date of birth and place of birth being Dublin, Ireland.

5.14. The appellant also has an explanation as to why grounding information for the birth certificate is not available from the Russian authorities. The appellant submitted that from the evidence of the Russian Registry Office, it is apparent that (a) documentary evidence would have been necessary before registration of the appellant's birth could have taken place and (b) that evidence is no longer available. In relation to the respondent's contention that the response of the Russian Registry Office is unclear and that it may be construed as meaning the birth certificate was destroyed after a year, the appellant argued that this is untenable as the birth certificate is available.

5.15. No doubt was ever expressed by the respondent about the validity of the official documentation from the Soviet Union or Russia. Thus, the logical conclusion is that the respondent either does not believe or is not satisfied that whoever registered the appellant's birth in Russia in 1940 told the truth to the Soviet authorities. It is inconceivable that such an untruth would be told to achieve registration 75 years ago and it is difficult to see what benefit could have been achieved by registering his birth place as other than the Soviet Union. The Court should have regard to the fact that the Russian Registry would not have registered the birth place of the appellant as Dublin, Ireland unless there was documentary evidence before it to satisfy it of same.

Appeal Against Error
5.16. There are a number of fundamental errors on the part of the respondent:-

(i) The Registrar General applied the incorrect standard of proof. In the letter dated 20th September, 2012, he made it clear that the standard of proof he applied was not the appropriate civil standard, on the balance of probabilities, but one of him being "satisfied beyond doubt". The Registrar General now resiles from this and asserts that he applied the civil standard of proof. He stated at para. 22 of his affidavit sworn on 16th January, 2015:-

> "…as outlined in the Statement of Opposition filed on my behalf, I confirm that the standard applied in this case was that which is applied in all cases of this nature which is the civil standard of the balance of probabilities. I accept that the letter exhibited at paragraph 18 above uses the term 'beyond a doubt' but throughout the entire process of considering the Appellant's case I am satisfied that the standard of proof actually applied was the correct one; that being the balance of probabilities."

The respondent cannot now subsequently state on affidavit that that is not the meaning he intended. Further, even if the standard of proof contained in the letter was mistaken, the respondent applied the higher standard of proof as the effect of what he did and the types of proof he was seeking was essentially to allow himself to be satisfied beyond a reasonable doubt, i.e. requiring contemporaneous, independent evidence from a person unconnected with the family.

(ii) The second error is his insistence on having independent documentary evidence. The Registrar General should not have gone beyond the evidence of the qualified informant as this was sufficient to deal with the application. The legislative intent of s. 19(5) of the Act of 2004 is clear. The power of the Registrar General to act on such evidence as he considers adequate only arises where a qualified informant cannot be found. The respondent's position appears, in this case and it seems in all cases, is that as a *sine qua non* of acceding to an application for registration of a birth that there be independent documentary evidence. Without prejudice to the above submission, pursuant to s. 19(5) and s. 65 of the Act of 2004, the respondent is given a discretion in relation to adequacy of evidence but he could not impose an absolute bar or absolute rule not to accept the statements unless accompanied by independent documentary evidence (see *Re N* (Unreported, High Court, 30th June, 1980, Finlay P.); *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539; *Humphrey v. Minister for the Environment* [2001] 1 I.R. 263; *McDonagh v. Clare County Council* [2002] 2 I.R. 634).

(iii) The Registrar General also erred in holding that there was no independent documentary evidence or no corroborating evidence. The appellant provided official documentation issued by the Soviet Union and the Russian State, all of which certify the appellant as being born in Dublin, Ireland on 28th September, 1940. What in effect the respondent seeks to do is to look behind all of those certificates issues by a sovereign State where no question has ever been raised by him as to the validity or genuineness of these certificates.

Submissions of the Respondent

Is the Appeal Out of Time?
6.1. The respondent submitted that the notice of the respondent's decision was given by the letter dated 10th July, 2013, subsequent to the letter from the appellant's solicitor dated 4th March, 2013 and additional documentation enclosed with said letter. The letter stated that the Registrar General had:-

> "[r]eviewed your client's application again and has taken into consideration the various additional enclosures. The Registrar General has decided that there is nothing additional of substance contained in the enclosures and, consequently, that he is not in a position to authorise the late registration of your client's birth."

The respondent argues that this was a clear decision on the part of the decision-maker that there was no additional material of substance and that he had made a decision not to authorise the late registration of the birth. No appeal was brought within 21 days.

6.2. Eight months later, the appellant sought to restart the clock by letter dated 7th March, 2014. Although the appellant's solicitor, in the said letter, requested confirmation that the respondent had received and taken into account the letter from the Russian Registry Office submitted by the appellant's solicitor on 25th May, 2011, and again on 5th October, 2011, no new information was supplied at that time. The respondent notes that specific reference was made to that documentation by the respondent in his reply

of the 11th October to the applicant's solicitor's letter dated 5th October, 2011. It was therefore clear that it had been considered. In terms of the argument that the respondent was open to considering additional information and that the appellant could come back with such, the respondent argues that the letter of 10th July, 2013, could only be objectively and reasonably construed as a final decision.

6.3. In regard to an extension of time to appeal, the respondent considered the 3-stage test as set out in *Éire Continental*. In regard to the first condition that the applicant must show that he had a *bona fide* intention to appeal formed within the permitted time, the respondent submitted that there is no evidence of a specific intention on the part of the appellant to appeal the decision of 10th July, 2013, if the Court agrees that that was the date of the relevant decision. The respondent contended that the general averment in the affidavits of an intention to appeal is not sufficient to satisfy this condition. The appellant could not meet the condition in circumstances where Ms. Donnery says in her affidavit that she was of the view that the respondent had not in fact formed a decision and thus, there was no decision to appeal.

6.4. In regard to the second condition, that the appellant must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient, the mistake normally contemplated is in terms of putting into operation the intention formed within the relevant period. It is not normally a generalised mistake by the legal advisor as to the general legal position.

6.5. The respondent argues that if right on one or both of those conditions, one must return to the general discretion conferred on the Court pursuant to Order 84C, rule(5)(b), both stages of which must be met by the appellant. As regards the extension of the period not resulting in an injustice being done to any other person concerned in the matter, the respondent submitted that failing to bring finality to the proceedings in a timely way is in itself a potential and significant injustice. Reliance for this argument was placed on the decision of Clarke J. in *Goode Concrete* where he stated at para. 3.3:-

> "The reason why the *Éire Continental* test applies in the vast majority of cases is clear. The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides. Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice."

Further, the respondent contended that there may be an injustice to other parties or the whole system if one party is allowed to re-open an application after a long period of time and it may divert resources available to deal with other applications.

The Scope of Appeal

6.6. The respondent relied on the test set out by Keane C.J. in *Orange Communications* where at pp. 184-185 he stated:-

> "In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors."

This was followed and applied by Laffoy J. in *Carrigdale Hotel Limited v. The Comptroller of Patent and Trade Marks & Anor.* [2004] 3 I.R. 410 in respect of s. 41(3) of the Copyright Act 1963 and by Finnegan P. in Ulster Bank Investment Funds Limited v. Financial Services Ombudsman [2006] IEHC 323.

6.7. The respondent submitted that the decision in *Manorcastle Limited v. Commission for Aviation Regulation* [2008] IEHC 368 was comparable given the similarities between licensing and registration. Here, one of two preliminary issues before the Court was that of the test to be applied on appeal; Charlton J. noting that there were a number of possibilities ranging from a de novo appeal to principles applying to judicial review. Charleton J. ultimately held that the *Orange* test should apply. The respondent submitted that when one examines the nature of the Act of 2004, the Office of the Registrar General falls within the ambit of a specialist decision-maker and thus the test as set out in *Orange* applies. The ex-tempore decision of Kearns P. in *Langley v. The Teaching Council* (High Court, 21st June, 2012, Kearns P.) was relied upon as supportive authority for the notion that a registration body falls within the ambit of the Orange principles.

6.8. The respondent submitted that maintaining the integrity of the register of births is a matter of fundamental public policy for the State, given that the registration of a person's birth triggers the exercise on many legal rights and access to services. As a result, the maintenance of such a system requires a certain level of expertise and experience in dealing with a myriad of situations and applying careful consideration to applications. The scope of the appeal to the Court must be considered in conjunction with the nature of the decision-making power the subject of the appeal. The language of s. 19(5) of the Act of 2004 is that of a statutory body or specialist decision-maker exercising discretionary powers and assessing the quality of evidence produced.

6.9. If *Orange Communications* is applicable, the test is whether there was a serious error or a series of such errors. If not, then the applicable appeal is an error on record and whether there was an error *simpliciter*. Thus, the Court will have to determine whether the appellant produced adequate evidence for registration. The respondent submitted that neither s. 19(5) nor s.65 provide that the statement, or evidence, of the qualified informant are adequate for the purposes of registering a birth. The discretion as to what constitutes adequate evidence is left to the respondent to determine. In reply to the appellant's argument that the respondent fettered his discretion by imposing a rule that statements which are not supported by documentary evidence are not acceptable, the respondent asserted that no such rule applies. The respondent is entitled in the exercise of his discretion pursuant to s. 19(5) to have regard to the nature and type of evidence that will assist him and/or suffice in the exercise of his statutory duties. The respondent did not fetter his discretion or set an inflexible rule and was open to considering additional evidence the appellant could produce.

6.10. In relation to the evidence produced, the respondent submitted that:-

> (i) The statement of the appellant's aunt is devoid of information on how she and the appellant's mother came to Dublin, how they arrived, who they met in Ireland, who organised accommodation for them and how they left Ireland.
>
> (ii) There is no detail on what evidence was required to get a birth certificate in Moscow. The meaning of the response from the Russian Registry Office regarding the birth certificate is unclear and the respondent was entitled to question the adequacy of that evidence. A potential meaning contended for by counsel was that the original birth certificate was destroyed after a year, rather than clearly meaning that the documents grounding the birth certificate were destroyed after a year.

(iii) Other declarations, for example from Mr. Gribkov, are hearsay evidence.

6.11. Further, the respondent submitted that, noticeable by its absence, the appellant never provided details of discussions he had with his mother or father regarding the circumstances of his birth.

6.12. In relation to the use of the phrase "beyond doubt" by the respondent, the respondent argued that the words should not be considered in isolation as to the standard of proof applied. Upon consideration of the entire file, it is clear the respondent was considering whether or not there was adequate evidence pursuant to s. 19(5). For example, the respondent spoke with the appellant's solicitor by telephone on and made a note of the questions and queries raised, which are as follows:-

> "1. Does Mr Chesnokov have any older siblings? No.
>
> 2. What can other witnesses mentioned in letter dated 16 October 2012 add? Solr says that they may have knowledge of the circumstances of the family. I asked solr to obtain affidavit from one of these witnesses, who should have contemporary knowledge and not be connected to the family.
>
> 3. Where is declaration of Mr Gribkov's mother referred to in declaration of Mr Gribkov? Solr will check.
>
> 4. Are there other documents available showing Mr. Chesnokov's place of birth? Solr is confident that other documents relating to his education or healthcare may exist and will seek to obtain same.
>
> I told solr that the narrative of the circumstances of the travel of the family is sketchy and would need to be filled out somewhat, eg. What was Mr Chesnokov's mother doing in the UK in 1940, where was her husband, how did they travel, etc."

This was a proper exercise of the respondent's statutory power under s. 19(5) and shows that he did not fetter his discretion or come to his decision by reference to an inflexible policy. The onus to produce adequate evidence was on the appellant and the respondent assisted in so far as he could with suggestions.

Decision

7.1. The following issues are to be determined by this Court:

> (i) What is the relevant date on which the final decision was communicated to the appellant? Is the appeal out of time? If so, does the applicant meet the test for the extension of time to appeal?
>
> (ii) What is the scope of appeal provided for under s. 60(8) of the Act of 2004?
>
> (a) Does the *Orange Communications* test apply? Is the respondent a specialist decision-maker for the purposes of coming within the ambit of the *Orange Communications* test?
>
> i. If so, is the decision of the respondent vitiated by a serious and significant error or a series of such errors?
>
> (b) If not, what is the appropriate test for this Court to apply? Is the present case an appeal on record or an appeal against error?
>
> i. If an appeal on record, is there sufficient evidence to support the appellant's application for late registration of his birth?
>
> ii. If an appeal against error, did the respondent come to a correct decision on the basis of that record?

In particular:-

- Did the respondent apply the correct standard of proof?
- Did the respondent act *ultra vires* his powers pursuant to s. 19(5) of the Act of 2004?
- Did the respondent err in holding that there was no independent documentary evidence or no corroborating evidence?

7.2. The appellant argues that the decision of the respondent herein was made on the 12th September, 2014 and the notice of motion to appeal was filed on the 3rd October, 2014 exactly 21 days later in accordance with O. 84C, r. 1(5). The respondent argues that the final decision by him was upon enquiry made pursuant to s. 65 of the Act of 2004 on the 10th July, 2013. Thus, in the respondent's argument, the appeal was brought well outside the 21 day limitation period. When was the final decision communicated to the appellant? It is clear that the respondent and his staff made every effort to deal with the appellant's case as humanely and fairly as they could. Perhaps this was because the story was so unusual and had elements involved that were positively Tolstoyan. I do not doubt that the respondents try to deal with all cases fairly and humanely. In this case, they certainly proffered all possible assistance and seemed to keep the door open to the appellant, even following apparently unfavourable decisions. Ms. Donnery, solicitor for the appellant, certainly seemed to think so as she states in her affidavit herein, sworn on the 15th May, 2015. Each unfavourable response precipitated further investigation by her. It seems to me that it was not unreasonable for her to consider that the door remained open and that a final, I emphasise final, decision had not in fact been reached. This, she said, continued up to when she reached the end of her best efforts and wrote the letter of the 7th March, 2014. The response she got six months later, dated 12th September, 2014, seemed the final decision because there were no further avenues of investigation open to her.

7.3. I do not criticise the respondent or his staff for their conduct of the application. It seems to me that whilst striving to protect the integrity of the register of births, they held out the hand of assistance to the appellant at every turn. However, it also seems to me that, in doing this, they left the door apparently open to the applicant and did not definitively shut it until their letter of the 12th September, 2014. Certainly, the appellant's solicitor had good reason to think so. Moreover she states, and I accept, that she had clear instructions to pursue the application through every avenue open to her. In all the circumstances of this unusual case, and bearing in mind the timeframe of the story which starts on the 28th September, 1940, I do not think that it would be just to close off the applicant's ability to avail of an appeal herein. Moreover looking at the terms of the respondents letter on the 12th September, 2014 – "….we have reviewed your clients application in detail…", it seems quite likely that, in fact, the application was looked at again. Certainly, there was good reason for the appellant's solicitor to think so. I find the letter of the 12th September, 2014

amounted to the final decision in this case and thus the appeal is within time.

7.4. The scope of this appeal is to be determined by construction of the particular legislative provision and the legislative context (see *Orange Communications*). The Court must take into account, *inter alia*, the subject matter and the nature of the Tribunal involved. As noted earlier in this judgment, Clarke J. in *Fitzgibbon v The Law Society* identified four different types of appeal:-

(a) A *de novo* appeal;

(b) An appeal on the record;

(c) An appeal against error, and

(d) An appeal on a point of law.

This appeal is clearly either (b) or (c). Looking to the nature of the respondent Tribunal and the application made herein, it seems to me that this is in the nature of an appeal on the record. This is so because, although there is a considerable skill and expertise in compiling and maintaining the register and making its contents available when and as required, the actual assessment of the evidence submitted to support the application is an exercise in which the Court is in at least as good a position as the respondent. Whilst there may be *modus operandi* of an expert nature relating to the assessment of the integrity of evidence, nothing of that nature appears here. The documents that were produced to back the applications are not challenged as to their validity. I could understand and accept a need to acknowledge an expertise in, for instance, doubting particular documents from particular countries. That however does not arise here. There may be other such areas. In this case, however, all that is involved is an assessment of the evidence produced to support the application. The registrar has assessed that evidence and has not been convinced that it is sufficient to allow him register the appellant's birth. This is an assessment that the Court, at the least, is in just as good a position to make as the registrar. It is, therefore, in my judgment an appeal on the record. Thus, this Court must come to its own conclusions on the evidence without regard to the decision made by the first instance body. See Clarke J. in *Fitzgibbon v The Law Society* at para. 5.1.

7.5. The evidence consists of the declaration of Nadezhda Iljinichna Zhirnova of the 29th April, 2010; the declarations of Vladimir Gribkov and Alexey Chesnokov concerning Madame Zhirnova's declaration; a copy of the appellant's birth certificate issued in Russia on the 14th October, 1940 recording his birth place as Dublin, Ireland; a copy of the appellant's marriage certificate recording his place of birth as Dublin; a copy of his passport also stating his birth place as Dublin; the appellant's trade union membership and driving licence recording his place of birth in Dublin; and, finally, two statements of Leizers Dumess and Vladimir Gribkov containing references to what was known about the appellant's birth place but no direct evidence. What was missing was any original document which might provide real concrete evidence. Moreover, no details were known of the appellant's parents' presence in the United Kingdom and his mother's presence in Dublin in September 1940, including why they were there, how the appellant's mother travelled from the United Kingdom to Dublin or from Dublin to Moscow. Efforts by the appellant's solicitors to obtain such information from the Irish Department of Foreign Affairs and from the Red Cross were unsuccessful. The level of proof required is on the balance of probabilities.

7.6. In order to resolve this matter, it is necessary to consider the context of time and place. It was a time when the world seemed turned upside down. Vast armies swept across international boundaries bringing war, destruction and death on a scale almost unimaginable to the mind of Western Europeans today. Less than nine months after the birth of the appellant, the army of Nazi Germany turned from its conquests in the West and invaded the Soviet Union itself. It brought to that country a tidal wave of savagery, destruction, and death equally unimaginable to us today. That army reached the very suburbs of Moscow before being halted. Almost four years of savage, destructive warfare continued across the Soviet Union until the invader was eventually expelled from the country and finally defeated. Thus, the time was one of horror and confusion. Turning to the context of place, the place where concrete proof of the appellant's birth might be found is firstly Dublin and then Moscow. The case has been made by the appellant that registering his birth in Dublin might have been perceived as a rejection of Soviet nationality and as something thus anti-Soviet. The registration in Moscow of his birth in Ireland may have required backing documents but these would not have been retained after one year. So all we have in documentary terms is an extract from the Russian Registry of Births. It seems somewhat surprising, at first, that the appellant does not have any oral history of his parent's presence in the United Kingdom in 1940 and his mother's escape from London in the Blitz through Dublin and back to Moscow when she was heavily pregnant and eventually carrying an infant baby.

7.7. Yet, taking these absent elements of proof in order and in the context of time and place gives us a somewhat different perspective. The fear of been indicted as guilty of anti-Soviet activity was, as we know today, a very real one. The history of the Gulag Archipelago identifies many humble folk who fell victim to Stalinist paranoia and spent decades in exile in these infamous work camps. Keeping one's head down was undoubtedly the safest course. The treatment by the Stalinist authorities of those considered contaminated by foreign influence extended, as we know now, even to exiling many Russian soldiers taken prisoner of war by the Nazis. In the light of these risks, silence was always the safest option. Moreover, all human experience teaches us that in a time of war with all its horrors, savagery and social upheaval, a normal human reaction is to forget in order to survive and move on. Thus, I do not find it surprising, in the light of these extraordinary circumstances, that there is little concrete evidence to support the application. However, there is evidence in the birth certificate, the marriage certificate, the passport, the trade union card and driving licence and in the declaration of Madame Zhirnova and the declarations of Vladimir Gribkov and Alexey Chesnokov. The integrity of these documents has not been questioned. Assessing the evidence in the context of time and place, I find that the probability is that Sergey Chesnokov was born on the 28th September, 1940 at Number 5 Henrietta Street in the City of Dublin and I will make an order that his birth be registered to that effect.