THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 908 J.R.]

BETWEEN

M.A.M. (SOMALIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2017 No. 988 J.R.]

K.N. (UZBEKiSTAN), E.M, F.M (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND K.N.) and Y.M. (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND K.N.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2017 No. 730 J.R.]

I.K. (GEORGIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL, AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

No.1

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of February, 2018

1. Does a refugee continue to be a refugee after acquiring citizenship of the State? That fairly simple question, the main issue in these three cases, which have been heard together, has a fairly simple and indeed monosyllabic answer which I will come to later in this judgment; but to get to that answer, one has to open a series of Russian dolls of increasing complexity that have been put together very skilfully on behalf of the applicants.

Facts in *M.A.M*.
2. The applicant was born in Somalia in 1980 and came to Ireland as an asylum seeker in 2007. She was granted asylum on 29th August, 2008 and was naturalised as an Irish citizen on 21st October, 2013. In June, 2009 she applied for family reunification with her children, having lost contact with her husband. That application was granted and the applicant's children and wards and her mother were granted permission to come to Ireland.

3. In December, 2016 the applicant re-established contact with her husband and then applied for family reunification in respect of him on 7th April, 2017. That application was refused by a decision dated 16th May, 2017 on the basis that the applicant had not applied for family reunification within twelve months of the grant of refugee status, as allegedly required by s. 56(8) of the International Protection Act 2015. Shortly thereafter, the Minister reviewed that decision and withdrew it on 14th September, 2017 (on the basis that s. 56(8) was not retrospective as originally alleged) but then made a further decision on 24th October, 2017 to the effect that the application for family reunification was being refused on the basis that as the applicant had become an Irish citizen in 2013 she was not eligible to apply for family reunification under s. 18 of the Refugee Act 1996.

4. In this case I have heard helpful submissions from Mr. Colm O'Dwyer S.C. (with Ms. Patricia Brazil B.L.) for the applicant and from Ms. Sara Moorhead S.C. (with Ms. Emily Farrell B.L.) for the respondent.

Facts in *K.N.*
5. The first named applicant is a naturalised Irish citizen born in 1972 in Uzbekistan. She entered the State in February, 2008 and was granted asylum on 25th February, 2009. In 2009 she made an application for family reunification on behalf of her mother and three daughters, including the second named applicant. The application in relation to the second named applicant was withdrawn in 2011. A feature that this case has in common with other cases is that prior to August, 2010, the Minister took the view that an Irish citizen was not subject to the provisions on family reunification under s. 18 of the Refugee Act 1996 and was not entitled to make an application under those provisions. However in August, 2010 on foot of legal advice that the Minister is now saying is incorrect, the Minister began processing applications for family reunification from citizen applicants.

6. In January, 2012 the first named applicant was granted family reunification in respect of two of her children. She was naturalised on 13th December, 2012. On or about 19th July, 2016 she applied for family reunification under s. 18 of the 1996 Act and submitted further formal information on 26th July, 2016. That application was in respect of the second, third and fourth named applicants and the first named applicant's son-in-law.

7. Another feature that the case has in common with the other cases is the relevance of the commencement on 31st December, 2016 of the International Protection Act 2015. That commencement was notified to the first named applicant by letter issued on behalf of the Minister in December, 2016. Shortly before the commencement of the Act, the Minister reversed the approach being taken to

family reunification by naturalised persons and as of October, 2017 the Minister reverted to the previous interpretation of s. 18 of the 1996 Act to the effect that citizens were not eligible to avail of that section. On 28th November, 2017 the Refugee Applications Commissioner informed the first named applicant that as she was a citizen they had ceased to process the application at the request of the Minister and by letter dated 29th November, 2017 the Minister notified the first named applicant of the decision to refuse the application for family reunification in respect of the second, third and fourth named applicants on the basis that, as a citizen, s. 18 of the 1996 Act did not apply.

8. In this case I have heard helpful submissions from Ms. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L.) for the applicants and from Ms. Sara Moorhead S.C. (with Ms. Kilda Mooney B.L.) for the respondents.

Facts in *I.K.*
9. On 15th January, 1995 the applicant underwent a ceremony of marriage in Georgia with Mr. I.K. On 23rd September, 2008 the applicant says she arrived in the State. She applied for asylum on 21st April, 2009 following a fire in a house she was sharing with her husband. In the course of that application she stated that her husband was living in the State and that their three children were still in Georgia. On 14th October, 2009 she received a recommendation that she not be declared a refugee. That recommendation was affirmed on appeal by the tribunal on 8th February, 2010. A proposal to make a deportation order was issued on 23rd March, 2010. On 14th April, 2010, in response, she applied for leave to remain and subsidiary protection.

10. The subsidiary protection application was refused on 19th September, 2012 and a deportation order was made in respect of the applicant on 21st March, 2013. On 20th May, 2013 the applicant made the first of three applications for revocation of the deportation order pursuant to s. 3(11) of the Immigration Act 1999. That first application was made in effect on her behalf and on behalf of her husband, Mr. K. On 14th October, 2013 she failed to present to GNIB and then continued to evade for a period of almost two years until 21st July, 2015. On 4th November, 2013 the deportation order was affirmed. On 27th April, 2015 the applicant went through a ceremony of marriage with Mr. B.D., a recognised refugee from Georgia and a naturalised Irish citizen. On 17th June, 2015, the applicant made a second s. 3(11) application based on her marriage to Mr. B.D. in which she claimed for the first time to the Minister that she was never legally married to Mr. K. On 4th May, 2017 the second s. 3(11) application was refused. On 29th May, 2017 she made a third s. 3(11) application which she says was to correct the errors identified in the refusal of the second application. That third application was refused on 12th September, 2017, and is now challenged in these proceedings. On 20th September, 2017 she made an application for family reunification as the spouse of a recognised refugee, which application is apparently pending.

11. In this case I have heard helpful submissions from Mr. Aengus Ó Corráin B.L. and Mr. Brian Leahy B.L., who also addressed the court, for the applicant and from Ms. Sara Moorhead S.C. (with Ms. Sinead McGrath B.L.) for the respondent.

Categories of application for family reunification.
12. Any analysis of this area needs to distinguish between three categories of application for family reunification in respect of a recognised refugee depending on when the application was made, as follows:

> (i). The first category is applications prior to the 2015 Act. In accordance with s. 70(14) of the 2015 Act, in the case of *K.N.* the application was correctly dealt with under s. 18 of the 1996 Act because it was made prior to the repeal of the 1996 Act. Thus in such a case neither ss. 47 or 56 of the 2015 Act applies.
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> (ii). Secondly, applications made post the 2015 Act but where the citizen is naturalised pre the 2015 Act. Applications after the 31st December, 2016 are being dealt with under the 2015 Act. In the case of *I.K.* and *M.A.M.* the application is made under s. 56 of the 2015 Act. The time limit under s. 56(8) of twelve months from declaration of refugee status is being interpreted in the case of pre-commencement applications as meaning twelve months from the commencement of the 2015 Act. In such cases s. 56 of the 2015 Act applies whereas s. 47(9) does not.
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> (iii). The third category is applications for family reunification where the application is made after commencement of the 2015 Act and where the sponsor is also naturalised after such commencement. Section 47(9) of the 2015 Act provides that a declaration of refugee status or subsidiary protection ceases to have effect on a person becoming a citizen. Thus in this third category both ss. 47 and 56 of the 2015 Act apply.

Most grounds of challenge in *M.A.M.* are based on a false premise.
13. The applicant in *M.A.M.* sought a declaration that s. 47(9) is not retrospective. But that declaration is unnecessary because the Minister is not contending that that subsection is retrospective. Most of the grounds of challenge in *M.A.M.* are based on the false premise that s. 47(9) is being applied to the applicant. For the reasons I have just outlined, that is not so. The fact that this was pleaded is not entirely the applicant's fault because there was some vacillation on the part of the Minister as to how the application should be treated.

14. Nonetheless, it is clear now that s. 47(9) was not applied to the applicant and thus grounds 2, 4, 6 and 7 seem to me to fail *in limine*. That leaves grounds 1, 3 and 5, which I will deal with later.

***I.K.* involves the collateral attack on a deportation order**
15. Any grounds as to why the applicant in *I.K.* should not be deported by reason of the second marriage existed as of the date of that marriage on 27th April, 2015. Not one but two s. 3(11) decisions have been made since then. At the very latest, the applicant should have challenged the refusal of the second s. 3(11) decision dated 4th May, 2017. It seems to me that in accordance with the logic of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 as interpreted by the Supreme Court in *Re Illegal Immigrant (Trafficking) Bill 1999* [2000] IESC 19 [2000] 21 I.R. 360, she cannot do so now simply because she has had the idea of making a further s. 3(11) application. If I am wrong about that, I will go on to consider the remaining issues.

I.K.'s* application is an exercise in *jus tertii
16. The applicant's rights in *I.K.*, if any, are entirely derivative from the rights of her second husband, the sponsor in the family reunification application, who is not a party to the proceedings. It seems to me that the applicant cannot make the case that she is entitled to succeed in circumstances where her husband is not a party to the proceedings. If that was the only difficulty for the applicant I would have looked at ways of enabling her to rectify the matter but unfortunately, as I have indicated, it is not. However, if I am wrong about that I will go on to consider the grounds raised.

Grounds in *I.K.*
17. The grounds pleaded in *I.K.* can be analysed as follows:

(i). The first ground seems to me to be simply a statement of fact.

(ii). The second ground is that the Minister erred in holding that the applicant's second husband ceased to be a refugee as a result of becoming an Irish citizen, and I will come to this later.

(iii). The third ground is that the Minister erred in not giving any analysis in the determination of the claim that the applicant's spouse is a disabled person. However, it is not generally necessary for the Minister to engage in narrative discussion, especially in a s. 3(11) context.

(iv). The fourth ground is that the Minister erred in holding that it was a valid option that a recognised refugee could return to his country of persecution. It seems to me that is not a point that is open on the facts because it is clear that Mr. B.D. did return to Georgia on a number of occasions. No further narrative discussion is required. The analysis in *I.K.* says that failed asylum seekers are not being subject to ill-treatment in Georgia. It accepts that Mr. B.D. is not a failed asylum seeker but contends he is similar because he made an asylum claim. It seems to me that there is no error at all in the analysis, still less one that invalidates the decision. The analysis, it seems to me, is entirely reasonable.

(v). The fifth ground is that as a result of the Minister's actions the applicant has incurred loss. That is a derivative point depending on unlawfulness being established.

(vi). The sixth ground is that the Minister is obliged by art. 26 of the EU Charter on Fundamental Rights to recognise the rights of persons with disabilities. That may well be so but it has not been established that the decision is unlawful on that ground. The complaint is certainly unparticularised and in any event art. 26 of the Charter does not override all other immigration law.

(vii). Ground seven is that the respondent is obliged to give effect to the U.N. Convention on Refugees. Again that is unparticularised and not a basis for relief as pleaded. In any event the Geneva Convention is not necessarily supportive of the applicant's contentions for reasons I will outline later.

Gorry*-related complaint in *I.K.
18. A submission is made that the s. 3(11) decision is contrary to the Court of Appeal decision in *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th October, 2017). However, it seems to me that complaint is not pleaded and is not therefore open to the applicant.

Does the decision in *I.K.* violate art. 20 of the TFEU and the Charter of Fundamental Rights?
19. The applicant claims that the decision could have the effect of forcing a citizen to leave the territory of the European Union by analogy with the Case C-34/09 *Zambrano* case. It seems to me that that complaint is not pleaded, but apart from the fact that it could be an extension of EU law above and beyond *Zambrano*, it is very clear that the applicant's second husband is not going to leave Ireland and therefore the issue does not arise (see *Igbosonu v. Minister for Justice and Equality* [2017] IEHC 681 [2017] 10 JIC 0407 (Unreported, High Court, 4th November, 2017)).

The declaratory nature of the recognition of refugee status
20. Recital 14 to the Qualification Directive (Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) states that "*the recognition of refugee status is a declaratory act*". This principle is very clearly established both in European and international law, see Goodwin-Gill *The Refugee and International Law*, 3rd ed. (Oxford, 2007) at p. 51; "*In principle a person becomes a refugee at the moment when he or she satisfies the definition so the determination of status is declaratory rather than constitutive*" (see also *H.I.D. v. Minister for Justice and Equality* [2011] IEHC 33 (Unreported, Cooke J., 9th February, 2011) and *Danqua v. Minister for Justice and Equality* [2015] IECA 118 (Unreported, Court of Appeal, 10th June, 2015) (Hogan J.)).

21. A number of things follow from the declaratory nature of the recognition of refugee status. Firstly, if the grant of refugee status is declaratory it follows that the withdrawal of the recognition of refugee status is also declaratory in the sense that it recognises the person has ceased to be, or is not, a refugee.

22. Secondly, the declaratory nature of the grant of refugee status acknowledges that there will be a time lag between the person being a refugee and being recognised as such. That is acknowledged in the UNHCR handbook at para. 28 which states: *"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."*

23. Likewise there will inevitably be a time lag between the person ceasing to be a refugee and the declaration of refugee status being withdrawn. In the latter case, during that time lag, the person may be a person in respect of whom there is a declaration of refugee status but he or she is not fact a refugee. The crucial thing for present purposes is that to avail of s. 18 of the Refugee Act 1996 one must not only be in possession of a declaration but one must also actually be refugee. That is clear from the words of the section itself.

On the ordinary meaning of the Refugee Act 1996, is a person who becomes an Irish citizen no longer a refugee?
24. A refugee is defined by s. 2 of the Refugee Act 1996, which has been repealed by the 2015 Act; but s. 2(1) of the 2015 Act contains an equivalent definition. A refugee is a person who owing to a well founded fear of being persecuted for a convention reason "*is outside the country of his or her nationality*" and is unable or unwilling to avail of protection of that country, and related provisions were made for stateless persons as well as provision for certain exceptions. On that definition, a person ceases to be a refugee as soon as he or she becomes an Irish citizen. That is reinforced by s. 21(1)(c) which envisages that a declaration of refugee status can be revoked if a person acquires a new nationality other than that of the State. That exclusion only makes sense if a person who acquires nationality of the State is no longer a refugee. The new wording of that provision in the 2015 Act (see s. 52 and s. 9(1)(c)) is also consistent with the conclusion that ceasing to be a refugee happens automatically on acquiring Irish citizenship, but independently of those provisions the definition of refugee is clear. As one no longer is a refugee if one becomes a citizen it has the necessary effect that the declaration of refugee status ceases to have effect by operation of law without the necessity for formal revocation under s. 21. That explains the exclusion for persons who are Irish citizens. There is no basis in logic or in the text of

the statute for the argument made by Mr. O'Dwyer at para. 20 of his written submissions that the words "*at the time of assessment of the refugee or at the asylum application*" should be read into s. 2. That would be contrary to established principles of statutory interpretation and would be a judicial amendment to the Act by way of a usurpation of the legislative function, but furthermore, as will become clear, it would be an amendment very much contrary to European and international law.

25. The respondent's submissions include the homely example that a junior counsel may become a senior counsel, which supersedes the previous status, but the status as a junior counsel is not formally or expressly revoked. It seems to me that very much a similar procedure applies here. There is no injustice to an applicant because becoming a citizen is a volitional act. It confers numerous benefits on an applicant and the new status supersedes the applicant's previous status. This is also perfectly consistent with international law. Article 1C(3) of the Geneva Convention provides that "*This Convention shall cease to apply to any person falling under the terms of section A if: … He has acquired a new nationality, and enjoys the protection of the country of his new nationality*". Article 1E goes on to say that: "*The provisions of this Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country*." The UNHCR handbook notes at para. 88 that: "*There are no exceptions to this rule."*

26. The status of the UNHCR handbook as a guide for the court has been acknowledged in multiple decisions including *I.R. v. Refugee Appeals Tribunal* [2009] IEHC 353 (Unreported, Cooke J., 24th July, 2009) para. 7, *V.Z. v. Minister for Justice, Equality and Law Reform [*2002] 2 I.R. 135 at 145 and 148, *A.N. v. Minister for Justice, Equality and Law Reform* [2007] IESC 44 [2008] 2 I.R. 48 and *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481 [2013] 1 I.R. 448.

27. Such conclusions are also consistent with the "*Note on the Cessation Clauses*", document EC/47/SC/CRPE.20 by the UNHCR Standing Committee (30th May, 1997), at para. 15: "*Clearly, where a refugee has acquired the nationality of the country of asylum through naturalisation refugee status will cease*". Paragraph 35 calls for procedures to challenge such cessation where this terminates the residence rights of the refugee, but this clearly has absolutely no relevance where citizenship applies. It is manifest as a matter of the ordinary interpretation of Irish law consistent with international law that an applicant who becomes a citizen of the State automatically ceases to be a refugee by operation of law without the necessity for any formal decision in that regard or any formal revocation of the declaration of refugee status.

28. Essentially the same question has been posed and answered in the same way in the U.K. by the Court of Appeal of England and Wales in *D.L. (D.R.C.) v. Entry Clearance Officer, Karachi* [2008] EWCA Civ. 1420 (Unreported, Court of Appeal, 18th December, 2008) where Laws L.J. said at para. 29 "*In my judgment it is plain that a recognised refugee who thereafter obtains the citizenship of his host country, whose protection he then enjoys, loses his refugee status. Article 1C(3) of the Refugee Convention could not be clearer*." I would only respectfully add that art. 1E is also of particular relevance in this context. Laws L.J. went on to rely at para. 30 on the UNHCR handbook, in particular para. 129 which says: "*As in the case of the re-acquisition of nationality, this third cessation clause derives from the principle that a person who enjoys national protection is not in need of international protection*." Paragraph 130 of the UNHCR handbook goes on to say: "*The nationality that the refugee acquires is usually that of the country of his residence. A refugee living in one country may, however, in certain cases, acquire the nationality of another country. If he does so, his refugee status will also cease, provided that the new nationality also carries the protection of the country of his new nationality."*

29. At para. 31, Laws L.J. also relied on the analysis of this issue in Professor Hathaway's book *The Rights of Refugees under International Law* (Cambridge University Press, 2005) at p. 916: *"If a refugee opts to accept an offer of citizenship there, with entitlement fully to participate in all aspects of that state's public life, his or her need for the surrogate protection of refugee law comes to an end. There is no need for surrogate protection in such a case, as the refugee is able and entitled to benefit from the protection of his or her new country of nationality."*

30. I note in passing that this issue did not arise in the Supreme Court appeal on this issue, sub nom. *Z.N. (Afghanistan) (FC) and Others v. Entry Clearance Officer (Karachi)* [2010] UKSC 21.

Does EU law require the loss of refugee status on the acquisition of nationality to be expressly revoked or legislated for as an automatic consequence?

31. In oral submissions Mr. Ó Corráin made the interesting suggestion that European law, in his submission, required the loss of refugee status in such an instance to be either expressly revoked or legislated for as an automatic consequence. This particular point does not seem to me to have been pleaded by any of the applicants so therefore it does not seem to be really open to them, but assuming I am wrong about that I will go on to consider the issue.

32. I have already highlighted the difference between being a refugee, which is an automatic condition which either exists or not, or which may cease to exist, and the making or revocation of a grant of refugee status which requires a positive decision by the authorities of the host country, but a decision which is purely declaratory. Mr. Ó Corráin argued that, by virtue of EU law, there had to be either an affirmative withdrawal of refugee status under art. 14 of the Qualification Directive or pursuant to express provision for automatic removal of that status under art. 38(4) of the Procedures Directive (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection) and that in the absence of either the applicants were entitled to benefit from s. 18 of the 1996 Act.

33. The error in this superficially attractive argument is perhaps subtle as there are a few moving parts to the submission; but the error is basically the conflation of being a refugee with acquisition or loss of the purely declaratory position of refugee status. Being a refugee is dealt with by the definition of refugee in the Qualification Directive and cessation of that position is dealt with in art. 11. By contrast, and much less importantly for our purposes, the loss of declaratory refugee status is dealt with in art. 14 of the Qualification Directive and art. 38 of the Procedures Directive which itself occurs in Chapter 4 of the directive headed "*Procedures for the Withdrawal of Refugee Status",* the emphasis being on *status*, that is the declaratory recognition of a person as a refugee. The submission made assumes that arts. 11 and 13 of the Qualification Directive and art. 38 of the Procedures Directive are talking about the same thing, but in fact the applicants are mixing apples and oranges here.

34. The declaratory nature of recognition means that the question of whether one actually is or has ceased to be a refugee exists independently of whether or not one is recognised or when the recognition of that position or its cessation is made. Just as Irish and international law does, the Qualification Directive in arts. 2(c) and (d) draws the distinction between being a refugee and refugee status. The latter is "*a recognition by a member state that a third country national or stateless person is a refugee*". It is built into the very definition of a refugee in EU law that the person must be a third country national. By definition if they become a citizen of the host state they are no longer a third country national and therefore automatically they are no longer a refugee; nor indeed are they outside the country of their nationality or unable to avail of its protection. Article 11 provides that a "*third country national or a stateless person shall cease to be a refugee*" in certain circumstances. Thus art. 11 in its opening words refers back to cessation in

the case of a third country national or stateless person, which seems to me to be based on an unarticulated premise that is inherent in art. 2 rather than arising by virtue of art. 11, that independently of art. 11 a person ceases automatically to be a refugee upon ceasing to be either such third country national or stateless.

35. But if I am wrong and if it is necessary to look to the wording of art. 11, para. (1)(c) of that article provides for a person ceasing to be a refugee on the acquisition of citizenship and on enjoying the protection of the status of citizenship. Again given the declaratory nature of recognition, that is a provision that must act independently and automatically; and thus immediately upon being granted Irish citizenship a refugee ceases to be such. Article 14 goes on to provide that *"if he or she has ceased to be a refugee in accordance with Article 11"* the member state may "*revoke, end or refuse to renew*" the refugee status, but that is concerned with the recognition of the refugee and not the question of being a refugee. Article 38 of the Procedures Directive 2005/85/EC provides at para. 1 that "*Member States shall ensure that, where the competent authority is considering withdrawing the refugee status in accordance with Article 14 of Directive 2004/83/EC, certain procedural guarantees apply*"; at para. 2 that *"Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge it"*; at para. 3 that *"Once the competent authority has taken the decision to withdraw the refugee status, Article 15, paragraph 2, Article 16, paragraph 1 and Article 21 are equally applicable"*; and at para. 4 that "*By derogation to paragraphs 1, 2 and 3 of this Article, Member States may decide that the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a) to (d) [of the Qualification Directive] or if the refugee has unequivocally renounced his/her recognition as a refugee."*

36. While reliance was placed on art. 38(4) this does not seem to apply because firstly, the sponsor for family reunification in each case is no longer a third country national. Therefore the withdrawal of refugee status is inherent in art. 2 rather than by virtue of ceasing to be a refugee under art. 11, and therefore art. 38.4 which refers back to art. 11 does not apply; and secondly because there is no particular reason why the decision by the member state to provide for a lapse of refugee status cannot be inferred as opposed to being expressly provided for as it now is in s. 49(7) of the 2015 Act. More fundamentally, an individual procedure can do absolutely nothing for such an applicant and would get them absolutely nowhere because they are clearly not refugees and thus no matter what procedure is applied to them, their declaration cannot be regarded as standing consistently with having citizenship of the State. On a purposive interpretation there is no reason to interpret EU law as going beyond the Geneva Convention. Refugee status is no longer necessary to protect an applicant if he or she chooses to become a citizen of the host country (see recital 6 to and art. 1 of the Qualification Directive, which refers to the need for protection). Hailbronner and Thym in *EU Immigration Asylum Law,* 2nd edn. (C.H. Beck/Hart/Nomos, 2016), part 3D p. 1195 by Judge Ingo Kraft states "*due to the subsidiarity of refugee status … an alien will cease to be a refugee if this condition is fulfilled*" that is the condition of acquisition of permanent residence in the host country equivalent to the indigenous population.

37. I will assume for a moment that I am entirely wrong about the foregoing and that there is a point of substance here to the effect that a formal withdrawal of refugee status is required or an express provision for it to automatically lapse as contended for as a matter of EU law. The problem for the applicants is that even if all of the arguments presented as to EU law are correct, they only amount to saying that the Minister has incorrectly failed to make a wholly superfluous affirmative decision to formally revoke the declaration of refugee status. The point that those arguments do not reach is that s. 18 requires a sponsor not simply to have a declaration but also to actually be a refugee. We go back to the declaratory nature of refugee status. No amount of inaction by the Minister can make a person who is not a refugee into a refugee. That is so either under s. 18 of the Refugee Act 1996 or s. 56 of the 2015 Act because to apply under s. 56 one has to be a qualified person, which is defined by s. 2(1) as a person who is either:"*(a) a refugee and in relation to whom a refugee declaration is in force, or (b) a person eligible for subsidiary protection and in relation to whom a subsidiary protection declaration is in force*". So the same position applies under either procedure.

38. By availing of Irish citizenship in Ireland each applicant or sponsor, as the case may be, ceases automatically to be a refugee in Irish, international and EU law as of that date. If, which I do not accept, there is a pointless obligation to formally revoke the declaration of refugee status, any failure to do so does not enable the person to satisfy s. 18 of the 1996 Act, which clearly requires the person not only to have a declaration but to actually be a refugee. So while I commend Mr. Ó Corráin on his very beguiling argument which certainly gave me some pause for thought, on further examination it seems to me that even if his argument is entirely correct, which in my view it is not, that is still insufficient to enable a valid application for family reunification to be made, because even if an applicant holds an unrevoked declaration of refugee status, the applicant in such a scenario is not actually a refugee as required by section s. 18. The answer to the riddle presented by this case is pithily summarised in the State's written submissions at para. 57, that "*If a person is not a 'refugee' as defined for the purposes of the Refugee Act, 1996 he or she cannot be a 'refugee in relation to whom a declaration is in force'".*

Given that the Minister decided between 2010 and 2017 to deal with such applications on a different basis, is there an unjustified discrimination in the new policy?

39. There is no substance to this argument. As pleaded by the respondents in written submissions at para. 79 of *K.N.,* "*if this was done in error the Minister cannot be required to continue with such an error*". There is no principle of continuity such as to enable somebody to continue to get away with something that they or others have been getting away with to date. Changing an incorrect position to reflect correct legal advice does not amount to unlawful or unconstitutional discrimination, or discrimination contrary to the EU Charter or the ECHR.

Given that the Minister decided between 2010 and 2017 to accept such applications is there a legitimate expectation in that regard?

40. The answer to this question is clearly not. To accept such a contention would be an enormous and unjustified expansion of the doctrine of legitimate expectation in a manner that would significantly impair the necessary evolution of administrative practices. There is no reliance on the previous practice such that it would make it unjust to allow the Minister to change. That the need for a criterion for positive injustice would be caused by the change of position is clear from *Webb v. Ireland* [1987] IESC 2 [1988] I.R. 353 [1988] I.L.R.M. 565 at 384 citing Lord Denning M.R. in *Amalgamated Property Co. v. Texas Bank* [1982] Q.B. 84 at 122 that a party could not go back on a mistaken assumption "*when it would be unfair or unjust to allow him to do so*".

41. The sponsors here merely made an application which the law requires to be refused because the sponsors as citizens are not entitled to apply under s. 18. Secondly, and in any event, no such legitimate expectation could contradict the clear wording of the Act: per Henchy J. in *Re Green Dale Building Company Ltd*. [1977] 1 I.R. 256 at 264: "*it is incompatible with parliamentary democracy for the Courts, under the guise of estoppel or waiver or any other doctrine, to set aside the will of Parliament as constitutionally embodied in a statute."* That decision was more recently followed in *Ashbourne Holdings Ltd v. An Bord Pleanala* [2003] IESC 18 [2003] 2 I.R. 114 [2003] 2 I.L.R.M. 446 at 134 and *R.X. v. Minister for Justice and Equality* [2010] IEHC 446 (Unreported, Hogan J., 10th December, 2010).

Given that the Minister decided similar applications on a different basis previously, is the Minister acting unlawfully,

arbitrarily or in breach of fair procedures?
42. It is absurd to argue that it is unlawful for the Minister to decide not to act unlawfully simply because he was acting unlawfully prior to 2017. The ascertainment of a previous error of law means that the change in position is not unlawful, arbitrary or contrary to fair procedures. Mr. O'Dwyer suggested that the first refusal of family reunification in *M.A.M.* was not based on the ultimate reason. To that one has to say, yes but so what? It is clear that some changes in position took place but we now have the Minister's current position. No injustice has been done to the applicants by the fact that it took the Minister a few assays to get a legally sustainable position.

43. The arbitrariness argument is based on the contention that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and application of law (see *P.P.A. v. Refugee Appeals Tribunal* [2007] 4 I.R. 94 [2006] IESC 53 at 104 *per* Geoghegan J.). But that principle refers to consistency in relation to the operation of a scheme under a discrete set of rules at a given time. It does not in any sense prevent the rules from being changed or clarified from time to time. Such change or clarification does not constitute arbitrariness simply because there is a difference between the result that might have been arrived at pre the interpretative change or the amendment or post such change or amendment. To hold otherwise would be to illegitimately and impermissibly interfere with the entitlement of the public administration to review, improve and change its policies and practices from time to time.

If an applicant as a naturalised citizen can no longer apply for family reunification under s. 18 of the 1996 Act, does that amount to unlawful discrimination?
44. It is well established that the prohibition on discrimination, whether under the Constitution, the ECHR, international law or general principles of judicial review only prohibits unjustified discrimination (see e.g., *S.N. v. Ireland (No. 2)* [2007] 4 I.R. 369). In *M.D. (a minor) v. Ireland* [2012] IESC 10 [2012] 1 I.R. 697 [2012] 2 I.L.R.M. 305 at para. 40, Denham C.J. cited the overlooked point made by Aristotle in *Nicomachean Ethics* (1131a) that unlike things must be treated as unlike as well as treating like things as like, and that not only "*when equals possess or are allotted unequal shares"* but also *"persons not equal equal shares, that quarrels and complaints arise*". The need for discrimination to be unjustified before it is unconstitutional also arises in *Re Illegal Immigrant (Trafficking) Bill 1999* [2000] IESC 19 [2000] 21 I.R. 360 at 410. As it was put by the Strasbourg Court in *Carvalho Pinto De Sousa Morais v. Portugal* (Application no. 17484/15, European Court of Human Rights, 25 July 2017) at para. 44 "*A difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."*

45. There is a perfectly rational and objective basis for the distinction between refugees who becomes citizens and those who do not. The former voluntarily trade the advantages of the refugee status for those of citizenship and acquire new benefits and a new legal situation. They are under no obligation to do so and thus no unlawful discrimination contrary to the Constitution, EU law, the ECHR or international law can arise. Indeed if a refugee remained entitled to operate s. 18 after acquiring citizenship, that could constitute discrimination against other Irish citizens under the applicant's logic. In any event, art. 14 of the ECHR seems to have limited, if any, relevance as there is no right to asylum under the Convention and it is well established that art. 14 is not a stand-alone right to equality but only applies where a Convention right is in issue.

Alleged breach of substantive family rights including under Articles 40 and 41 of the Constitution and art. 8 of the ECHR.
46. While submissions on this point were made in *M.A.M.*, this point does not seem to be pleaded either in that case or in *I.K.* so it cannot be pursued by those applicants. However, it is pleaded in *K.N.* where the applicants also rely on the right to respect for private life as protected by s. 18 of the 1996 Act, principle B in the recommendation of the final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recital 27 and art. 23 of Directive 2004/83, Article 7 and 18 of the EU Charter, the UN guidelines on reunification of refugee families, July 1983, Articles 40.3 and 41 of the Constitution, and art. 8 of the ECHR as applied by s. 3 of the European Convention on Human Rights Act 2003.

47. Although in the absence of a pleading he was not therefore entitled to make the point, Mr. O'Dwyer submitted that the state is "*stopping*" spouses from reuniting contrary to their family rights. That is not so. All that is happening is that applicants cannot apply under one particular statutory provision, namely s. 18 of the 1996 Act. Although they are outside s. 18 of the 1996 Act, other mechanisms, particularly the Immigration Act 2004 or the Non-EEA Family Reunification Policy document, provide a route for family members outside the State to apply for permissions to enter, so they are not entirely without legal recourse. It is suggested that such family members would not comply with the normal criteria, but that is not hugely relevant. If, and which I am by no means deciding, the applicants are correct in their contention that they would have some constitutional right to reunification arising from substantive family rights, the Minister would have to operate the 2004 Act and the policy document discretion in a constitutional manner.

Discretion in *I.K.*
48. A separate point arises in *I.K.*, even if I am incorrect in all of the following. It seems to me there are three substantial reasons to exercise discretion against the applicant. Firstly, her evasion for a nearly two year period. The second reason is her misleading of the Minister and the court in the sense that she represented herself as married when claiming asylum (see exhibit AK1, which was put before the court by the respondents rather than being part of the original application), whereas she later decided that it would suit her to deny having gone through a marriage ceremony and stated in her submission under s. 3(11) at exhibit IK 2 that she merely cohabited with Mr. K., which was regarded as a traditional marriage. There is no reference whatsoever in this submission to a ceremony. It seems to me that that is a misleadingly evasive representation and one incompatible with the information provided in the asylum claim. She failed to acknowledge the contradiction until pressed by the court. The third reason is that in 2015, when the applicant gave notice of her marriage to B.D., not only did she represent herself as single but in the declaration of no impediment she stated that she had never had any previous marriage either in Ireland or any other country *"including traditional and customary marriages"*. That question in the declaration under the Civil Registration Act 2004 s. 46(1)(b) is clearly designed to give the registrar notice of any previous ceremony of marriage so that the validity or otherwise of such ceremony can be examined on behalf of the registrar. Mr. Ó Corráin submits that the previous marriage was not legally valid anyway, and that may or may not be so, but that is somewhat beside the point. The point is that an applicant has to give an honest and accurate declaration to enable the registrar to satisfy him or herself in that regard, and she failed to do that. She certainly has not established evidentially that her first marriage was invalid in law as a matter of probability and it seems to me there is a question mark over the validity of her marriage to Mr. B.D., but I am not deciding that. However, even if her second marriage is valid, that point is quite independent of the three grounds on which I would exercise discretion against her in any event, even if I am wrong about any of the foregoing findings as to the substance of her claim.

Order
49. The answer to the question posed at the outset of the judgment is "no". A refugee in the State automatically ceases to be a refugee by operation of law on acquisition of citizenship of the State. No formal revocation of a declaration of refugee status is required in that regard. Such a position is fully consistent with the position taken in EU and international law and in the neighbouring

jurisdiction. It poses no incompatibility with the Constitution, the EU Charter, other EU law, international law or the ECHR. It is also clear that it is not contrary to the Constitution, EU law, the ECHR or international law for the State to make express provision that a declaration of refugee status ceases to have effect on the acquisition of Irish nationality. Such express provision has been made in respect of applications made following naturalisations on or after 31st December, 2016 but the absence of that provision for naturalisations before that date does not mean that persons so naturalised are refugees. They are not. Nor is an express revocation of refugee status required in such cases.

50. The order therefore will be that each application is dismissed.