[2012] IESC 63

THE SUPREME COURT

323/2010

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.

Between:

FAISOL OLUWANIFEMI SULAIMON(an infant),

suing by his Father and Next Friend FATAI A. AYIMLA SULAIMON

Respondent

and

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Appellant

JUDGMENT of Mr. Justice Hardiman delivered the 21st day of December, 2012.

1. This is the Minister's appeal from the judgment of the High Court (Mr. Justice Ryan: 9th July 2010) and that Court's consequent order of 30th July 2010. By that order the High Court quashed the Minister's decision of 5th October 2009, to refuse to issue a Certificate of Nationality to the infant respondent.

2. The titles "the Minister" or "the Appellant" are used in this judgment to refer to the Minister for Justice, Equality and Law Reform. In general, I have used the form "the appellant" in referring to steps taken or contentions made in the present proceedings. I have used the form "the Minister" in referring to steps taken in that capacity in the past, in relation to the infant respondent's application for a certificate of nationality, or otherwise under the Immigration Act 2004. Where the word "Minister" occurs in a statute, a reported judgment, official correspondence or other material cited, I have retained it regardless of context.

3. By virtue of s.2 of the Ministers and Secretaries Act 1924, the Minister is a distinct legal entity, a Corporation Sole with perpetual succession, and an official Seal, and may sue or (as in this case) be sued under his or her official title. The phrases mentioned above are, as used in this judgment, references to the legal entity created by s.2 of the Act of 1924, and not to any individual holder of the Office, past or present.

4. The phrases "infant respondent" or, in more personal contexts, "the child" are references to the four year old boy whose nationality is at issue in these proceedings. He was originally the Applicant, the moving party in this action. Being an infant he was required to sue through a "next friend", in this case his father. When he succeeded in the High Court, and the Minister appealed to this Court, he became the "infant respondent". His standing and relevant history will shortly be discussed below.

5. The infant respondent's application for a certificate of Irish nationality, and for an Irish passport, were refused on grounds so threadbare that I regard the administrative decision which the appellant upholds in these proceedings as not merely being wrong, but as flying in the face of the ordinary meaning of words and numbers, especially dates.

6. I have two concerns in particular. The first is that the appellant maintained in this case that a particular thing was done only on the 22nd July 2005 even though correspondence from his department, and an internal departmental record, makes it quite clear that the relevant thing was done on the 7th July 2005. **The whole case turns on the difference between the two dates**. Secondly, the appellant has defended this case without contradicting the infant respondent's evidence, and without putting forward any evidence of his own, but in a wholly abstract and theoretical way, on the basis of successive (and inconsistent) hypotheses as to how the Minister may have thought or acted at different stages of a bureaucratic procedure. In my view this is an inadmissible manner in which to conduct litigation and has led to the advancing of highly contrived and artificial arguments, such as have brought other areas of the law into disrepute. It is dispiriting to see State litigation conducted in this way, at public expense. It must also have subjected the family of the infant respondent to prolonged anxiety and to no little expense.

7. It is on account of the two concerns mentioned above that I offer a judgment of my own in addition to the learned and convincing judgment of Mr. Justice O'Donnell, which is about to be delivered and with which in general I agree. I have not however considered the position that would arise (especially in the context of correspondence such as found in this case) if the infant respondent were marginally on the wrong side of the cut off point created by s.6A(1) of the Irish Nationality and Citizenship Act 1956 (as amended), and I express no opinion about that. I believe the infant respondent to be comfortably on the right side of that cut off point. The section is set out and discussed below.

8. Faisol Oluwanifemi Sulaimon ("the infant respondent") was born in the Rotunda Hospital, Dublin on the 24th August, 2008. He is therefore now almost four years and four months old. He lives with his father in Tyrrelstown, Dublin 15. The boy's father is a naturalised Irish citizen. He has an older sister (born 31st July, 2002 in Ireland and now ten years old). She is an Irish citizen because she was born in 2002, before Irish law changed dramatically in 2004. The infant respondent has lived in Ireland all his life.

Background.

9. This case is about whether the infant respondent is entitled to a certificate of Irish nationality from the Minister. If he is, then he can also obtain an Irish passport and be treated for all purposes as an Irish citizen, like his father and sister. The law on this issue is set out below. For present purposes it comes down to this: his entitlement depends on whether a parent (his father in this instance) was lawfully resident in Ireland for a total of three of the four years immediately preceding the boy's birth. "Lawfully resident" means resident here with the permission of the Minister for Justice. There is no doubt that the father was resident here for well in excess of the required period; the sole issue in this case is whether he was "lawfully" resident, that is, resident with the permission of the Minister for three years of the four years immediately preceding Sunday 24th August 2008. The father says he was continuously and lawfully resident at least since 7th July 2005. The Minister says he was lawfully resident only since 22nd July 2005. This is the nub of the case.

The Central Event.
10. On the 7th July 2005 (about thirty-seven and a half months before the boy's birth) a civil servant in the Minister's department wrote to the father in relation to his "application for permission to remain in the State". The Department's letter continued:

> "**As an exceptional measure, I am to inform you that the Minister has decided to grant you permission to remain in the State for two years until 07/07/2007.** Your case will be reviewed at the end of this period". (Emphasis added)

11. The meaning of the words "for two years until 07/07/2007" is the central issue, doggedly disputed between the appellant and the infant respondent.

12. The father says that this letter demonstrates a permission for him to remain in the State and that this permission was granted on the 7th July, 2005 and was valid for two years. He was not alone in this view. Very revealingly, the Department itself thought so too until something happened to make it change its collective mind.

13. We know the Department's view very precisely because, in 2007, the father made an application for renewal of his permission to remain. This, too, was granted (subject to certain conditions). In the departmental document, dated the 23rd July 2007, in which a civil servant recommended to the Minister that the permission to remain should be extended, it is noted:

> "Date of permission to remain under IBC/05 granted: 07/07/2005".

14. This whole case is about the appellant's attempts to resile from this position. Unless he can do this, the infant respondent must succeed. The phrase 1BC/05 refers to a policy adopted in 2005 relating to Irish Born Children and their families.

15. Although the note just quoted is of obvious interest its role in the case is merely incidental or illustrative. The infant respondent's case stands or falls on the letter of 7 July 2005.

The meaning of the letter.
16. Of course a date may be placed on an official document such as the one described above in error or as a result of some kind of misunderstanding. But such a thing does not appear to be likely, or even possible, in the present case for the following reasons.

17. The document mentioned above, giving the date on which permission was granted as 07/07/2005, was obtained in the course of this action by a process of Discovery; so too was the Departmental document in which the Minister was advised to grant the father's first application for leave to remain (2005). This recommendation is **also** dated 7th July 2005. Since the letter of the same date, quoted above, states in terms that the Minister **has** (i.e. already) decided to grant permission and since the Minister never does this without a recommendation one way or another being before him, it is clear that (i) the recommendation, (ii) the Minister's decision, and (iii) the letter notifying the father of the Minister's decision **all came into being on the same day, the 7th July, 2005**.

18. Even apart from that, the permission to remain was permission to remain in the State "**for two years until 7/07/2007**". Therefore the father was not simply granted permission to remain in the State for **a** period of two years; he was granted permission to remain for **the** period of two years ending on the 7th July, 2007. According to ordinary reckoning of dates and periods of time, that is a period beginning on the 7th July 2005. The result of this elementary exercise is confirmed by the fact that it was stated unambiguously (as we have seen) by the Department in an internal document that the 7th July 2005 was the day on which **permission was in fact granted**. It was granted by the Minister and subsequently renewed by him. The 7th July 2005 is the **only** date on which a period of two years ending on 7th July 2007 can begin.

Why does that matter?
19. This whole case depends on the answer to the question, did the **Minister** grant permission to remain in the State to the father on the 7th July 2005, or did the permission (as the appellant claims) only come into being on the 22nd July 2005? If the appellant is correct, the father will be three days short of the three years of legal residence required - 1092 days instead of 1095. The appellant says that the three missing days enable him to refuse the child a certificate of citizenship and therefore enable the Department of Foreign Affairs to refuse him an Irish passport. The Minister and the D.F.A. have done both of these things, on that basis. The infant respondent has challenged both decisions and succeeded in the High Court (Ryan J.). This is the Minister's appeal.

Overview.
20. I consider that the decision to refuse this child a certificate of nationality and an Irish passport is not merely wrong but wrong-headed. It was justified by a bewildering display of unembarrassed casuistry. I use that term in its original sense of a process for resolving difficult individual cases by the inflexible application of what are alleged to be general rules, often involving a quibbling or evasive way of dealing with real difficulties.

21. When the infant respondent started his proceedings in November 2009, the appellant was immediately made aware of the importance being placed on the letter of 7 July 2005. (See the "Statement required to ground application for Judicial Review", paragraph E XII) The appellant could see the significance of the phrase "for two years until 07/07/2007". He sought to avoid the effect of this phrase by contending:

> (a) That the letter did not contain, and did not evidence, a permission.
>
> (b) That a permission could be created only by an **immigration** officer putting a suitable stamp on an applicant's passport, and therefore
>
> (c) The appellant himself cannot, or at least did not, give the father of the infant respondent any permission to remain in the State.

22. This approach has involved the appellant in two successive, inconsistent, and most improbable statements of what the law requires and then in a great deal of logic-chopping in an attempt to pummel statutory provisions and the indisputable facts of the case (mainly documentary) into that peculiar template. It involved the appellant, first, in denying the existence of his own inherent, and statutory, powers to grant or refuse permission to remain at all. When this theory was thoroughly punctured in the High Court the appellant came up with a new theory, presented for the first time in the oral argument in this Court: the appellant now admits that he as Minister had a power to grant permission to remain but stated that he had voluntarily (and therefore consciously) decided to abstain from using it but instead to permit it to be exercised by an immigration officer. Needless to say, nothing of either sort was said at the time, and what was said and recorded is totally inconsistent with either theory. Nor was there any evidence on affidavit or otherwise that the Minister ever actually held or acted on either theory: the argument was advanced at a level of total abstraction.

But it must be said in the same breath that the refusal was not based on discrimination or any sort of malice against the boy himself. Rather it was based on an extraordinary form of **group think** within the public service which resulted in the Department of Justice ignoring its own original, obvious and natural acknowledgement that permission to remain the State was given to the father of the 7th July 2005. This change of front appears to have happened as soon as the consequences of that first view first became apparent to the Department, after it read the reasoning which led the Department of Foreign Affairs to refuse the child an Irish passport in 2008.

23. When the total unstatability of the first new theory was exposed in the High Court, the appellant appealed to this Court. To judge by his written submissions (dated 12 March 2012) he intended to urge the same case on appeal as the one that had failed in the High Court. But when it came to the oral hearing of the appeal, on the 12th November 2012, the appellant's Department relied on a new and different theory, the second of two which it had developed, with great ingenuity, to permit the refusal of a certificate of nationality, and an Irish passport, to this child. The 12th November, as it happened, was the Monday after Saturday 10th November, the day the People voted in the "Childrens Referendum".

24. I simply do not understand why so great an effort has been made over so long a period to deprive a small boy of citizenship in the country where he has been permitted to reside all his life, a citizenship enjoyed by his father and his sister. If there is a point to the pain and anxiety caused to the child's family, the expense to which they have been put and the taxpayers money which has been spent, it entirely eludes me.

Background to the litigation.
25. To understand the point which the Court must decide it is necessary to give a little background which emerges from the affidavit evidence which was before the High Court and is before this Court.

26. In October 2008 the father applied to the Department of Foreign Affairs for an Irish passport for his infant son, then three months old.

27. It was, apparently, in response to this application that the Department of Foreign Affairs (not, at that stage, Justice) developed the theory on which the State relied in the High Court. Insofar as relevant the Department's letter of the 31st October, 2008, refusing the passport, stated:

> "In accordance with the Irish Nationality and Citizenship Act 2004 a child will qualify for Irish citizenship if, at the time of the birth of the child in the island of Ireland, one of his or her parents had reckonable residence in the island of Ireland during the four years immediately preceding the birth of the child.
>
> Reckonable residence is regarded as residence where he or she had been **lawfully** resident in the island of Ireland for a period of not less than three years, or periods the aggregate of which is three years. Periods of unlawful residence, periods of residence which were for the sole purpose of having an application for refugee status determined or periods of residence where permission was granted for the purpose of study are excluded from the determination of periods of reckonable residence".

28. From a perusal of this letter, and of the Department's document which was enclosed with it, it appears that the Department of Foreign Affairs regarded the period between the 7th July 2005 and the 22nd July 2005 as a period of "unlawful residence".

29. This letter was accompanied by a document headed "Calculation of Reckonable Residency for Children born in the island of Ireland on or after 01 January 2005". This document referred to the father's passport number and gave the dates of "claimed residence" as being from the 22nd July 2005 to the 7th July 2007. It further stated that the "**reckonable residency**" was from the 22nd July 2005 to the 7th July 2007.

30. In these proceedings, the claimed residence is from 7 July 2007, and not as stated above. The Department of Foreign Affairs worked from 22nd July 2007, because that was the date the father was registered in accordance with s.9 of the Act of 2004, and his passport stamped. Foreign Affairs may not have known, and certainly paid no heed to, anything that happened before the last-mentioned date.

31. The period of residence between 2005 and 2007 which the Department of Foreign Affairs was prepared to allow amounted to a total of 716 days. To this must be added a further period of 376 days which elapsed after the father's permission to remain in the State was renewed in 2007 and which D.F.A. were also prepared to allow. This period is said to have ended on the 23rd August 2008. The Birth Certificate says the child was born on Sunday 24th August 2008. If this is so, the shortfall on which the minister relies seems to be only two days.

Statutory provision on the computation of periods of time.
32. Section 18(h) of the Interpretation Act 2005 provides as follows:

> "**Periods of Time**.
>
> Where a period of time is expressed to begin on or to be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period".

33. In this case, there appears to be two periods of time which require to be "reckoned to a particular day". The first is the period of four years laid down by s.6A(1) of the Irish Nationality and Citizenship Act 1956 (as amended), being "the period of four years immediately preceding the person's birth". The person's birth, in this case, took place on Sunday 24th August 2008 so it would appear that this day is reckonable. The second period is the period of two years mentioned in the Minister's letter of the 7th July 2005, in which it was said that the Minister had decided to grant the father "permission to remain in the State for two years until 07/07/2007". It would appear, on the basis of the statutory provision cited above that both the period of time to which the two years is reckoned, 7th July 2007, and the date on which that period begins, 7th July 2005, are reckonable.

34. It is true that s.18 of the Interpretation Act applies in its terms only "to the construction of an enactment", and only the four year period referred to above is specifically provided in a statute. However, I believe that the ordinary method of reckoning periods of time to and from a particular date, or a date which is ascertainable, is the same as that provided in the statute. Also, the letter of 07/07/2005 was written in the discharge of a statutory function and should not, I think, be construed other than in accordance with the Act of 2005.

35. These periods accepted by the D.F.A., when aggregated, amount to 1092 days or thirty-five months and twenty-six days according to the Department of Foreign Affairs.

36. Since the required period, or aggregate of periods, is three years or 1095 days the child is, on the Department's computations, three days short of the period which would secure him Irish nationality and an Irish passport. The true shortfall appears to me to be only two days, on the D.F.A. figures, because the effect of s.18(h).

37. The Department of Foreign Affairs material exhibited makes no reference to the Department of Justice's 7th July 2005 letter or its later note that permission had been granted on the 7th July 2005. Perhaps they did not know of these documents. But it is obvious from their calculation sheet that if the father's residency with permission were dated from that date he would meet the 1095 day threshold with ease.

38. Accordingly, the question in this case relates to the date on which permission was granted. The genesis of the appellant's present view can be found in the computation sheet already referred to. The first column reads "passport number" and under it the number of the father's passport is given. The second column is entitled "page number", and this column contains the figure "five".

39. On page 5 of the father's passport, under the title "Visas" there is a stamped endorsement, in a quadrilateral box which says "permitted to remain in Ireland until…".

40. There is then added in handwriting the words "07 July 07". This is followed by a signature which itself is followed by the stamped words "for Minister for Justice Equality and Law Reform". Underneath this, in a separate box there is a date stamp 22nd July 2005.

The kernel of the Appellant's case.

41. The facts just set out are the origin and basis of the case argued on the part of the Minister in the High Court, and also of the case argued on his behalf on this appeal, which was a somewhat different one.

42. The appellant is saying that, notwithstanding the content of the letter of 7 July 2005, **no permission actually came into effect until the immigration officer endorsed the stamps just described on the father's passport** two weeks and one day after the Minister had granted permission. The Minister says there was no permission until those stamps were placed on the passport. He says that it is important for the administration of the immigration system that this should be so. The infant respondent; through his father, says that this requirement is an invented one, without any foundation in the statutes.

43. It is necessary now to turn to the statutory provisions applicable to the child's application for a Certificate of Nationality, in order to see what substance there is in the Minister's case. These provisions are not intrinsically complex or difficult to understand. But they suffer from the endemic fault of Irish legislation, which is a failure to set out all the statutory provisions relevant to a particular subject matter in one place, and a habit of introducing changes by insertion in older statutes, so that the same Act may have several different forms.

Statutory provisions.

44. The first important statutory provision is s.5 of the Immigration Act 2004. The relevant parts of this provision are as follows:

> "5 - (1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, **or a permission given under this Act after such passing, by** or on behalf of the Minister. (Emphasis added)
>
> (2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."

45. The significance of this provision will be discussed below, when the provision in relation to the entitlement of an Irish born child to Irish citizenship has been considered.

46. This involves a perusal of s.6A of the Irish Nationality and Citizenship Act 1956 (as inserted by s.4 of the Irish Nationality and Citizenship Act 2004). The earlier Act now provides as follows at s.6A(1):

> "A person born in the island of Ireland shall not be entitled to be an Irish citizen **unless a parent** of that person has, during the period of four years immediately preceding the person's birth, been resident in the island of Ireland for a **period of not less than three years**, or periods the aggregate of which is not less than three years." (Emphasis added)

47. This is the claimed basis of the Minister's refusal.

48. The Act goes on to provide, at s.6B(4), inserted by s.4 of the Irish Nationality and Citizenship Act 2004:

> "A period of residence in the State shall **not** be reckonable for the purpose of calculating a period of residence under s.6A if
>
> > (a) it is in contravention of s.5(1) of the Act of 2004."
>
> (Emphasis added)

49. This last phrase is a reference to the Immigration Act 2004, Section 5(1), the text of which has already been set out.

50. On the basis of the foregoing provisions only, the precise point of difference between the infant respondent and the appellant begins to emerge: the appellant says that the father has not three years residence in the four years immediately preceding the child's birth because he was resident here with the consent of the Minister for only 1092 days of that time, as opposed to the required 1095 days. The father says this is not so: the plain terms of the permission given to him (made even plainer by the documents obtained on discovery), show that he had permission from the Minister himself since the 7th July 2005 and that there is absolutely no legal or statutory warrant for counting the period of his permitted residence only from the date when the immigration officer put a stamp on his passport. The High Court upheld this point.

51. The appellant sought to dispose of that objection by reference to s.4(1) of the Immigration Act 2004. This provides:

"Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, given to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission')."

52. The appellant also relies on the definition section of the Act of 2004 which provides that:

"In this Act, except when the context otherwise requires permission shall be construed in accordance with s.4."

53. The appellant also relies, importantly, on the terms of the letter of the 7th July 2005 other than those set out above. This letter, in its entirety, is set out in the judgment of O'Donnell J. The relevant provision for present purposes is the contents of the last full paragraph on the first page of the letter which provides as follows:

"Please note that this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to register at your local registration office. If you live in the Dublin region this is located at the Immigration Registration Office, Garda Siochana, 13/14 Burgh Quay, Dublin 2… you will be presented with a certificate of registration which shows that you have been given permission to remain and which sets out the conditions on which you have been given permission to remain."

54. This, then, is the basis of the appellant's case. He says that the letter of the 7th July 2005 is of no evidential significance and (even if it were) could merely evidence a decision to grant permission. No actual permission comes into being until the passport is stamped, he says.

55. I cannot agree that the letter of 7th July 2005 is without evidential effect. It was proved by the infant respondent's father as being a statement of the Minister made on his behalf by a civil servant in his department. No attempt has been made in evidence to deprive it of that character. In it, the Minister acknowledges that he has decided to grant the infant respondent's father permission to remain in the State for the period of two years ending on the 7th July 2007. The statement that "this letter is not in itself evidence of permission to remain in the State" is incapable of depriving of the letter of its manifest evidential significance, just as an I.O.U. is not deprived of its evidential effect by endorsing on it "please note that this document is not of itself evidence of debt".

56. In this connection it is instructive to look at s.9 of the Immigration Act 2004, which was relied on by the infant respondent. Insofar as relevant this provides:

"9 - 1(A) A register of non-nationals who have permission to be in the State shall be established and maintained by registration officers in such manner as the Minister may direct."

57. This process of registration is what is referred to in the paragraph just cited from the letter on the 7th July 2005. I say this with some confidence as there is no other process of registration which could be in question. What is of interest for present purposes is that the register is not a register of non-nationals in general, but a register of non-nationals "who have permission to be in the State". Since this is the defining characteristic which gives rise to the requirement to register, it appears to me to follow that that registration is not also the process creating the state of "having permission". This section is further discussed below.

58. We have already seen that, in October 2008, the infant respondent's father applied for an Irish passport in the child's name and received a rejection of this request dated the 31st October. That letter and the enclosure showing the calculation of reckonable residency have been explained and discussed.

59. It appears to be at this stage that the infant respondent's solicitors, Messrs. Kelleher O'Doherty first became involved. They complained very coherently to the Department of Foreign Affairs and represented the infant respondent doughtily thereafter. In response to their complaint to the Department of Foreign Affairs they received a letter dated 27th March, 2009. This letter sets out the appellant's case in some considerable detail. Of particular relevance is the third sentence from the end of the letter which reads:

" the lawfulness or otherwise of a period of residency outside the validity of stamps issued by the Garda National Immigration Bureau and whether or not these periods are reckonable under the terms of the [2004] Act are both immigration and citizenship matters. As these matters fall within the responsibility of the [Department of Justice] it is open to your client to pursue these issues with that Department."

60. In other words, the D.F.A., having devised the theory which allows the child's passport to be refused, was now referring the problem back to the Department of Justice.

61. The Solicitors did indeed take up the matter with the Department of Justice and that Department replied in August 2009 in a letter whose relevant portion reads:

"For certain non-nationals, **periods of lawful residence only commence when an officer of the Garda National Immigration Bureau decides to issue a stamp** on the basis of checks carried to ensure that a person is still meeting all the conditions that would allow them to remain. The requirement to a new GNIB registration at regular periods allows for greater control over the immigration process and is a matter of vital importance in calculating reckonable residence. Lawful residence can only be proved by a thorough examination of the Garda National Immigration Bureau stamps." (Emphasis added)

62. If this represents the law then the Minister must succeed and the infant respondent has no case at all. But the infant respondent points out that the vital statutory provision is s.5(1) of the Act of 2004. For the purpose of that Section it is sufficient that one of the applicant's parents should have been resident in the State in accordance with "a permission given under this Act after such passing, by or on behalf of the Minister". The Section makes no mention of permission only coming into being when a passport is stamped.

The Minister's case as pleaded, and as presented.

63. The basis on which the Minister claims to be entitled to refuse Certificate of Nationality to the infant respondent is set out in para. 2 of his Statement of Opposition dated the 28th January 2010:

"The applicant's father was granted permission to be in the State by an immigration officer placing an inscription or stamp on her [sic] passport on the 22nd July 2005. The period from the 22nd July 2005 to the 7th July 2007 was reckonable."

64. Accordingly, as mentioned above, the Department calculated that the infant respondent's father had only 1092 days of residence

with the Minister's permission in the period reckoned to the child's birth, whereas he needed 1095 if he was to confer a right to citizenship on his son. This is the point on which the appellant has taken his stand. The slightly lower figure is produced by the D.F.A. by a very simple process; they exclude from the computation of permitted residence the time between the Minister's decision and letter of the 7th July 2005, and the immigration officer's stamping the passport on the 22nd July 2005. This was the date when the father produced himself to register under s.9 of the Immigration Act 2004, discussed below.

65. The argument advanced by the appellant to justify this exclusion originally, and very surprisingly, was that the Minister himself had no power to grant permission to remain in the State. (See para. 23 of the appellant's submissions). It was said that "only" an immigration officer could do this. This is manifest nonsense: s.5 of the Act of 2004, which requires a non-national (with certain exceptions) to have permission to remain in the State, actually refers to a permission granted "by or on behalf of the Minister".

66. The appellant himself seems eventually to have realised this because, in the oral submissions in this Court, in November 2012, he conceded for the first time that he has and his predecessors had power to grant permission to remain in the State. But, he said, in this case the Minister had voluntarily refrained from exercising this power and left it to an immigration officer. This view of events was advanced in legal argument but no evidence, by affidavit or otherwise, was advanced to support the proposition that the Minister had actually taken that view of this case at any stage of the process. The departmental notation naming the 7th July 2005 as the day on which permission to remain "was granted" was simply omitted from this analysis. It is manifestly inconsistent with the appellant's case, either as originally advanced or as argued on appeal. More importantly, so is the letter of that date, recording the Minister's decision to grant permission.

The narrow ground.

67. This narrow ground, then, is what the case comes down to. For the purpose of the present case, by reason of the statutory provisions cited above, the father's residence in the State was lawful so long as it did not contravene s.5(1) of the Act of 2004. It would not contravene that section if his residence was in accordance with a Ministerial permission. But the Minister says that no permission can be acknowledged for this purpose unless it is stamped on the father's passport by an immigration officer. The infant respondent, through his father, says that this is pure wishful thinking: it is based on a reading of words into the Act, to facilitate the appellant's case, words which the Oireachtas did not enact when the Act was passed in 2004. Equally the father says, (but this is a subsidiary point) that he was never told in the letter of the 7th July 2005 that he had to register with the GNIB before he had permission to remain in the State. He did not indeed receive the letter until 11th July 2005.

The Minister's power.

68. It is very remarkable that the appellant should have advanced an argument in the High Court to the effect that the power to grant permission to remain was vested in the immigration officer to the exclusion of himself as Minister. It has long been established that the power to decide what non-nationals may enter the State, and who must leave it, and what non-nationals may stay in the State and for how long is an important aspect of the sovereignty of the State itself, which is asserted in Articles 1 and 5 of the Constitution. The absolutely fundamental nature of this power, and of its exercise by the Minister for Justice, has been amply established in a large number of cases of high authority. For present purposes it is unnecessary to look further than *Bode v. The Minister for Justice* etc. [2008] 3 IR 663. In the words of Denham J. (as she then was), at p.689 of the Report:

> "In this case one of the fundamental powers of a State arises for consideration. In every State, of whatever model, the State has the power to control the entry, the residency and the exit of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland **this executive power is exercised by the Minister [for Justice] on behalf of the State**". (Emphasis added)

The High Court decision.

69. The learned trial judge in this case (Ryan J.) gave judgment on the 9th July 2010. It is plain from para. 8 of this judgment that the infant respondent's substantive contention was the same in the High Court as it is in this Court:

> "there is no statutory basis for the Minister's insistence on the father having immigration stamps on his passport in order for his residence in Ireland to be reckonable".

70. It will be recalled that the form of the infant respondent's proceedings was an application to quash the Minister's refusal of the respondent's application for a certificate of citizenship. This issue was resolved in his favour by the learned High Court judge. I would endorse, with great respect, what is said at para. 18 of the judgment as follows:

> "There is no question but that the applicant's father has actually been living here for more than the required statutory period. There is no doubt that he has been in continuous residence since 7th July 2005. And it is also clear that his presence in the country has been with the permission of the Minister. So what is the problem? It is said that he has been in the State otherwise than in accordance with a permission that comes within the definition of the Immigration Act 2004. On the respondent's case, even if the Minister gave permission using his official seal that would still not be sufficient. The argument is that the **only** permission that conforms to the statutory requirement is permission given **by an immigration officer** in the form of a document or an inscription and nobody else, not even the Minister himself, can provide a permission that is in any respect lawful and effective. It should be remembered that the immigration officer can only exercise this function 'on behalf of the Minister'. **If the respondent's interpretation were correct the principal would be unable to do what his agent was authorised to do on his behalf**." (Emphasis added)

71. The very radical nature of the appellant's case can be seen clearly from this quotation. He went so far as to contend that he himself had **no power** to give permission to remain in the State; that such permission could **only** be given by an immigration officer. This contention is indeed a remarkable one for the appellant to have made because it involves him denying that he has a jurisdiction of his own which (quite apart from its constitutionally grounded inherency) is specifically mentioned in the Act of 2004 on several occasions. For example, s.5(1) refers to a permission "given under this Act… **by or on behalf of the Minister".** Equally, the immigration officer's power to give permission to remain is stated to be a power to do so "on behalf of the Minister", in s.4. The appellant was actually saying that permission "by or on behalf of the Minister" excluded a permission "by the Minister".

Refined case on appeal.

72. Although a submission to the effect just summarised was to be found in the written submissions of the appellant, the oral submissions on appeal radically departed from it. In argument in this Court it was conceded that the Minister had a power to grant permission to remain. But it was argued that he had voluntarily chosen **not** to exercise the power at all. This proposition would flatly contradict the Department's own records and correspondence and is little short of ludicrous. The appellant never advanced this view until the hearing of the appeal, seven years and four months after the decision of July 2005. All the surviving evidence is to a

contrary effect. The new approach is not merely unrealistic: it is a negation of reality.

Difficulties with this change of front.
73. It is manifest that there are very considerable difficulties with this change of front on the part of the appellant. If, at the time the 2005 decision was made, the Departmental position was that the Minister had no power to grant permission to remain, then it is manifest that he did not simply and voluntarily decide not to do so. It is a step too far into unreality to conceive of a Minister solemnly deciding not to exercise a power which he had not got in the first place. If that was not the Departmental position, the argument is mere speculation. Even more specifically, the letter of the 7th July 2005 states that the **Minister** "has decided to grant permission to remain in the State" to the applicant's father. This is utterly inconsistent **either** with the belief that the Minister did not have power to grant permission to remain **or** with the proposition that, though he thought he had such power the Minister had voluntarily decided not to exercise it. The plain fact, as was stated in the Minister's own files, is that he granted permission to the applicant's father to remain, and he did so on the 7th July 2005. He could not have done so earlier because he received his advisers recommendation only on that day, and he could not have done so later, because the letter of that day referred to his having (already) done so. This inference is inescapable: the facts admit of no other possibility. The Minister's own words and records admit of no other possibility. The appellant's case is not based on a view of what actually occurred: it is based on a theory conceived years after the event, of what must be taken to have occurred if the appellant's view of the law is to be borne out.

74. It is important to stress that neither in this Court nor in the High Court did counsel for the appellant advance any reason for interpreting the departmental letter, or the note that permission to remain had been granted on the 7th July 2005, in any but their ordinary and natural meaning. In fact, at least on the hearing of this appeal, counsel did not refer to the note **at all**. None of the documents discussed have been disowned or denied in the appellant's argument.

75. The proposed interpretation of the statutory provisions, the correspondence and the notations in this case puts me in mind of what was said by the great Welsh Judge, Lord Atkin, in a case about wartime detention, in *Liversidge v. Anderson* [1942] 1 A.C. 206, at 245. In that case, a statute allowed the Home Secretary to detain a person without trial "for the duration", if he had "reasonable grounds" for believing certain things about him. The Home Secretary said that all that this required was that he himself should believe that the grounds he had were reasonable: they did not need to be objectively reasonable. Faced with this interpretation of the statute, Lord Atkin said:

> "I know of only one authority which might justify the suggested method of construction: 'when I use a word' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less'. 'The question is' said Alice, 'whether you can make words mean so many different things'. 'The question is' said Humpty Dumpty, 'which is to be master - that's all'."

76. The quotations are from *Through the Looking Glass* by Lewis Carroll. The circumstances of Lord Atkins citation of Lewis Carroll, the consequences to him of having done so, and the eventual triumph of his view of the law are fully described in *Lord Atkin* by Geoffrey Lewis (Butterworths, London, 1983).

77. Notwithstanding the appellant's arguments, I reiterate that the phrase "permission to remain in the State for two years until 07/07/2007" means a permission to remain from the 7th July 2005 to the 7th July 2007. No rational person would maintain the contrary in any forum but a court of law. It is important for this court to assert that words in a statute, or in a bureaucratic decision, will be interpreted in their ordinary and natural meaning unless there is coercive reason to the contrary.

Missing document
78. No document containing the actual grant of permission by the Minister was discovered, but it was accepted on behalf of the State that a document to that effect must exist somewhere. It is apparently no longer available. No explanation whatever has been advanced for the most unfortunate coincidence of the loss of this central document in the very case in which the challenge arises. The infant respondent and his father would not have known the document was missing when proceedings were issued. The document must bear a date and that date might have obviated the need for this litigation. It is the absence of this document which allows the scope for the contrived argument which we have heard.

79. The letter of 7th July 2005 states that "the Minister has decided to grant you permission to remain in the State for two years until 07/07/2007". The Minister now wishes this to be read as "the Minister has decided that an officer of the GNIB will grant you permission to remain in the State for a period commencing on the date you present yourself for registration until 07/07/2007". It is simply not possible to "read in" these words, just as it is not possible to read words into the statute. In my view, once it is accepted, as I think it must be for the reasons given above, that the Minister's permission was "granted" on the 7th July 2005, the infant respondent must succeed. The letter of July 2005 is itself a historical and evidential fact and cannot now be re-written with retrospective effect. What is written, is written.

80. I do not for a moment accept that the definition of "permission" in the Act of 2004 excludes the permission conveyed by the Minister's letter just referred to. This argument was advanced on the basis that the term **permission** "shall be construed in accordance with s.4".

81. Section 4 certainly creates a power in an immigration officer to grant a permission "on behalf of the Minister". To judge from the context and, most obviously, the shoulder note, ("*Permission to Land*") this envisages a permission granted by an official at a seaport or airport and in no way trenches on the Minister's inherent or statutory power to grant such permission. (I agree with Mr. Justice O'Donnell for the reasons which he gives, that regard may be had to the shoulder note). Indeed, this ministerial power is restated in s.4 and s.5. This empowering of an immigration officer in relation to permission to land, or to remain by no means divests the Minister of his own power to grant permission to remain himself, as his own Department's correspondence records him as doing, on 7th July 2005.

82. The permission most directly in question here is the permission envisaged by s.5 without which a non-national's residence in the country would be "for all purposes" unlawful. This Section specifically envisages a permission given either "by" **or** "on behalf of" the Minister. It is stressing the obvious to say that, accordingly, a permission given **by** the Minister will prevent an applicant's presence in the country from being unlawful, but I feel obliged to stress that obvious fact because part at least of the appellant's submissions seem to suggest that he does not, or did not, accept the point.

83. It is perhaps equally obvious to say that the immigration officer is, for these purposes, the agent of the Minister and that his powers derive from his principle. As Ryan J. pointed out it is inconceivable that the agent would have powers denied to the principal. But this very point was, at one time, trenchantly argued by the appellant.

84. As for the alternative and latest form of the argument, that which at last admitted that the Minister had power to grant permission to remain in the State, but claimed that he consciously decided not to exercise it; this argument would involve anyone who accepts it in a total departure from reality. The Minister has never said that he acted in this way. His letter says that he "decided to grant [the infant respondent's father] permission to remain" in the country. This is utterly inconsistent with his not having the power to grant such permission, and equally inconsistent with a decision to refrain from exercising the power. But in my view this argument in any case fails *in limine* because there is a total absence of any factual matrix to permit it to be advanced. It amounts to an argument that a hypothetical Minister might perhaps, in a hypothetical universe, have understood his powers in this way and acted accordingly. There is in my opinion no standing to advance such an argument unless it is grounded in evidence in some way - grounded, that is, in the facts of this case, not presented as a mere hypothesis or abstract proposition.

85. Certain areas of the law - those relating to the imposition or the avoidance of taxation and to aspects of Road Traffic Law in particular - have acquired an unenviable reputation for over subtle arguments which sometimes depend on a willingness to prescind from reality. Official spokesmen not infrequently disparage such Byzantine technicalities. But this case, in my view, shows that the State itself may be all too willing to resort to an argument as Byzantine as any I have heard.

The Register.
86. The basis of the appellant's argument that the permission to remain did not become effective until the infant respondent's father had presented himself for registration is based on the father's obligation to register, contained in s.9(2) of the Immigration Act 2004. This happened, it is agreed, on the 22nd July, 2005. But what is this Register in which the father was obliged to be registered? It is the Register established by s.9(1)(a) of the Act of 2004 in the following words:

> "A register of **non-nationals who have permission to be in the State** shall be established and maintained by registration officers in such manner as the Minister may direct."
>
> (Emphasis added)

87. This means that, in order to be registered, or to be obliged to register, a non-national must "**have** permission to be in the State". Registration on this Register is what is referred to in the letter of the 7th July 2005 - there is no other process of registration which could be in question. What is of interest for present purposes is that the Register is not a register of non-nationals in general, but a register of non-nationals "who have permission to be in the State"; not "who have applied for permission" but "who **have** permission". Since this is the defining characteristic which gives rise to the requirement to register, it appears to me logically to follow that the permission to be in the State must pre-exist the obligation to register. One must "have" permission before one registers: this is quite consistent with the Department's original view that the father had permission as of the 7th July 2005. The Department's new view has the ridiculous consequence that the father would have been illegally in Ireland as he made his way, with the Minister's letter in his hand, to the Immigration Office in order to register, as he was legally obliged to do.

Conclusion.
88. I would dismiss the appeal and affirm the order of the learned trial judge on the basis that the infant respondent's father's first permission to remain was operative from the 7th July 2005. Since that is sufficient to dispose of the litigation I do not consider it necessary to consider the question of the date from which the second (2007) permission to remain subsisted. The infant respondent does not need to win that argument to make up the shortfall between 1092 and 1095 days on which the appellant has taken his stand.

THE SUPREME COURT

Appeal No. 323/2010

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.

Between:

FAISOL OLUWANIFEMI SULAIMON (AN INFANT, SUING BY HIS FATHER AND NEXT FRIEND FATAI A. AYIMLA SULAIMON)

Respondent/Applicant

AND

MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Appellant/Respondent

Judgment of Mr. Justice O'Donnell delivered the 21st day of December 2012

1 Fatai Ayimla Sulaimon a Nigerian national and the father and next friend of the infant applicant herein arrived in Ireland in 2001. The following year he and his then wife had a daughter who in accordance with the laws that then stood automatically became an Irish citizen. In consequence Mr. Sulaimon became entitled to remain in Ireland under the provisions of the then applicable Irish Born Child ("IBC") Scheme and in July 2005 was granted permission to remain for a period of two years. In 2007 that period was extended for a further three years. On the 24th of August 2008 his son, the infant applicant herein, was born to Mr. Sulaimon and another partner. In October of 2008 Mr. Sulaimon applied for an Irish passport for his son under the terms of s.6A of the Irish Nationality and Citizenship Act 1956 ("1956 Act") (as inserted by s.4 of the Irish Nationality and Citizenship Act 2004) which provides as follows at s.6A(1):

> "A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."

2 Superficially it might have been thought that Mr. Sulaimon clearly satisfied the statutory test since he had been resident in Ireland since 2001 as a matter of fact and had been granted formal permission to remain in July of 2005 more than three years before the birth of the applicant, but on the 31st of October 2008 the application was refused on the grounds that Mr. Sulaimon had only been lawfully resident in the State for a period of 1,092 days prior to the birth of his son and accordingly he was three days short of the requisite 1,095 days. It appears therefore that had the infant applicant been born some three days later or, it appears, if his father's passport had been stamped some three days earlier, in either 2005 when permission was granted or, in 2007 when it was renewed, then the application would have been successful. In a further twist, the Court was informed on the hearing of this appeal that Mr. Sulaimon had now been naturalised as an Irish citizen.

3 It is tempting to dismiss this outcome as an exercise in bureaucratic application of rules to the exclusion of common sense and justice. However, the control of immigration, residence and citizenship is an important State function and increasingly so in the modern world. It is also something that requires clear rules which can be administered efficiently. A person either has a passport or does not. That passport is either in force or it is not. There is no penumbra area. When any question of dates and times arise, it is almost inevitable that circumstances will throw up situations which fall just on either side of the line. One person will be qualified by one day, and another will just miss qualification by the same margin. This in itself however is not a reason to criticise the system or for a court to intervene because sympathy might dictate a different result. Accordingly it is necessary to scrutinise the reasoning of the Departments of State involved in this case with some care lest an immediate resolution of the case should give rise to further unintended confusion in the administration of what is an already complicated immigration and naturalisation system.

4 The first step is that the period of residence required under s.6A of the 1956 Act is not actual residence but rather is a concept of "lawful residence". Thus s.6B(4) of the 1956 Act, (as inserted by s.4 of the Irish Nationality and Citizenship Act 2004) provides:

> "A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if—
>
> (a) it is in contravention of section 5(1) of the Act of 2004."

The "Act of 2004" is defined by s.2 of the Irish Nationality and Citizenship Act 2004 as meaning the Immigration Act of 2004. Section 5(1) of the Immigration Act 2004 provides in turn:

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

The final step in the argument then is that under the interpretation provision of the Act of 2004 it is provided that "In this Act, except where the context otherwise requires - … 'permission' shall be construed in accordance with section 4." Section 4(1) provides as follows:

> "Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission')."

By this rather tortuous route it becomes apparent that reckonable residence for the purpose of the three year period required by s.6A of the 1956 Act is residence pursuant to a permission under the Immigration Act 2004. This case raises questions of law and fact: what constitutes a permission for the purposes of the 2004 Act, and when was such permission granted in this case.

5 Turning now to the facts of this case it will be apparent that the relevant period is that between July 2005 and the birth of the

applicant in August 2008. Although the father and next friend was resident in the country since 2001, the period prior to receiving permission to remain was not reckonable because it was residence in contravention of s.5(1) of the Act of 2004. This much is not in dispute. It appears that Mr. Sulaimon's application was made around March 2005 to the Minister for Justice, Equality and law Reform ("the Minister") for permission to remain in the State on the basis of his parentage of an Irish born child under the provisions of the IBC scheme. By letter of the 7th July 2005 a Mr. Patrick J Quinlan from the IBC unit wrote to him referring to the application. The operative provisions of the letter read as follows:

> "As an exceptional measure, I am to inform you that the Minister has decided to grant you permission to remain in the State for two years until 07/07/2007. Your case will be reviewed at the end of this period. The following conditions apply to your permission to remain in the State:
>
> that you will obey the laws of the State and will not become involved in criminal activity,
>
> that you will make every effort to become economically viable in the State by engaging in employment, business or a profession
>
> that you will take steps (such as appropriate participation in training or language courses) to enable you to engage in employment, business or a profession,
>
> that you accept that the granting of permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to you or not, to enter the State.
>
> Please note that this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to register at your local registration office. If you live in the Dublin Region this is located at the Immigration Registration Office, Garda Síochána, 13/14 Burgh Quay, Dublin 2.
>
> If you live elsewhere, you should register at your local Garda District Headquarter Station. You will be presented with a certificate of registration which shows that you have been given permission to remain and which sets out the conditions on which you have been given permission to remain. That certificate is an important document and care should be taken to ensure that you retain it in your safe keeping.
>
> You may work in the State without the need for a work permit and set up in business without seeking the permission of the Minister.
>
> Yours sincerely".

6 This letter was the subject of a very detailed analysis on the hearing of the appeal. The sentence "I am to inform you that the Minister has decided to grant you permission to remain in the State for two years until 07/07/2007" clearly suggests that:

> (i) a decision has been made;
>
> (ii) by the Minister;
>
> (iii) to grant permission;
>
> (iv) the permission was to remain for two years from the 7th of July 2005 (being coincidentally the date of the letter) since the period expired on the 7th of July 2007.

The State however relied on the sentence which provided that the letter was not itself evidence of permission to remain in the State and could only be used for the purposes of registration. It should perhaps be explained at this point that the Act of 2004 contemplates not simply a process of *permission* for a person to remain within the State, but also that such persons will be *registered* in a register of non-nationals pursuant to s.9 of that Act. That register, it should be noted, is of non-nationals "who have permission to be in the State". Thus the sentence referring to the certificate of registration clearly contemplated a process of registration which is separate and distinct from, and subsequent to, the permission to remain required by section 5. In due course Mr. Sulaimon attended at the Garda Síochána National Immigration Bureau ("GNIB") on the 22nd July 2005 where his passport was stamped with the following entry "permitted to remain in Ireland until 07/ July /07" and a signature "for Minister of Justice, Equality and Law Reform". The words "07/July/07"and the signature were in handwriting. This stamp was accompanied by another stamp of the Garda National Immigration Bureau dated the 22nd of July 2005 being, it appears, the date upon which that stamp was affixed to the passport.

7 While it has become apparent that there is substantial dispute as to the commencement of the date of the permission granted to Mr. Sulaimon to remain in Ireland, there is no doubt about its expiry date – the 7th July 2007. In advance of the expiry of that permission, Mr. Sulaimon applied for renewal of his IBC/05 (Irish Born Child/05 Scheme) permission to remain in the State. On the 7th June 2007 a Ms. Bernie S Maguire from the IBC unit of the Irish Naturalisation and Immigration Service in the Department of Justice, Equality and Law Reform wrote to Mr. Sulaimon returning his passport to tell him that the matter was under consideration. The operative part of that letter read as follows:

> "I am directed by the Minister for Justice, Equality and Law Reform to acknowledge receipt of your Application for renewal of your (IBC/05) permission to remain in the State on the basis of your parentage of an Irish born child.
>
> Please find the following original documents returned herewith.
>
> Applicant's passport No. A1355693.
>
> **Should your current leave to remain within the State expire while your renewal application is under consideration, you are advised to contact your local Garda National Immigration Officer to have your current permission to remain extended. You will require this acknowledgement letter, your passport and your GNIB Card. This applies only to those who require evidence of entitlement to remain in the State for employment, social welfare and travel purposes.**
>
> We will write to you when a decision has been reached in your case and all other original documentation submitted with your IBC/05 renewal application will be returned to you at that stage."

8 Thereafter on the 23rd of July 2007 a Mr. John B Brady from the same unit wrote to Mr. Sulaimon informing him of the success of his application. The operative provision of the letter read as follows:

> "As an exceptional measure, I am to inform you that the Minister has decided to renew your permission to remain in the State for a further three years until the 7th day of July 2010, subject to the results of enquiries as to whether you have obeyed the laws of the State or been convicted of any offence and have not been involved in criminal activity. The following conditions will apply to your permission to remain in the State:-
>
> That you will reside continuously in the State;
>
> - that you will take an active role in the upbringing of your Irish Born Child;
>
> - that you will obey the laws of the State and will not become involved in criminal activity;
>
> - that you will make every effort to become or to remain economically viable in the State by engaging in employment, business or a profession;
>
> - that you will take all steps (such as appropriate participation in training or language courses) to enable you to engage or to remain in employment, business or a profession;
>
> - that you accept that the renewal of your permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to you or not to enter or remain in the State.
>
> Please note that your permission to remain in the State will only become operative when you have registered at your local Registration Office.
>
> If you live in the Dublin Region this is the Immigration Registration Office, Garda Immigration Bureau, 13/14 Burgh Quay, Dublin 2.
>
> If you live elsewhere, you should register at your local Garda District Headquarters Station.
>
> When you apply to register at the appropriate Registration Office, the Garda National Immigration Bureau will make enquiries to ascertain;
>
> - whether or not you have obeyed the laws of the State;
>
> - whether or not you have been convicted of any offence and
>
> - whether or not you have been involved in criminal activity.
>
> In the event that information comes to light indicating you have not met any of these requirements, the Garda National Immigration Bureau will not register the renewal of your permission to remain in the State and your file be referred back to the IBC Unit in INIS for whatever action is deemed appropriate. This may include the refusal of your application for renewal of your permission to remain in the State. In the event that this occurs you will become illegal in the State and your file will be referred to the Immigration area of INIS for whatever action is deemed appropriate.
>
> Provided that the Garda National Immigration Bureau is satisfied that you have met the above requirements, upon payment of the appropriate fee of **€100**, you will be issued with a Certificate of Registration. This Certificate will show that you have been given permission to remain in the State and will set out the conditions attached to this registration. The Certificate is an important document and you should guard it safely.
>
> The Certificate of Registration will entitle you to work in the State without the need for a Work Permit and will entitle you to set up a business without seeking the permission of the Minister.
>
> You permission to remain in the State may be **revoked** for the following reasons:
>
> - if you do not comply with the conditions set out in this letter or
>
> - if you are found to have provided false or misleading information in the course of you application for renewal of permission to remain in the State or
>
> - if you are found to have provided false or misleading information in the course of your application under the revised arrangements announced on 15 January 2005, under which your prior permission was granted.
>
> This list is not exhaustive. It does not set out all the reasons for which permission to remain may be revoked.
>
> Yours sincerely".

9 These two letters together with the letter of the 23rd of July 2005 were the subject of protracted debate during the course of this appeal. None of them are clear as to the legal situation. Of the letter of the 7th June 2007 it can be said that it seems to imply – although not state explicitly – that on expiry of the permission Mr. Sulaimon would be unlawfully in the State unless that permission was extended, which extension could be effected by a Garda National Immigration Officer. On the other hand the letter seemed to suggest that this applied only to those who required *evidence* of entitlement to remain in the State, suggesting perhaps that it would be lawful to remain pending determination of the application. Mr. Sulaimon has sworn an affidavit stating that he did not require such evidence for any purpose since he had no intention of travelling and his current employer did not require him to obtain a temporary extension of his permission. The position of someone in that situation is accordingly somewhat ambiguous at least under the terms of the letter. This is made more complex by the fact that s.5(2) of the 2004 Act contemplates that a person without a permission will be unlawfully within the state, but does not make that status an offence in itself.

10 The letter of 23rd July 2007 is at the outset, broadly consistent with that of the 7th July 2005. It too implies that:

(i) a decision has been made;

(ii) by the Minister;

(iii) to renew the permission;

(iv) the renewal was for "a further three years until 7th July 2010", and accordingly must have commenced on the expiry of the first permission on the 7th July 2007.

However the letter is somewhat confused and confusing. The sentence "please note that your permission to remain in the State will only become operative when you have registered at your local Registration Office" is a departure from the format in the 2005 letter and implies some conditionality on the coming into force of any permission. This is perhaps also to be inferred from the reference to the decision being "subject to" the results of inquiries as to whether the applicant was involved in any criminality. On the other hand the reference to inquiries by the GNIB is itself instructive. The GNIB is not empowered to refuse or revoke any permission. All it can do is refuse registration and refer the matter back to the IBC unit in the Department of Justice. The Department might then refuse the application for renewal of permission. The next sentence, "In the event that this occurs, you will become illegal in the State …", seems to suggest that it would only be then, however, that the recipient of a letter in these terms would become illegal within the State which implies that a permission of some sort had been given. There is thus a significant ambiguity in the letter as to the precise point at which it can be said that a person becomes lawful within the State. This ambiguity may only rarely become significant in the case of any individual applicant but may become crucial when in a case such as this, the precise period of permitted lawful residence must be identified. In the event, Mr. Sulaimon duly attended at the Immigration Registration Office on the 14th of August 2007 and his passport was then stamped in the following terms: "permitted to remain in Ireland until 07 July 2010, J Sergeant for Minister for Justice, Equality and law Reform. Date 14th August 2007". The words "07 July 2010", "J Sergeant" and "14th August 2007" were in handwriting.

11 Two additional pieces of information should be noted. First, the applicant sought discovery which was exhibited in this case and relied on without objection. That showed a departmental submission from Patrick Quinlan on the 7th July 2005 (who it will be recalled, was the signatory of the letter of the same date issued to Mr. Sulaimon in respect of his permission to remain in Ireland). The submission recommended "that Fatai A. Ayimla Sulaimon should be granted permission to stay in the State for two years". That document does not show that the recommendation was accepted by the Minister, but on the hearing on this appeal it was accepted on behalf of the State that there existed a document to that effect. It seems possible that the acceptance of the recommendation was simply endorsed on another copy of the same submission. Second, when the application in 2007 was made for renewal of the permission to remain in the State, that too received a positive recommendation on the 23rd of July 2007 that "Fatai A. Ayimla Sulaimon should be granted a renewal of his permission to remain in the State for a further three years". That document also contained the following statement: "date of permission to remain under IBC/05 granted: 07/07/2005".

12 The view taken of the application by the Department of Foreign Affairs (in accordance with guidance given by the Department of Justice) was that the reckonable period of permitted residence in accordance with s.5(1) of the 2004 Act, was only that period between the date of endorsement of each permission upon Mr. Sulaimon's passport and the expiry of that permission. This meant that the period ran from the 22nd July 2005 to the 7th July 2007, and the 14th of August 2007 to the 7th of July 2010. The period of reckonable residence prior to the birth of the infant applicant on the 24th of August 2008 totalled 1,092 days, 3 short of the statutory requirement. The reasoning was if not simple at least discernible: the reckonable period could only include those periods of residence not in breach of s.5(1) of the 2004 Act; s.5(1) prohibited presence in the State other than in accordance with "permission"; "permission" had a special definition under the Act; s.1 required the word to be "construed in accordance with s.4"; s.4(1) referred to a "permission" being given by the immigration officer on behalf of the Minister in a document to the non-national concerned, or the inscription on the passport or other equivalent document by the immigration officer; in either case the document given, or the inscription made, had to "authorise the non-national to land or be in the State"; in this case the inscription had been made by an immigration officer on the passport on two occasions, the 22nd July 2005 and the 14th of August 2007; these were "permissions" within the meaning of s.4(1) and accordingly the period covered by that permission and the renewal prior to the birth of the infant applicant was the 1,092 days calculated by the Department of Foreign Affairs. Neither the letter of the 7th July 2005 nor that of the 23rd July 2007 could, by their terms, constitute such a permission nor be evidence of any such permission.

13 This approach places heavy emphasis on the act of the immigration officer placing a stamp on the passport of the applicant. The situation contemplated by s.4 is obviously that of an immigration officer at a frontier post, port or airport, who stamps a passport or other official identity document. However, the Irish Born Child Scheme was administered by the Department of Justice. The procedure for stamping a passport or any similar document is clearly a useful one: it provides certainty and durable evidence on a document designed and intended to carry such proofs in relation to legal residence. Accordingly, it is perhaps understandable from an administrative point of view that it was considered useful and desirable to bring together the two routes to permission and to attempt to make the process of placing a stamp on the passport or other such document, the key moment.

14 Indeed in the High Court, the Minister argued that the Act <u>only</u> contemplated one permission, namely that given in accordance with s.4 by an immigration officer, and accordingly the Minister's decision was not a permission but simply a preliminary step to permission. That claim was repeated in the written submissions to this court. As the High Court judge observed, this argument led to the strange conclusion that although the immigration officer was acting on behalf of the Minister, and therefore his agent, he (the agent) could do something (grant permission) which it was asserted the principal could not. However, in oral submissions to this court, Michael Collins SC on behalf of the Minister took a more nuanced line. He conceded that there were two possible sources of permission. Under s.4 an immigration officer could grant permission on behalf of the Minister. However, the Minister could also grant permission. Nevertheless, he maintained that the Minister had deliberately not exercised that power in this case. He had instead decided that permission should be granted by the immigration officer. On this argument the formal legal, and only, permission in this case occurred (or in the language of the letter of the 23rd July 2007 "became operative") <u>only</u> when permission was inscribed by the immigration officer on the passport Mr. Sulaimon.

15 The Minister's argument in the High Court (that the only permission which could satisfy s.5 was one granted under s.4 by an immigration officer) has at least a perverse logic, since it could be argued that this special definition of "permission" was required by the combined effect of ss. 1 and 4 of the Act, even if the outcome seemed more than a little strange. However, as counsel recognised in this Court, that position could not be maintained. It was clear not only from the theory but also from the text of the Act itself that a minister could separately grant permission and independently of the act of an immigration officer under s.4(1). This was clear from the terms of s.5 itself which spoke of "permission… <u>by</u> or on behalf of the Minister". That was to be contrasted with the formulation to be found in s.4 which referred to permission being granted by an immigration officer "on behalf of the Minister". Therefore the Act clearly contemplated at least two permissions, one granted by the Minister and another granted by or on his or her behalf by an immigration officer. Furthermore s.4(5)(d) dealt with the position of non-nationals entering the State other than by sea

or air, and provided:

> "A non-national to whom this subsection applies shall not remain in the State for longer than one month without the permission of the Minister given in writing by him or her or on his or her behalf by an immigration officer."

Accordingly it follows that the Act contemplates a separate power in the Minister to grant this permission other than through the agency of the immigration officer. It is not necessary here to discuss the interesting question of whether that power is derived directly from the Executive power of the State or is now statutory since it is sufficient for present purposes that the Act at least clearly recognises the existence of a power in the Minister whatever its legal basis.

16 Nevertheless counsel maintained that although the Minister had power to grant permission he had not done so here because, it was argued, permission had to be construed in accordance with s.4 and accordingly, even if not executed by an immigration officer, it had to comply with the other aspects of that section. Therefore a permission granted by the Minister had to be in writing and more importantly given to the non-national involved. Although it was conceded that there was a documentary record of a ministerial decision, no such document had been given to the non-national. Although the letter of the 7th July 2005 had been *given* to the non-national (instead of being sent directly) it was not on its terms either the permission or evidence of it.

17 Even this subtle position has its difficulties. Once it is acknowledged that the permission did not have to be in compliance with all the requirements of s.4 (in particular that it did not have to be given by an immigration officer) then there is no reason why the remaining aspects of s.4 should be read into any ministerial permission, and in particular, a requirement of a document given physically to a non-national. But all that s.5 requires is that a person be in the State with the permission of the Minister. Furthermore, it is clear that the word "permission" in s.5 did not have a special meaning derived from s.4 but rather was used in a more general and ordinary sense. Thus, in s.5 (which for the purposes of this case is the critical section since it is incorporated by reference in the definition of reckonable residence), it is provided that:

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

Any permission given to the non-national prior to the coming into force of the Act could not comply with s.4 which did not at that time exist. Furthermore, the permission could not lose its status as such because the grantor did not have the prescience to grant it in accordance with the terms of an Act not yet passed. Accordingly counsel was forced to argue that the word permission had two different meanings not only in the same section, but in the same sentence.

18 It seems much simpler to conceive of the word having the same meaning in s.5 and that meaning being the ordinary natural meaning of the word. Section 1 does not require a special and artificial definition of the word. Rather, it merely provides, save where the context otherwise requires, that the word "permission" shall be construed in accordance with s.4. In my view this means no more than that any ministerial permission shall be of the same nature (rather than form) as the permission which is granted under s.4. This indeed is consistent with a broader view of the Act. The Act does not provide any details about the grant of a ministerial permission and does not set out any procedure for either an application for such permission or the manner in which application is to be approached. It seems unlikely therefore that it would require precision as to the manner of the communication of any permission, particularly when that would be achieved only by indirect reference to construction in accordance with s.4. Furthermore even if (contrary to the view expressed above) the word "permission" is to be normally read in the Act as meaning either a permission under s.4(1) or in the same form, I would consider that for the reasons already discussed, in the case of a ministerial permission, the context does otherwise require and it should be given its ordinary and natural meaning.

19 Finally, I consider that this is also consistent with the structure of the Act. It should be remembered that the Act was introduced with some haste in the period between the High Court decision and the subsequent Supreme Court appeal in *Leontjava v. DPP* [2004] 1 I.R. 591. The obvious focus of s.4 is not to set some general template for all permissions granted, but rather to make provision for the decision of immigration officers at point of entry to the State. That is the significance of the reference in s.4(1) to "…authorising the non-national to land or be in the State." Indeed the shoulder note to the section refers to "Permission to land." While s.18(g) of the Interpretation Act 2005 provides that such notes are not normally to be taken as part of the enactment or construed or noticed in relation to the construction or interpretation of the enactment, that provision is itself subject to s.7 which permits a court, notwithstanding s.18(g) to make use of all matters that accompany the text in the case of ambiguity under s.5 of the Interpretation Act 2005. In this case there is more than sufficient ambiguity to permit recourse to be had to the note. Furthermore the structure of the Act conceives of a permission being separate and distinct from the registration required under s.9. Such registration is required of all non-nationals who have permission to be in the State. Taking the simple situation of a person given permission under s.4(1) when at the point of entry, such person must still register under s.9 and indeed an offence is committed if he or she fails to do so. Logically the same distinction should be maintained between the permission granted by the Minister and the subsequent registration. However, if the approach of the Minister is correct, the two positions are conflated and the act of registration also becomes the act of grant of permission. Finally, the approach taken by the Minister would involve an unfortunate and illogical consequence. Section 5(2) provides that a non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State. It would follow from the Minister's interpretation that on the two occasions that Mr. Sulaimon attended at the GNIB, he was unlawfully in the State (and thus liable to deportation) even though the Minister had decided to grant him permission to remain. In my view therefore the Act, as properly construed, recognises that the Minister may grant permission, and does not prescribe any particular formality for such permission.

20 It remains to consider whether in fact the Minister did grant such permission in 2005 on the 7th of July. I have no doubt that he did. First, that is most clearly shown by the departmental file in relation to the renewal of permission which refers to the 7th July being the date upon which permission to remain under the IBC/05 was granted. Second, the letter dated the 7th of July is only consistent with that interpretation. It refers to the Minister's decision to grant permission (thus implying that it is the Minster who is granting the permission and no other step is necessary) and that such permission is to remain in the State for two years until the 7th July 2007 which, as already noted, necessarily implies that the permission commences on the same date, namely the 7th July 2005. Furthermore the letter refers to a certificate of registration, which "shows" that "you have been given" permission. Thus the registration does not constitute permission: it evidences a permission previously given. Accordingly, I am satisfied that permission was granted irrespective of the date on which registration was effected. When registration is effected (or if it is desired to inscribe on a passport or any other document some evidence of permission) it should in my view, in a case such as this show the date of permission granted and in this case, that of the ministerial permission. This is sufficient for the plaintiff to succeed since if permission was granted on the 7th of July 2005, the period between that date and the date of the letter must be included in the reckonable residence theory for the purposes of s.6(A) and s.6B(4) of the Irish Nationality and Citizenship Act 1956 (as amended) and that period is clearly more than the 1095 days required. Accordingly it is not necessary to address the position on the renewal of the permission in 2007, or attempt to further construe the letter of the 23rd of July of that year.

21 Finally, I should say for the sake of completeness that while it may in theory be possible for the Minister to nominate the date of coming into force of permission to remain within the State (although such a decision itself would be reviewable), this does not seem to me to be a desirable approach (to put it at its lowest) if utilised to attempt to create an entire administrative scheme for execution of documents by immigration officers. The confusion, at a minimum, which this can lead to is illustrated by the letter of the 23rd of July 2007, which seems to suggest on the one hand that a permission has been renewed for three years from the 7th of July 2007 until the 7th July 2010, and on the other hand that the permission only becomes operate on registration. Even then, it suggests that an issue may arise in registration which may involve referral back to the IBC unit. This, it is said, may result in the refusal of the application. But it appears that it is only then that the person will become illegal in the State. However, since s.5(2) provides that any person who is in the State without permission is unlawfully within the State, then it must follow that until the point of refusal, the letter contemplates that Mr. Sulaimon would have been lawfully within the State. This can only have been the case if a permission had been granted. This seems an entirely undesirable state of confusion. It is also in my view doubtful that the immigration officer should, where the Minister has granted permission under the Irish Born Child Scheme, seek to inscribe details of permission on the passport pursuant to s.4(1). The power under s.4(1) is a statutory power granted to an immigration officer and grants him a degree of discretion. It does not appear to me that such a procedure is appropriate where the Minister has made a decision and the role of the immigration officer is merely secretarial in recording that decision. For example, it does not appear possible that where a permission has been granted by the Minister, subject to conditions, an immigration officer would be entitled to exercise the powers under s.4(3) to refuse to give a permission (since the permission has already been granted) or to impose additional conditions on such permission. If it is desired to create a scheme in which the action of the immigration officer becomes the only manner in which permission can be given or recorded, then a comprehensive scheme should be prepared and set out in statute or regulations drafted for that purpose and coordinated with all existing provisions in this field. In the circumstances and for the reasons set out above, I would dismiss the appeal.