AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000053

O'Donnell CJ
Charleton J
Baker J
Woulfe J
Hogan J

Between/

ELG (A minor suing by her mother and next friend SG)

Applicants/Appellants

-AND-

HEALTH SERVICE EXECUTIVE

Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of December 2021

1. Where a judge elects to make a consultative case stated but resigns, retires or dies before a higher court is in a position to deliver a judgment in respect of the question or questions posed by the case stated, is the jurisdiction of that (higher) Court thereby affected? Specifically, is that higher Court any longer empowered to answer the consultative case stated? This is the slightly unusual problem which has been presented as a preliminary issue in this appeal from the decision of the Court of Appeal.
2. As it happens I agree with the conclusions which Baker J has reached in the thorough and comprehensive judgment she has just delivered. I also agree with her general reasoning. I differ only in that I take the view that the decision of this Court in *Cork County Council v.*

Commissioners of Public Works (1943) 77 ILTR 195 was to the effect that the Court had no jurisdiction to entertain a consultative case stated from the High Court where the judge stating the case no longer held judicial office. But I agree, however, that one way or the other, the effect of Article 34.5.3 of the Constitution (as inserted by the 33rd Amendment of the Constitution Act 2013) is that it now requires this Court to determine the case-stated, the retirement of the judge who first stated the case notwithstanding, once the Court of Appeal had in the meantime delivered an otherwise binding judgment and this Court had independently decided to grant leave pursuant to Article 34.5.3 itself.

3. All of this, however, is to anticipate somewhat because it is first necessary to set out the background to this appeal and to explain in a little more detail the novel problem which now arises.

The background to the present appeal

4. The applicant, ELG, is a little girl who is now aged six. Her mother, SG, was concerned that she may have a disability. To that end her mother made an application to the respondent Health Service Executive in October 2017 pursuant to the provisions of the Disability Act 2005 ("the 2005 Act") to have her assessed. The HSE completed a summary report in March 2018 in which it was stated that it was believed that ELG did not have a disability, but she was nonetheless referred for a further psychological and occupational therapy assessment.

5. It is unnecessary for present purposes to chart the further issues which arose between SG and the HSE regarding the other range of services that should be made available to this little girl. It is sufficient to record that a complaints officer recommended – admittedly on a conditional and provisional basis - that ELG be supplied with a service statement from the HSE. When the HSE declined to issue a service statement, the applicant (through her mother) invoked the redress mechanism contained in the 2005 Act with a view to compelling the HSE to do so.

6. The matter ultimately came by way of motion before Her Honour Judge Linnane in the Circuit Court. On 28th February 2020 Judge Linnane agreed to state a consultative case stated to the Court of Appeal pursuant to s. 16 of the Courts of Justice Act 1947 ("the 1947 Act"). The single question posed in the consultative case stated is as follows: "Where an assessment report prepared under the Disability Act 2005 concludes that an applicant has no disability, but nonetheless identified that an applicant has health needs and requires health services, is that applicant entitled under s. 11 of the Disability Act 2005 to a service statement?"

7. One might pause at this point to observe that the resolution of this question is of considerable importance, not only to the applicant and her family, but also to many other children and their parents who are in a similar situation. As it happens there is no other issue as between the parties and the Court has been informed that the HSE does not propose to seek costs in this case. In view of the importance of this matter, it would be highly desirable that this Court should finally resolve this question, assuming, of course, it has jurisdiction to do so.
8. Returning now to the narrative of the background facts, the appeal ultimately came before the Court of Appeal in January 2021 when judgment was reserved. The Court of Appeal delivered judgment on 1st April 2021 by answering the question posed in the negative. The Court further made no order as to costs. The actual order of the Court was perfected on 26th April 2021. By a determination issued on 21st July 2021 ([2021] IESCDET 84) we granted the applicant leave to appeal to this Court in accordance with Article 34.5.3 of the Constitution.

The status of a consultative case stated where the referring judge no longer holds judicial office

9. The preliminary issue which now arises in this case comes about by reason of the fact that Her Honour Judge Linnane retired from the Circuit Court on 15th April 2021. Critically, however, by reason of effluxion of time, no final answer was ever returned to her during the currency of her judicial office such as would have enabled her to make a decision in this case. The problem presented now concerning the Court's jurisdiction to entertain this appeal is essentially the same as where a judge retires or resigns or dies during the currency of a hearing without a final decision having been made.
10. This question is perhaps particularly problematic at first instance with a single judge sitting alone (as with the Circuit Court). There have, however, historically been instances of where following the death or resignation of a member of this Court the parties have elected to be bound by a decision of a two or four judge member Court. Thus, for example, in *O'Reilly v. Gleeson* [1975] IR 258, FitzGerald CJ died a few months after judgment had been reserved but before that reserved judgment could be delivered. The report of this case records that "the parties agreed to be bound by the judgments of the two other members of the Court": see [1975] IR 258 at 268. But it is equally clear that no party could be *compelled* so to elect, as they are in principle entitled in those circumstances to a fresh hearing before a fully constituted court. However, it seems quite obvious that this solution cannot be

adapted to the case of a first instance court with a judge sitting alone where the resignation, retirement or death occurs before a final decision can be given by the judge concerned.

11. It is against this background that this issue falls to be resolved. I propose first to consider the situation as it pertained prior to the establishment of the Court of Appeal in October 2014. I will then consider whether the situation has been changed following the passage of the 33rd Amendment of the Constitution Act 2013. It may, however, be convenient to start with an examination of the nature of the consultative case stated procedure itself, along with a consideration of some of the case-law which has arisen touching on this and related questions.
12. Section 16 of the 1947 Act enables a judge of the Circuit Court to state a case to the Court of Appeal. That provision is in the following terms:

    > "A Circuit Judge may, if an application in that behalf is made by any party to any matter … pending before him, refer, on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgement or order in the matter pending the determination of such case stated."

13. Of course, the power to state a case under this section originally lay to the Supreme Court. Following the establishment of the Court of Appeal, the reference to the Supreme Court in s. 16 of the 1947 Act must now be read as a reference to the Court of Appeal: see s. 74(1) of the Court of Appeal Act 2014. For completeness, it may be noted that the s. 16 of the 1947 Act is drafted in very similar terms as s. 38 of the Courts of Justice Act 1936 ("the 1936 Act") which deals with the right of the High Court to state a case to the Supreme Court (now the Court of Appeal).
14. Side by side with this consultative case stated jurisdiction there exists a right of appeal by way of case stated from the District Court to the High Court contained in s. 2 of the Summary Jurisdiction Act 1857 ("the 1857 Act"). In this context it may be first observed that the jurisdiction conferred by the 1857 Act is in truth an appeal simpliciter, albeit one described as being in the nature of an appeal by way of case stated. Second, in this context at least, there is in fact a fundamental distinction between a consultative case stated and an appeal by way of case stated, principally because in the former case there has been no final decision taken by the judge who has stated the case, whereas the latter involves an appeal by the dissatisfied party seeking to have an adverse decision set aside or otherwise reversed.

15. This distinction between consultative cases stated and appeals by way case stated was well explained by Allen J. in his judgment in *Director of Public Prosecutions v. Larkin* [2019] IEHC 16. Allen J. put the matter thus:

> "The purpose of a consultative case stated is to resolve an issue of law so as to allow the judge hearing the case to decide it. By contrast, the purpose of an appeal by way of case stated is to allow the party who is dissatisfied with the decision as being erroneous in point of law to have the error of law corrected. In a case where the judge who has referred a consultative case stated has retired or died, the case will necessarily have to be reheard because there will have been no decision. By contrast, on an appeal by way of case stated the High Court will be able to say whether the decision which was made was correct. On a consultative case stated the issue or issues of law will have been propounded by the judge. But on an appeal by way of case stated the judge will have decided the case and the issue of law will have been propounded, or at least identified, by the dissatisfied party. If, as in this case, it should transpire that something has gone wrong in the District Court, it seems to me that there is no good reason why it should not be put right: at the very least to the extent to which it can be put right. In this case the issue of law which gave rise to the case stated was, in the meantime, decided by the Court of Appeal but if it had not been, it would have been highly desirable for it to have been decided by the High Court. In this case the issue was whether the respondent was correctly acquitted. In another case the issue might have been whether the appellant had been properly convicted. Apart from the public interest in certainty in the law, it seems to me to be wrong in principle to contemplate that an erroneous conviction should be allowed to stand, or that a dissatisfied litigant might be deprived of a statutory right to appeal, by the chance of the death, retirement or promotion of the District Court judge."

16. I cannot but agree with this lucid and compelling analysis. Much emphasis was, however, placed in the course of the hearing on a decision of the House of Lords in respect of the 1857 Act, namely, *Griffith v. Jenkins* [1992] 2 AC 76. In that case the House of Lords held for the purposes of an appeal by way of case stated that the High Court had the power to order a rehearing before a differently constituted bench of magistrates. As Lord Bridge observed (at page 84) in his speech:

> "My conclusion is that there is always power in the court on hearing an appeal by case stated under section 6 of the Act of 1857 to order a rehearing before either the same or a different bench when that appears to be the appropriate course and the court, in its discretion, decides to take it. It is axiomatic, of course, that a rehearing will only be

ordered in circumstances where a fair trial is still possible. But where errors of law by justices have led to an acquittal which is successfully challenged and where the circumstances of the case are such that a rehearing is the only way in which the matter can be put right, I apprehend that the court will normally, though not necessarily, exercise its discretion in favour of that course. I recognise that very different considerations may apply to the exercise of discretion to order a rehearing following a successful appeal against conviction by the defendant in circumstances where the error in the proceedings which vitiated the conviction has left the issue of the defendant's guilt or innocence unresolved. In some such cases to order a rehearing may appear inappropriate or oppressive. But this must depend on how the proceedings have been conducted, the nature of the error vitiating the conviction, the gravity of the offence and any other relevant consideration…"

17. I respectfully agree with that reasoning. It would appear, in any event, that there is an *ex tempore* decision of this Court in *Director of Public Prosecutions v. Fitzpatrick*, 14 June 2007 concerning an appeal by way of case stated under s. 2 of the 1857 Act which arrives at the same conclusion. (A note of this decision appears to have been furnished to Allen J in *Larkin* and key passages from the judgment of Murray CJ are reproduced in that judgment.) Given, nevertheless, the fundamental distinction between consultative cases stated and appeals by way of case stated, I do not think that either decision is directly on point in this particular context other than to illustrate the differences between the two types of case stated procedure.
18. The real point of difference from the present case is that the appeal by way of case stated in s. 2 of the 1857 Act is in fact an appeal against a *final* decision. Even if that decision is wrong in point of law, it can be reversed by the High Court under s.2 and the powers of the Court under s. 6 of the 1857 Act extend to remitting the case to a different judge of the District Court. While described as an appeal by way of case stated, it is in truth no different to the situation where, for example, the Court of Appeal allows an appeal from the High Court and remits the matter back to a different judge of that Court. As the case will have to re-start before that new judge, the fact that the original judge whose decision was reversed no long holds judicial office is irrelevant.
19. As I have already observed, it is the absence of a *final* decision in the case of a *consultative* case stated which is crucial because, as Allen J observed in *Larkin*, where the judge who has referred a consultative case stated "has retired or died, the case will necessarily have to be reheard because there will have been no decision." To anticipate somewhat, all of this

has implications for the jurisdiction of the higher court because if the referring judge no longer holds judicial office by the time the consultative case stated comes back before that court, this means that any judgment so rendered would be in the nature of an advisory judgment because the case will ultimately have to be reheard as there is no longer a judge at first instance who can make a final decision.

The decision of this Court in *Cork County Council v. Commissioners of Public Works*

20. I next propose to consider in a little detail the decision of this Court in *Cork County Council v. Commissioners of Public Works* (1943) 77 ILTR 195 which all are agreed is the principal authority to date on the point. This was a claim for rates made by Cork County Council. Having lost in the Circuit Court, the appeal came on before Meredith J. sitting as a judge of the High Court. Meredith J. had originally stated a case for this Court under s. 38(3) of the 1936 Act but he died in August 1942 a few months before this Court heard the case stated in January 1943.

21. It seems clear from the (admittedly somewhat terse) report that the Court itself raised the preliminary question as to whether in these circumstances it had jurisdiction to entertain the case stated. Just as was to happen in the present case almost 80 years later, counsel for both parties took the unusual step of jointly addressing the Court in urging it to hear and determine the case stated. They are reported as having submitted that:

> "…great inconvenience and expense would be caused to the parties if this were not done. No precedents governing the matter could be discovered…The case stated should be treated as an undisposed case in the High Court list. There was nothing to prevent the Supreme Court disposing of the case stated. The facts were not in dispute and the determination of the case would enable the judge in whose list the appeal was entered to dispose of the appeal. That judge would have all the powers of his predecessor in office."

22. These immensely practical arguments echo the joint submission of counsel for the parties in the present case in which both counsel urged this Court to hear the present appeal. In *Cork County Council*, this Court was not, however, prepared to determine the consultative case-stated, with Sullivan C.J. saying:

> "… it was clear to the Court that the wording of section 38 (3) of the Courts of Justice Act, 1936, emphasised the individuality rather than the office of the judge. The section contemplated that the same individual judge who stated the case should pronounce judgment after determination of the case stated. That was now impossible. The case stated propounded certain questions. The answers to these questions would have

resolved the doubts in the mind of the judge who propounded them but there was no guarantee that another judge would not have other points to raise, or that, at a re-hearing, there would still be agreement amongst the parties on all of the facts. In view of those considerations the Court felt that it would merely stultify itself by determining the case stated as the judge who stated the case was no longer available to act on the determination and to pronounce judgment."

23. One might immediately ask: what did this case actually decide? It seems to me that the best reading of the *ratio* of this decision is that this Court concluded that it had no jurisdiction to hear and determine a consultative case stated where the judge who stated the case no longer holds judicial office before the matter could be finally determined. As it happens, I think that in his judgment in *Director of Public Prosecutions v. Galvin* [1999] IEHC 227, [1999] 4 IR 88 Geoghegan J came to the same conclusion regarding the effect of this particular decision.
24. I agree, of course, that the last line in the passage I have just quoted (where Sullivan CJ said that the Court "would merely stultify itself by determining the case stated as the judge who stated the case was no longer available…") might, if taken on its own, suggest that the Court was simply declining jurisdiction on purely discretionary grounds. If the Court, however, considered that any potential obstacle to its determining the matter was not jurisdictional in nature but was rather simply a matter of discretion (somewhat akin to the recognised exceptions to the modern mootness doctrine), then it is very hard to see why the Court would not hear and determine the consultative case stated, not least given that both parties had urged it to take this very step.
25. It is also true that *Cork County Council* concerned the interpretation of s. 38(3) of the 1936 Act rather than s. 16 of the 1947 Act. But the since the statutory language and structure of the consultative case stated procedure provided for by the two separate sub-sections of (admittedly different) items of legislation is nearly identical, I do not think that one can realistically draw any distinction for present purposes between the two statutory provisions. In both instances the decision to refer the consultative case stated is personal to the judge concerned and both sub-sections necessarily contemplate that it is that judge who will receive the answer from the higher court and who will then proceed to apply it in the course of making a final decision in the matter. Just as in *Cork County Council*, one can equally say of the present case that which is necessarily contemplated by the sub-section cannot now happen.

26. To that extent, therefore, I consider that in *Cork County Council* this Court decided that it had no jurisdiction to answer a consultative case stated where the referring judge no longer held judicial office. It follows, therefore, that unless it could be said that this decision was clearly wrong by reference to *Mogul* principles (*Mogul of Ireland Ltd. v. Tipperary (NR) County Council* [1976] IR 260), that decision binds this Court.
27. For my part, I cannot say that the *Cork County Council* was wrongly decided, still less that it was clearly wrong by reference to the *Mogul* test. I agree that the result of *Cork County Council* is highly inconvenient and must be greatly disappointing and deeply frustrating for parties who, through no fault of their own, are deprived of the benefit of the very ruling from a higher court which they had so earnestly desired.
28. Yet, having regard to the language and structure of both s. 38 of the 1936 Act and s. 16 of the 1947 Act, one cannot escape the conclusion that the consultative case stated procedure provided for by these two items of legislation is entirely personal to the referring judge and that the legislation necessarily presupposes that the judge in question will remain in office so that the consultative case stated can be answered by the higher court and prior to the referring judge making a final decision. If, for whatever reason, the referring judge no longer holds judicial office, the net effect is that an appellate court would be simply rendering an advisory opinion if it were to answer the consultative case stated, precisely because it is *only* the referring judge who can make a final decision in the matter. If (as here) the judge in question no longer holds office, compliance with that which is presupposed by the relevant statutory provisions is simply impossible and necessarily takes from the jurisdiction of this Court.
29. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must accordingly endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. As I observed in *Salaja v. Minister for Justice* [2011] IEHC 51, if they were to do otherwise, then "the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, since we have not been invested with the power to deliver purely advisory opinions." Yet this is what would in effect be the case if a court were now to pronounce on the specified question posed by the consultative case stated because there is now no judge in office who can make a final decision in this matter.
30. For all of these reasons, therefore, I consider that this Court lacks generally jurisdiction to hear and determine a consultative case stated where the referring judge no longer holds judicial office. I use the word "generally" advisedly because, as we shall now see, there is

one narrow - if constitutionally sanctioned - exception to this general rule, the context and tenor of which we must now examine.

Is the result affected by the 33rd Amendment of the Constitution Act 2013?

31. If the decision in *Cork County Council* remained the law immediately prior to the establishment of the Court of Appeal in October 2014, one must next consider whether (and, if so, to what extent) the law in that regard has been affected by the operation of the 33rd Amendment of the Constitution Act 2013.
32. As I have already noted, the consultative case stated was heard by the Court of Appeal in January 2021 and judgment was delivered on 1st April 2021. This was a perfectly lawful exercise of jurisdiction by that Court at that time because the referring judge only retired on 15th April 2021. Had, for example, the judge retired on 15th December 2020 then the Court of Appeal would have lacked jurisdiction to hear the consultative case stated for all of the reasons which have already been just articulated.
33. The new element, however, *is the fact that the Court of Appeal delivered a judgment at a time when the referring judge still held judicial office*. This is in fact a critical consideration. As that Court had jurisdiction to deliver judgment on 1st April 2021 that judgment must be regarded (absent an appeal to this Court) as an authoritative exposition of the law which binds all first instance courts. This *is* different from the situation in *Cork County Council* because in that case there was of course no (otherwise binding) intermediate court judgment.
34. This Court granted leave in the present case pursuant to the provisions of Article 34.5.3 of the Constitution. That provision provides for and clearly anticipates that this Court will necessarily have jurisdiction to entertain such appeals where this Court is satisfied that the decision under appeal involves a matter of general public importance or where this is in the interests of justice. As this Court has already so determined that the matter involves a matter of general public importance, then Article 34.5.3 must be taken to envisage that this Court has jurisdiction to determine whether an *otherwise binding decision* of the Court of Appeal which is of general public importance is, in fact, correctly decided.
35. *To that extent*, therefore, the decision would not be a purely advisory one because it would represent a constitutionally sanctioned exercise of jurisdiction by this Court in respect of the correctness (or otherwise) *of an otherwise binding decision of the Court of Appeal*. I accept that at one level this outcome is not entirely satisfactory because one way or the other the case will simply have to go back to be heard afresh by a different judge of the Circuit Court. As it happens, the parties in the present case are agreed that all issues will

effectively be ruled by any decision of this Court on the substantive issue, but in many other cases this will not be the case. There may, indeed, be instances where the new judge hearing the matter afresh would not even find it necessary to address the question which was originally posed in the case stated by the original judge. To that extent, therefore, any judgment which this Court might deliver in such circumstances could at one level amount to an exercise in futility. Yet this would nevertheless represent the exercise of constitutionally sanctioned jurisdiction by this Court because, to repeat, it would represent a decision by this Court as to whether a lawfully rendered decision of the Court of Appeal was correct or otherwise.

36. To my mind, the exercise of jurisdiction in these circumstances must be deemed to flow from the terms of Article 35.5.3 itself. Any other conclusion would perhaps be even more unsatisfactory, because it would mean that there would now be in existence an authoritative decision of the Court of Appeal which would have general *erga omnes* effect, yet would stand beyond review by this Court by reason of subsequent external events (namely, in this instance the retirement of the Circuit Court judge after the Court of Appeal had given judgment). This would be so even though this Court had already determined that the decision of the Court of Appeal satisfied the criteria specified by Article 34.5.3.
37. It follows, therefore, that in these highly special and unusual circumstances, this Court must be taken to continue to have jurisdiction by virtue of Article 34.5.3 to hear and determine this consultative case stated, the retirement of the referring judge notwithstanding. Any other conclusion would take from the effectiveness of Article 34.5.3 itself.

Conclusions

38. In summary, therefore, I would sum up my principal conclusions as follows:
39. The exercise of the consultative case stated procedure under s. 16 of the 1947 Act is personal to the judge concerned. That section clearly presupposes that the judge will proceed to make a binding determination only after the judgment of the higher court has been finally delivered. If, however, the referring judge ceases (for whatever reason) to hold judicial office as a judge of that court before that Court delivers judgment, then, as the decision of this Court in *Cork County Council* illustrates, the higher court to whom the consultative case stated has been referred will *generally* lack jurisdiction to proceed to hear and determine the case stated.
40. To this general rule there is, however, a narrow exception. In the present case the Court of Appeal had jurisdiction to hear and determine the consultative case stated in the present

case because at the date of the delivery of the judgment the Circuit Court judge in question continued to hold office as a judge of that Court. Unlike the situation in *Cork County Council*, there is now in existence an authoritative and binding decision of the Court of Appeal which was delivered at a time when that Court had jurisdiction to do so.

41. It is this special (and hitherto unique) situation which constitutes the exception to the general rule. As this Court has already determined that the matter involves a matter of general public importance, then Article 34.5.3 of the Constitution must be taken to envisage that this Court has jurisdiction to determine whether an *otherwise binding decision* of the Court of Appeal which is of general public importance is, in fact, correctly decided. *To that extent*, therefore, the decision would not be a purely advisory one because it would represent a constitutionally sanctioned exercise of jurisdiction by this Court in respect of the correctness (or otherwise) of an otherwise binding decision of the Court of Appeal. Any other conclusion would take from the effectiveness of Article 34.5.3.

42. It follows, therefore, that in these highly special circumstances, I consider that this Court continues to have jurisdiction to hear and determine this particular consultative Case Stated, the retirement of the referring judge following the decision of the Court of Appeal notwithstanding.