



**THE SUPREME COURT  
DETERMINATION**

**BETWEEN**

**THOMAS FOX**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND LAW REFORM**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**Neutral Citation:** [2021] IESCDET 30

**Supreme Court record no:** S:AP:IE:2021:000012

**Court of Appeal record no:** A:AP:IE:2018:000037

**High Court record no:** 2016 No. 21 JR

**Date of Determination:** Thursday, 11<sup>th</sup> March 2021

**Composition of Court:** Clarke C.J., O'Malley J., Baker J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court grants leave to the Applicant to appeal to this Court from the  
Court of Appeal

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

<b>COURT:</b> Court of Appeal
<b>DATE OF JUDGMENT OR RULING:</b> 22 <sup>nd</sup> May, 2020
<b>DATE OF ORDER:</b> 16 <sup>th</sup> November, 2020
<b>DATE OF PERFECTION OF ORDER:</b> 7 <sup>th</sup> January, 2021

THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 29 <sup>th</sup> January, 2021 AND WAS NOT IN TIME.
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### **General Considerations**

1. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B. S. v. Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 IR 812. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.
2. Furthermore, the application for leave filed and the respondent's notice are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties.
3. Any ruling in a determination concerns whether the facts and legal issues meet the constitutional criteria identified above, is particular to that application, and is final and conclusive only to that extent and as between the parties.

### **The Application**

4. Mr Thomas Fox ("the applicant") is the nephew of Mr Seamus Ludlow, a forestry worker who was murdered on 2 May 1976 in Dundalk, Co. Louth. Nobody has been charged in relation to the killing of Mr Ludlow, and his family say he was the innocent victim of loyalist paramilitaries or

individuals possibly linked to British State Security Services in a case of mistaken identity.

5. A Garda inquiry into his death was stood down after weeks, and the Barron Inquiry noted that some Garda information and files were missing or incomplete. The DPP and the DPP for Northern Ireland have each decided that no prosecutions be initiated.
6. The Minister for Justice and Law Reform has refused to establish an investigation or inquiry into the circumstances surrounding the murder of Mr Ludlow, as was recommended by an Oireachtas Joint Committee. The applicant seeks judicial review including declaratory relief and an order of *mandamus* compelling the establishment of an inquiry or suitable investigation into the circumstances of the death. The Court of Appeal, *per* Birmingham P. (Edwards and McCarthy JJ. agreeing) [2020] IECA 141, dismissed the appeal from the decision of the High Court, where Faherty J. had refused judicial review [2017] IEHC 817.
7. The application for leave to appeal has as its focus one only of the grounds on which judicial review was sought, that relating to Article 2 of the ECHR, as the arguments on legitimate expectation, fairness, unreasonableness or irrationality are not now being pursued.
8. The applicant relies on the authority of two ECtHR Grand Chamber judgments in *Šilih v. Slovenia* [2009] 49 EHRR 996, GC and *Janowiec v. Russia* [2013] 58 EHRR 792, GC, and the UK Supreme Court judgments in *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 and *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7.
9. The Minister for Justice and Law Reform, the Attorney General and Ireland (“the respondents”) oppose the application for leave.
10. The application for leave to appeal was filed one day out of time on account of a mistake as to the Statutory Instrument that regulated time to

appeal. The respondents do not oppose the applicant's application to extend time.

### **Discussion and Conclusion**

11. This Court considers that there is a general public interest in the clarification of the extent of the procedural obligations on the State under Article 2 ECHR and whether it carries an obligation on the State to carry out an effective investigation or inquiry into the circumstances of a death, or whether any such obligation is confined to the identification and punishment of the perpetrators of crime. The question also arises as to whether any such obligation can exist in respect of a death that occurred before the effective date of application of the ECHR in Ireland, but where some, or what is argued by the applicant to be a significant or weighty part, of the material facts came to light thereafter. In that regard, an analysis of the correct "critical date" for the operation of the principles found in Article 2 is desirable. It is apprehended that the issue transcends the particular facts of the present appeal.
12. It is in the interest of justice that the matter be considered by this Court as an appeal may bring finality to the family of the late Mr Ludlow.
13. In the circumstances, where there is no objection to the nominal extension of time, and where the justifying explanation for the delay is credible, the Court will extend the time for the lodgement of the application.
14. Leave to appeal will therefore be granted and the issues may be further refined in an early case management.

**And it is hereby so ordered accordingly.**