



**THE SUPREME COURT
DETERMINATION**

**IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996 AND IN THE
MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 (AS AMENDED) AND
IN THE MATTER OF THE CIVIL LIABILITY AND COURTS ACT, 2004
BETWEEN**

N.K.

APPLICANT

AND

R.P.

RESPONDENT

Neutral Citation: [2021] IESCDT 25

Supreme Court record no: S:AP:IE:2020:000122

Court of Appeal record no: N/A

High Court record no: 2019 No. 88 CAF

Date of Determination: Thursday, 25th February 2021

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

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE
CONSTITUTION APPLIES**

RESULT: The Court does not grant leave to the Respondent / Applicant to appeal to this Court from the High Court.

REASONS GIVEN:

ORDER SOUGHT TO BE APPEALED

COURT: High Court
DATE OF JUDGMENT OR RULING: 15 th October, 2020
DATE OF ORDER: 15 th October, 2020
DATE OF PERFECTION OF ORDER: 15 th October, 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 4th November, 2020 AND WAS IN TIME.

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, (Unreported, Supreme Court, 6 December 2017) 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 I.R. 812. The additional criteria required to be met in order that the so-called 'leapfrog appeal' directly from the High Court to this court can be permitted were addressed by the court in *Wansboro v Director of Public Prosecutions* [2017] IESCDET 115. Accordingly, it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.
- 2.** 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 in any detail.
- 3.** It should be noted that any ruling in a determination is a decision particular to that application and is final and conclusive only as far as the parties are concerned. The issue calling for the Court's consideration is whether the facts and legal issues meet the constitutional criteria. It will not, save in very rare circumstances, be appropriate to rely on a refusal of leave as having a precedential value relative to the substantive issues, if and when such issues should further arise in a different case. Where leave is granted on any issue, that matter will be disposed of in due course in the substantive decision of the Court.

Background

- 4.** The applicant is the mother of a boy, now aged about 16, referred to here as "A". A has been diagnosed with Asperger's Syndrome. As described by the trial judge (Jordan J., who met with him twice), he "thinks in black and white", in "straight lines". However, he is a high-functioning, mature young man.
- 5.** A lived with his mother and her partner (who have a son aged about 10) after the breakup of his parents' marriage in or around 2006. In 2018 he made a unilateral decision to go and live with his father and his father's partner. A continues to

believe that this was a correct decision. He is happy where he is, and does not want to see his mother.

6. The applicant sought an order for access with A for herself and her younger son. This was refused in the Circuit Court insofar as she was concerned, the court having taken A's age and views into account, although access was ordered as between the two boys. It was ordered that A continue to live with his father; that A retain his own passport; that the applicant should be kept informed as to all school, health plans and as to A's development; and that the parents should both take appropriate steps to bring about contact. In his *ex tempore* ruling on the appeal, Jordan J. stated that he had extraordinary sympathy for the applicant, and that he did not believe that the situation was fair. Furthermore, he felt that contact with his mother would be in A's best interest. However, A was as he was, and could not be changed by a court order. Jordan J. accepted the view, expressed in a report, that to attempt to coerce him would be futile and could be counterproductive. He therefore dismissed the appeal and affirmed the order made in the Circuit Court, with some minor adjustments to reflect a request by the court that the parties engage in mediation and that the father use his influence with A proactively.

The application for leave

7. The applicant asserts that the decision of the High Court was reached without regard to relevant European Union law. She has referred the Court to Case C-378/17, *Minister for Justice and Equality v. Workplace Relations Commission*. Insofar as her point is the primacy of EU law, that concept has never been disputed in this jurisdiction. However, she has not indicated what particular point of EU law is relevant to this particular case.
8. The applicant also refers to the European Convention on Human Rights. Lest there be any doubt on her part, it may be necessary to say that the Convention is not an EU instrument and does not have the same direct effect in Irish law. However, Irish courts are bound by the provisions of the European Convention on Human Rights Act 2003 to apply the laws of the State, so far as possible, in a manner compatible with the State's obligations under the Convention.
9. It is claimed by the applicant that her family rights under Article 8 of the Convention have been breached. It is submitted that the State is obliged to take all appropriate measures to reunite parents and children, but her contact with her son has ended because the court concluded that contact arrangements could not be implemented. She asserts a breach of Articles 6 and 13, insofar as she

says that the Irish court system does not deal appropriately with access disputes involving children with disabilities. Further, she says that she has been denied an effective remedy, as guaranteed by Article 13, since the High Court's request that the parties engage in mediation cannot be enforced.

Additional communication

- 10.** The applicant has informed the Court that a garda officer has told her that they have information relevant to the case, and that she should bring a motion for discovery to obtain this information.

Decision

- 11.** The Court considers that in reaching its decision the High Court applied well-established principles of law. No relevant aspect of EU law has been identified, while the reliance on the European Convention on Human Rights appears to be misplaced.
- 12.** Principles relating to the reunification of families in the context of asylum or immigration law cannot be directly transposed into the context of a family law dispute where an issue arises because a minor does not want to be in contact with a parent.
- 13.** In giving the weight that he did to A's views, the trial judge was acting in accordance with both the general practice of the courts in relation to older children and the reluctance of the courts to make orders that will be either futile or counterproductive. Furthermore, it is clear that, in the particular circumstances of A's situation, he was acting with the assistance of an appropriate report or reports. There are many areas of life in which judges can claim no personal expertise, and that is why expert reports are utilised.
- 14.** Finally, the High Court did indeed provide an "effective remedy", since it determined the dispute between the parties. The fact that the judge made an additional request to the parties to resolve matters by a different way does not mean that the court did not carry out its task.
- 15.** The Court considers it important to point out that court rulings in relation to issues such as custody and access are always open to revision in the event of any relevant change in circumstances. The Court notes, without expressing any view and without seeking any further detail, that the applicant may be able to obtain information relevant to her case from the Gardaí. Since this Court is an appellate court, it would normally be entirely inappropriate for it to engage in a

discovery process. However, it is of course open to the applicant to pursue this process in the Circuit Court.

- 16.** In the circumstances the Court does not consider that the constitutional criteria have been met.

Leave to appeal to this Court will accordingly be refused.