



THE SUPREME COURT

S:AP:IE:2021:000053
Court of Appeal Record No. 2020/155
Circuit Court Record No. 2019/5526

O'Donnell C.J.
Charleton J.
Baker J.
Woulfe J.
Hogan J.

ELG

(a minor suing by her mother and next friend SG)

Appellants/Applicants

- AND -

Health Service Executive

Respondent/Respondent

Judgment of Ms. Justice Baker delivered the 20th day of December 2021

1. A preliminary issue has arisen in this appeal concerning the jurisdiction of this Court to hear an appeal from a decision of the Court of Appeal on a case stated from the Circuit Court when the Circuit Court judge who stated the case has now retired.

Background facts

2. By originating notice of motion, the appellants sought orders from the Circuit Court pursuant to s. 22 of the Disability Act 2005 (“the Act of 2005”). One legal issue remained

to be resolved and the Circuit Court judge, Her Honour Judge Linnane referred that legal issue to the Court of Appeal by way of consultative case stated. The Court of Appeal heard the case stated and delivered judgment on 1 April 2021. Judge Linnane retired shortly thereafter on or about 15 April 2021 before the order was perfected on 10 May 2021. It is not suggested that the difficulty that has arisen as a result of her retirement depends on the date of the perfection of the order, judgment having been pronounced on the legal issue before she retired, but rather on the question of whether this Court may entertain an appeal from the order of the Court of Appeal when the judge making the case stated has retired, and when it can be stated without hesitation that she no longer requires the answer to the question she sought clarification on in order to come to a decision on the point before her.

3. No argument is made that the Court of Appeal was not competent to hear the case stated as it had been made properly before Judge Linnane retired and the Court of Appeal had heard argument and delivered its judgment. As will appear presently, the authorities suggest that an incomplete case stated may not be sufficient to vest jurisdiction in the court to whom the question is stated.

4. The obvious practical difficulty that arises as a result of the retirement of Judge Linnane is that the issue before her under s. 22 of the Act of 2005 cannot now be returned to her. If the case was returned to the Circuit Court, it would fall to be considered by another Circuit Court judge, who would presumably have to start the hearing afresh and who might take a different view of the law or the facts, with the result that the answer given to the case stated would be either irrelevant to that judge, or not sufficiently answer his or her legal questions.

The legislative source of the jurisdiction to state a case.

5. Section 16 of the Courts of Justice Act 1947 (“the Act of 1947”) provides for the making of a consultative case stated by a Circuit Court judge to the Supreme Court. The Circuit Court judge cannot state a case on his or her own motion but only on application

made by at least one of the parties to a matter pending before that judge: see the discussion in *McKenna v. Deery* [1998] 1 I.R. 62 below. Section 16 provides as follows:

“A Circuit Judge may, if an application in that behalf is made by any party to any matter (other than a re-hearing, under section 196 of the Income Tax Act, 1918, of any such appeal as is referred to in the said section) 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 judgment or order in the matter pending the determination of such case stated.”

6. This Court in *Doyle v. Hearne* [1987] I.R. 601 came to the conclusion that the provision for the adjournment of pronouncement of the judgment or order must be construed as mandatory, as any other construction

“would create a total absurdity for it would be giving to the Circuit Court a power to consult the Supreme Court as to the determination of a question of law, but leaving him free to decide the case in which it arose and thus, presumably, the question of law as well, prior to that determination” (Finlay C.J. in his judgment p. 607).

7. The ability to state a case was described in *Doyle v. Hearne* by Finlay C.J. as “of fundamental importance to the relationship between [the Supreme Court] and the Circuit Court and to the nature of the assistance which [the Supreme Court] can give to judges of the Circuit Court on questions of law.” (at p. 609).

8. As is clear from a plain reading of s. 16, a consultative case stated is made by a Circuit Court judge before he or she comes to a decision on a matter to be determined in the Circuit Court and enables the judge to ask the opinion of the Supreme Court as to the correct legal interpretation of a statutory provision or a principle of common law. In *McKenna v. Deery* the role was described as follows:

“[...] consultative cases stated are primarily for the guidance and assistance of the judge who is asked to state such a case and if the judge is quite clear in his own mind as to the proper decision in the case, *prima facie* he is entitled to refuse the application and to go ahead and decide the case in accordance with his firm and positive views.”
(at p. 75)

9. Since the establishment of the Court of Appeal, the case stated made by a Circuit Court judge is now made to the Court of Appeal pursuant to s. 74(1) of the Court of Appeal 2014 (“the Act of 2014”):

“References (howsoever expressed) to the Supreme Court, in relation to an appeal, including proceedings taken by way of case stated, which lies (or otherwise) to it in any enactment passed or made before the establishment day, shall be construed as references to the Court of Appeal, unless the context otherwise requires.”

10. Order 86B of the Rules of the Superior Court, inserted by S.I. 485 of 2014 and effective from 28 October 2014, provides for the procedure for the lodging and transmission of a case stated by a judge of the Circuit Court to the Court of Appeal pursuant to s. 16 of the Act of 1947.

11. A consultative case stated may also be made by a District Court judge to the High Court under s. 52 of the Courts (Supplemental Provisions) Act 1961 (“the Act of 1961”) and by the High Court, hearing an appeal from the Circuit Court, to the Court of Appeal under s. 38(3) of the Courts of Justice Act 1936 (“the Act of 1936”).

12. Section 34(1) of the Criminal Procedure Act 1967 provides for a case stated on a question of law in circumstances where a verdict is given in favour of an accused by direction of the trial judge, without prejudice to an acquittal, and could be said to reflect a legislative view of the purpose of the case stated as a vehicle to clarify the law in the interests of justice.

The authorities

13. The question that arises in this appeal does not concern the jurisdiction of the Court of Appeal to hear the case stated but whether this Court can, and if it can whether it should, give an answer to the question when the answer cannot be returned to the judge who asked for clarification in the first place. The point is not answered in the authorities which is scarcely surprising as the question has arisen in the light of the new jurisdiction of this Court following the 33rd Amendment to the Constitution, and the fact that the legislation as enacted envisaged the case stated from the Circuit Court to the Supreme Court, the court of last resort from which no appeal lay.

14. There is some analysis in the authorities on the effect and meaning of s. 16 of the Act of 1947, and the earliest case to which the Court was referred to was the tantalisingly short judgment of the Supreme Court in *Cork County Council v. Commissioners of Public Works* (1943) 77 I.L.T.R. 195. There the High Court judge had stated a decision for the Supreme Court pursuant to s. 38(3) of the Act of 1936, but the High Court judge died before the case stated was heard by the Supreme Court. Neither the headnote nor the short judgment of Sullivan C.J. set out the nature of the underlying proceedings or whether any issue remained unresolved in the lower court, save to show that the appeal concerned a claim for rates in respect of a holding on Haulbowline Island, County Cork. But as is apparent from the report, counsel for both parties advanced the proposition that the hearing of the case stated could proceed as no facts remained in dispute. It was argued in those circumstances that the judge with seisin of the Circuit Court list could dispose of the appeal in the light of the answer given by the Supreme Court so that the ability to give an answer did not depend on whether the person seeking the answers was competent to receive them.

15. As I said, the judgment of Sullivan C.J. is tantalisingly short but he did note that s. 38(3) of the Act of 1936 “emphasised the individuality rather than the office of the Judge”, and that the section contemplated that that judge who had stated the case would pronounce

judgment following the answer given by the Supreme Court to the questions posed. He noted also the obvious and significant fact that “there was no guarantee that another Judge would not have other points to raise, or that, at a rehearing, there would still be agreement amongst the parties on all the facts.”

16. Sullivan C.J. concluded that the Court should not accept jurisdiction, but he did not expressly say that jurisdiction did not exist, rather that the Court “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” (emphasis added). Later authorities read the judgment of Sullivan C.J. as expressing a view that the court had no jurisdiction, but the terms used by the Chief Justice do not go that far and suggest that the decision was based on a practical view that giving an answer would be futile. I return later to more fully deal with this argument.

17. The consultative case stated was considered by this Court in *Dublin Corporation v. Ashley* [1986] I.R. 781, a case referred by the Circuit Court for the determination of the Supreme Court. *Dublin Corporation v. Ashley* did not involve any question of the jurisdiction of the Supreme Court to hear the case stated from the Circuit Court, however, Finlay C.J. did address the question of whether it would be appropriate for the Supreme Court to entertain an issue or point which had not been argued or decided in the court below and said as follows:

“Although if this were an appeal the ordinary principle of this Court would be that it would not entertain any issue or point which had not been argued and decided in the court below, that principle does not, in my view apply to a consultative case stated from the Circuit Court. The purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision.”

(at p. 785)

18. He considered that it would be inappropriate for the Supreme Court to abstain from expressing a view on the point which might have been capable of determining the result of the case before the Circuit Court judge. Nothing in that judgment assists in the answer to the question here, save that it may be read as taking a view that the court should take a broad approach to the consultative case stated as it has the purpose of clarifying the law.

19. In *Dolan v. Corn Exchange* [1975] I.R. 315, a case stated from a High Court hearing a Circuit appeal to the Supreme Court pursuant to s. 38(3) of the Act of 1936, the Court having answered the case stated referred the matter back to the High Court judge at which point the landlord sought leave to adduce further evidence and the High Court judge stated a second case asking whether he had jurisdiction to admit further evidence. By a majority decision, the Supreme Court held that it could not entertain a second case stated in the same appeal on the basis that s. 38(3) of the Act of 1936 must be construed as prohibiting the stating of a case until all the evidence has been concluded and the case in the lower court was at the point where only judgment or order remained to be pronounced.

20. A similar conclusion was reached in *Corley v. Gill* [1975] I.R. 313, where the court held that the express power to adjourn the pronouncement of judgment contained in s. 16 of the Act of 1947 indicated that it was only at the conclusion of the evidence brought before the Circuit Court judge that he had jurisdiction to refer the question of law to the Supreme Court because, as stated by Kenny J. in that case, “there is no basis to support a question of law until evidence has been given on the facts found.”

21. The *dicta* of Henchy J. in *Dolan v. Corn Exchange* (at p. 325-326) identifies the characteristics of a consultative case stated: the matter passes out of the hands of the judge stating the case until the matter of law was decided in the Supreme Court when the appeal “returns” to that judge for the pronouncement of a judgment or order. That “return” illustrates the personal nature of the request and the fact that the superior court does not resolve the *lis* before the Circuit Court.

22. Walsh J. dissenting in *Dolan v. Corn Exchange* considered that the High Court judge could state a case at any stage of the proceedings prior to the determination of that appeal, because many important questions of law may arise at different points in the hearing.

23. In *Doyle v. Hearne*, a later case concerning a consultative case stated, the Court by a three/two majority considered that the power to state a case was exercisable at any time during the hearing of the matter before the Circuit Court, notwithstanding that all the facts had not been found or all the evidence heard. *Doyle v. Hearne* concerned the question of jurisdiction albeit on quite a different basis from that presenting in this appeal.

24. Finlay C.J. thought it unlikely that it would be appropriate to state a case under s. 16 of the Act of 1947 when no evidence at all had been adduced in the lower court but was prepared to depart from the decisions of the previous court to arrive at a conclusion that allowed a “more flexible and more expansive” approach to the question of whether further evidence could be allowed in the lower court in the light of a reply from the Supreme Court or after the Supreme Court had given its decision on a case stated.

25. Henchy J. dissented and thought it was only when the facts were found, and he emphasised that this was to be taken to mean all of the facts and not some of the facts, that a case could be stated to the Supreme Court. He relied on *Dolan v. Corn Exchange* and the same reasoning in *Corley v. Gill* noting that it had been followed in an unreported decision of *DPP v. Gannon* (Unreported, Supreme Court, 3 June 1986), where all five judges of the Supreme Court agreed with the conclusion, albeit McCarthy J. entered a reservation as to whether *Corey v. Gill* should apply in criminal cases.

26. Griffin J. (also dissenting) accepted the argument from statutory interpretation advanced by Henchy J. but considered the matter also from the point of view of convenience, costs and the desirability not to leave open the possibility that a further case is to be stated when additional evidence was adduced.

27. The reason given in *Cork County Council* which is the closest to the issue in the present case, although it is far removed from the ultimate question, does not offer unequivocal support for the proposition that the Court lacks jurisdiction in the circumstances. The use of the word “stultify” is more indicative of a view that continuing with the case stated would be futile because the question the parties seek an answer on is moot.

28. Jurisdiction in the true sense was the issue before the High Court in *DPP v. Galvin* [1999] 4 I.R. 18, where Geoghegan J. considered an appeal by way of case stated, and concluded that the court had no jurisdiction to hear a case stated because the signature on the case stated necessary to complete the process had been affixed by the judge stating the case after he had been appointed a judge of the Circuit Court, when he was no longer a judge of the District Court. That judgment was not concerned with the jurisdiction to hear a properly constituted case stated and the conclusion that is to be drawn is that to be properly constituted the case stated must be stated and signed by the judge seeking the opinion of the Superior Court while he or she is a judge of the District Court.

29. Geoghegan J. had relied on an old decision by a Divisional Court of the King’s Bench in *Kean v. Robinson* [1910] 2 I.R. 306 where a request for a case stated had been made by three Justices of the Peace but two of the them had died before it was signed, one before it had been approved, and the other after it had been approved but before it was signed. Geoghegan J. observed that the majority decision of the Divisional Court was based on a combination of common law principles of impossibility and the fact that the case stated was not intended to be one by a single justice.

30. Jurisdiction in this sense was established as the present case stated was properly constituted before the Court of Appeal.

Appeal by way of case stated

31. It seems useful to briefly make reference to the other form of case stated, the case stated by way of appeal, the substance of which is quite different. The case stated by way

of appeal is capable itself of determining an issue and is an appeal of a decision made by a judge where an issue has been identified by one or more of the parties which might still require clarification. The court hearing the appeal by way of case stated is able to determine whether the decision of the lower court was correct.

32. The consultative case stated on the other hand is a request for the view of the superior court by a judge who has yet to determine the case before him or her and is a request for guidance by that judge.

33. The principles underlying an appeal by way of case stated were discussed in a recent judgment of Allen J. in *DPP v. Larkin* [2019] IEHC 16. There, a District Court judge had dismissed a charge under s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, but on the application of the Director of Public Prosecutions stated a case for the opinion of the High Court on questions concerning the standard and burden of proof. When the case stated came on for hearing before the High Court, the questions raised in the case stated had already been effectively answered by the Court of Appeal in another case and the parties were agreed as to the correct answers to the three questions in the case stated. But by then the District Court judge who had stated the case had been appointed as a judge of the Circuit Court and Allen J. was considering whether the case could, or should, be remitted to the District Court to a judge other than the judge who had stated and signed the case stated.

34. Allen J.'s analysis illuminates the provisions of s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Act of 1961, the source of the jurisdiction to state a case by way of appeal, and he noted what he called a "fundamental distinction between a consultative case stated and an appeal by way of case stated" (at para. 18). That difference was in my view correctly stated 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 an error of law corrected.”

35. He stated a view *obiter* that in a case where a judge who has made a consultative case stated has retired or died the case in the lower court would necessarily have to be reheard because there had been no decision, but that in an appeal by way of case stated the High Court would be able to say whether the decision made was correct. Thus the answer in an appeal by way of case stated could be returned to a different judge but not that in a consultative case stated.

36. That comment does not in my view fully resolve the jurisdictional question, as I now explain.

A matter of jurisdiction or futility?

37. It is difficult to discern any broad principle from the case law save the emphasis upon the importance of the relationship between the lower court and the court whose opinion is sought., that a degree of flexibility may be justified, and that in *Doyle v. Hearne*, McCarthy J. considered the hearing of a consultative case, in circumstances where no evidence had been called, would involve the court entertaining a moot issue.

38. The approach of this Court in *Cork County Council* was to decline to hear the case stated as by doing so the court would “stultify” itself, to use the words of Sullivan C.J. I do not read the judgment as taking a view that the court would not have *jurisdiction* to hear the case stated, but rather that it should not engage in a pointless exercise of clarifying a legal question that no longer requires an answer. That is a test better described as one of mootness or futility.

39. This Court recently considered the law regarding mootness in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 and examined the case law see: *O’Brien v. The Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328, *Irwin v. Deasy & Anor.* [2010] IESC 35 *per* Hogan J. in *Salaja (a minor) & Anor. v. Minister for Justice, Equality and Law Reform*

[2011] IEHC 51. The Court re-stated the established principle that the courts do not give advisory opinions or answer purely academic or hypothetical questions which are not in furtherance of the resolution of a dispute.

40. Factors which influence the determination whether an issue is moot were set out in detail in the judgment of McKechnie J. at p. 298. These include the continuing existence of some aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute; the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked; the general importance to the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo; and, the issue of resources and the position of the court in the constitutional model.

41. The fact that the authorities have stressed the importance of stating the case on some facts as found by an individual judge for whom the question is seen as personal to that judge's approach to the case before him or her, and the fact that the answer is said to "return" to the judge for final decision on the *lis*, point to the superior court being reluctant to hear a case stated when the judge stating the case is no longer a judge of the relevant court.

42. But whilst the superior court hearing a case stated does not have competence to determine the *lis* and because the step of making a consultative case stated is one taken before the *lis* has concluded in the lower court, the questions of law submitted may be of public importance, it may be in the public interest to have such questions determined. There may be cases where the legal issue is of such importance and of potentially far-reaching effect that the interests of justice, the public interest in clarifying the law and the efficient use of court time and resources might result in the court answering the case stated, especially as in most, or probably in all cases where the lower court judge retires, dies or is promoted

the issue in dispute between the parties remains a live one that could be resolved by the answer.

43. This is one such case and the parties agree that no facts remain in dispute and that the decision of this Court, should the Court engage the appeal, will be wholly dispositive of the issue and that a mere procedural step remained in the Circuit Court which would flow naturally from the conclusion of this Court on the statutory point. It was accepted in those circumstances that no dispute would remain to be resolved in the Circuit Court, so that in a true sense the judgment on the case stated would resolve the dispute even if the judge who stated the case had retired.

44. Thus, although for the reason I now explain it does not resolve the present case, it seems to me that whether a court hears and determines a consultative case stated when the judge stating the case no longer holds judicial office or has been promoted, is a matter of the discretion of the court to be determined in the light of the principles explained in *Lofinmakin v. Minister for Justice*, and is not a matter that goes to the jurisdiction of the court to hear and determine the case stated.

A different and novel issue arises in the present case

45. As noted above, the consultative case was stated by Judge Linnane when she was a sitting judge of the Circuit Court and the Court of Appeal heard the case on 13 January 2021 when Judge Linnane continued in that role. The Court of Appeal gave judgment on 1 April 2021 and Judge Linnane retired some two weeks later on or about 15 April 2021. The costs hearing was heard by the Court of Appeal and the judgment perfected a short time thereafter on 10th May 2021.

46. Thus the judge making the consultative case stated had completed the process and the case was, from a procedural point of view, correctly before the Court of Appeal and no doubt can arise as to the jurisdiction of the Court of Appeal to determine the case stated while Judge Linnane remained a judge of the Circuit Court.

47. What is in question in this judgment is not the jurisdiction of the Court of Appeal, but that of the Supreme Court. As noted *supra*, s. 74 of the Act of 2014, introduced after the 33rd Amendment to the Constitution, provides that all references to the Supreme Court must now be read as being a reference to the Court of Appeal.

48. It is necessary to examine the new constitutional architecture with a view to answering the question of whether this Court's jurisdiction to hear an appeal from the decision of the Court of Appeal derives from the Act of 1947 or whether, as I consider to be the correct proposition, the Court's jurisdiction derives from the constitutional and statutory structure created by the establishment of the Court of Appeal.

The Constitutional architecture and the 33rd Amendment

49. This Court is exercising an appellate jurisdiction on appeal from the Court of Appeal and it derives its jurisdiction by reason of being an appeal from that Court, and not by reason of the making of a consultative case stated by Judge Linnane.

50. The new statutory architecture was considered at some length in the joint judgment of Clarke J. (as he then was) and O'Malley J. in *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10. There, what was under consideration was s. 50 of the Planning and Development Act 2000 (as amended) which provided that no appeal lay from a decision of the High Court except with the certification of that court. The appeal would at the time have been an appeal to the Supreme Court, but by reason of the Act of 2014 and the 33rd Amendment to the Constitution, the powers of the Supreme Court were transferred to the Court of Appeal, thus the refusal of the certificate was to be seen as a refusal of a certificate to appeal to the Court of Appeal.

51. The unanimous judgment of a seven judge court was that the new constitutional architecture did not preclude this Court assuming jurisdiction pursuant to Article 34.5.4^o of the Constitution as introduced by the 33rd Amendment. These so called "leap frog" appeals are an assumption of that jurisdiction. The Court examined the wording of Article 34.5.4^o

of the Constitution and noted that, while it could regulate appeals, it could not exclude an appeal to this Court. Jurisdiction to entertain an appeal derived from the constitutional power of the Court to grant leave to appeal under this Court's new constitutional position. The only limitation on the assumption of jurisdiction is that the Court itself considers whether the constitutional threshold has been met. If the Court is so satisfied it assumes jurisdiction.

52. The jurisdiction to hear an appeal from the Court of Appeal now arises under Article 34.5.3° of the Constitution which it is convenient to repeat here:

“The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that:-

- (i) The decision involves a matter of general public importance, or
- (ii) In the interests of justice it is necessary that there be an appeal to the Supreme Court.”

53. Accordingly, the jurisdiction of this Court is derived from the fact that a decision was made by the Court of Appeal, that leave to appeal was granted and that this Court thereby assumed jurisdiction. The Court does not therefore in my view derive its jurisdiction from the fact that the question in respect of which a consultative case has been made can no longer be said to arise in a true sense on the facts because the person raising the question no longer needs the answer, and is no longer in a position to apply that answer to the facts as found in the lower court.

54. Thus, on a reading of the constitutional provision the jurisdiction of this Court to hear an appeal from the Court of Appeal arises under the Constitution and the Court itself decides to assume jurisdiction if it concludes that the constitutional threshold is met.

55. Leave to appeal was granted in this appeal and thus the constitutional threshold required for the Court to assume jurisdiction is met. The jurisdiction derives from that new architecture, and not from the stating of the case by a Circuit Court judge. There being no

statutory impediment that regulates that appellate jurisdiction, I conclude that the Court does have jurisdiction which derives from the Constitution, and from the fact that it has concluded that an appeal is warranted from the decision of the Court of Appeal.

56. That is not to say however that the Court, notwithstanding that it has assumed jurisdiction, might decline to answer the question raised in the case stated on account of a view that it is futile to answer the question or that the case stated is essentially a moot issue as the person who asked the question is no longer competent to receive the answer. That seems to me to be a question more of futility or mootness than jurisdiction, and once jurisdiction to entertain an appeal has been assumed, the Court may still come to the conclusion that it ought not to answer the question, but it would do so having engaged its jurisdiction as an appellate court.

57. A consideration of whether the Court would entertain and answer the questions raised in a consultative case stated would therefore come to be considered in the light of the principles explained recently by the Court in *Lofinmakin v. Minister for Justice*.

58. In that regard it is clear and the parties both submit that a decision by this Court on the question concerning the proper interpretation of s. 22 of the Act of 2005 would have a practical impact not merely on the litigation between the parties to this appeal, but also on a large number of other persons who claim an entitlement to a service statement in the circumstances advanced by this applicant.

59. The implications of the decision of the Court of Appeal which is under appeal are far reaching, this was clear from the judgment of Ní Raifeartaigh J. and from the Determination of this Court by which it assumed jurisdiction to hear the appeal.

60. Thus a decision of this Court on the interpretation question is capable of finally resolving the question of law between the parties which will not only resolve the case in hand, but also the cases of those other children potentially affected by the statutory provisions.

61. At the hearing on this matter, the parties jointly urged the Court to assume jurisdiction on that basis and it seems to me that in the light of the wide-ranging practical effect that the decision of this Court is likely to have, the effect which the decision of the Court of Appeal undoubtedly did have, and because the question is one of the interpretation of the provisions of the Act of 2005 which are required to be construed to answer the question raised in the motion in the Circuit Court. I conclude that it would not be futile for this Court to enter upon a consideration of the appeal from the Court of Appeal. I would accordingly conclude that the Court should now proceed to hear the appeal.

Summary and conclusion

62. In summary then, I consider that this Court has jurisdiction to hear this appeal and, notwithstanding that the answer cannot be returned to the judge who asked the advice of the Court of Appeal, this Court should answer the question posed as the point is one of some considerable importance to persons who seek to avail of the provisions of the Act of 2005, and is one of systemic importance in the interpretation and application of what is undoubtedly a difficult statutory provision.