An Chúirt Uachtarach

The Supreme Court

Clarke CJ
O'Donnell JJ
Dunne J
Charleton J
Baker J

Supreme Court appeal number: S:AP:IE:2019:000201 and 209
[2020] IESC 000
Court of Appeal record number 2?
[2019] IECA ?
High Court record number 2019/000
[2019] IEHC 000?

Between

A, S and S and I
Applicants/Respondents

- and -

The Minister for Justice and Equality, Ireland and the Attorney General
Appellants/Respondents

Judgment of Mr Justice Peter Charleton delivered on Tuesday 8 December 2020

1. Family reunification for those granted refugee status or subsidiary protection is the subject of several judgments of this Court, including that of Dunne J on this appeal and with which this judgment concurs. Section 56 of the International Protection Act 2015 has been greatly clarified by that judgment but not without the need for the most careful analysis as to the statutory context, the State's obligations in European and international law, including: the provisions of Article 23 of Council Directive 2004/83 (the Qualification Directive) and Directive 2003/86/EC, now updated as Directive 2011/95/EU, (the Family Reunification Directive); any relevant provisions of the Charter of Fundamental Rights of the European Union, 2012/C 326/02; the decisions of the European Court of Human Rights; the positions adopted from time to time by the United Nations High Commissioner for Refugees; and, above all and certainly not last, the Constitution. Already, who is a family member, a qualifying family member, a member of the household of a European Union citizen, a spouse, the time and circumstances or genuineness of marriage, a partner duly attested, a child of particular needs though over 21 years-of-age, or a parent

or grandparent of an adult but essential to the workings of a family, has been subject to so much litigation. It is hoped that with this and other decisions what has now become a well-trodden path may settle into a legal roadway that all may define and follow. The decisions of Barrett J in the *A* and the *S* cases and the judgment of Humphries J in the same field, in particular the *I* case here decided, have resulted in valuable advancements towards legal certainty.

2. Both of those judges, working in the sphere of asylum and citizenship law, are confronted by a range of arguments that seem potentially supportable by reference to an interlocking web of existing law. Consequently, notwithstanding the expertise of both judges, and the diligent intellectual contribution which both continue to make, it might be predicted that they, or other judges working in similarly complex areas of law, may differ. To combat potential issues arising from this, the courts system works on the basis of mutual respect.

3. Reading the analysis of Barrett J in the cases now under appeal, and in particular the section whereby he came to differ from Humphries J, there is evidence of highly rigorous analysis. It is clear that he was neither unmindful of other views nor lacking the respect which requires him to closely scrutinise the law before reaching a different conclusion. In the judgment of Dunne J it is, however, correctly pointed out that no reasons were advanced for not following the earlier precedent. There is, rather, a full analysis of his reasons for reaching a different conclusion.

4. A judge faced with a prior authority from the same level, which can be called a horizontal precedent, may feel faced by a dilemma. To not follow may be seen to criticise, most especially when reasons are given. Hence, there is an obvious draw towards not confronting the reasoning of another judge for fear of drifting into the expression of apparent disrespect. This is understandable. Nonetheless, the law is clear: reasons must be given for not following an earlier judgment on the same legal issue. The choice made here was to reason matters out in such a way as to construct a view of the law at odds with that previously declared by another judge of the High Court without offering more particular reasons for departing from that earlier reasoning. Offering polite reasons for not following the judgment of a colleague on the same level is part of the structure of the administration of justice whereby the courts maintain internal cohesion for the benefit of the proper workings of the judicial arm of government.

5. The doctrines of *res judicata*, whereby litigation as between the same parties is brought to an end by a final ruling, and of *stare decisis*, which requires courts at trial level to follow the decisions of an appellate court as a co-equal source of legal authority to that of statutory law, are linked by an underlying principle of mutual and appropriate deference to the structure of the courts. These principles ensure that the administration of justice is a monolith that is both self-correcting and the only lawful source of justice. As such, justice is never in dispute with itself. Turning to the theory behind *res judicata*, this is explained by McDermott in Res Judicata and Double Jeopardy (Bloomsbury Professional, 1999) at [3.01] thus:

> During the course of its development several theories were advanced to explain the doctrine of *res judicata.* Coke spoke of the "inviolable sanctity of the record" which was of "so high and conclusive a nature as to admit of no contradiction thereof". [2 Co Litt, 260a and 352a] A more curious view was that as nature abhors a vacuum, so "the common law … abhors infiniteness". [*Ferrer v Arden* (1599) 6

> Co Rep 7a, 77 ER 236 at 266] Perhaps the strangest suggestion was that it would be a monstrous inversion of the natural order of things, that man being mortal, litigation should be immortal. [*Ellis v McHenry* (1871) 1 LR 6 CP 228 at 239]

6. Of course, this speaks to finally sorting an issue. But if the courts cannot do that as between the same parties, and within a reasonable time and without unreasonable expenditure, recourse to justice may, arguably, be regarded as possibly futile. In the same way, a system of first-instance and appellate opinions will undermine itself if law becomes a shifting sand which never crystallises into a legal principle that is generally applicable to all cases over which a judicial decision declares itself to govern. The civil law system of codes and principles already achieves that end; precedent does not bind in the same way though operates through respect. Hence, in the United States of America, that common law based but highly codified system of laws, does not allow departure by trial or lower appellate courts from decisions of the Supreme Court or state supreme or appellate courts. Our system is the same: precedent must be followed, and while a court may review a prior decision on final appeal, that is approached with marked caution. At Federal Appellate Court level, the circuits are required to follow all prior decisions at the same level and cannot overturn such decisions, unless there are perchance contradicting decisions. A review at that level of an existing precedent requires the judges to consider a precedent *en banc* of all active judges.

7. Horizontal precedent, as that jurisdiction calls this aspect of *stare decisis*, is referred to in England as co-ordinate jurisdiction precedent. Halsbury (Halsbury's Laws of England, 5th edition, volume 11, paragraph 32, footnotes omitted,) correctly explains that co-ordinate precedent is ordinarily to be followed by judges on the same level:

> There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions.

8. Departure from horizontal precedent is possible. It is also not desirable without there being an expressed and good reason. The law operates as a fortress of certainty from within, whereby the shape of decisions is apparent to those approaching it. Legal certainty and the value of resort to the courts may be undermined by quarrels among judges. Hence, the difficulty faced here. While particular skill and a deftly polite style is needed in expressing that a colleague of co-ordinate jurisdiction was wrong, it is better for the administration of justice, as well as being legally required, to quietly state a reason for not following a decision. In that way, an appellate court can see where the divergence is and why a co-ordinate decision should not be followed. The relevant decisions are binding and are as set out in the judgment of Dunne J. In particular, *Re Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 and *Kadri v The Governor of Wheatfield Prison* [2012] IESC 27 highlight that it should be unusual not to follow a judge of co-ordinate decision without reasons, politely expressed, as to why that other judgment was wrong. It may be that an authority was not considered, or a statute or piece of European law was left out of the

analysis, or that time has advanced the understanding of the basis for the general rule upon which the decision was made and so ought no longer to be considered as an authority in modern circumstances.

9. Here, while respecting the choice of the trial judge to conduct his own analysis and to avoid the appearance of apparent conflict, it is nonetheless clear that the rule in *Kadri* requires the expression of some kind of reason for not following a co-ordinate decision. While the approach of Barrett J was to tacitly express the reasons for not following a relevant precedent from the same court, an expression of reasons based on the prior decision was required. No doubt, what was sought was to avoid any appearance of disrespect, or even worse, a public quarrel. That did not happen and it should never happen. Since the rule is simple, follow unless there is good reason to depart by reason of a clear deficit, a simple expression of why there is to be departure from co-ordinate precedent suffices.

10. For the purpose of analysing the European Convention of Human Rights and the decisions based on that instrument, it was of considerable assistance that the trial judge gave substantial reasons for his view.