APPROVED **[2024] IEHC 279**

THE HIGH COURT
JUDICIAL REVIEW

2023 1315 JR

BETWEEN

OSCAR
(A PSEUDONYM)

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 16 May 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to restrain a criminal prosecution. The applicant is charged with the defilement of a twelve year-old child by engaging in sexual intercourse with her. The applicant is also charged with an offence of sexual exploitation of a child under the Child Trafficking and Pornography Act 1998. As of the date of the alleged offences, the applicant himself had been aged fifteen years.

2. The legal challenge to the criminal prosecution is advanced on a number of

different fronts as follows. First, it is alleged that there has been culpable prosecutorial delay. It is contended that had the criminal investigation and prosecution been conducted expeditiously, then the applicant would have been entitled to have the charges against him heard and determined in accordance with the procedures prescribed under the Children Act 2001. This would have afforded the applicant certain statutory entitlements including, *inter alia*, a right to anonymity, a mandatory probation report, and favourable sentencing principles. The benefit of these statutory entitlements is not now available in circumstances where the applicant has reached the age of majority prior to the criminal prosecution coming on for trial. The shorthand "*ageing out*" will be employed to describe this legal consequence.

3. Secondly, it is alleged that it is unfair of the Director of Public Prosecutions to charge the applicant with the offence of defilement of a child under seventeen years of age in circumstances where, or so it is said, the applicant would have been able to avail of a "*reasonable mistake*" defence had he been charged with the distinct offence of defilement of a child under fifteen years of age.

4. Thirdly, the applicant raises a number of constitutional issues. These constitutional issues relate to the *mens rea* requirement for the offence under section 3 of the Criminal Law (Sexual Offences) Act 2006. In brief, the applicant submits that the legislation must be interpreted in such a way as to allow him the benefit of a particular statutory defence. The applicant submits, in the alternative, that if this contended-for interpretation is not available, then the legislation is invalid. The defence is the "*close in age*" defence provided for under sub-section 3(8). This defence is sometimes referred to as the "*Romeo and Juliet*" defence. The details of this defence are discussed below, at

paragraphs 71 and onwards.

5. All references in this judgment to the Criminal Law (Sexual Offences) Act 2006 are to the Act as amended by the Criminal Law (Sexual Offences) Act 2017.

APPLICABLE LEGAL PRINCIPLES

6. The Supreme Court has held that, in the case of a criminal offence alleged to have been committed by a child or young person, there is a special duty on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial. See *B.F. v. Director of Public Prosecutions* [2001] IESC 18, [2001] 1 I.R. 656 and *Donoghue v. Director of Public Prosecutions* [2014] IESC 56, [2014] 2 I.R. 762.

7. The Supreme Court in *Donoghue* emphasised that blameworthy prosecutorial delay alone will not suffice to prohibit a trial. Rather, the court must conduct a balancing exercise to establish if there is something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. See paragraph 52 of the reported judgment as follows:

> "There is no doubt that once there is a finding that blameworthy prosecutorial delay has occurred, a balancing exercise must be conducted to establish if there is by reason of the delay something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. In the case of a child there may well be adverse consequences caused by a blameworthy prosecutorial delay which flow from the fact that the person facing trial is no longer a child. However, the facts and circumstances of each case will have to be considered carefully. The nature of the case may be such that notwithstanding the fact that a person who was a child at the time of the commission of the alleged offence may face trial as an adult, the public interest in having the matter brought to trial may be such as to require the trial to proceed. Thus, in a case involving a very serious charge, the fact that the person to be tried was a child at the time of the commission of the alleged offence and as a consequence of the delay will be tried as an adult, may not

> be sufficient to outweigh the public interest in having such a charge proceed to trial. In carrying out the balancing exercise, one could attach little or no weight to the fact that someone would be tried as an adult in respect of an offence alleged to have been committed whilst a child if the alleged offence occurred shortly before their 18th birthday. Therefore, in any given case a balancing exercise has to carried out in which a number of factors will have to be put into the melting pot, including the length of delay itself, the age of the person to be tried at the time of the alleged offence, the seriousness of the charge, the complexity of the case, the nature of any prejudice relied on and any other relevant facts and circumstances. It is not enough to rely on the special duty on the State authorities to ensure a speedy trial of the child to prohibit a trial. An applicant must show something more as a consequence of the delay in order to prohibit the trial."

8. The Supreme Court held that the trial judge was correct to attach significance to the fact that the accused in *Donoghue* would not have the benefit of certain of the protections of the Children Act 2001. Three particular aspects of the Children Act 2001 were referenced as follows. First, the reporting restrictions applicable to proceedings before any court concerning a child (section 93). Secondly, the sentencing principle that a period of detention should be imposed on a child only as a measure of last resort (section 96). Thirdly, the mandatory requirement to direct a probation officer's report (section 99).

9. The Supreme Court then stated its conclusions as follows (at paragraph 56):

> "The special duty of State authorities owed to a child or young person over and above the normal duty of expedition to ensure a speedy trial is an important factor which must be considered in deciding whether there has been blameworthy prosecutorial delay. That special duty does not of itself and without more result in the prohibition of a trial. As in any case of blameworthy prosecutorial delay, something more has to be put in the balance to outweigh the public interest in the prosecution of offences. What that may be will depend upon the facts and circumstances of any given case. In any given case, the age of the young person before the courts will be of relevance. Someone close to the age of 18 at the time of an alleged offence is not likely to be tried as a child no matter how expeditious the State authorities may be in

> dealing with the matter. On the facts of this case, had the prosecution of Mr. Donoghue been conducted in a timely manner, he could and should have been prosecuted at a time when the provisions of the Children Act 2001 would have applied to him. The trial judge correctly identified a number of adverse consequences that flowed from the delay. Accordingly, I am satisfied that the trial judge was correct in reaching his conclusion that an injunction should be granted preventing the DPP from further prosecuting the case against Mr. Donoghue."

10. The principles governing the assessment of prosecutorial delay have been more recently considered in three judgments of the Court of Appeal, *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020; *Director of Public Prosecutions v. L.E.* [2020] IECA 101; and *Furlong v. Director of Public Prosecutions* [2022] IECA 85. These judgments elaborate upon the nature of the prejudice which might be suffered by an accused, and also address whether there are steps which the High Court might take to mitigate the loss of some of the protections provided for under the Children Act 2001. These judgments will be considered, in context, in the discussion which follows.

PARTICULARS OF THE ALLEGED OFFENCES

11. The summary of the particulars of the alleged offences which follows below is predicated upon the material in the book of evidence. It should be emphasised that this summary does not entail the making of any findings of fact by the High Court and that the applicant enjoys a presumption of innocence.

12. Having regard to the fact that there is a criminal prosecution pending, and that the complainant has a statutory entitlement to anonymity, certain specific details have been deliberately excluded from the summary. Moreover, personal details, such as the parties' respective dates of birth, have been omitted to avoid the risk of jigsaw identification.

13. The twelve year old child will be referred to in this judgment as "*the complainant*". This is the standard term employed in sexual assault cases. The use of this term should not be understood as expressing any view—one way or the other—on the applicant's contention that the sexual intercourse had been consensual.

14. The incident giving rise to the alleged offences is said to have occurred on the evening of 10 May 2021. As of this date, the applicant had been fifteen years of age and the complainant twelve years of age. The applicant contends that the complainant had told him that she was fifteen years of age and that she attended secondary school in [named town]. The applicant further contends that the complainant looked older (than her actual age) and that he honestly believed that she had been the same age as him, i.e. fifteen years of age.

15. The applicant and the complainant had not previously met in person but had exchanged messages and photographs on Snapchat. It seems that the pair arranged to meet up in [named town] on the evening of 10 May 2021. The pair engaged in sexual intercourse in a field. The applicant made a number of video recordings of the sexual intercourse on his mobile telephone.

16. On their return to the town centre, they were intercepted by relatives of the complainant who had been concerned as to her whereabouts. The applicant subsequently sent a copy of the video recordings, which he had made on his mobile telephone, to one of the complainant's relatives in an attempt to corroborate his assertion that the sexual intercourse had been consensual.

17. An Garda Síochána were alerted to the alleged incident on the same night on which it occurred. The applicant co-operated with members of An Garda Síochána by directing them to the location of the alleged incident. The area was

preserved and a number of items of interest were collected including a condom. The applicant's mobile telephone was seized and the applicant co-operated by voluntarily providing the passcode.

18. The complainant's mobile telephone and the clothes which she had been wearing were also secured by An Garda Síochána. The complainant was examined at a paediatric sexual assault unit on the morning of 11 May 2021.

CHRONOLOGY

[…] September 2005	Applicant's date of birth
10 May 2021	Date of incident
11 May 2021	Applicant cautioned and mobile telephone seized
12 May 2021	Search warrant in respect of the applicant's home
5 June 2021	Consent to specialised interview withdrawn
16 September 2021	Fresh consent to specialised interview
28 October 2021	Specialised interview carried out
12 February 2022	Applicant arrested by appointment and interviewed
7 April 2022	DNA sample sent for forensic analysis
4 May 2022	Further witnesses make statements
30 May 2022	Referral to Garda Youth Diversion Office
20 June 2022	Applicant deemed unsuitable for diversion
16 July 2022	File to State Solicitor
8 August 2022	State Solicitor submits file to DPP
15 August 2022	Clothing sent to FSI (as requested)
20 November 2022	Forensics report
2 June 2023	DPP directs charge
28 June 2023	Applicant charged

26 July 2023	Section 75 hearing:
[…] September 2023	Applicant ages out

CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

Overview

19. The gravamen of the applicant's case is that the delay has prejudiced him in that he has lost the opportunity of relying on the procedures under the Children Act 2001. It is submitted that had the prosecuting authorities pursued the criminal investigation and subsequent criminal proceedings with reasonable expedition, then the criminal proceedings could have been heard and determined prior to the applicant "*ageing out*".

20. Accordingly, the first question to be addressed by this court is whether the pace of the criminal investigation between the date of the initial complaint (May 2021), and the date upon which the applicant reached his eighteenth birthday (September 2023), entailed culpable or blameworthy delay.

21. Before turning to consider the chronology, it is salutary to make the following general observations. It is not the function of the High Court to carry out a detailed audit of the conduct of the prosecuting authorities by examining the process at a granular level with a view to deciding, retrospectively, whether the time expended at each point in the process was appropriate. Rather, the purpose of the exercise is to determine, by evaluating the progress of the criminal investigation in the round, whether the threshold of reasonable expedition has been met. This is case-specific and will depend on factors such as, for example, the nature of the offence alleged; whether the accused has made admissions; the number of witnesses to be interviewed; the vulnerability of the complainant; and the volume of "*real*" evidence, e.g. CCTV footage, to be collated and examined.

The carrying out of any criminal investigation will take time: the resources of An Garda Síochána are finite. While the importance of ensuring a speedy trial in the case of alleged youth offenders is well established, there is no obligation on the prosecuting authorities to unrealistically prioritise cases involving minors (see the judgment of the High Court (Kearns P.) in *Daly v. Director of Public Prosecutions* [2015] IEHC 405 (at paragraph 48)).

22. The nature of the obligation upon the prosecuting authorities has recently been described as follows by the Court of Appeal in *Furlong v. Director of Public Prosecutions* [2022] IECA 85 (at paragraph 22):

> "What one would like to see, and what seems to me to be absent in this case, is an awareness on the part of the Gardaí that their suspect was a juvenile due to attain majority at a particular stage, and that it was desirable, if practicable, to conclude the investigation before the suspect turned eighteen years of age. In saying that, I recognise and wish to acknowledge that there will be many cases where that will not be practicable. Further investigations may be complex or sensitive. As a force, An Garda Síochána, and no doubt, individual Gardaí, have very significant caseloads and it would be unrealistic and inappropriate to approach matters as if Gardaí were in a position to deal with a particular investigation on an exclusive basis. Other cases being worked on may be of greater importance and will naturally demand higher priority. However, what concerns me in the present case is that I do not observe an awareness on the part of Gardaí that they were dealing with a suspect who was a juvenile, and linked to that awareness, a desire to deal with matters with the level of expedition required so as to make having the matter dealt with before the suspect attained his majority a realistic prospect."

23. It should also be explained that there is a further procedural step which is unique to juvenile offenders, and the need to complete this step adds to the lapse of time between the date of an alleged offence and the date upon which charges are preferred. Specifically, juvenile offenders must be considered for admission to the Garda Diversion Programme. This is provided for under section 18 of the

Children Act 2001 as follows:

> "Unless the interests of society otherwise require and subject to this Part, any child who—
>
> (a) has committed an offence, or
>
> (b) has behaved anti-socially,
>
> and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objective set out in section 19".

24. Relevantly, one of the criteria under section 18 is that the young offender accepts responsibility for his or her criminal or anti-social behaviour. The making of a referral to the Garda Diversion Programme must normally await the completion of the investigation file. This is because it is only when the full extent of the alleged offence is known that an informed decision can be taken as to whether or not the young offender has accepted responsibility. The making and completion of a referral to the Garda Diversion Programme will take some time, and this has to be taken into account by a court in assessing whether there has been blameworthy or culpable delay.

25. Similarly, the requirement to submit a file for directions to the Office of the Director of Public Prosecutions will also take some time, and that Office must be allowed a reasonable period within which to issue its directions.

26. The Court of Appeal in *Furlong v. Director of Public Prosecutions* has suggested (at paragraph 21) that the progress of the criminal investigation and prosecution should be looked at in the round:

> "[…] For my part, I am more inclined to step back and view the situation in the round. I say this because it seems to me that in many cases, there will be a degree of swings and roundabouts, in the sense that if particular tasks are carried out with considerable expedition, this may allow the pace to drop at other stages of an investigation. Conversely, there

> may be cases where, if it is established that some aspects of the investigation were not conducted with the expedition that would be expected, an obligation arises to pick up the pace and make up for time lost at other stages."

27. The assessment of whether or not there has been blameworthy prosecutorial delay is fact-specific and has to be carried out on a case-by-case basis. Nevertheless, earlier case law provides a useful reference point in assessing delay. There is now a large number of judgments addressing prosecutorial delay and a consensus is emerging that—in the context of an uncomplicated investigation—an explanation may be called for where the time expended on a straightforward offence has gone beyond eighteen months.

Timeline in the present proceedings

28. An Garda Síochána were informed of the alleged sexual assault on the very evening upon which it is said to have occurred, i.e. 10 May 2021. This afforded a period of some two years and four months before which the applicant would "*age out*", during which period the criminal investigation might be completed and any criminal charges brought in accordance with the procedures under the Children Act 2001.

29. The first period of delay alleged is in relation to the carrying out of a specialised interview with the complainant. This interview was carried out on 28 October 2021, i.e. some five months after the date of the alleged incident. It appears from the affidavit evidence that the lapse of time here is explicable, in part, by reference to an initial reluctance on behalf of the complainant's mother to allow her to be interviewed. More specifically, it seems that the mother withdrew her initial consent to an interview in June 2021, and did not formally consent again until September 2021. Thereafter, there was a delay of a number of weeks as the

interview was arranged.

30. This period of delay is not unreasonable. Whereas it would have been preferable had the specialised interview been carried out closer to the date of the alleged incident, it is necessary to have regard to the circumstances of the case. The complainant was a child of twelve years of age. The parents of such a young child may well have been anxious to avoid subjecting her to a potentially upsetting interview. An Garda Síochána were required, within reason, to respect the wishes of the parents.

31. There was some suggestion at the hearing before me that there should be an obligation upon An Garda Síochána to put it to the parents of a complainant that they (An Garda Síochána) have a duty towards an accused person who is also a child to expedite an interview with a complainant. With respect, it seems to me that such an approach would not properly reflect the sensitivities inherent in cases of alleged child sexual assault. Whereas An Garda Síochána should, of course, seek to progress the criminal investigation with all reasonable expedition, it would not be appropriate, in conversation with the parents of the complainant, to equate her position to that of the accused.

32. A period of some three and a half months elapsed between the date of the specialised interview and the arrest and interview of the applicant. This delay was unreasonable having regard to the time already lost. It is unacceptable that the applicant was not interviewed until some nine months after the alleged incident. Even allowing that it was necessary to await the completion of the specialised interview with the complainant before interviewing the applicant, An Garda Síochána should not have delayed for a period of some three and a half months thereafter. It should also be reiterated that the identity of the applicant

was known to An Garda Síochána from the very outset. This is not a case where any time was lost in attempting to identify or locate the suspected perpetrator.

33. The longest period of delay incurred was during the processing of the garda file within the Office of the Director of Public Prosecutions. The lapse of time between the submission of the file and the direction to charge the applicant was almost ten months. The affidavit sworn by the principal prosecutor in the Office of the Director of Public Prosecutions sets out, in detail, the various stages of the processing of the file. It is apparent that the file had been escalated within the Office and that the advice of external counsel had been sought. These steps would, of necessity, have taken some time to progress. Nevertheless, the overall delay of ten months is unreasonable in circumstances where the applicant was set to age out in September 2023. This was not an especially complex case. The garda file cannot have been extensive: it would consist, largely, of the record of the complainant's interview; the record of the applicant's interview (which consisted of a short pre-prepared statement and the recitation of a series of questions to which the applicant responded "*no comment*"); and the forensic evidence.

34. It is correct to say, as counsel for the respondents does, that the processing of the file took place against the backdrop of legal uncertainty pending the delivery of the judgment of the Supreme Court in *C.W. v. Minister for Justice* [2023] IESC 22 in August 2023. Nevertheless, the delay was unreasonable. The uncertainty related to proofs and applied equally to the offence under section 2 as to that under section 3. The uncertainty should not have prevented the Director from deciding which offence the applicant should be charged with. The duty of expedition in child cases applies equally to the Director as it does to An

Garda Síochána.

35. In summary, the lapse of two years and two months between the date of complaint and the date of charge represents, in the absence of any extenuating circumstances, a failure to comply with the constitutional imperative of reasonable expedition in the investigation and prosecution of offences alleged to have been committed by a child.

BALANCING EXERCISE: PREJUDICE ALLEGED BY APPLICANT

36. In circumstances where I have concluded that there has been culpable or blameworthy prosecutorial delay, it is next necessary to carry out the balancing exercise as set out by the Supreme Court in *Donoghue*.

LOSS OF PROTECTIONS UNDER THE CHILDREN ACT 2001

37. The principal prejudice alleged by the applicant is the loss of certain procedural entitlements under the Children Act 2001. The applicant argues that "*but for*" the prosecutorial delay, the charges against him would have been heard and determined in accordance with the Children Act 2001. The applicant points to a number of benefits which will now be denied to him, including, in particular, the loss of anonymity in relation to the criminal prosecution. I will address each of the benefits said to have been lost to the applicant under separate sub-headings below.

38. Before turning to that task, however, it is appropriate to make the following general observation on the availability of the procedural entitlements under the Children Act 2001. The striking feature of the legislation is that the key date for determining eligibility for the procedural entitlements is the date of trial, not the

earlier date of the alleged offence. Put otherwise, it is a prerequisite that the accused person still be under the age of eighteen years as of the date of the trial. This has the practical consequence that almost all of the procedural entitlements are only available during the currency of an accused person's childhood. (The principal exception is the provision made, under section 258, for the expunging of certain findings of guilt).

39. There may well be differing views as to the appropriateness of this legislative policy choice. An argument might be made that an approach which focussed on the age of the accused person as of the date of the alleged offence would better reflect the special considerations which apply in respect of criminal wrongdoing by juvenile offenders who lack the intellectual, social and emotional understanding of adults. Of course, it is quintessentially a matter for the legislature and not the courts to make such policy choices.

40. The potential significance of all of this for the present proceedings is as follows. The procedural entitlements under the Children Act 2001 are intended, primarily, to shield a child participant from aspects of the criminal process rather than intended to reflect a broader principle that criminal wrongdoing by a juvenile offender should be treated differently. This, admittedly subtle, distinction may be illustrated by reference to the reporting restrictions under section 93. These reporting restrictions are only available for as long as the accused person is under the age of eighteen years. The practical effect of this is that if an accused person "*ages out*" during the course of a criminal trial or prior to the hearing of an appeal, then they lose the right to anonymity. (This interpretation is the subject of a pending appeal before the Supreme Court: *Director of Public Prosecutions v. P.B.* [2024] IESCDET 41). The legislative

intent is that a child, who is participating in a criminal trial, should be shielded from media coverage, not necessarily that an adult, who is alleged to have committed a crime as a child, should be shielded from having the fact of their having been prosecuted reported in the media. An adult only obtains lifelong anonymity in relation to criminal proceedings if same are *concluded* prior to their reaching the age of eighteen years.

41. This leads to a more general point that most of the procedural protections prescribed under the Children Act 2001 are intended to address the exigencies of a child who is a participant in the criminal legal process. If and insofar as these protections are not available to the applicant, *qua* adult, that is in consequence of a deliberate legislative policy which considers that adults do not require such procedural protections even in respect of crimes alleged to have been committed when they were a child. It is, therefore, not entirely accurate to suggest that the applicant has "*lost*" a statutory benefit: the rights which he claims to have lost are ones which were never intended for adults. Strictly speaking, the prosecutorial delay has resulted in the *loss of opportunity* to assert a procedural entitlement which, although intended only to benefit a child participant, is also attractive to an adult.

(1). Reporting Restrictions

42. An alleged offender, who is prosecuted while they are still a child, is entitled to anonymity. This is provided for under section 93(1) as follows:

> "In relation to proceedings before any court concerning a child—
>
> (a) no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a

broadcast or any other form of communication, and

(b) no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included."

43. The applicant in the present case cannot invoke these provisions in circumstances where he has already "*aged out*". The loss of the opportunity to assert this statutory right to anonymity represents a *potential* cause of prejudice to the applicant. Offences of the type with which he is charged, i.e. sexual assault and sexual exploitation of a child, are ones which attract public opprobrium. If the applicant were to be named in the print or broadcast media, this may well be harmful to his reputation even if he were to be acquitted. A future employer, for example, might be deterred from hiring the applicant. The nature of modern media coverage is such that any report of the criminal prosecution would be available online indefinitely and would be readily discoverable by any potential employer searching against his name.

44. The loss of the opportunity to avail of reporting restrictions has been described by the Court of Appeal in *Director of Public Prosecutions v. L.E.* [2020] IECA 101 as a "*significant disadvantage*". This disadvantage has to be weighed against other considerations, such as, in particular, the seriousness of the offence alleged. This balancing exercise is addressed at paragraphs 54 to 66 below.

(2). District Court's discretion to accept jurisdiction

45. Section 75 provides, in relevant part, that the District Court may deal summarily with a child charged with any indictable offence *unless* the court is of opinion that the offence does not constitute a minor offence fit to be tried summarily, or, where the child wishes to plead guilty, to be dealt with summarily. In deciding

whether to try or deal with a child summarily for an indictable offence, the court shall also take account of (a) the age and level of maturity of the child concerned, and (b) any other facts that it considers relevant. In the event that the District Court accepts jurisdiction, the maximum custodial sentence which can be imposed is twelve months.

46. These provisions are inapplicable in the case of an accused who has reached the age of eighteen years prior to the District Court having made a decision on whether or not to accept jurisdiction: *Forde v. Director of Public Prosecutions* [2017] IEHC 799.

47. On the chronology in the present case, the applicant was afforded the benefit of a section 75 hearing on 26 July 2023, i.e. a number of weeks prior to his eighteenth birthday. Accordingly, the applicant cannot assert any prejudice in this regard. The applicant has had the benefit of this statutory entitlement. The fact that the District Court ultimately declined to accept jurisdiction does not alter this.

48. The point is made, in the applicant's papers and in oral submission, that the presenting guard had opposed the application that the District Court should retain jurisdiction. With respect, it is difficult to understand the precise point being taken here. It is entirely legitimate for the prosecuting authorities, whether the presenting guard or the legal representatives of the Director of Public Prosecutions, to make submissions to the District Court in the context of a section 75 hearing. This is because such submissions may be of assistance to the District Court in determining the application. The District Court would only be entitled to accept jurisdiction if the judge were satisfied that the particulars of the offences alleged are such that, even taking the case at its height, the range of

penalties which might realistically be imposed would *exclude* a custodial sentence of in excess of twelve months. Both sides are entitled to make submissions on this point. Of course, it is ultimately a matter for the District Court alone to decide whether to try or deal with a child summarily for an indictable offence.

(3). Sentencing Principles

49. The applicant submits that had the matter been determined before he attained the age of majority, he would have been entitled to the benefit of the statutory provision which indicates that a custodial sentence should be imposed upon a juvenile offender as a matter of last resort. Section 96(2) provides as follows:

> "(2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,
>
> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort."

50. As appears, this aspect of the sentencing principles reflects the special considerations applicable where a penalty is being imposed upon a person who is still a child as of the date of sentencing. These considerations are not directly applicable to an adult who is being sentenced in respect of an offence committed

as a child.

51. In the present case, the practical significance of the loss of the opportunity to avail of section 96(2) is very limited. This is because the fact that the alleged offences had occurred at a time when the accused had been a child under the age of eighteen years is something which must be taken into account by a sentencing court in any event, i.e. even in the absence of the direct applicability of section 96(2). This issue has been addressed by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020. Birmingham P. stated as follows (at paragraph 16):

> "I agree with the High Court judge that if the stage of considering sentence is reached, then the judge in the Circuit Court would be required to have regard to the age and maturity of the appellant at the time of the commission of the offence. The judge will be sentencing him as a person who, aged fifteen and a half years, offended. Obviously, his age and maturity will be highly relevant to the assessment of the level of culpability. In these circumstances, I do not see the fact that s. 96(2) of the Children's Act, which stipulates that a sentence of detention will be a last resort, and s. 99, which mandates the preparation of a probation report, will not be applicable, as having any major practical significance."

(4). Mandatory Probation Report

52. The next prejudice alleged is the loss of a right to a mandatory probation report under section 99. For the reasons identified by the Court of Appeal in *A.B. v. Director of Public Prosecutions* (cited above), this does not entail any material prejudice. In the event of conviction, the Circuit Court would have discretion to seek such a report as appropriate.

Summary

53. In summary, therefore, I have concluded that the only *potential* prejudice suffered by the applicant as a result of the prosecutorial delay is that he has lost the opportunity of availing of the reporting restrictions under section 93 of the Children Act 2001.

FINDINGS OF THE COURT ON BALANCING EXERCISE

54. The balancing exercise requires the High Court to weigh the prejudice which the *potential loss* of the reporting restrictions, if realised, would cause to the applicant, on the one hand, against the public interest in the prosecution of serious criminal offences, on the other. Here, the particulars of the alleged offences are such that they weigh heavily on each side of the scales. There is a strong public interest in ensuring that credible allegations of sexual assault upon, and exploitation of, a twelve year old child are pursued by way of criminal prosecution.

55. The public interest in there being an adjudication on credible allegations of child sexual assault and exploitation reflects the public opprobrium which attaches to such offences. The existence of this public opprobrium has the practical consequence that the *potential loss* of the reporting restrictions is all the more prejudicial to the applicant. If the applicant were to be named in the print or broadcast media, this may well be harmful to his reputation even if he were to be acquitted. The nature of modern media coverage is such that any report of the criminal prosecution would be available online indefinitely and would be readily discoverable by anyone searching against the applicant's name.

56. There was some discussion at the hearing before me as to the extent, if any, to which the court of judicial review is entitled to form a view on the seriousness

of the specific offences alleged by assessing the nature of the defence asserted. Counsel on behalf of the applicant submitted that the court would be entitled to take into account the asserted defence of mistaken belief as to the complainant's age. The implication being that the public interest in prosecution in the present case might be less strong than in a case with more extreme facts. Counsel cited a number of judgments wherein the court had taken into account the particulars of the offences alleged. The cited cases included *Cerfas v. Director of Public Prosecutions* [2022] IEHC 70 (at paragraph 39) and *D.K. v. Director of Public Prosecutions* [2023] IEHC 273 (at paragraph 88).

57. As explained by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, 21 January 2020 (at paragraph 19), the public interest in prosecuting offences involving allegations of sexual assault against a child is "*very high*":

> "In a situation where there has been blameworthy prosecutorial delay, which has prejudiced the appellant in the manner and to the extent discussed, how is this to be weighed against the public interest in prosecuting crime? It seems to me that the public interest in prosecuting offences of the nature charged here is very high. Sexual assault covers a wide span of activity, and so can vary very significantly in gravity, from cases on the cusp of rape/attempted rape at one of the spectrum, to two fourteen-year olds engaging in consensual fondling of the other. Here, the assault alleged is a particularly grave one. It is the assault in her own home of a six-year old child, an assault involving digital penetration which resulted in visible vaginal bleeding."

58. It is correct to say that, in assessing the public interest in prosecution, the court of judicial review will take into account the particulars of the offence alleged. However, the court of judicial review will not normally attempt to appraise the strength or otherwise of the case against the accused person. Rather, the usual approach is to take the prosecution case, as laid out in the book of evidence, at its height. This is because the court of judicial review is not well placed to

anticipate what may happen at the criminal trial. Here, the allegation against the applicant is that he engaged in sexual intercourse with a child aged twelve years and that he engaged in sexual exploitation of a child, as defined under the Child Trafficking and Pornography Act 1998, by video recording the incident. It should be reiterated that these are only *allegations*, and that the applicant is entitled to a presumption of innocence. If, however, these allegations were to be proven at trial, same would constitute serious criminal offences. There is a strong public interest that credible allegations of sexual acts involving a young child who lacks legal capacity to consent should be prosecuted. The public interest is that there be an adjudication upon such allegations by the court of trial. It is not the role of the court of judicial review to seek to pre-empt such an adjudication by forming its own opinion as to what the likely outcome of such a criminal prosecution might be.

59. To date, the outcome of the balancing exercise in most cases has been that the public interest in the prosecution of serious criminal offences outweighs the prejudice caused to an adult-accused by the loss of the opportunity to avail of the reporting restrictions under section 93 of the Children Act 2001. However, a different approach may be appropriate in the present case. This is because the criminal prosecution will be subject to reporting restrictions imposed, independently, by the Criminal Law (Rape) Act 1981 (as applied by section 6 of the Criminal Law (Sexual Offences) Act 2006).

60. It should be explained that any anonymity enjoyed by the applicant under that Act is derivative, i.e. the only reason that the applicant would not be named is that to do so might lead, indirectly, to the complainant's identity being disclosed. Put otherwise, the purpose of the reporting restrictions applicable to a charge of

sexual assault is to protect the privacy of the complainant not of the accused. (Different rules apply where a person is charged with a rape offence).

61. The fact that there are likely to be reporting restrictions imposed in any event has the consequence that the loss of the opportunity to avail of the mandatory reporting restrictions under section 93 may not cause any actual prejudice to the applicant. Of course, it would be open to the complainant, upon reaching the age of majority, to exercise her statutory right under the Criminal Law (Rape) Act 1981 to waive anonymity. This would remove the derivative anonymity that the applicant might otherwise enjoy.

62. For the reasons explained in my judgment in *Doe v. Director of Public Prosecutions* [2024] IEHC 112 (at paragraphs 81 to 86), it may be appropriate to adopt a modified approach to cases, such as the present, in which statutory reporting restrictions apply under legislation other than the Children Act 2001. The potential prejudice to an "*aged out*" child might best be addressed by a step short of the prohibition of a criminal prosecution in its entirety. The High Court might, instead, make an order directing that permanent reporting restrictions are to apply which preclude the identification of the adult-accused.

63. The judgment in *Doe* is under appeal by the Director of Public Prosecutions. The Director contends, *inter alia*, that the imposition of far-reaching reporting restrictions fails to have sufficient regard to the importance of justice being administered in public and to the complainant's statutory right to waive her anonymity. It will, ultimately, be a matter for the appellate courts to rule upon these issues and to determine whether *Doe* was correctly decided. For the purpose of the present judgment, having carefully considered the submissions made by the Director, I remain of the view that the High Court enjoys an inherent

jurisdiction to make such an order for all of the reasons explained in my earlier judgment.

64. The making of a direction by the High Court that the criminal prosecution is to be subject to *ad hoc* reporting restrictions will entail only a limited interference, if any, with the principle that justice should be administered in public. This is because the criminal proceedings are subject, independently, to reporting restrictions under the Criminal Law (Rape) Act 1981.

65. It is correct to say that one consequence of the High Court directing that *ad hoc* reporting restrictions apply will be that a complainant will lose her statutory right to waive anonymity. This is, of course, a significant loss. Nevertheless, I am satisfied that it is proportionate to take this lesser step in preference to making an order prohibiting the criminal prosecution in its entirety. The proper balance between the competing constitutional values is struck by directing that the criminal prosecution may proceed subject to *ad hoc* reporting restrictions. The effect of the blameworthy prosecutorial delay is that the applicant has lost the opportunity, which he would otherwise have had, of availing of the reporting restrictions under section 93 of the Children Act 2001. Any potential prejudice so occasioned is eliminated by the imposition by the High Court of *ad hoc* reporting restrictions.

66. In summary, therefore, the outcome of the balancing exercise is that the criminal prosecution should proceed but subject to a direction that *ad hoc* reporting restrictions are to apply.

SEX OFFENDERS ACT 2001 (AS AMENDED)

67. It should be noted that the objection that the prosecutorial delay has caused

potential prejudice to the applicant in relation to the sex offenders register is misplaced. The objection appears to overlook the very recent amendments introduced to the Sex Offenders Act 2001 by the Sex Offenders (Amendment) Act 2023. These amendments provide that the court now has *discretion* to specify the period for which a person, who has been convicted of an offence committed as a child, is to remain on the sex offenders register. This period shall not exceed five years.

CONSTITUTIONAL ISSUES

68. The applicant, in addition to pursuing an objection on the grounds of prosecutorial delay, also raises a number of constitutional issues. These constitutional issues relate to the *mens rea* requirement for the offence under section 3 of the Criminal Law (Sexual Offences) Act 2006. In brief, the applicant submits that he should be entitled to rely on a defence of reasonable mistake in relation to the complainant's age. It is said that, if the applicant had reasonable grounds for believing, first, that the complainant was fifteen years of age or older, and, secondly, that she had consented to sexual intercourse, then he has a complete defence under sub-section 3(8).

69. It is submitted, in the first instance, that the statutory provisions are capable of being interpreted in a manner which allows for such a defence. In the alternative, it is submitted that if the provisions cannot be interpreted in this manner, then they are constitutionally infirm. The applicant also makes submissions as to the form of remedy which should be fashioned in order to vindicate his rights.

70. It is proposed to structure the analysis of these constitutional issues as follows. First, the proper interpretation of the relevant statutory provisions will be

considered by reference to the general rules of statutory interpretation. Secondly, in the event that this interpretation does not yield a result favourable to the applicant, it will then be necessary to consider whether such an interpretation would involve a breach of any constitutional right of the applicant. If so, it will next be necessary to consider whether such a breach might be avoided by adopting a more expansive approach to the interpretation of the statutory provisions by reliance on the so called *"double construction rule"*. It is only if this cannot be done, that it would become necessary to consider whether the provisions of section 3 of the Criminal Law (Sexual Offences) Act 2006 should be set aside as invalid or whether some form of declaratory relief granted.

STATUTORY INTERPRETATION

71. Section 3 of the Criminal Law (Sexual Offences) Act 2006 provides that a person who engages in a "*sexual act*" with a child who is under the age of 17 years shall be guilty of an offence. This offence is described in the side note as "*defilement*". The offence can consist of any one of the following four sexual acts: (i) vaginal sexual intercourse, (ii) buggery, (iii) rape, or (iv) aggravated sexual assault.

72. There are two express defences to the offence as follows under sub-sections 3(3) and (8):

> "(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.
>
> […]
>
> (8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be

> a defence that the child consented to the sexual act of which the offence consisted where the defendant—
>
> (a) is younger or less than 2 years older than the child,
>
> (b) was not, at the time of the alleged commission of the offence, a person in authority in respect of the child, and
>
> (c) was not, at the time of the alleged commission of the offence, in a relationship with the child that was intimidatory or exploitative of the child."

73. As appears, the first of these two defences expressly requires consideration of the accused person's mental state: a reasonable mistake as to the victim's age is a full defence. The applicant contends that the second of the defences should similarly be interpreted as requiring consideration of the accused person's mental state. More specifically, it is submitted that an accused person who had a reasonable, but mistaken, belief that (i) the child concerned had attained the age of 15 years and (ii) had consented to the sexual act, has a full defence. On the applicant's argument, this defence is subject only to the proviso that the accused person not be more than two years older than the child concerned, and not be a person of authority nor in a intimidatory or exploitative relationship with the child.

74. Notwithstanding that the Criminal Law (Sexual Offences) Act 2006 is a penal provision, the process of statutory interpretation must commence with a consideration of the ordinary and natural meaning of the statutory language. The approach to be adopted has been summarised by the Supreme Court as follows in *Director of Public Prosecutions v. T.N.* [2020] IESC 26 (at paragraph 119):

> "Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given

> situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled [to] a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation."

75. The Supreme Court reaffirmed this statement in its judgment in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60. O'Donnell J., having cited the passage above, then stated as follows (at paragraph 56 of his judgment):

> "I would merely add that the principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. That approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision."

76. These, then, are the principles which guide the interpretation of the Criminal Law (Sexual Offences) Act 2006. For the reasons which follow, the correct interpretation of the special defence under sub-section 3(8) is that it does not create a defence of reasonable mistake as to a complainant having attained the age of 15 years.

77. First, the existence of an *express* defence of reasonable mistake as to age under sub-section 3(3) militates against the implication of a similar defence under sub-section 3(8). The omission of similar statutory language is properly regarded as

deliberate. It is apparent from the structure of section 2 and section 3 of the Act that the Oireachtas was fully alive to the question of *mens rea* when creating the new categories of child sexual offences. This is consistent with the legislative history: the Criminal Law (Sexual Offences) Bill 2006 was introduced and enacted within a single week, in response to the judgment of the Supreme Court in *C.C. v. Ireland (No. 2)* [2006] IESC 33, [2006] 4 I.R. 1. Against this backdrop, the omission, from sub-section 3(8), of a reasonable mistake defence is significant. This is an appropriate case, therefore, to apply the maxim *expressio unius est exclusio alterius*, i.e. to express one thing is to exclude another. This maxim was applied by the Supreme Court (*per* Geoghegan J.) in *C.C. v. Director of Public Prosecutions (No. 1)* [2005] IESC 48, [2006] 4 I.R. 1 (at paragraph 160 of the reported judgment). The presence of a statutory defence (namely, that the accused person had reasonable cause to believe that the girl was of or above the age specified) to one charge, coupled with its absence in the case of another related charge, was held necessarily to imply that the enacting legislature did not intend such a defence to be available in the case of the latter offence.

78. Second, sub-section 3(8) identifies a number of conditions precedent to the availability of the "*close in age*" defence. These include that the accused person not be more than two years older than the child concerned. The structure of the sub-section indicates that these conditions precedent are factual matters which do not entail any mental element on the part of the accused person. They are directed to the factual circumstances surrounding the conduct rather than to the mental element.

79. Thirdly, the principle underlying the "*close in age*" defence is that a child who

has attained the age of 15 years is capable of giving a legally effective consent to a sexual act, within the limited circumstances prescribed under sub-section 3(8). A younger child, such as the twelve-year old complainant in the present proceedings, is incapable of giving a legally effective consent to a sexual act. This is so irrespective of any mistake, reasonable or otherwise, on the part of an accused person. It follows that the rival interpretation contended for by the applicant would negate the legislative intent underpinning the "*close in age*" defence by sidelining the issue of consent.

80. In summary, applying the general rules of statutory interpretation without reference, at this point, to the double construction rule, the ordinary and natural meaning of the statutory language is that the special defence under sub-section 3(8) is not available unless the child concerned has, as a matter of fact, attained the age of fifteen years. The "*close in age*" defence is not available in cases where the accused person has a reasonable, but mistaken, belief as to the age of the child, i.e. that the child had attained the age of fifteen years. (It is always a defence that the accused person had a reasonable belief that the child had attained the higher age of *seventeen* years).

81. Having regard to this interpretation, it now becomes necessary to consider whether the parameters of the "*close in age*" defence pass constitutional muster. If not, then the interpretation of the provisions would have to be revisited by applying the "*double construction*" rule.

82. The "*double construction*" rule has been summarised as follows in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341):

> "Therefore, an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction

> to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. […]".

83. The "*double construction*" rule allows a court, within limits, to push the meaning of legislation beyond that which is allowed by the conventional rules of statutory interpretation. As appears, however there are limits to the "*double construction*" rule: the "*constitutional*" interpretation of a legislative measure must be one which is reasonably open on the statutory language. A statutory provision which is clear and unambiguous cannot be given an opposite meaning.

MENS REA: THE CONSTITUTIONAL PRINCIPLES

84. Before turning to address the arguments advanced on behalf of the applicant in relation to *mens rea*, it is useful, first, to summarise the principles enunciated in the case law cited by the applicant.

85. The first judgment relied upon is that of the Supreme Court in *C.C. v. Ireland (No. 2)* [2006] IESC 33, [2006] 4 I.R. 1. There, the Supreme Court found the form of "*absolute liability*" provided for under sub-section 1(1) of the Criminal Law (Amendment) Act 1935 to be inconsistent with the Constitution of Ireland. The legislative provision had made carnal knowledge of a girl under the age of fifteen years a criminal offence. The Supreme Court had previously interpreted the legislative provision as *excluding* a defence of mistake on the part of the

accused person as to the girl's age (*C.C. v. Ireland (No. 1)* [2005] IESC 48, [2006] 4 I.R. 1).

86. The Supreme Court in *C.C. v. Ireland (No. 2)* characterised the statutory offence as wholly removing the mental element and expressly criminalising the mentally innocent (paragraph 40 of the reported judgment). The Supreme Court then stated as follows (at paragraphs 43 and 44 of the reported judgment):

> "[…] There is simply no [defence of due diligence] available here. No form of due diligence can give rise to a defence to a charge under s. 1(1), even where the defendant has been positively and convincingly misled, perhaps by the alleged victim herself.
>
> It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end' […]. It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution. These rights seem fundamental […]".

87. The position is summarised as follows (at paragraph 49 of the reported judgment):

> "I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution:-
>
> > 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'"

88. The second judgment relied upon by the applicant is that of the Supreme Court in *C.W. v. Minister for Justice* [2023] IESC 22. There, the Supreme Court considered a different aspect of the Criminal Law (Sexual Offences) Act 2006. More specifically, the Supreme Court considered whether it was permissible to

impose a legal burden on an accused person to prove the defence of reasonable mistake as to age to the civil standard of proof. For present purposes, the part of the decision in *C.W. v. Minister for Justice* which is of most immediate relevance is the Supreme Court's characterisation of the *ratio* of its earlier decision in *C.C. v. Ireland (No. 2)*. This is to be found at paragraphs 179 to 182 as follows:

> "The judgment in *C.C. No. 2* is replete with references to 'mental innocence', 'moral innocence', 'lack of blameworthiness' and 'absence of guilty intent'. It is firmly stated that the requirement for mental guilt before conviction for a serious criminal offence is of central importance in a civilised legal system. However, it seems to us that, read in the light of the judgments in *C.C. No. 1* (in which four of the same members of the Court participated) the judgment does not turn on questions of moral innocence. Certain things are clear. Firstly, the Court accepted that it is a general principle of the common law that a person should not be convicted of a serious criminal offence in the absence of guilty intent. Quite apart from issues concerning the allocation of the burden of proof, that principle underlies the general rule that a person will not be convicted if he or she acts under a mistaken factual belief, such that had the facts been as believed, no offence would have been committed. In this regard, the majority judgment in *C.C. No.1* (Geoghegan J.) endorsed the views of Brett J. in *Prince*. However, the majority accepted that, given the history of the Act of 1935 and the differences between it and the preceding legislation, the presumption as to *mens rea* in the construction of a criminal offence had been rebutted in '*compellingly clear*' circumstances.
>
> Secondly, the references to '*moral innocence*' must be assessed with caution. The appellant C.C. could not have been considered to be a '*morally innocent*' person since he had, even on his own account, committed a criminal offence by engaging in intercourse with an underage girl who he knew did not have the capacity to give a legally valid consent. The Court's analysis must be seen as having been directed, therefore, to his potential innocence, *in legal terms*, of the offence with which he had been charged.
>
> Thirdly, the Court's most explicit objection to the provision was that there was '*absolutely*' no defence to the charge. In its view, the right of an accused not to be convicted of a true criminal offence in the absence of *mens rea* was not simply qualified or limited by the 1935 Act in the interest of some

> other right, but had been '*wholly abrogated*'. As one counsel pithily put it in the course of this appeal, '*there was no way out*'.
>
> In our view this is the *ratio* of the decision. In the circumstances it appears clear that the Court was prepared, in principle, to accept that there could be some qualification of the defence rights. Further, when this is coupled with the acceptance by the Court that there were a number of options for the legislature, including the deployment of presumptions against the accused, it seems clear that the Court would in principle have accepted that a burden of proof could be imposed on the defence in this regard. Indeed, the discussion in *C.C. (No.1)* contained a number of passages which seemed to contemplate the possibility of a provision which required the defendant to prove mistake on the balance of probabilities."

89. In the present case, counsel on behalf of the applicant sought to extrapolate a broader principle to the effect that it is not constitutionally permissible to convict an individual of a serious offence, carrying a significant criminal sanction, in the absence of a requirement that the necessary *mens rea* be proved. The precise formulation of this contended-for principle was put in a number of different ways during the course of submission. In his reply, counsel summarised the contended-for principle as follows: the Constitution requires that the mental state relevant to the actual offence in the particular circumstances of the accused should be proven.

90. Counsel observes that had the applicant been factually correct in his (asserted) belief that the complainant had been 15 years of age at the time, then the sexual intercourse would have been lawful (assuming that it had been consensual). Counsel seeks to assimilate the applicant's position to that of the accused person in *C.C. v. Ireland (No. 2)*. With respect, this comparison is fallacious. The crucial distinction between the statutory offence under section 3 of the Criminal Law (Sexual Offences) Act 2006, and that at issue in *C.C. v. Ireland (No. 2)*, is

that under the latter offence the *mens rea* requirement had not simply been qualified or limited but had been "*wholly abrogated*". By contrast, an accused person cannot be convicted of a criminal offence under section 3 of the Criminal Law (Sexual Offences) Act 2006 in the absence of *mens rea*. A conviction can only be entered where the accused person engaged in a sexual act with a child who is under the age of 17 years in circumstances where the accused person either knew that the child was under age or was reckless in respect of the child's age, in the sense of there being no grounds for a reasonable mistake as to age. The jury must be satisfied that an accused person had the requisite *mens rea* in respect of the core element of the statutory offence. This requirement is not affected by the existence of a special defence in the circumstances delineated under sub-section 3(8). Having prescribed a *mens rea* requirement for the core element of the offence, it is constitutionally permissible for the legislature to carve out an exception to address the contingency of consensual sexual intercourse between two older children who are close in age. It is fundamental to this special defence that the child concerned have capacity to give a legally effective consent. The legislature has determined that this necessitates that the child concerned must be at least fifteen years of age. The existence of this factual state of affairs is a condition precedent to the availability of the special defence. The overall structure of the legislation does not offend against the principles identified in *C.C. v. Ireland (No. 2)* [2006] IESC 33, [2006] 4 I.R. 1 as subsequently explained in *C.W. v. Minister for Justice* [2023] IESC 22.

CONSTITUTIONAL FAIRNESS

91. The applicant has sought to advance a related argument to the effect that the

decision of the Director of Public Prosecutions to elect to charge him with the offence under section 3 of the Criminal Law (Sexual Offences) Act 2006 is unfair. It is submitted that the appropriate offence to have charged him with would have been the offence of defilement of a child under fifteen years of age. It is further submitted that, had he been charged with the younger child offence, the applicant could have successfully raised the defence of mistaken belief as to age under sub-section 2(1). Put otherwise, the applicant contends that in circumstances where a reasonable mistake to the effect that the complainant had been aged fifteen years would represent a full defence under section 2, the Director of Public Prosecutions is precluded from pursuing a prosecution under section 3. The principal defence under the latter section, namely a reasonable mistake to the effect that the complainant had been aged seventeen years or over, is said not to be available to the applicant on the admitted facts as per his prepared statement.

92. The main authority cited in support of this submission is *G.E. v. Director of Public Prosecutions* [2008] IESC 61, [2009] 1 I.R. 801. With respect, the circumstances of the present case are entirely distinguishable from those at issue in the former case. There, the accused person had been charged, under the previous legislative regime, with the offence of defilement of a girl between fifteen and seventeen years of age. Relevantly, the firm view had been taken within the Office of the Director of Public Prosecutions that a rape charge against the accused person would not have been warranted. In the aftermath of the Supreme Court judgment in *C.C. v. Ireland (No. 2)* [2006] IESC 33, [2006] 4 I.R. 1, the Director entered a *nolle prosequi*. The accused person in *G.E.* was then re-arrested and charged with rape. The Supreme Court held that

fair procedures required that any alternative charge brought against the accused person should not be one which was grossly different and disproportionate from the original charge. Given that no new or additional evidence had emerged from the time when the original charge of attempted carnal knowledge was brought, the Supreme Court characterised the adoption of the rape charge, which upon conviction provides for the possibility of a sentence of life imprisonment, as an approach which was both inconsistent with the view taken earlier and a ramping up of major proportions in the scale of criminal behaviour alleged against the accused person in *G.E.*

93. The Supreme Court further held that the accused person had been prejudiced by this change in position. The Director had previously indicated that he would consent to the original charge being dealt with summarily on a guilty plea. The accused person elected for a trial on indictment. The Supreme Court held that it was palpably unfair that the accused person had lost his option of having his case dealt with in the District Court.

94. The present case exhibits none of the features which informed the decision of the Supreme Court in *G.E.* Here, the approach of the Director of Public Prosecutions has been consistent throughout. The only charge ever preferred was that under section 3. It was never represented to the applicant that he might have been charged with an offence under section 2. It cannot, therefore, be said that the Director committed the type of *volte face* which grounded the finding of unfairness in *G.E.*

95. More generally, there is no principle of constitutional law which precludes the Director of Public Prosecutions from electing to prefer charges for a particular offence, notwithstanding that it would be more difficult for an accused person to

defend such a prosecution than had he been charged with a similar but different offence. Under the Criminal Law (Sexual Offences) Act 2006, conduct consisting of engagement in sexual intercourse with a child aged twelve years is, in principle, prosecutable under either section 2 or section 3. In contrast to the previous legislative regime, the latter offence is not confined to circumstances where the complainant is of or over the age of fifteen years but under the age of seventeen years. Section 3 applies to a sexual act with a child who is under the age of seventeen years *simpliciter*.

96. The section 2 offence is a more serious offence in that it carries a maximum sentence of imprisonment for life. The maximum sentence for the section 3 offence is seven years. (This is increased to fifteen years in the case of a person in authority (as defined)). It was lawful for the Director to choose to charge the applicant with the less serious offence. The fact, if fact it be, that the applicant might have had a full defence to a charge under section 2 is irrelevant in this regard.

97. For completeness, it should be recorded that counsel for the applicant invited the court to find that the Director of Public Prosecutions has tacitly acknowledged that the applicant would have a full defence to a prosecution under section 2. More specifically, counsel submits that the court should *infer* that the only reason for which the Director would have chosen to pursue a prosecution under section 3 is that she must have accepted that the applicant had a reasonable belief that the complainant had been aged fifteen years.

98. With respect, there is no proper basis for drawing such an inference. There are many legitimate reasons for which the Director might elect to prefer charges for one offence not another. It would be inappropriate for the High Court, as the

court of judicial review, to read too much into such choices. In any event, even if such an inference were justified—and it is not—this would not affect the analysis above. The Director would be entitled, in principle, to choose to charge an individual with a different offence, which carries a less severe maximum penalty, in circumstances where she considers that the evidence is such that there is no reasonable prospect of securing a conviction on another similar type of offence.

CONCLUSION AND PROPOSED FORM OF ORDER

99. There has been blameworthy prosecutorial delay in the investigation and prosecution of the offences alleged against the applicant. In the absence of any proper explanation for same, the lapse of a period of two years and two months from the date of complaint to the date of charge entails a breach of the special duty of expedition which pertains in criminal cases involving children.

100. The case law indicates that the existence of blameworthy prosecutorial delay will not automatically result in the prohibition of a criminal trial. Rather, something more has to be put in the balance to outweigh the public interest in the prosecution of serious criminal offences. What that may be will depend upon the facts and circumstances of any given case. Factors to be considered include (i) the length of delay itself; (ii) the age of the accused at the time the alleged offences occurred; (iii) the loss of the opportunity to avail of statutory safeguards under the Children Act 2001; (iv) the stress and anxiety, if any, caused to the child as a result of the threat of prosecution hanging over them; and (v) any prejudice caused to the conduct of the defence.

101. Here, the only prejudice which has been established by the applicant is the

potential loss of the opportunity to avail of the reporting restrictions provided under section 93 of the Children Act 2001. It is unlikely that the applicant would have suffered any actual prejudice in this regard in circumstances where the criminal prosecution is subject, independently, to reporting restrictions under section 7 of the Criminal Law (Rape) Act 1981 (as applied by section 6 of the Criminal Law (Sexual Offences) Act 2006). At all events, the risk of potential prejudice can be eliminated by the High Court making a direction that the criminal prosecution is to be subject to *ad hoc* reporting restrictions.

102. It should be recorded that the applicant has not sought any such *ad hoc* reporting restrictions. Rather, the consistent position of the applicant has been to seek an order prohibiting the criminal prosecution in its entirety. The formal position of the Director of Public Prosecutions, as adopted in her appeal against the decision in *Doe v. Director of Public Prosecutions* [2024] IEHC 112, is that the High Court does not have jurisdiction to impose reporting restrictions beyond the circumstances allowed for under the Children Act 2001. It follows, therefore, that in deciding to adopt a *via media* by imposing *ad hoc* reporting restrictions in preference to making an order prohibiting the criminal prosecution, the High Court is producing a result which neither party has directly sought. Judicial review is intended to be a flexible remedy and the High Court has discretion as to the nature of the reliefs to be granted. It is a proper exercise of the judicial review jurisdiction to grant a form of remedy which, although falling short of that sought by the applicant, does nevertheless provide a significant benefit to him. In principle, however, it is open to the applicant to waive this benefit.

103. Subject to any waiver by the applicant, an order will be made directing that no report shall be published or included in a broadcast or any other form of

communication which either (i) reveals the name or address of either the complainant or the accused in the criminal proceedings, or (ii) includes any particulars likely to lead to the identification of either of these individuals as participants in the criminal proceedings. This order precludes the publication or inclusion of any still or moving picture of, or including, any of these individuals or which is likely to lead to his or her identification.

104. These reporting restrictions extend to these judicial review proceedings. For the avoidance of any doubt, the reporting of the content of this judgment is permitted. However, no detail is to be *added* which might allow for the identification of the complainant or the applicant. It is not permissible, for example, to identify the town in which the alleged offences are said to have occurred.

105. As to legal costs, my *provisional* view is that the applicant, in securing an order for reporting restrictions, has been partially successful in the proceedings and should be allowed to recover at least part of his legal costs as against the Director of Public Prosecutions. (This is on the assumption that the applicant has not previously indicated an intention to seek a recommendation under the Legal Aid – Custody Issues Scheme).

106. I will list the matter for submissions on the final form of the order and on costs on Wednesday 29 May 2024 at 10.30 a.m. If it is of assistance to the parties, this listing can be by way of a remote hearing.

Appearances

Giollaíosa Ó Lideadha SC and Fiachra Treacy for the applicant instructed by Harringtons LLP
Remy Farrell SC and David Fennelly for the respondents instructed by the Chief State Solicitor