APPROVED **[2024] IEHC 314**

THE HIGH COURT
JUDICIAL REVIEW

2024 73 JR

BETWEEN

THOMAS MCCANN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 May 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to restrain a criminal prosecution. The criminal prosecution arises out of an alleged assault causing harm. The applicant contends 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*, an enhanced possibility for

summary disposal, 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.

APPLICABLE LEGAL PRINCIPLES

2. 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.

3. 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 [be] 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."

4. 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).

5. 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."

6. 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

7. 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.

8. Having regard to the fact that there is a criminal prosecution pending, certain specific details have been deliberately excluded from the summary. Personal details, such as the applicant's precise date of birth, have been omitted.

9. The applicant is charged with an offence of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997; and with an offence of producing, in the course of a dispute or fight, in a manner likely unlawfully to intimidate another person, an article capable of inflicting serious injury, contrary to section 11 of the Firearms and Offensive Weapons Act 1990.

10. The incident giving rise to these charges may be summarised as follows. On 31 January 2020, the applicant and two other teenagers are alleged to have had a verbal altercation with two adult males at Newbridge train station. It is alleged that the teenagers shouted abuse at the adult males, describing them as "*faggots*", "*queers*", "*benders*" and "*rim lickers*". One of the teenagers is alleged to have said that he was "*sick of ye taking over our country*". Thereafter, it is alleged that there was a physical altercation resulting in one of the adult males receiving cuts to his stomach, right arm, right thigh, left leg and left knee.

11. The injuries were subsequently summarised as follows in a report prepared by the Emergency Department of Tallaght University Hospital: a superficial laceration to the anterior abdominal wall in the left upper quadrant measuring approximately 1.1 cm in depth and approximately 8 cm transversely; a wound to the medial upper right arm measuring approximately 5 cm; and a wound to the right thigh measuring approximately 4 cm. There were also lacerations to the left knee area and the left lower leg.

12. Members of An Garda Síochána attended at the scene shortly after the incident and viewed CCTV footage in the train station's control room. The guards identified a number of suspects, including the applicant. The guards called to the home of the applicant and spoke to him in the early hours of 1 February 2020. A voluntary cautioned statement was taken from the applicant in the presence of

his mother. The guards also seized a number of items.

13. Thereafter, on 6 February 2020, the applicant attended at Newbridge Garda Station by arrangement and was arrested, detained and interviewed. His fingerprints, palm prints and DNA samples were taken. The applicant was also photographed.

CHRONOLOGY

[…] June 2004	Applicant's date of birth
31 January 2020	Date of incident
1 February 2020	An Garda Síochána attend at applicant's home
2 February 2020	Statement by injured party
6 February 2020	Applicant arrested by appointment and interviewed
22 May 2020	Referral to Juvenile Liaison Officer ("*JLO*")
29 July 2020	JLO's recommendation that applicant unsuitable
5 March 2021	Applicant's solicitor requests update on progress
16 April 2021	Formal decision of Garda Youth Diversion Office
[…] June 2022	Applicant ages out
July 2022	File submitted to DPP
1 March 2023	Ineffective direction
25 May 2023	Letter with direction to charge prepared but not sent
24 August 2023	DPP's Office issues direction to charge
6 September 2023	Applicant charged
19 February 2024	*Ex parte* leave application (judicial review)
14 May 2024	Judicial review hearing
18 June 2024	Trial date before Circuit Court

CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

Overview

14. 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*".

15. Accordingly, the first question to be addressed by this court is whether the pace of the criminal investigation between the date of the alleged incident (January 2020), and the date upon which the applicant reached his eighteenth birthday (June 2022), entailed culpable or blameworthy delay.

16. 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 injured party; 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)).

17. 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."

18. 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".

19. 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.

20. 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.

21. 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."

22. 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

23. An Garda Síochána were informed of the alleged assault on the very evening upon which it is said to have occurred, i.e. 31 January 2020. This afforded a period of approximately two years and five 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.

24. Counsel on behalf of the applicant has identified the following periods of delay. First, there was a period of three months between the arrest and cautioned interview of the applicant (February 2020) and the referral to the Juvenile Liaison Office (May 2020). Second, there was a delay of eleven months between the referral and the decision that the applicant was unsuitable for the Garda Youth Diversion Programme (April 2021). This was so notwithstanding that the juvenile liaison officer had made a recommendation as early as July 2020 that the applicant was unsuitable. The ensuing delay appears to have been as a result of this recommendation being misfiled and as a result of ignorance on the part of more senior garda officers as to the procedure. Thirdly, there was a delay of

some fourteen months in submitting the investigation file to the Office of the Director of Public Prosecutions. The file was not, in fact, submitted until after the applicant had already "*aged out*". There was then a delay of some thirteen months between the submission of the file to the Office of the Director of Public Prosecutions (July 2022) and an effective direction to charge (August 2023).

25. The overall delay in the criminal investigation and the processing of the file within the Office of the Director of Public Prosecutions is inordinate and inexcusable. It is a cause of concern that not only was no urgency shown at any stage in the criminal investigation, but senior members of An Garda Síochána were, seemingly, ignorant of the procedure governing the juvenile diversion programme and its interaction with the procedure for preferring criminal charges. The delay in the Office of the Director of Public Prosecutions is of even greater concern. It appears that a file in relation to an alleged juvenile offender was allowed languish for more than six months before any substantive action was taken in relation to same. Thereafter, the handling of the file was bungled, with correspondence from the State Solicitor seemingly going unanswered.

26. This was not an especially complex case. An Garda Síochána were able to identify the applicant as a potential suspect almost immediately and spoke to him in his home within a matter of hours. The garda file cannot have been extensive: it would consist, largely, of the record of the applicant's interviews (which consisted of the recitation of a series of questions to which the applicant responded "*no comment*"); the injured party's statement and those of the direct witnesses; the applicant's cautioned statement; the CCTV footage; and the forensic evidence.

27. In summary, the failure to conclude the criminal prosecution within the period

of some two years and five months between the date of the alleged assault (January 2020) and the date upon which the applicant reached his age of majority (June 2022) 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. This delay was exacerbated by the further delay, subsequent to the applicant "*ageing out*", in processing the file within the Office of the Director of Public Prosecutions. The total period of time between the date of the alleged incident and the date of charge was approximately three years, seven months.

BALANCING EXERCISE: PREJUDICE ALLEGED BY APPLICANT

28. 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

29. 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.

30. 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).

31. 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.

32. 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.

33. 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

34. 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."

35. The applicant in the present case cannot invoke these provisions in circumstances where he has already "*aged out*". 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 61 to 67 below.

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

36. 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.

37. 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. The applicant in the present case is thus unable to avail of these provisions.

38. The applicant submits that he has been prejudiced by the loss of the opportunity to rely on the District Court's enhanced jurisdiction, under section 75, to deal with charges against a child summarily. In particular, the maximum penalties to which he is now potentially exposed are far more severe: a person guilty of an assault causing harm is liable on conviction to imprisonment for a term not exceeding ten years. This is to be contrasted with the maximum custodial sentence which could have been imposed by the District Court, i.e. twelve months.

39. In assessing whether the loss of opportunity to rely on section 75 gave rise to any actual prejudice, it is necessary to have regard to the likelihood of the District Court having accepted jurisdiction. The first matter which the District Court would have been required to address under the section is whether or not the offences alleged constituted minor offences fit to be tried summarily or dealt with summarily on a guilty plea. This exercise necessitates consideration of the moral quality of the offences alleged and an appraisal of the severity of the penalty likely to be imposed were the particulars as alleged to be established at trial. (See generally *Director of Public Prosecutions v. Doherty* [2023] IECA 315). In appraising whether there is a realistic prospect of a custodial sentence in excess of twelve months, the District Court is required to take account of the age and level of maturity of the child concerned. This refers to their age and maturity as of the date of the alleged offence. In practice, the District Court will often be furnished with expert evidence in cases where it is

contended that an accused child has a level of maturity which is less than that which would be normal for their age. These reports might, for example, identify educational, emotional or social difficulties suffered by the child which might have impaired their ability to appreciate the consequences of their actions. Any such mitigating factors would have to be taken into account in evaluating whether there is a real prospect of a custodial sentence in excess of twelve months. Similarly, the District Court would have to make the appropriate allowance for a guilty plea where offered.

40. 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.

41. It should be emphasised that this exercise will, by definition, have to be carried out on the basis of limited materials only and that this preliminary view of the realistic range of penalties is not binding on the court of trial. Put otherwise, the fact that the District Court may have refused jurisdiction does not indicate that a custodial sentence is inevitable, still less that any custodial sentence which *might* be imposed would necessarily exceed twelve months. The refusal of jurisdiction means no more than that, taking the case at its height, the possibility of a significant custodial sentence could not realistically be ruled out *in limine*.

42. The particulars of the alleged offences in the present case are such that the District Court is unlikely to have accepted jurisdiction under section 75. This is because the alleged offences are grave offences and exhibit a number of aggravating factors which, in the absence of any mitigating factors, might indicate that there would be a realistic prospect of a custodial sentence of in

excess of twelve months. The aggravating factors include the following: (i) the serious physical and psychological injuries caused to the victim; (ii) the use of an article capable of inflicting serious injury, i.e. a sharp bladed object; (iii) the seeming motivation of the assault, i.e. hostility towards the victim's sexual orientation; and (iv) the co-ordinated nature of the assault involving at least one other perpetrator.

43. In the absence of any mitigating factors having been identified to date, the alleged offences could not have been properly characterised, at a preliminary hearing, as minor offences suitable for summary disposal. The District Court could not have realistically ruled out the prospect of the court of trial considering the imposition of a custodial sentence of in excess of twelve months.

44. Different considerations might have pertained had the applicant indicated an intention to enter a guilty plea. This would have been a relevant factor at any hypothetical section 75 hearing and would have been a mitigating factor in sentencing. The District Court might well have been prepared to accept jurisdiction if there had been an early plea of guilty. It should also be emphasised that no evidence has been put before the High Court as to the level of maturity or other personal circumstances of the applicant which might have pointed towards summary disposal. It follows that, in assessing the likely outcome of a hypothetical section 75 hearing, it has been necessary to assume that the District Court would approach the hearing on the basis that there were no special circumstances to differentiate the applicant from a typical fifteen year old.

45. Of course, it remains open to the applicant to adduce such evidence before the court of trial. On the current state of the evidence, however, and having regard to the particulars of the alleged offences, it cannot be said, on the balance of

probabilities, that the District Court would likely have accepted jurisdiction.

46. To summarise: in the absence of any mitigating factors having been identified to date, the alleged offences could not have been properly characterised, at a preliminary hearing, as minor offences suitable for summary disposal.

47. It should be emphasised that this does not involve any finding by the High Court, as the court of judicial review, as to what the proper characterisation of the alleged offences should ultimately be, still less as indicating any view on sentencing in the event of a conviction. These are all matters exclusively for the Circuit Court as the court of trial. This judgment says no more than that the District Court could not have realistically ruled out the prospect of the court of trial considering the imposition of a custodial sentence of in excess of twelve months.

(3). Sentencing Principles

48. 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,
>
> I 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."

49. 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.

50. 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."

51. Counsel for the applicant has also drawn attention to the provisions of section 144. This allows a sentencing court to defer the making of a children

detention order if a place is not available for the child in a children detention school or for any other sufficient reason.

52. Sub-section 144(2) provides as follows:

> "The court shall defer the making of a children detention order only if the court is satisfied that, having regard to the nature of the offence and the age, level of understanding, character and circumstances of the child concerned, it would be in the interests of justice to defer the making of the order."

53. In cases where a deferral has been made, the sentencing court is required, at the resumed hearing, to take into account: the child's conduct in the meantime, including the extent to which the child has complied with any conditions suggested by the court; any change in the child's circumstances; and any reparation by the child to the victim.

54. It is apparent from the structure of section 144 that it is addressed to the special considerations applicable where a penalty is being imposed upon a person who is still a child as of the date of sentencing. This is apparent, in particular, from the reference to the expectation that the *child's parents or guardian*, where appropriate, will help and encourage the child to comply with any conditions suggested by the court and not commit further offences. The same considerations are not applicable to an adult-accused who is being sentenced for offences committed as a child.

55. The loss of the opportunity to avail of section 144 does not cause any material prejudice to an adult-accused. The rationale of the section is that a period of detention might be deferred to allow consideration of the individual's *subsequent* conduct. It remains open to an adult-accused to rely on his or her good behaviour in the intervening period as a mitigating factor at a sentencing hearing.

(4). Mandatory Probation Report

56. 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.

(5). Expunging of convictions

57. Section 258 provides, in short, that criminal convictions for offences committed as a child shall be expunged after a period of three years. This is subject to certain exceptions, e.g. it does not apply to an offence which is required to be tried by the Central Criminal Court, or where an accused has been dealt with regarding an offence within that three-year period.

58. The applicant contends, mistakenly, that he has lost the benefit of these provisions. In truth, section 258 represents one of the few benefits under the Children Act 2001 which is predicated on the age of an accused person as of the date the offence is *committed* rather than their age as of the date of trial: see sub-section 258(1)(a).

(6). Family conference

59. There was some discussion at the hearing of these judicial review proceedings as to whether the applicant may have lost the benefit of provisions which are intended to rehabilitate a juvenile offender. Reference was made, in particular, to the provision made for family conferences under Part 8 of the Children Act 2001. These provisions are directed to circumstances where a child accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal

advice sought by or on behalf of him or her. Here, the applicant, as is his absolute right, has pleaded not guilty to the alleged offences. The relevant provisions of Part 8 of the Act would not, therefore, have been applicable to him.

Summary

60. In summary, therefore, the only 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

61. Counsel on behalf of the applicant invited the court to attach great weight to what he described as the "*egregious*" delay in the criminal investigation and prosecution. Counsel characterised the process as marked by bungling, forgetfulness and dereliction of duty; in short, the opposite of expedition. Counsel submitted that having regard to these factors, the nature of the prejudice which the applicant was required to place on the other side of the scales is minimal.

62. The Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] IESC 56, [2014] 2 I.R. 762 has emphasised 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.

63. The first and second limbs of the legal test in *Donoghue* are not necessarily hermetically sealed. To elaborate: notwithstanding that a finding that there has been blameworthy prosecutorial delay is a condition precedent under the first limb of the legal test, the length of the delay may also be relevant in assessing

the balance of justice for the purposes of the second limb. The length of the delay may have had the effect of exacerbating the prejudice caused to the accused person. For example, where the evidence establishes that an accused person has incurred a medical condition as a result of stress and anxiety such as might, exceptionally, justify an order of prohibition (cf. *Director of Public Prosecutions v. L.E.* [2020] IECA 101), the length of the delay may be relevant in assessing prejudice. The greater the period for which the accused person has had the medical condition, the greater the prospect of the criminal prosecution being prohibited.

64. However, the length of the delay is not an exacerbating factor in relation to the type of prejudice alleged by the applicant in the present case. Here, the principal prejudice alleged is the loss of the opportunity to avail of the reporting restrictions which would otherwise have been available under section 93 of the Children Act 2001. This prejudice was triggered the moment that the applicant "*aged out*". It has not gotten any worse in the interim. The balancing exercise requires the High Court to weigh the prejudice which the loss of the reporting restrictions would cause to the applicant, on the one hand, against the public interest in the prosecution of serious criminal offences, on the other.

65. In principle, the identification of an individual, in the print or broadcast media, as a person accused of an assault causing harm may well be damaging to his reputation even if he were to be subsequently 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 that person's name. The extent of prejudice is reduced in the present case. This is because the applicant already has a criminal conviction in

respect of another serious offence. More specifically, the applicant entered a guilty plea on 16 January 2024 to an offence of possession of cocaine for the purposes of sale or otherwise supplying same, contrary to the provisions of the Misuse of Drugs Act 1977. This offence was committed by the applicant as an adult, i.e. after he had already reached his age of majority, and thus does not attract reporting restrictions. Any marginal damage to reputation caused to the applicant by the loss of the reporting restrictions in respect of the offences the subject of these judicial review proceedings is lessened.

66. In assessing the public interest in prosecution, the High Court will take into account the particulars of the offence alleged. The usual approach is to take the prosecution case, as laid out in the book of evidence, at its height. Here, the applicant is charged with very serious offences. The alleged assault caused serious physical injuries to the victim leaving him with significant scarring on his arms, legs and torso. Moreover, it is alleged that the assault may have been motivated by hostility towards the victim's sexual orientation. 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 such a serious assault 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.

67. Having regard to these factors, the result of the balancing exercise is that the public interest in the prosecution of serious criminal offences outweighs the

prejudice caused to the applicant by the loss of the opportunity to avail of the reporting restrictions under section 93 of the Children Act 2001. This is especially so having regard to the loss of reputation which has already been caused to the applicant as the result of his conviction for a serious drug related offence.

CONCLUSION AND PROPOSED FORM OF ORDER

68. 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 failure to conclude the criminal prosecution within the period of some two years and five months between the date of the alleged assault (January 2020), and the date upon which the applicant reached his age of majority (June 2022), entails a breach of the special duty of expedition which pertains in criminal cases involving children.

69. Here, the only prejudice which has been established by the applicant is the loss of the opportunity to avail of the reporting restrictions provided under section 93 of the Children Act 2001. This prejudice is outweighed by the public interest that there be an adjudication, by a court of trial, upon credible allegations of a serious assault causing harm.

70. As to legal costs, my *provisional* view is that the Director of Public Prosecutions, having succeeded in resisting the application for judicial review, should be allowed to recover her legal costs as against the applicant. (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).

71. I will list the matter for submissions on the final form of the order and on costs

on Friday 31 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

Conor Devally SC and Sarah Connolly for the applicant instructed by Michael J. Staines & Co
Sunniva McDonagh SC and Niall Nolan for the respondents instructed by the Chief Prosecution Solicitor