APPROVED **[2024] IEHC 112**

THE HIGH COURT
JUDICIAL REVIEW

2022 802 JR
2022 884 JR
2022 994 JR

BETWEEN

DOE AND OTHERS

APPLICANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

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

INTRODUCTION

1. This judgment is delivered in respect of three related judicial review proceedings. In each case, the male applicant stands accused of offences arising out of the alleged sexual assault and false imprisonment of a fifteen year old female. As of the date of the alleged offences, each of the applicants was under the age of eighteen years and thus a "*child*" as defined under the Children Act 2001.

2. These judicial review proceedings arise against a legislative backdrop whereby

the qualifying criterion for most of the important procedural protections provided for under the Children Act 2001 is the age of the accused as of the date of the trial of the offences (as opposed to his or her age as of the date when the alleged offences are said to have occurred).

3. The applicants seek to restrain the criminal prosecution pending against them on the basis of prosecutorial delay. It is contended that had the criminal investigation and prosecution been conducted expeditiously, then the applicants would have been entitled to have the charges against them determined in accordance with the procedures prescribed under the Children Act 2001. This would have afforded the applicants certain statutory entitlements including 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 each of the applicants reached the age of majority prior to their being charged with the alleged offences. The shorthand "*ageing out*" will be employed to describe this legal consequence.

4. For the reasons explained herein, it is only the loss of the opportunity to avail of a right to anonymity which, potentially, represents a cause of prejudice to the applicants. This prejudice can, however, be removed by the High Court directing that the criminal prosecution is to be subject to reporting restrictions. Accordingly, the applications for judicial review will each be refused.

APPLICABLE LEGAL PRINCIPLES

5. 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.

6. 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."

7. 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).

8. 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."

9. 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

10. 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 applicants all enjoy a presumption of innocence.

11. 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.

12. The incident giving rise to the alleged offences is said to have occurred on 10 June 2019. As of that date, the female complainant and the male applicants had all been students at the same secondary school and were known to each other. The parties were sitting their junior certificate examinations at the time. The complainant alleges that, during a break between examinations, she had gone into a named building off-campus and that eight male students entered the building thereafter.

13. It is alleged that the second applicant pulled down his trousers and boxers exposing his penis and that others in the company then said that the

complainant should "*give him a blow job*" or "*shag*" him. It is alleged that the second applicant put his hands up the complainant's shirt and bra, and that he also touched the complainant's "*ass*" and "*vagina*" (over her pants). It is alleged that the first applicant also touched the complainant on her "*ass*" and "*vagina*" (over her pants) and her "*boobs*" (under her shirt and bra). The complainant alleges that she was prevented by two students from leaving the building: the complainant describes these individuals as catching her on the waist and "*throwing*" her back in. The third applicant is named as one of these students. The complainant alleges that she was told that she would not be allowed out until she agreed to "*meet*" (French kiss) one of the male students and that she was coerced into French kissing a student. The complainant describes that she felt like a "*monkey in a cage*". The incident ended when a number of female students approached the building as the lunch time recess was coming to an end. All parties then returned to the main school building.

14. Arising out of these alleged events, charges have been preferred against the three applicants in these judicial review proceedings and two other individuals. The first and second applicants are charged with an offence of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990. The third applicant has been charged with an offence of false imprisonment contrary to section 15 of the Non-Fatal Offences against the Person Act 1997.

CRIMINAL INVESTIGATION

15. The complainant first made a complaint to An Garda Síochána in mid-February 2020, some eight months after the alleged incident. As of this time, the applicants were aged between fifteen and sixteen years. This afforded a period

of some two years before which the applicants 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.

CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

Overview

16. The gravamen of the applicants' case is that the delay has prejudiced them in that they have 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 applicants "*ageing out*".

17. 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 (20 February 2020), and the date upon which the applicants reached their respective eighteenth birthdays, entailed culpable or blameworthy delay.

18. 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)).

19. 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."

20. 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".

21. 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.

22. 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.

23. 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."

24. 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

25. The usual approach adopted in cases of this type is for the prosecuting authorities to file affidavit evidence which outlines, in general terms, the progress of the criminal investigation. In the present case, a very different approach has been taken. The timeline of the investigation has been set out in skeletal form in the statement of opposition filed in response to each application. Three *pro forma* verifying affidavits have then been filed, in each case, sworn by members of An Garda Síochána. In each instance, the deponent simply says that so much of the statement of opposition as relates to their own acts and deeds is true, and that so much as relates to the acts and deeds of any other person, they believe to be true.

26. Counsel on behalf of the Director of Public Prosecutions sought to justify this approach by saying that it conforms with the provisions of Order 84 of the Rules of the Superior Courts (as amended by the Rules of the Superior Courts

(Judicial Review) 2011)).

27. Counsel for the Director submitted that the applicants should have requested to cross-examine the deponents on their *pro forma* affidavits. Counsel criticised the applicants' failure to do so, citing the judgment of the Supreme Court in *RAS Medical v. Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63 (at paragraph 88):

> "Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question."

28. Counsel for the Director of Public Prosecutions drew attention to the following pleas which appear in each of the three statements of opposition:

> "The first Covid lockdown occurred in late March 2020. This had a significant impact on the operation of an Garda Síochána. The country was in various stages of lockdown during the entirety of the investigation.
>
> The investigation file was progressed in a timely manner given the workload of the investigating members, changes to Garda rosters as a result of the Covid restrictions, the age of potential witnesses who could not be contacted directly and whose details had to be obtained in compliance with GDPR and Covid restrictions.
>
> The investigation of the complaint and charging of the Applicant was done with all due expedition."

29. Counsel for the Director submitted that this pleading presented a variety of issues which could be raised on cross-examination. Counsel further submitted that these verified "*facts*" had not been challenged appropriately by the

applicants: if the applicants had wanted to attack the reliability or credibility of An Garda Síochána's witnesses, they had an avenue to do so by way of cross-examination.

30. With respect, these submissions are not well founded for the following reasons. First and foremost, the question of whether or not there has been blameworthy prosecutorial delay is the "*ultimate issue*" in these proceedings: it is exclusively a matter for the court to determine. No witness of fact is competent to offer their opinion on whether the criminal investigation and prosecution were carried out with reasonable expedition or in a timely manner. Such an opinion would be inadmissible as evidence and there would be no obligation on the opposing party to seek to cross-examine the witness of fact on such an opinion. The principles in *RAS Medical v. Royal College of Surgeons in Ireland* do not apply to evidence which is inadmissible.

31. Secondly, none of the deponents has actually purported to give direct evidence in relation to the progress of the criminal investigation and prosecution. The inclusion of a bald plea in a statement of opposition is not elevated into an assertion of fact by the filing of a *pro forma* affidavit. Here, none of the three deponents has purported to identify which elements of the statement of opposition they claim to have direct knowledge of. In each instance, the deponent simply says that so much of the statement as relates to their own acts and deeds is true, and that so much as relates to the acts and deeds of any other person, they believe to be true. Such an averment is largely meaningless in the absence of the deponents having provided any detail of their direct involvement in the criminal investigation. There is nothing in the *pro forma* affidavits which could form the basis of a cross-examination.

32. Thirdly, the procedure seemingly envisaged by the Director, i.e. the cross-examination of each of the deponents, would be hugely wasteful of time and costs. The notion seems to be that the applicants would have to draw out the details of the progress of the criminal investigation by painstakingly cross-examining the deponents. This cross-examination would, seemingly, have to be carried out in the blind, i.e. on the basis of *pro forma* affidavits which reveal nothing of the criminal investigation. This would result in the hearing of judicial review proceedings being prolonged unnecessarily. The applicants' side would be required to piece together, question by question, the chronology of the criminal investigation and prosecution notwithstanding that this information could have been readily provided on affidavit.

33. No deponent is available to answer for the, seeming, lapse of six months between the date on which the files were submitted to the Office of the Director of Public Prosecutions for directions and the date upon which the directions were ultimately given. The three deponents who swore the *pro forma* affidavits are all members of An Garda Síochána and cannot, therefore, provide evidence on behalf of the Director, an independent officeholder, in respect of the direction stage of the process. In the absence of any deponent from the Office of the Director of Public Prosecutions, the delay between the submission of the garda file and the giving of directions remains inscrutable.

34. For all of these reasons, then, the approach advocated for by the Director is not the proper approach to be adopted in proceedings alleging blameworthy prosecutorial delay in cases involving children. It is inappropriate to file *pro forma* affidavits and skeletal statements of opposition. Rather, the prosecuting authorities are expected to lay their cards face up on the table. The prosecuting

authorities are expected to furnish the High Court with an accurate chronology of the criminal investigation and prosecution. In cases where the time taken is, objectively, unreasonable, the evidential burden shifts to the prosecuting authorities to justify that delay. On the facts of the present case, a period of some two years and three months elapsed between the date of complaint and the date of charge. This is a greater lapse of time than those which have been found to be excessive in other cases involving alleged juvenile offenders. See, for example, *Furlong v. Director of Public Prosecutions* (above). A delay of this order calls for explanation. Whereas the alleged offences are grave, the logistics of the criminal investigation were straightforward.

35. Notwithstanding that a period of two years and three months calls for explanation, the Director has signally failed to provide any adequate explanation. It is not sufficient for the Director to file a statement of opposition which sets out an incomplete narrative grounded on *pro forma* affidavits. Crucial information, such as the date on which directions were given to charge the applicants has been omitted.

36. The most that can be ascertained from the statements of opposition is that certain steps in the criminal investigation were carried out on certain dates, e.g. the specialist interview with the complainant (6 May 2020); the arrest for interview of the applicants (12 & 13 August 2020); and the referral to the Juvenile Liaison Office and subsequent decision (August/September 2020 and December 2020). No meaningful information is given as to what actions, if any, were taken between these milestone dates, still less is any explanation offered for the delay in progressing to the next step.

37. The involvement of the Office of the Director of Public Prosecutions in the

procedure is shrouded in secrecy. It is pleaded that the (garda) file in respect of five suspects was forwarded to the Director on 26 July 2022. It has since been acknowledged in submission that this date is incorrect: it is now said that the actual date is 26 July 2021. This has not been confirmed on affidavit. Whereas some clerical or typographical errors will inevitably occur in the drafting of pleadings and affidavits, it is unsatisfactory that, once discovered, an error in respect of what is a crucial date in the procedure has not been corrected on affidavit. No detail has been provided as to the date upon which the Director gave directions that charges were to be preferred against the applicants.

38. It has been possible to reconstruct the chronology by reference to the legal submissions filed. It should be explained, however, that not all of these dates have been verified on affidavit.

10 June 2019	Incident giving rise to the alleged offences
20 February 2020	Complaint first made to An Garda Síochána
6 May 2020	Specialist interview with complainant
12 & 13 August 2020	Applicants arrested and interviewed
September 2020	Referrals to Juvenile Liaison Office
December 2020	Applicants deemed unsuitable for diversion programme
Late July 2021	Files submitted to Office of DPP
[…] August 2021	Second applicant's eighteenth birthday
[…] January 2022	Third applicant's eighteenth birthday
27 January 2022	Directions issued by Office of DPP
[…] March 2022	First applicant's eighteenth birthday
May 2022	Applicants charged
June 2022	First appearance before District Court

39. It is apparent from even the limited material which has been provided by the Director that there are several periods of culpable delay. First, there was a delay of some three months between the date of the complaint (20 February 2020) and the date of the specialist interview with the complainant (6 May 2020). The only hint of an explanation for this delay is a reference to there being forty-seven "*live referrals*". No further detail is provided in this regard. It is essential in cases of alleged sexual offences against children that the complainants should be interviewed promptly. In the absence of any adequate explanation being offered, a delay of three months in carrying out this step is unreasonable.

40. Second, there was a further delay of some three months before the applicants were interviewed. This delay is simply inexplicable. The identity of the alleged offenders would have been known to An Garda Síochána from the outset: the applicants were fellow students of the complainant and, as is apparent from the transcript of the specialist interview, she had been in a position to name each of her alleged assailants and to indicate their addresses. The particulars of the alleged offences were known in full to An Garda Síochána from 6 May 2020 when the specialist interview was carried out. An Garda Síochána would have also been aware of the ages of the applicants and the need for the criminal investigation to be carried out with reasonable expedition. The applicants should have been—but were not—interviewed as a matter of urgency.

41. Third, there is an unexplained delay of some three to four months in furnishing a file to the Juvenile Liaison Office. It is difficult to understand how it could have taken this length of time to complete the investigation file. The materials

consist largely of the specialised interview with the complainant and the cautioned interviews of the applicants. The latter statements run to approximately forty pages. There was no objective evidence, such as CCTV footage or forensic evidence, to be reviewed.

42. It appears, although this has not been verified on affidavit, that the files were submitted to the Office of the Director of Public Prosecutions on 26 July 2021 and that directions to charge were given on 27 January 2022. This is a critical period: had directions been given within, say, three months of the date of the request for directions, it would have been possible to charge at least two of the applicants within time to allow them to avail of a hearing under section 75 of the Children Act 2001. Again no proper explanation has been provided as to why it took some six months to give directions in respect of what appears to have been a succinct garda file. The paperwork cannot have been extensive. The principal evidence consists of the record of the interview with the complainant and the subsequent interviews with the five individuals who were ultimately charged. The time required to read and review this file in full would be measured in hours not days. There was a further delay of some four months between the date of direction and the date of the charges being brought. Again, no proper explanation has been provided for this further delay. The lapse of an overall period of ten months between the submission of the garda file and the bringing of charges is entirely unreasonable in circumstances where the accused persons were approaching their eighteenth birthdays.

43. For completeness, it should be recorded that, at a number of points throughout the statements of opposition, reference has been made to factors which supposedly delayed the criminal investigation. There is, for example, reference

to the restrictions introduced in response to the coronavirus pandemic. No attempt has been made to relate this generic concern to the circumstances of this specific criminal investigation. It is not suggested, for example, that An Garda Síochána had been required to delay interviewing the applicants because of public health restrictions. There is also vague reference to records having been sought from the Health Service Executive ("*HSE*") but no explanation is given as to the potential significance of these medical records nor the delay in seeking same. No medical records have been included in any of the books of evidence. There is also a vague reference to GDPR issues but again no attempt is made to relate this to the specific investigation. In the absence of any explanation of the practical implications of same, none of these various factors can be relied upon as justifying the delay.

44. Notwithstanding the undoubted sensitivity of this case, the lapse of three months two years between the date of complaint and the date of charge represents, in the absence of any proper explanation to the contrary, a failure to comply with the constitutional imperative of reasonable expedition in the investigation and prosecution of offences alleged to have been committed by children.

BALANCING EXERCISE: PREJUDICE ALLEGED BY APPLICANTS

45. 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

46. The principal prejudice alleged by the applicants is the loss of certain procedural entitlements under the Children Act 2001. The applicants argue that "*but for*" the prosecutorial delay, the charges against them would have been heard and determined in accordance with the Children Act 2001. The applicants point to a number of benefits which will now be denied to them, 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 applicants under separate sub-headings below.

47. 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).

48. 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 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.

49. 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 (*Director of Public Prosecutions v. […]*, unreported, Court of Appeal, 19 January 2024). 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.

50. 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 applicants, *qua* adults, that is in consequence of a deliberate legislative policy which considers that adults do not require such procedural protections. It is, therefore, not entirely accurate to

suggest that the applicants have "*lost*" a statutory benefit: the rights which they claim 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

51. 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."

52. The applicants in the present case cannot invoke these provisions in circumstances where they have already "*aged out*". The loss of the opportunity to assert this statutory right to anonymity represents a *potential* cause of prejudice to the applicants in the present case. Offences of the type with which they are charged, i.e. sexual assault and false imprisonment of a minor, are ones which attract public opprobrium. If the applicants were to be named in the print or broadcast media, this may well be harmful to their reputations even if they were to be acquitted. A future employer, for example, might be deterred from hiring the applicants. 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 their names.

53. 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 78 to 89 below.

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

54. 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.

55. 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 applicants in the present case are thus unable to avail of these provisions.

56. In the case of an adult accused, the District Court can only deal with an alleged offence of sexual assault by way of summary trial in circumstances where the

Director of Public Prosecutions has consented: section 12 of the Criminal Law (Rape) Act 1981. By contrast, had the applicants been charged while they were still under the age of eighteen years, the Director would have had no such veto. Moreover, the District Court, in deciding whether or not to deal with the matter summarily, would have been obliged to take account of the applicants' respective ages and levels of maturity.

57. The applicants submit that they have 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 they are now potentially exposed are far more severe: a person guilty of sexual assault upon a child is liable on conviction to imprisonment for a term not exceeding fourteen years and a person guilty of false imprisonment is liable for life imprisonment. These maxima are to be contrasted with the maximum custodial sentence which could have been imposed by the District Court, i.e. twelve months.

58. 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.

59. 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.

60. 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*.

61. 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, i.e. the sexual assault and the false imprisonment of a child, 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 young age of the complainant; (ii) the involvement of more than one alleged assailant; (iii) the public humiliation of the complainant: she describes feeling like a "*monkey in a cage*"; and (iv) the duration and seeming purpose of the alleged false imprisonment, i.e. to facilitate an ongoing sexual assault.

62. 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.

63. Different considerations might have pertained had any of the applicants 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 any of the individual applicants 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 these applicants from a typical fifteen year old.

64. Of course, it remains open to the applicants 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.

65. There was some discussion at the hearing before me as to the significance, if any, of the indication given by the local District Court judge that he would not have accepted jurisdiction. This issue arose as follows. The solicitor acting on behalf of the first applicant had made an application to the District Court on 8 July 2022 to have the proceedings dismissed on the grounds of delay. The District Court refused the application. The District Court judge is reported as having indicated that there was "*no prospect*" of the matter being dealt with in the District Court. The judge is further reported as having stated that he viewed the charges as very serious, referencing that the complainant had been a schoolgirl and that several parties are alleged to have been involved.

66. Counsel for the first applicant submitted that no weight should be attached to this indication, given that the question of the District Court accepting jurisdiction was moot in circumstances where the applicants were being charged as adults and the Director of Public Prosecutions did not consent to a summary trial.

67. The question of whether or not the District Court would have been entitled, in the particular circumstances of this case, to accept jurisdiction under section 75

is primarily a legal question. It is one which the High Court is entitled to assess objectively by reference to the materials which would have been before the District Court had there been, counterfactually, a section 75 hearing. There is no requirement that there be evidence as to what the attitude of the local judge of the District Court might have been.

68. There was also some discussion at the hearing before me as to the precise threshold which would have to be met by an applicant in order to establish that they had been materially prejudiced by the loss of the opportunity to avail of a section 75 hearing. Attention was drawn to the fact that whereas in certain judgments the High Court considered the question of whether the District Court would have accepted jurisdiction by reference to the balance of probabilities (*C.L. v. Director of Public Prosecutions* [2023] IEHC 331), a lower threshold, i.e. "*reasonable prospect*", appears to have been applied by the High Court in other cases (*Furlong v. Director of Public Prosecutions* [2021] IEHC 326 (at paragraph 84)). I am satisfied that the standard of proof is that pertaining to all civil proceedings, i.e. the balance of probabilities. In order to establish that they have suffered material prejudice as a result of the loss of the opportunity of a section 75 hearing, the applicants would have to establish on the balance of probabilities that the District Court is likely to have accepted jurisdiction. This threshold has not been met by the applicants in the present case.

69. 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.

70. 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

71. Each of the applicants submit 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."

72. 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.

73. 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 recently 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."

74. Counsel on behalf of the first applicant sought to suggest that there is a conflict in the case law of the Court of Appeal. Counsel cited the following passages from the judgment of Mahon J. in *Director of Public Prosecutions v. J.H.* [2017] IECA 206. Having referenced section 143 of the Children Act 2001, which mirrors the imperative under section 96(2) that a period of detention should be imposed only as a measure of last resort, Mahon J. stated as follows

(at paragraphs 13 to 15):

> "Section 143 is primarily designed to ensure that the detention of a child offender should be a sanction of last resort because such detention is likely to disrupt the child's normal development and education and thereby hamper the opportunity for the child to achieve adulthood in what might be described as normal circumstances. Undoubtedly also, there is the concern that places of detention facilitate children getting into bad company and paving the way towards criminality in adulthood.
>
> The same concerns will not however necessarily be present (if indeed present at all) in circumstances where a child offender is being sentenced as an adult. In such a case, a sentencing court is free to approach sentencing in a different and less constrained manner than if the offender was still a child. In such circumstances, the court is not concerned, in general terms, with the potential detrimental effect of a custodial sentence on the offender, at least to the same extent as it would in the case of a child.
>
> What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentencing court is required to access the offender's level of maturity at the time of the commission of the offence and to accordingly access his culpability as of that time."

75. With all due respect to counsel's submissions, there is no discrepancy between these two judgments of the Court of Appeal. Rather, the case law reflects the distinction between those sentencing principles which are unique to a convicted child and those which are also relevant to an adult who is to be sentenced in respect of offences committed while they were a child. In the case of the former, it is necessary to consider the impact which detention would have on the development of the child, their relationship with their family and their educational development. In the case of the latter, the fact that the offence was committed while a child will still be highly relevant. In the present case, in the event that any of the applicants were to be convicted—and it should be reiterated that they are presumed innocent—then the sentencing judge would

be required to have regard to their age and maturity at the time of the events of June 2019. In assessing maturity, the sentencing judge would be required to have regard to any educational, emotional or social difficulties suffered by that individual as a child which might have impaired their ability to appreciate the consequences of their actions.

(4). Mandatory Probation Report

76. 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

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

FINDINGS OF THE COURT ON BALANCING EXERCISE

78. 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 applicants, 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 allegations of sexual assault upon a child

are pursued by way of criminal prosecution. This public interest 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 applicants. If the applicants were to be named in the print or broadcast media, this may well be harmful to their reputations even if they 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 applicants' names.

79. 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. It should be explained that any anonymity enjoyed by the applicants under that Act is derivative, i.e. the only reason that the applicants 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). In the circumstances of the present case, however, it seems inevitable that the reporting restrictions would extend to a prohibition on the publication of the names of the accused. This is because of the context in which the alleged

offences occurred: the parties were all students at the same secondary school in a small rural town. The publication of the names of the accused is likely to lead to the identification of the complainant.

80. 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 applicants. Of course, it would be open to the complainant to exercise her statutory right under the Criminal Law (Rape) Act 1981 to waive anonymity. This would remove the derivative anonymity that the applicants might otherwise enjoy.

81. All of this raises the question as to whether a modified approach might be applied in this type of case. Ordinarily, the High Court is confronted with a binary choice in the case of non-sexual offences. The criminal prosecution is either prohibited in its entirety or proceeds without any reporting restrictions. It may be appropriate to adopt a *via media* (middle way) in the present case, whereby the potential prejudice to the adult-accused would be mitigated by the court ensuring that mandatory reporting restrictions apply.

82. There has been some discussion in the case law as to whether there might be a *statutory basis* for imposing reporting restrictions in respect of an "*aged out*" accused. The High Court (Twomey J.) in *A.B. v. Director of Public Prosecutions* [2019] IEHC 214 considered that section 93 might apply in the circumstances. This was doubted by the Court of Appeal in its decision in the same case: *A.B. v. Director of Public Prosecutions*, unreported, 21 January 2020. The very recent judgment of the Court of Appeal in *Director of Public Prosecutions v. […]*, unreported, 19 January 2024, confirms that section 93

cannot be applied once the accused person has reached the age of eighteen years.

83. In *M. MCD. v. Director of Public Prosecutions* [2016] IEHC 210, the High Court (Humphreys J.) suggested that section 45(1) of the Courts (Supplemental Provisions) Act 1961 might provide a statutory basis for imposing reporting restrictions. This was doubted by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, 21 January 2020, citing my own judgment in *L.E. v. Director of Public Prosecutions* [2019] IEHC 471.

84. The fact that there is no *statutory basis* for reporting restrictions which might be relied upon generally in respect of an "*aged out*" accused does not necessarily preclude the High Court, in the exercise of its judicial review jurisdiction, from imposing reporting restrictions in specific cases on an *ad hoc* basis. This is subject to the caveat that any such encroachment upon the fundamental constitutional value that justice should be administered in public would have to be proportionate. The High Court would appear to have jurisdiction, in an appropriate case, to impose reporting restrictions where necessary to vindicate the constitutional right to a trial with reasonable expedition. It would seem to follow, as a corollary of the High Court having jurisdiction to prohibit the criminal prosecution entirely, that it should have jurisdiction to take the *less drastic* step of imposing a modification to the form in which the trial takes place. The greater includes the lesser. The High Court is exercising its inherent jurisdiction to vindicate an accused person's constitutional right to a trial with reasonable expedition. This right is not unqualified: it must be balanced against other constitutional rights and values, including, relevantly, the public interest in the prosecution of serious criminal

offences. The High Court has ample powers to ensure that an apprehended breach of an accused person's right is vindicated. In most instances where, having carried out the requisite balancing exercise, it has been established that a breach has occurred, the appropriate remedy will be an order prohibiting the criminal prosecution. In the particular circumstances of the present case, the event giving rise to any potential breach can be fully remedied by taking the lesser step of imposing reporting restrictions.

85. Of course, the taking of such a step would only be justified where it does not involve a disproportionate interference with the principle that justice should be administered in public. In this regard, weight must be attached to the legislative context and the nature of the reporting restrictions, if any, provided for under statute. See *Gilchrist v. Sunday Newspapers Ltd* [2017] IESC 18, [2017] 2 I.R. 284 (at paragraph 41):

> "[…] Where the Oireachtas has not seen fit to legislate for the possibility of a hearing *in camera*, then the court should only exercise an inherent jurisdiction to depart from a full hearing in public where it is shown that the interests involved are particularly important, and the necessity is truly compelling."

86. It might be thought that to allow an adult-accused the benefit of reporting restrictions would cut against the legislative policy underlying section 93 of the Children Act 2001. As against this, it is more disruptive to the legislative policy to prevent there being any criminal prosecution at all. Moreover, there is other relevant legislation which allows for reporting restrictions in this type of case, namely, the Criminal Law (Rape) Act 1981.

87. Having regard to the very particular circumstances of the present case, the proper balance between the competing constitutional values is struck by directing that the criminal prosecution may proceed subject to reporting

restrictions. The effect of the blameworthy prosecutorial delay is that the applicants have lost the opportunity, which they 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.

88. 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. It is correct to say that one consequence of the High Court directing that *ad hoc* reporting restrictions apply will be that the complainant will lose her statutory right to waive anonymity. This is a lesser loss than that which would otherwise arise were the High Court to make an order prohibiting the criminal prosecution outright.

89. 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.

SHOULD CIRCUIT COURT'S SENTENCING POWERS BE LIMITED?

90. The first applicant has, in his amended statement of grounds, sought an order which would confine the Circuit Court's sentencing powers. More specifically, it is sought to restrict any sentence by reference to the limits which would apply to the District Court. The Circuit Court would, in effect, be confined to imposing a maximum term of imprisonment of twelve months. Counsel cites,

by analogy, the judgment of the High Court (Hogan J.) in *B.G. v. Judge Murphy* [2011] IEHC 445, [2011] 3 I.R. 748.

91. An argument in similar terms has been rejected by the High Court (Mulcahy J.) in *C.L. v. Director of Public Prosecutions* [2023] IEHC 331 (at paragraphs 53 to 58). I respectfully agree with that analysis. The facts of *B.G. v. Judge Murphy* were exceptional and are entirely distinguishable. The key distinction being that the High Court had made a finding that the relevant legislation violated the constitutional command of equality before the law as required by Article 40.1 of the Constitution of Ireland. The passages of that judgment which the first applicant seeks to call in aid are ones which are directed to the legal consequences of this finding of unconstitutionality. The High Court ultimately determined that rather than invalidation of the relevant portion of the statute in question, the appropriate remedy was the making of a declaration regarding its scope of application. This was the context in which the High Court made a declaration which had the effect of confining the Circuit Court to imposing a maximum sentence equivalent to that which would have been available to the District Court.

92. None of the applicants in the present case has sought to challenge the constitutional validity of any of the provisions of the Children Act 2001. It follows that the discussion of remedies flowing from a finding of unconstitutionality has no application.

93. It is a moot point as to whether, in an appropriate case, the High Court might be persuaded that the loss of the opportunity to rely on the provisions of section 75 of the Children Act 2001 was sufficiently prejudicial as to call for some intervention but not so prejudicial as to justify the outright prohibition of

the criminal prosecution. The High Court might, in principle, determine that a step short of outright prohibition would be proportionate and might fashion an *ad hoc* remedy which would limit the Circuit Court's sentencing jurisdiction. This issue simply does not arise for consideration in the circumstances of the present case. This is because the particulars of the alleged offences are such that it would be inappropriate, *at this stage of the proceedings*, to make a definitive finding that they are properly characterised as minor offences suitable for summary disposal. This is not a case, therefore, where the High Court would be justified in confining the sentencing powers of the Circuit Court to those which would have been available had the matter been tried summarily before the District Court.

94. It should be reiterated 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. It should also be reiterated that the applicants enjoy the presumption of innocence. This judgment says no more than that, at this remove and on the basis of the limited materials before this court, it cannot be said that it would involve a constitutional unfairness for the normal sentencing jurisdiction of the Circuit Court to apply, in principle, to the criminal prosecution.

ARTICLE 42A OF THE CONSTITUTION OF IRELAND

95. Counsel on behalf of the second applicant has placed some emphasis on Article 42A of the Constitution of Ireland. Article 42A.1 reads as follows:

> "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

96. These rights are, self-evidently, important rights, and ones to which this court must, and does, have careful regard.

97. It should be noted, however, that Article 42A envisages that effect will be given to these constitutional rights by way of legislation. (See, by analogy, *In the matter of JB (A minor)* [2018] IESC 30, [2019] 1 I.R. 270). The Oireachtas has put in place legislation, i.e. the Children Act 2001, which recognises the special needs of children and seeks to adapt the criminal law accordingly. It is a feature of this legislation that the qualifying criterion for many of the important procedural protections is the age of the accused as of the date of the trial of the offences (as opposed to his or her age as of the date when the alleged offences are said to have occurred). The legislation does not extend all of these protections into adulthood. The applicants are no longer children, and, as such, have no statutory right to most of these protections. No challenge has been made to the validity of the legislation.

98. It must also be open to question whether the imperative, under Article 42A.4, that "*the best interests of the child shall be the paramount consideration*", is applicable to criminal proceedings. The structure of Article 42A.4 indicates that it is directed to proceedings for the "*safety and welfare*" of a child, or for the adoption, guardianship or custody of, or access to, a child. The constitutional issues engaged by the prosecution of criminal offences require some consideration of the rights of the victims of crime and of the public interest in the prosecution of criminal offences. This balance is properly struck by section 96(5) of the Children Act 2001 as follows:

> "When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

99. In summary, whereas there is a constitutional dimension to the carrying out of the balancing exercise, this is inherent in the *Donoghue* test and no further adjustment is required. (The judgment in *Donoghue v. Director of Public Prosecutions* had been decided shortly before the introduction of Article 42A by way of constitutional referendum in 2015).

SEX OFFENDERS ACT 2001 (AS AMENDED)

100. For completeness, it should be noted that the objection made by some of the applicants by reference to the Sex Offenders Act 2001 is misplaced. The objection appears to overlook the very recent amendments introduced to that Act 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.

ORDER 84 TIME-LIMIT

101. The Director has raised the objection that the third applicant's proceedings were instituted outside the three month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts.

102. There has been some debate in the case law as to whether the time-limit should be calculated (i) from the date of the return for trial, or (ii) from the later date of the formal service of an indictment. The Supreme Court judgment in *C.C. v. Ireland* [2006] 4 I.R. 1 indicates that the time-limit runs from the date of the

indictment.

103. The correctness of the approach adopted in *C.C. v. Ireland* has, however, since been queried by the judgment of the High Court (Kearns P.) in *Coton v. Director of Public Prosecutions* [2015] IEHC 302. Kearns P. suggested that the time-limit issue was not fully argued in *C.C.* In particular, it was suggested that the Supreme Court had not considered the fact that, in practice, an indictment may not be served until the morning of the criminal trial. If followed through to its logical conclusion, fixing the time by reference to the date of the indictment could have the result that applications to restrain a criminal prosecution could take place on the eve of the trial.

104. The Supreme Court judgment is binding on the High Court and, accordingly, the proceedings have been brought within time.

CONCLUSION AND PROPOSED FORM OF ORDER

105. There has been blameworthy prosecutorial delay in the investigation and prosecution of the offences alleged against the applicants. In the absence of any proper explanation for same, the lapse of a period of two years and three 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.

106. 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.

107. Here, the only prejudice which has been established by the applicants 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 applicants 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. 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.

108. Accordingly, 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, address or former school of the complainant or of any of the five accused in the criminal proceedings, or (ii) includes any particulars likely to lead to the identification of any 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.

109. These reporting restrictions extend to the three 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 applicants. It is not permissible, for example, to identify the school or even the town in which the alleged offences

are said to have occurred.

110. As to legal costs, my *provisional* view is that the applicants, in securing an order for reporting restrictions, have been partially successful in the proceedings and should be allowed to recover at least part of their legal costs as against the Director of Public Prosecutions. I will list the matter for submissions on the final form of the order and on costs on Thursday 14 March 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

Michael Delaney SC and Amy Deane for the first applicant instructed by David Burke & Co., Solicitors
Philip Sheahan SC and Conor Roberts for the second applicant instructed by J.F. Williams & Co., Solicitors
Dermot Cahill SC and Gareth Hayden for the third applicant instructed by J.F. Williams & Co., Solicitors
Feichín McDonagh SC and Gráinne O'Neill for the respondent instructed by the Chief Prosecution Solicitor