THE HIGH COURT

[2017 No. 96/S.S.]

IN THE MATTER OF SECTION 52(1) OF THE COURTS

(SUPPLMENTAL PROVISIONS) ACT 1961

BETWEEN

CLODAGH FORDE

APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of October, 2017

1. This is a consultative case stated by Judge John O'Connor, a Judge of the District Court, sitting as the Children Court, pursuant to s. 71 of the Children Act, 2001, ("the 2001 Act") at the request of the appellant, Clodagh Forde, pursuant to s. 52(1) of the Court's (Supplemental Provisions) Act 1961.

2. The background as set out by the learned District Judge is as follows:

> "1. In the present case, Clodagh Forde with a date of birth of 18th of April 1998 was charged by Garda Kieran McCabe on Bridewell Charge Sheet 17316629 on the 16th of December 2016 with the following offence, that on the 2/07/2015 at Capel Street, Dublin 1 in the said district, she did assault one Tatiana Petruskova with intent to commit an indictable offence robbery, contrary to Section 18 of the Criminal Justice (Public Order) Act, 1994 as amended by Section 22 of the Intoxicating Liquor Act 2008.
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> 2. As a result of the 17 and a half month delay in charging Clodagh Forde, she has now turned 18. She wishes to make submissions under Section 75(1) to seek to have the Children's Court deal summarily with the indictable offence with which she has been charged.
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> 3. Section 75(1), (2), (3) and (4) of the Children Act, 2001 state the following:
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> *(1) Subject to subsection (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, 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.*
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> *(2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—*
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> *(a) the age and level of maturity of the child concerned, and*
>
> *(b) any other facts that it considers relevant.*
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> *(3) The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.*
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> *(4) In deciding whether or not to consent under subsection (3) a child may obtain—*
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> *(a) the assistance of his or her parent or guardian or, if the child is married to an adult, his or her spouse, or*
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> *(b) where the parent or guardian or adult spouse of the child does not for any reason attend the relevant proceedings, the assistance of any adult relative of the child or other adult who is accompanying the child at the proceedings.*
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> 4. On the 10th January, 2017 the Children's Court was asked to consider the following question,
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> Where Section 75(1) of the Children Act 2001 refers to "a child charged" with an indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, does that also include a child who was under 18 at the time of the date of the alleged offence but over 18 at the time of the actual charging of the alleged offence.
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> 5. The Children's Court made a determination that, where section 75(1) of the Children Act 2001 refers to "a child charged" with an indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, it means the date on which the child is actually charged.
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> 6. Clodagh Forde wishes to appeal this determination of the Children's Court by way of case stated to the High Court refer the following question of law,
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> Where section 75(1) of the Children Act 2001 refers to "a child charged" with an indictable offence, other than an offence which is required to be tried by the Central Criminal on manslaughter, does that also include a child who was under 18 at the time of the date of the alleged offence but over 18 at the time of the actual charging of the alleged offence.
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> 7. The opinion of the High Court is therefore sought on the following question:
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> On the facts of this as agreed, section 75(1) of the Children Act 2001 refers to "a child charged" with an indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, does that also

include a child who was under 18 at the time of the date of the alleged offence but over 18 at the time of the actual charging of the alleged offence, and was I correct in determining that it means the date on which the child was actually charged."

The appellant's submissions

3. The appellant's primary contention is that in order to benefit from the provisions of the 2001 Act, it is sufficient that the person before the Children's Court was a child at the time of the commission of the alleged offence. It is submitted that for the 2001 Act to be properly construed, it must be read to cover persons who appear in the Children's Court when over the age of 18 years in circumstances where they were under the age of 18 at the time of the commission of the alleged offence which, counsel submits, is the critical time for the purposes of the interpretation of the 2001 Act. Counsel contends that this is the interpretation most consistent with the intention of the Oireachtas, and with the provisions of Article 42A of the Constitution.

4. It is further urged that the existing custom and practice of the Children's Court supports the appellant's interpretation. District Judge O'Connor takes the view that if a child has attained the age of 18 years at the time of the s. 75 submissions, that will not preclude the person from the benefit of the 2001 Act, provided the person was a child at the time of the commission of the offence and a child at the time of charging.

5. It is thus submitted that it is the practice in the Children's Court that if a person turns eighteen before the question of s. 75 submissions has been dealt with, that the court will allow such persons to avail of s. 75. Counsel asserts that the construction being contended for by the appellant, namely that being a child at the time of charging is not a necessary requirement for the appellant to receive the benefits of the 2001 Act, and that it is sufficient if the appellant was a child at the time of the commission of the alleged offence, represents no more than the logical extension of the existing custom and practice in the Children's Court.

6. As the appellant understands it, the respondent's position is that the correct measuring date for the purposes of s. 75 submissions is the date on which the s. 75 hearing takes place and that it is not sufficient for the purposes of securing the benefit provided for in s. 75 that the person would have been under 18 years at the time of charging. Counsel for the appellant thus submits that the respondent's interpretation of s.75, which is that in order to get the benefit of the 2001 Act, a person has to be under 18 years of age at the time of the s. 75 submissions as well as at the time of charging, cannot be reconciled with the current practice and procedure of the Children's Court. Accordingly, the respondent's interpretation of s. 75 is at odds with the existing custom and practice in the Children's Court.

7. It is not the appellant's contention that the District Judge must keep the case in the Children's Court, rather, the appellant contends that it is the legal position, on the appellant's interpretation of the 2001 Act, that it is open to the District Judge to entertain a submission to keep the appellant's case in the Children's Court.

8. Accordingly, the appellant's argument is that it is the time of the offence that is the immutable issue, whereas the time of charging and the s. 75 hearing are subject to variables. It is thus argued that the variables which pertain as to when a person may be charged with an offence, or come before the court for a s. 75 hearing, should not be the grounding principle by which to determine whether a person is a child for the purposes of the 2001 Act.

9. While there may be a case to be made for the District Judge's contention, and for the respondent's position, the correct/preferred view, counsel submits, is that the date of the commission of the alleged offence is the relevant date. This, counsel contends, is supported by a purposeful reading of s. 75, particularly if the 2001 Act is infused with the provisions of Article 42A of the Constitution.

10. It is submitted that the appellant's position is also supported by the contents of the long title to the Act which provides as follows:

> "An act to make further provision is relation to the care, protection and control of children…".

11. Counsel also contends that it is well established in law that a person who is convicted of an offence which occurred many years prior to conviction can only be subjected to the sentence in being at the time the offence was committed. By analogy with this principle, it would require clear and compelling language to oust the purpose of the 2001 Act and to hold that for the purpose of s. 75, a person before the Children's Court could not rely on the date of the commission of the alleged offence as the relevant temporal rate for the purposes of securing the benefit provided by s. 75.

12. Furthermore, the respondent's contention that the person has to be under the age of 18 years at the time of the s. 75 hearing is arbitrary and unfair particularly in circumstances where the person may have been under 18 at the time of charging and where the Children's Court has taken seisin of the matter over a number of remands.

13. It is also the appellant's contention that none of the references to "child" in subsections 2, 3, 4 or 5 of s. 75 designate a temporal question. Therefore, it is artificial for the respondent to say that a person has to be a child at the time of the s. 75 hearing.

The respondent's submissions

14. The issue which was raised by the appellant in the Children's Court, and in respect of which she wishes to appeal by way of case stated, is whether the reference to "a child charged" in s. 75(1) includes a child who is under eighteen at the time of the alleged offence but over eighteen at the time of the actual charging. The District Judge ruled adverse to the applicant. It is submitted that if the Court concurs with the determination of the District Judge, then the answer to the first question raised in the consultative case stated (which should be answered in the negative, counsel submits) is dispositive of the within matter.

15. As to the second question raised in the case stated, namely whether the relevant date for the purposes of s. 75 is the date the appellant was actually charged with the alleged offence, it is the respondent's contention that the relevant date for the purposes of s. 75 is the date that the person is before the Children's Court for the purpose of the s. 75 hearing. It is contended that this must be the accepted interpretation of s. 75 on the basis of the approach taken by the courts to date vis-à-vis the operation of the 2001 Act.

16. In aid of her contention that it is axiomatic that the rationale which underpinned the decisions in the relevant case law centred on protections which the 2001 Act affords to persons who are under 18 years of age, counsel for the respondent cites *Donoghue v. DPP* [2014] 2 I.R. 762, *Daly v. DPP* [2015] IEHC 405, *G. v. DPP* [2014] IEHC 33 and *Allen v. Governor of St. Patrick's Institution* [2012] IEHC

17. It is submitted that on any construction of s. 75, the applicant cannot benefit from its protections since she was over 18 years of age both when charged and when before the Children's Court for the purposes of the s. 75 hearing. Counsel thus submits that the answer to both of the questions posed in the consultative case stated must be answered in the negative, given the approach adopted to date by the courts, and given that the literal or plain interpretation of s. 75 bears out the respondent's submission that a person seeking to avail of a hearing as to whether the matter should be dealt with summarily must be under 18 years of age.

Considerations

18. In this case the District Judge determined that the appellant was over the age of 18 when she was charged and was therefore not entitled to the benefits provided for in s. 75 of the Act of 2001.

19. The appellant's principal argument is that the use of the word "charged" in s. 75 does not indicate a legislative intention that the relevant temporal date is the date of charging, but rather that the use of the word "charged" is shorthand for the situation of a person who commits offence as a child and who is later charged with an indictable offence. Accordingly, it is the appellant's contention is that the term "a child charged" in s. 75 does not purport to be prescriptive of the eligibility of the person to benefit from the provisions of s. 75.

20. This submission is urged upon the Court for the following reasons:

> (i) The 2001 Act when read as a whole indicates a parliamentary intention that young persons who were underage at the time of committing offences should be covered by the legislation;
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> (ii) The 2001 Act should be read in light of the Constitution, and in particular Art. 42A.
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> (iii) The interpretation Act 2005 cautions against interpreting legislation in a manner that would give rise to an absurdity;
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> (iv) The respondent's interpretation of s.75(1) ignores the fact the scheme of the Act is to treat more favourably the indiscretions of youth and that it was intended that persons who commit offences at young age should be dealt with in a more lenient fashion than their adult counterparts;
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> (v) The respondent's interpretation is inconsistent with the existing custom and practice in the Children's Court;
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> (vi) The respondent's interpretation would give rise to arbitrary, unfair and uneven results; and
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> (vii) The normal canons of statutory interpretation indicate the appellant's construction of the section should be preferred.

21. The respondent's principal contention is that the reference to "a child charged" in s. 75 covers a person who is a child at the time of the alleged offence and who remains a child at the time of the s. 75 hearing.

22. In the course of his submissions, counsel for the appellant conceded that, broadly speaking, some case law, as relied on by the respondent in these proceedings, may be said to support the respondent's contention as to how s. 75(1) is to be construed. He contends, however, that all of the jurisprudence relied on by the respondent is premised on the basis that once a person reaches the age of 18 years, they lose the benefit of the 2001 Act. The argument which the appellant advances is that none of the case law relied on by the respondent considered the underlying premise, which is that the 2001 Act must be read to allow the statutory protections afforded by the Act to enure to the benefit of those over the age of 18 years who committed offences while under the age of 18 years.

23. The respondent's answer to what is posited by the appellant is that the reason the issue raised by the appellant not been litigated in the courts is that, to date, all sides in the jurisprudence which arises from the 2001 Act have operated on the premise that, save in specific instances which are clearly spelled out in the Act, the provisions of the 2001 Act apply until a person reaches the age of 18 years, which the respondent submits is the correct position.

24. It is necessary therefore to consider the relevant jurisprudence.

The Court was referred to the decision of the Supreme Court in *Donoghue v. DPP*. The applicant was 16 years of age when a quantity of heroin was found at his home and he admitted responsibility for it. One year and four months later he was charged with an offence under s. 15 of the Misuse of Drugs Act 1977. The delay in charging the applicant meant that there was no prospect of his being tried before his 18th birthday and that as a result, he would be tried as an adult. In the High Court, Birmingham J. granted an order restraining the trial, finding that there had been significant prosecutorial delay and that there was a particular and special duty on State authorities to provide a speedy trial for a child. He noted that, if the trial had come before the court when it ought to have done, the applicant would have benefitted from ss. 93, 96 and 99 of the 2001 Act and that the prospect of the applicant being tried in the District Court would have been significantly better.

25. In the course of her judgment for the Supreme Court in *Donoghue*, Dunne J. summarised the approach adopted by Birmingham J., as follows:

> *"[16] Birmingham J. noted that had the case come before the court when it ought to have done that Mr. Donoghue would have benefited from the provisions of s. 93 of the Act, as substituted by s. 139 of the Criminal Justice Act 2006, which provides for anonymity in respect of a child defendant. The trial judge was of the view that that section was particularly significant when considered in combination with the provisions of s. 258 of the Act allowing for convictions to be spent after three years in certain circumstances. As Birmingham J. observed:-*
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> > *"The ability to expunge the record of conviction is particularly valuable if the original conviction did not and could not receive publicity."*
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> *In addition, had the case come to court when Mr. Donoghue was still a child, he would have been entitled to the benefit of s. 96 of the Children Act 2001 which provides that a sentence of detention should be imposed only as a measure of last resort. He would also have had the benefit of s. 99 of the Act which mandates the obtaining of a probation report where a court is of opinion that the appropriate sanction is detention.*

[17] Birmingham J. also referred to s. 75 of the Act which relates to the determination of the jurisdiction of the court to deal summarily with indictable offences and in particular to the provisions of s. 75(2) which states:-

> *"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."*

Birmingham J. pointed out that had such a hearing taken place in 2010, the presiding judge would have had to decide whether to deal summarily with a 16 year old or send that child forward for trial to the Circuit Criminal Court. When the issue of jurisdiction was finally dealt with by Judge Smyth on the 17th January, 2012, Mr. Donoghue was within ten weeks or so of his 18th birthday. On that basis the trial judge concluded that the case was not likely to have been concluded before Mr. Donoghue attained his majority. Birmingham J. concluded that the prospects of Mr. Donoghue staying in the District Court would have been significantly better had the case come before the court in 2010. Thus he concluded that there had been unacceptable delay in the case giving rise to serious consequences and on that basis an injunction was granted restraining the DPP from proceeding with the trial."

26. The learned Judge went on to state at para. 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."*

27. I am satisfied that the rationale underpinning the approach of the Supreme Court in *Donoghue* was that the protections provided for in 2001 Act apply until the age of eighteen years.

28. In *Daly v. DPP*, the applicant sought an injunction restraining the DPP from prosecuting him on the grounds that there was blameworthy prosecutorial delay such that he lost the benefit of being tried as a minor. In that case, the submissions made on behalf of the applicant to the High Court was that the loss of the applicant's entitlement to rely upon s. 75 of the 2001 Act was a factor which merited prohibition of his trial and that the alleged delay disqualified him from the provisions of s. 75. It was argued that the delay disqualified the applicant from potential that the District Judge sitting in the Children's Court would have accepted jurisdiction in the particular circumstances of the case. Kearns P. did not grant the relief sought in that case. In the course of his consideration of the matter, the learned Judge stated.

> *"The applicant has placed considerable reliance on the loss of his ability to rely on the provisions of s75 of the Children's Act. The Court accepts the argument advanced on behalf of the respondent that even if the garda investigation had been completed sooner, for example within three months of the date of commission, given the requirement to send the file to the Youth Diversion Office and the office of the D.P.P., it is highly unlikely that a s.75 hearing and the sentencing of the applicant would have been completed by the time he was 18. In considering this aspect of the case, the Court has also had regard to the finding of the Supreme Court in Donoghue that "someone close to the age of eighteen 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".*

29. It seems to me that there in no suggestion in the decision of Kearns P. otherwise than what was in issue in Daly was the alleged loss of a benefit which would have been available to the applicant qua his status as a child had matters been progressed with more dispatch.

30. In *Daly*, Kearns P. referred to *G. v. DPP*, a decision of O'Malley J. In *G.*, the applicant sought to restrain the continuation of a prosecution against him relating to two charges of serious sexual offences against a very young girl. The offences were alleged to have been committed just before the applicant's sixteenth birthday. He was not charged until he was almost twenty years of age. The argument canvassed on behalf of the applicant, before O'Malley J., was that the applicant, through no fault of his own, was charged as an adult and thereby lost the benefit of various provisions of the 2001 Act for the protection of young offenders. Particular reliance was placed on the regime under the 2001 Act whereby the anonymity of an accused child is safeguarded at all times and that where a child is convicted, he or she would be detained only as a measure of last resort. Reliance was placed on those provisions in the Act which provided that if a child is certified as a sex offender the resulting restrictions will endure for only half the period applicable to an adult offender.

31. In the course of her judgment, O'Malley J. made reference to the protections afforded by the 2001 Act to a "*person under the age of eighteen*" who "*is in law a child*". She had regard, *inter alia*, to a number of protections under the Act which were lost to the applicant by reason of the prosecutorial delay, most particularly those afforded by ss. 93 and 96. She made reference, *inter alia*, to the salient features in the case which merited an order of prohibition, most particularly the loss of the right to anonymity, the mandatory ordering of a prohibition report and the provision in the 2001 Act that detention should be considered as a measure of last resort, all of which were acknowledged by O'Malley J. as "*matters of real significance*". She went on to state at para. 68:

> *"Even allowing fully for the accepted position that a sentencing judge in a case of this sort would approach the task of sentence with particular care, having full regard to the age of the accused at the time of the offence, the fact was that a different statutory regime would apply."*

32. O'Malley J. granted prohibition of the trial, finding that *"the most important provision of the Children Act, now unavailable to the applicant, is the right to anonymity. This is not something that is within the gift of a sentencing judge but would, in the event of conviction, depend on an assessment of the likelihood of identification of the injured party. The applicant is not related to the complainant. There is therefore a real risk that he will lose a protection that the Oireachtas intended him to have."*(at para. 108)

33. In *Allen v. The Governor of St. Patricks Institution*, Finlay Geoghegan J. was satisfied to grant the release of the applicant pursuant to Article 40.4.2 of the Constitution upon finding his detention unlawful by reason of the fact that his sentencing, which took place two days short of the applicant's 18th birthday, had been conducted without the applicant having the benefit of a probation report, as provided for in the 2001 Act.

34. Having regard to the aforesaid jurisprudence, I am satisfied that if the Court were to adopt the arguments posited by the appellant, it would be counter to the interpretation afforded to date to the provisions of the 2001 Act. It is clear that the courts have operated on the basis that the provisions of the 2001 Act, such as ss. 75, 93 and 96, operate as protections for persons who are under the age of 18 years.

35. In aid of his argument that the correct measuring date for the assessment of the applicability of a criminal statute is the date of the commission of the alleged offence, counsel for the appellant cited the *People (DPP) v. Geraghty* [2014] IECA 2. In *People (DPP) v. Geraghty,* Finlay Geoghegan J. opined as follows as to how penalties which prescribe criminal conduct must be enacted:

> *"14. The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto.*
>
> *15. This principle finds expression in a variety of different ways within the criminal justice system. Article 15.5.1 of the Constitution expressly prohibits the creation of retroactive criminal offences. Laws which create criminal offences which are vague and uncertain have been held to be unconstitutional on the ground that they contravene a number of constitutional provisions, including the guarantee of trial in due course of law in Article 38.1: see, e.g., King v. Attorney General [1981] I.R 233, Dokie v. Director of Public Prosecutions [2011] IEHC 110, [2011] 1 I.R. 805, Douglas v. Director of Public Prosecutions [2013] IEHC 343, [2013] 2 I.L.R.M. 324 and McInerney v. Director of Public Prosecutions [2014] IEHC 181. There is, moreover, a strong presumption against either the creation of criminal offences or the extension of criminal liability through the use of lax or oblique language: see, e.g., Director of Public Prosecutions v. Flanagan [1979] I.R. 265, 281, per Henchy J. and The People (Director of Public Prosecutions) v. Cagney [2008] 2 I.R. 111, 120-121, per Hardiman J."*

36. I am satisfied that there is nothing in the decision of the learned Judge which would impel this Court to depart from adopting the rationale which underpins the approach of the courts to date to the 2001 Act, namely that it has been enacted clearly and unambiguously to afford protections, *inter alia*, in the course of criminal proceedings, to child offenders, as "child" has been defined in the Act. Accordingly, I have no apprehension that the provisions of s. 75 contain any lax or oblique language such as might give weight to the arguments canvassed on behalf of the appellant.

37. I am further satisfied that the jurisprudence on the 2001 Act, to which I have referred above, is not inconsistent with the provisions of s. 75 itself, irrespective of whatever canon of construction is utilised to ascertain its meaning.

38. Counsel for the appellant advocates a purposive approach to the construction of s. 75(1). However, I am satisfied however that the lengths to which a purposive approach can be employed is constrained by s. 3 of the 2001 Act, which, for the purpose of the Act, defines "child" as a person under 18 years of age.

39. Reliance is placed on Article 42A of the Constitution which provides, *inter alia*, that "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". While counsel for the appellant urges the Court to bear in mind Article 42A when construing s. 75(1), it is not being alleged that the provisions of s.75 are unconstitutional, by virtue of the provisions of Article 42A.

40. Counsel for the respondent contends that the reference to "a child charged" and "a child" in s. 75 must be construed literally, and that in so doing this raises no absurd or unfair result. It is submitted that s.75(1) must be afforded its plain meaning in the context of how a child is defined in s. 3 of the 2001 Act, namely "a child means a person under the age of eighteen years". It is argued that an interpretation of s. 75 so as to apply it to adults who offended as children is not supported by the plain and literal meaning of the section. Counsel argues that had that been the legislative intention it would have been specially provided for in s. 75.

41. In the course of her submissions, counsel acknowledged that while there may be some ambiguity in s. 75(1) of the 2001Act, by the reference to "a child charged", as to whether that term is meant to read that it is sufficient for a s. 75(1) hearing that a person was a child when charged, any perceived ambiguity is dispelled when one looks at the provisions of s. 75(2), (3), and (4). Upon a consideration of the relevant subsections, I agree with the respondent's contention in this regard.

42. Section 75(2) refers to the Children's Court, when exercising discretion under s. 75(1), taking account of "the age and level of maturity of the child concerned". I am satisfied this must be interpreted to mean that the person is a child both at the date of charging and at the date of the s. 75 hearing. Equally, s. 75(3) provides for the child being put on his or her election. Again, this must be taken to mean that at the date of election (which is subsequent to the date of charge), the person is still a child. Section 75(4) provides for the child obtaining assistance from an adult when electing. Again, given the reference to assistance from an adult, it is abundantly clear that the reference is to a child. To my mind, a reading of ss.75(2), (3) and(4) does not brook of any definition save that the reference to "child" in all of those subsections is to a "child" as defined in s. 3 of the 2001 Act. Thus, all of these subsections, insofar as they refer to "child" must, in my view, inform how s. 75(1) is to be construed, namely that in order for the Children's Court to entertain an application to deal summarily with "a child charged with an indictable offence…", the person must be a child at the time of charging and at the s.75 hearing. I am satisfied that "a child charged", as set out in s. 75, means a person who is currently charged with an offence and who is at the time in question (the s. 75 hearing) under the age of eighteen. No caveat has been added that the benefit of s. 75 continues for a person over 18 years on the basis that they were a child when the alleged offences were committed.

43. I note that in his book, Juvenile Justice (2005: Thomson Round Hall), Dermot Walsh observes as follows:

> "The provisions of the 1908 Act and the 2001 Act for determining the age of a child brought before the court do not necessarily determine the time at which the age of the child is relevant. They merely state that the court shall make due

> enquiry as to the age of a person who appears to be a child and who has been brought before the court charged with a criminal offence…Certainly if there were an issue of capacity of the child to commit the offence, it is submitted that the court would have to concern itself with the age of the child at the time the offence was committed. If the issue were the appropriate mode of trial or punishment, then the appropriate time would presumably be the point at which the child was brought before the court."

44. Subsequent jurisprudence on the 2001 Act, as referred to in this judgment, would appear to bear out the view expressed in the latter part of the extract cited above.

45. While finding as I have as to what is the plain meaning of s. 75(1), I accept entirely that it may well be the custom and practice of the Children's Court to afford the benefit of s. 75(1) to persons over 18 years of age once they were under 18 years at the time of charge. However, I am satisfied that the 2001 Act does not require that to be the case.

46. The case was also made by the appellant that s. 71(3) of the 2001 Act gives credence to the appellant's contention as to how s. 75(1) is to be read. Section 71(3) provides:

> "Where—
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> (a) in the course of any proceedings before the Court it appears to it that the person charged or to whom the proceedings relate is 18 years of age or upwards, or
>
> (b) in the course of any proceedings before the District Court sitting otherwise than as the Children Court it appears to the District Court that the person charged or to whom the proceedings relate is under the age of 18 years,
>
> nothing in this section shall be construed as preventing the Court or the District Court, as the case may be, if it thinks it undesirable to adjourn the case, from proceeding to hear and determine it."

47. Counsel for the appellant contends that what is provided for in s. 71(3) is what the appellant contends for in this case, namely, that the Children's Court may continue to have jurisdiction in respect of a person who has attained the age of 18. It is thus submitted that when looking at the purpose and policy of the 2001 Act, it seems clear that s. 75(1) must be interpreted in a manner as to avail a person in the position of the appellant.

48. As regards the appellant's reliance on s. 71(3) as support for the proposition that the provisions of s. 75(1) must be read as applying to the appellant who was over 18 years of age at the time she was charged and appeared at a s. 75 hearing, I do not find that the provisions of s. 71(3) negate in any way the clear meaning of s. 75(1), as found by this Court. It seems to me that what is provided for in s. 71(3)(a) is a mechanism to allow the District Judge in the Children Court, if he or she thinks it undesirable to adjourn the case, to continue to retain seisin of a case, when a child offender before the Children Court, colloquially speaking, "ages out" in the course of any proceedings then ongoing before the Children Court.

49. Furthermore, insofar as the Legislature has made provision for the benefits of the 2001 Act to be available to persons over the age of 18 years, it has been in done in clear terms. This is evident, for example, in the language used in s. 258 of the 2001 Act which makes provision for a conviction in the Children's Court to be deemed spent after a period of three years where, *inter alia*, "the offence was committed before the person attained the age of 18 years".

50. Counsel for the respondent argued that how s. 75 is to be construed, namely that its benefits apply to a person under 18 years of age, is also borne out by reference to other provisions of the 2001 Act. The following were relied on.

51. Section 88 of the 2001 Act mandates the Children's Court to remand a "child" to a designated remand centre, if a child is to be remanded in custody. Section 93 makes specific provision for anonymity in respect of a child offender. Section 96(2) mandates the Children's Court to consider every available option before, as a last resort, proposing a sentence of imprisonment on a "child".

52. Furthermore, the various orders which the Children's Court may make (as set out in ss. 98, 99 and 100 of the 2001 Act) consequent upon a finding of guilt, are premised on a person being a "child". There is further specific provision made in ss. 108 and 110 in respect of the extent to which fines may be imposed on a "child" and the consequences for a "child" who defaults in the payment of a fine. Equally, the limits imposed on the Children's Court as to when it can make a detention order are defined in the 2001 Act by reference to the person being a "child".

53. As can be seen from the case law referred to in this judgment, the courts have had occasion to consider some of these provisions and they have invariably been found as benefitting a "child", as defined in s. 3 of the 2001 Act.

54. When viewed against the aforesaid provisions, the protection inherent in s. 75, whereby "a child charged" with an indictable offence may make submissions that the matter should be dealt with summarily, is, in my view, part of the myriad protections which are available to a "child" at the various stages of the criminal process in the Children's Court, as provided for in the 2001 Act.

55. In the course of his submissions, and by way of illustration as to what was contended was the unfairness or absurdity of the respondent's position, counsel for the appellant posited an example of two persons under the age of 17 who commit an indictable offence. One only is charged at age 17, the other is charged after the age of 18. Both appear before the Children's Court together. Counsel submits that it would be absurd if one is given the benefit of a s. 75 hearing while the other is denied such a hearing. Accordingly, it was argued that the respondent's position requires an acceptance of the notion that the Legislature intended that the 2001 Act would be applied unevenly and that it intended that the child's entitlements, as provided for in the 2001 Act, would be held at the mercy of the vagaries of the system, for example whether the Gardaí acted with despatch in charging the child, or the happenstance of court listings and such matters.

56. I am not persuaded that the argument canvassed in this regard points to any unevenness in the application of the 2001 Act. While it is of course clear from the example given by counsel for the appellant that one of the offenders would be denied the benefit of the 2001 Act, the courts have afforded a remedy to persons who have been denied the benefits of the Act of 2001 where the lost of such rights arose because of tardiness on the part of the State in progressing the criminal proceedings. (See *Donoghue v. DPP* [2014] 2 I.R. 762 and *G. v. DPP* [2014] IEHC 33.) Furthermore, as already referred to, there remains with the District Judge in the Children's Court the discretion to continue to hear and determine a case in respect of a person who is 18 years or upwards, as provided for in s.71(3) of the 2001 Act.

57. A further point raised on behalf of the appellant is that the provisions of s. 52 of the 2001 Act are indicative of how the provisions of the Act are to be interpreted. Section 52 provides:

> "(1) Subject to subsection (2) a child under 12 years of age shall not be charged with an offence.
>
> (2) Subsection (1) does not apply to a child aged 10 or 11 years who is charged with murder, manslaughter, rape, rape under section 4 of the Criminal Law (Rape) (amendment) Act 1990 or aggravated sexual assault.
>
> (3) The rebuttable presumption under any rule of law, namely that a child who s not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong, is abolished.
>
> (4) Where a child under 14 years of age is charged with an offence, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions."

58. The appellant's argument is that the obvious intention of the Legislature, in enacting s. 52, is that a child under the age of 12 will not be charged with an offence. Counsel submits that when the respondent's interpretation of "a child charged", as contained in s. 75 of the 2001 Act, is pitted against s. 52(1), it renders the respondent's contention as to the meaning of "a child charged" absurd since, on the respondent's interpretation of "a child charged", it would mean that a child under 12 years, suspected of an offence, and who cannot be charged pursuant to s. 52(1), may later be charged with an offence once they have passed the age of 12 years. Counsel contends that this could not have been the intention of the Oireachtas. Therefore, the proper manner by which to measure what benefits enure for the purposes of 2001 Act is to have regard to the age of the person at the time of the commission of the alleged offence.

59. I am not convinced that the analogy with s.52 of the 2001 Act furthers the appellant's submissions as to how s. 75(1) should be construed, or that it undermines the respondent's contentions as to the true construction of s.75(1), and as found by this Court. By virtue of its mandatory language, s. 52(1) clearly provides that, save as provided for in subsection 2, a child under 12 years of age shall not be brought into the criminal process in any circumstance. In other words, except as to what is provided for in s. 52(2), to my mind, the mandatory language of s.52(1), does not admit of the entitlement of the DPP to pursue a child in respect of an offence committed when the child was under 12 years once the child passes the age of 12 years. I am also fortified in my conclusion as to what is intended by s.52(1) by the provisions of s. 52(4) which provides that no further proceedings in respect of a child under 14 years of age who is charged with an offence shall be taken save with the consent of the DPP.

Summary

60. By reason of the findings made by the Court, as set out in the judgment, I would answer the first question posed in the consultative case stated in the negative, as follows:

The reference to "a child charged" in s.75(1) of the 2001 Act does not include a child who was under 18 years of age at the time of the alleged offence but over 18 at the time of the actual charging of the alleged offence.

I would also answer "no" to the second question. The reference to "a child charged" in s. 75(1) of the 2001 Act must be construed as a person who was a child at the time of charging and who is a child at the time of the s. 75(1) hearing.