Neutral Citation: [2016] IEHC 2010

THE HIGH COURT

[2015 No. 734 J.R.]

BETWEEN

M. McD.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JUDGE DAVID KENNEDY

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25h day of April, 2016

1. The applicant was born in August, 1996. On 7th January, 2014, when he was aged seventeen years and four months, he was involved in an incident which gave rise to an allegation that he had been in possession of cannabis contrary to s. 3 of the Misuse of Drugs Act 1977, and in possession of a knife contrary to s. 9 of the Firearms and Defensive Weapons Act 1990.

2. His case was referred by Gardaí for a direction from the Juvenile Diversion Programme but he was deemed not suitable for diversion.

3. On 20th May, 2014, an application was made for two summonses arising from the incident in question. Those summonses were issued on 26th May, 2014, with a return date of 15th September, 2014.

4. The applicant turned eighteen in August, 2014.

5. The applicant had given his mother's surname to Gardaí but his father's address. While the applicant has denied that he was living between his mother's house and his father's house at the time (his parents being separated) (see para. 5 of his affidavit of 10th March, 2016), he has not denied the averment of Garda Padraig Nagle at para. 8 of his affidavit that *"from time to time the applicant uses two different addresses, that of his father… and that of his mother".*

6. Garda Nagle went on to aver that *"the use by the applicant of his mother' surname at his father's address created some confusion and concern about service and that due to these difficulties were encountered in serving the initial summonses and the two summonses were reissued and then served".*

7. An indication of the difficulty and confusion involved appears from the affidavit of Joseph Maguire, the applicant's solicitor, originally grounding the application and sworn on 18th December, 2016, which states that at para. 3 that the applicant *"was at that time and continues to live with his parents"*. No doubt this averment was made on instructions, but after quite a number of adjournments to enable the applicant to reply to the affidavit of Garda Nagle of 12th January, 2016, he has now stated instead that he was, at the time, living with his father at the given address.

8. In the light of what the prosecution says was the confusion referred to, the two summonses were returned unserved on 18th March, 2015.

9. On 18th May, 2015, fresh summonses were issued returnable for Bray District Court on 17th September, 2015.

10. The applicant's solicitor avers that these summonses were served on 2nd August, 2015 (para. 4 of his affidavit).

11. A statement grounding an application for judicial review was filed in the Central Office on 18th December, 2015, and the application was moved in court on 21st December, 2015. I directed that the respondent be put on notice, and I have now heard from Mr. Patrick McGrath, S.C. for the applicant and Ms. Lily Buckley, B.L., for the Director.

Should the notice party be struck out?

12. The applicant has named Judge David Kennedy as a notice party as appears from the title to the proceedings. The applicant now accepts that the Rules of the Superior Courts (Judicial Review) 2015 require that the judge concerned not be named, either as a respondent or notice party (O. 84, r 22(2A)) (see my judgment in *Hall v. Stepstone Mortgage Funding Limited* (No. 1) [2015] IEHC 737 (16th November, 2015)). The notice party must therefore be struck out.

Does the court have jurisdiction to restrict reporting of the applicant's identity?

13. This application concerns an offence allegedly committed when the applicant was, in law, a child, although he turned eighteen during the currency of the District Court proceedings.

14. The principle of publicity arises under Article 34.1 of the Constitution *"save in such special and limited cases as may be prescribed by law",* and is also embodied in Article 6(1) of the ECHR, which provides that "[j]udgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

15. Section 45(1) of the Courts (Supplemental Provisions) Act 1961 provides in pertinent part that *"[j]ustice may be administered otherwise than in public in any of the following cases…(c) lunacy and minor matters."*

16. It seems to me that the wording of this provision is in deliberately wide terms. It is not confined to proceedings relating to persons who are children at the time the matter comes before the court, but simply to *"minor matters",* which potentially can have a broader scope.

17. The existence of a discretion or jurisdiction does not, of course, mean that it should always be exercised to restrict reporting, and there may well be cases where what might be termed a "aged-out" young person should be named in the context of proceedings where this would not arise if he or she was a minor. Even the fact that a party is a child is not in itself an automatic reason for reporting restrictions, for example in the personal injury context. However, it seems to me that the jurisdiction conferred by s. 45 should not be construed so narrowly as to limit it to a situation where the person involved is a child at the time the matter falls to be considered by the court. Many examples could be produced to show how such a limited and rigid interpretation could give rise to injustice. For example, if due to a protracted process of judicial review or appellate scrutiny, a child turned eighteen just before the finalisation of proceedings, the court would, on such an interpretation, be powerless to restrict publication of his or her identity.

18. One can also envisage an incident involving similarly aged young people where for one reason or another, criminal proceedings against one of the co-accused did not come to fruition until after that child's eighteenth birthday. It would be invidiously discriminatory in those circumstances if that individual had to shoulder the full burden of publicity where a similarly aged (at the time of the offence) co-accused did not.

19. Furthermore, one might reasonably ask what would stop the naming of a child defendant even after the finalisation of proceedings, once he or she had turned eighteen? Under those circumstances, if s. 45 was to be given a rigidly narrow interpretation, it is hard to see how the court could make an order under that section which could endure to prevent such publication of identity after that point.

20. In my view, the interpretation of s. 45 that is most sensitive to the rights of the citizen and best enables the court to strike the balance between the competing interests involved is to read it as permitting the court to restrict the publication of the identity of persons in relation to matters where such persons were minors at the time of the issues being litigated. Obviously, such orders are not to be made automatically but a court might legitimately be more willing to make such an order where the young person concerned is in very early adulthood, as here.

How should the jurisdiction to restrict reporting be exercised in this case?
21. In the present case, it seems to me that the interests of justice are in favour of restricting the identification of the applicant in connection with proceedings. The conduct in question was allegedly committed when the applicant was a minor. In addition it was relatively recent conduct, rather than historical conduct by someone who had long since lost any entitlement to special protection in law.

22. I should also note that the interpretation of s. 45 which I have adopted would also allow the District Court to make a similar order in relation to the further conduct of the criminal proceedings involving the applicant.

The test for leave in G. v. D.P.P.
23. In *G. v. D.P.P.* [1994] 1 I.R. 374 at pp. 377 to 378, Finlay C.J. set out the criteria for the grant of an ex parte application for leave. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:

> (i) That the applicant *"has a sufficient interest in the matter to which the application relates"* (p. 377);
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> (ii) That *"an arguable case in law can be made that the applicant is entitled to the relief which he seeks"* (p. 378) on the basis of facts averred to, albeit that the court can also have regard at least to uncontradicted evidence adduced by a respondent who has been put on notice of the application. Of course in particular circumstances a higher threshold applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (Agrama v. Minister for Justice and Equality [2016] IECA 72 per Birmingham J. at para. 32);
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> (iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;
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> (iv) That *"the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure"* (p. 378).
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> (v) That there are no other grounds to warrant refusal of leave. *"These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application."* (p. 378).

24. It is now therefore necessary to assess the present application the headings of time and arguability in particular.

Is the application brought within time?
25. The primary limitation period for judicial review generally is set out in O. 84 r. 21(1) which requires that *"[a]n application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose." In a case "[w]here the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding"* (O. 84 r. 21(2)).

26. The normal and general rule is that the grounds of complaint first arise for the purposes of *certiorari* when they are crystallised in the form of a final decision at the end of the process complained of.

27. For prohibition purposes, grounds may be regarded as first arising at a significantly earlier date, for example as of the return for trial in the case of an attempt to prohibit a trial on indictment (*Coton v D.P.P.* [2015] IEHC 302 (Kearns P.)). Of course, in many cases including in the case of a summary trial, the grounds may first arise at a significantly earlier point.

28. The date on which an application is brought is that on which it is filed in the Central Office (*KSK Enterprises Ltd. v. An Bord*

Pleanala [1994] 2 I.R. 128; *McK. v. A.F.* [2005] 2 I.R. 163; *Burke v. Minister for Justice and Equality* [2015] IEHC 614), although if an application is moved in court before it is actually filed, a not-to-be-generally-encouraged practice, the earlier date can be taken as the date on which the action is brought.

29. The basic complaint made in Mr. McGrath's very able argument on behalf of the applicant is that an unacceptable level of delay occurred in the prosecution of the applicant, resulting in a situation where he was being tried as an adult for offences committed when he was seventeen years of age.

30. The applicant was aware that he was being prosecuted as of the date of service of the summonses on 2nd August, 2015. Assuming for the sake of this argument that prohibition is appropriate (because in the *certiorari* context, grounds would normally first arise on the date of the final decision), then for the purposes of prohibition, the grounds for the present complaint arose when the applicant was informed that he was being prosecuted, that is, on 2nd August, 2015. An application for relief by way of judicial review should therefore have been instituted not later than 1st November, 2015.

31. The operative date for commencement of the proceedings is the date on which they were filed in the Central Office (here, 18th December, 2015) and not, as Ms. Buckley submits, the date on which the application was actually moved in court. Nonetheless, the application remains out of time by over a month and a half.

32. The application is therefore out of time to seek prohibition. The question then is, in accordance with *G. v. D.P.P.*, whether time should be extended.

Should time be extended for the bringing of the application?
33. Where an application is made out of time, O. 84 r. 21(3) provides that *"the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:— (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either— (i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension."*

34. The particular basis for the extension of time must be set out on affidavit. O. 84 r. 21(5) provides that "[a]n application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons." It seems to follow from this that the extension of time must be expressly sought, and the appropriate way to do so is in the Statement of Grounds.

35. O. 84 r. 21(4) goes on to provide that "[i]n considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

36. A crucial element of the prejudice to third parties that arises in the criminal context is the interference in the *"obligation to conduct an effective prosecution"* (*Söderman v. Sweden* (Application no 5786/08) European Court of Human Rights 12th November 2013) para. 88) (see also comments of Kearns P. in *Coton v. D.P.P.* [2015] IEHC 302).

37. In the present case I have had regard to any potential prejudicial effect on the respondent or any third party. Of course there is a distinction between a complaint or allegation of prejudice and actual proof of prejudice. Furthermore prejudice that may be remediable in some way (such as by costs) does not seem to be the sort of prejudice that would automatically warrant refusal of an extension of time.

38. It is also clear that an extension of time, if required, must be positively sought by the applicant in the statement of grounds, as the extension of time is jurisdictional to the grant of leave. In the present case, no extension of time was so sought, and indeed not even an oral request for an extension of time was made notwithstanding that the Director took a time point in the course of oral submissions

39. Furthermore, in the context of a delay case, there is a particular onus on an applicant to make the application in a timely manner, and therefore there must be a corresponding reluctance on the part of the court to extend time for the making of a complaint of delay

40. Since no extension of time is, in fact, sought, it cannot therefore be granted. If such an extension of time had been sought I would have refused it given the lack of explanation for the delay that meets the demanding test as set out in O. 84, r. 21(3), the impact on the Director and third parties affected by the criminal process, and indeed given the very fact that the complaint itself relates to delay.

The requirement of arguability
41. If I am wrong about the foregoing it is necessary to go on to consider whether arguable grounds have been made out. A claim is not arguable if it is clearly wrong; for example if it is *"based on a fundamental misconception" (Agrama v. Minister for Justice and Equality* [2016] IECA 72 per Birmingham J. at para. 33, see also para. 36). Furthermore it is not arguable if the point involved has already been decided in another case adversely to the position now being argued for, and the applicant does not demonstrate any clear basis as to why the previous decision ought to be departed from. Otherwise there would simply be no end to the litigation of stale points. Of course the door is open to an applicant to show that the law should move on since any earlier decision but a demonstrable basis to do so must be shown.

42. A claim is not arguable merely because its consideration requires an amount, even a considerable amount, of debate and consideration by the court: by way of example see the very detailed judgments of Peart J. refusing leave in *Duffy v. Clare County Council* [2013] IEHC (8th February, 2012); and *Kelly v. Flanagan* [2014] IEHC 378 (26th June, 2014). An applicant does not establish substantial or even arguable grounds merely by weight of papers or number of grounds pleaded, or merely by virtue of the quantity of submissions, affidavits and time required to deal with the matter: see my judgment in *O'Mahony Developments v. An Bord Pleanála* [2015] IEHC 757 (27th November, 2015) at para. 50.

Is the applicant arguably entitled to leave for prohibition on the grounds of delay?
43. It would be fair to observe that the courts have been markedly more reluctant to grant relief by way of prohibition of criminal trials in recent years. In the context of prohibition, particularly of criminal trials, jurisprudence in recent years has strongly emphasised that the trial judge has the primary responsibility for ensuring fairness and that prohibition should only be granted in *"exceptional*

circumstances" where a real risk of an inevitability of unfairness has been shown: *Irwin v. D.P.P.* [2010] IEHC 232 (23rd April, 2010, per Kearns P.); Byrne v. D.P.P. [2011] 1 I.R. 346 (O'Donnell J. (Fennelly and Finnegan JJ. concurring); *M.S. v. D.P.P.* [2015] IECA 309; *H. v. DPP* [2006] 7 JIC 3107 (Murray C.J.)); *M.L. v. D.P.P.* [2015] IEHC 704 (Unreported, High Court, Noonan J., 13th November, 2015); *Kearns v. D.P.P.* [2015] IESC 23 (6th March, 2015, per Dunne J. (Denham C.J., Murray, Hardiman and O'Donnell JJ. concurring)); *Sirbu v. D.P.P.* [2015] IECA 238 (9th November, 2015, per Hogan J. (Irvine and Kelly JJ. concurring)).

44. It is clear that all persons in the State are entitled to trial within a reasonable time (a right also protected by art. 6 of the ECHR). In addition to that general duty on the State, there is a *"special duty of State authorities owed to a child or a young person over and above the normal duty of expedition to ensure a speedy trial".* (Donoghue v. D.P.P. [2014] IESC 56 (30th July, 2014) per Dunne J. at para. 58, p. 26)

45. However *"[t]hat special duty does not of itself and without more result in the prohibition of a trial…something more has to be put in the balance to out way the public interest in the prosecution of the offences. What they may be will depend on the facts and circumstances of any given case"* (para. 58).

46. One of the circumstances will be the age of the young person concerned. As Dunne J. commented, presciently if I may respectfully say so, in Donoghue, *"[s]omeone 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"* (at para. 58).

47. I take the decision of the Supreme Court in Donoghue to be a definitive statement of the law in this respect, and in that regard, I would therefore respectfully consider the obiter comment of Denham C.J. in Cullen v. D.P.P. [2014] IESC 59 (16th October, 2014) at para. 50, that prohibition may be granted *"where a period of delay has been so substantial as to amount of a breach of an applicant's constitutional rights, even where the applicant has suffered no actual prejudice"* as not being a controlling statement of the current law in this context. It seems to me that the test to be applied is that as set out by the Supreme Court in Donoghue, namely that the duty to avoid delay, including in particular the special duty to children *"does not of itself and without more result in the prohibition of a trial".*

48. In the present case, the applicant was seventeen years and four and a half months old at the time of the offence. Even if the summonses were served immediately when issued, the return date for those summonses would have fallen after his eighteenth birthday. In the light of Dunne J.'s views in *Donoghue* in relation to persons who are near their eighteenth birthday, it does not seem to me to be arguable that any actionable wrong has been done to this applicant.

49. The applicant relies on the decisions in *Cullen v. D.P.P., Donoghue v. D.P.P.* (ex tempore, not circulated, High Court, Birmingham J., February, 2013) (referred to in the High Court decision in Cullen) and *G. v. D.P.P.* [2014] IEHC 33 (24th January, 2014, per O'Malley J.).

50. However, largely those were cases where the delay was measured in years rather than months. As Dunne J. said in *Donoghue*, whether enough has been put into the balance to warrant prohibition "will depend upon the facts and circumstances of any given case" (para. 58) which, to my mind, does not exclude as a matter of principle consideration of the seriousness of the offence concerned.

51. The closest that the applicant can get to the present case is what is said to be a comment of Birmingham J. in an *ex tempore* decision in *Donoghue v. D.P.P.* in which he is said to have referred acceptingly to delays in the order of four to six months. The "delay", if one wishes to call it that, in the present case between the alleged offence and the applicant's eighteenth birthday was in the order of six and a half months. In those circumstances, I do not consider that the complaint made is arguable, even taking the applicant's legal submission at its highest. However, I do not think that that submission is in any event well founded because in general terms, it seems to me that a delay in the prosecution of a child would need to be measured in years rather than months before any question of prohibition would normally arise. In the present case however, the "delay" is in any event so short and the child so close to his 18th birthday at the time of that "delay" that the complaint presented does not appear to me to be properly arguable in the light of the Supreme Court's decision in *Donoghue*.

Has the applicant been prejudiced by the lapse of time?

52. If I am wrong about my conclusion that this application is out of time and if I am wrong in concluding that the applicant was sufficiently close to the age of eighteen at the time of the alleged offending as to take him outside the zone whereby the level of delay could, in principle, be a basis to contend that he is arguably entitled to seek prohibition, I then have to consider the issue of whether he has in fact been prejudiced by the delay, given the principle that delay alone does not furnish grounds for judicial review without more.

53. Four grounds of prejudice have been put forward.

54. Firstly, it is suggested that if the applicant had been tried as a child, he would have had the benefit of anonymity under s. 93 of the Children Act 2001. As I have held in this judgment, the power to protect anonymity under s. 45 of the 1961 Act is wide enough to protect the applicant in this situation. There is, therefore, no prejudice necessarily arising from his having turned eighteen because the District Court will have jurisdiction to make an order protecting against reporting of his identity.

55. The second alleged prejudice is that if the applicant was tried as a child, he would have been considered for admission to the Diversion Programme, in accordance with the principles set out in s. 18 of the 2001 Act. However, in the present case, the applicant was considered for admission to the Diversion Programme and not deemed suitable for it. He is, therefore, not prejudiced under this head by reason of having turned eighteen.

56. Thirdly, it is alleged that if the applicant had been tried as a child, he would not be deprived of his liberty unless a wide range of community-based possibilities that might be considered and found to be unsuitable. This appears to be a reference to the principles set out in s. 96 of the 2001 Act. Leaving aside elements of the section which do not add a great deal to the manner in which the applicant would be treated as an adult defendant, the main element of the section that the applicant could claim to be losing out on is the requirement that "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".

57. However, it is neither necessary nor proportionate to prohibit the trial altogether by reason of the fact that this provision would not, by its terms, apply to the applicant. The District Court can, and if it would be unjust not to do so, must, apply a sentencing

regime to the applicant that would be not less favourable to him than would have been the case if he had been tried as a child. What the precise requirements of justice in this situation are for an individual defendant can safely be left to the District Court, with the safeguard of a de novo appeal by way of rehearing in the Circuit Court if required, and the additional check and balance of judicial review by way of certiorari if a given ultimate sentence is unlawful. It is not proportionate to go down the road of prohibition in circumstances where the interests of justice can be fully vindicated by the court of trial. See *Kearns v. D.P.P.* [2015] IESC 23 (6th March, 2015), in which Dunne J. commented that "it is for the trial judge to ensure that the appellant's right to a fair trial guaranteed by the Constitution will be vindicated by making appropriate rulings on the issue before the court of trial". In *Sirbu v. D.P.P.* [2015] IECA 238 (9th November, 2015) Hogan J. concluded by saying that "I am not persuaded that the missing evidence in the present case means that the trial will inevitably be unfair or that such potential unfairness cannot be satisfactorily addressed by means of appropriate judicial rulings" (para. 24). A similar approach was taken by the Court of Appeal in relation to allegedly prejudicial delay, rather than missing evidence in *M.S. v. D.P.P.* [2015] IECA 309 (22nd December, 2015, per Hogan J. (Ryan P. and Peart J. concurring)). In *M.L. v. D.P.P.* [2015] IEHC 704 (13th November, 2015), referring to *Z. v. D.P.P.* [1994] 2 I.R. 476, Noonan J. stated that "only in exceptional circumstances will the court intervene to prohibit a criminal trial" (para. 22) and *"[a]s has been stated time and again, the fairness of the trial is primarily a matter for the trial judge"* (para. 25).

58. The fourth head of prejudice is that it is said that if the applicant had been tried as a child *"he would have had the record of his conviction erased three years after the commission of the offence"*. However, this argument is based on a simple misconception. Section 258(1)(a) of the 2001 Act provides for the non-disclosure of certain findings of guilt where *"the offence was committed before the person attained the age of eighteen years"*. Therefore the section applies even if the person has become an adult by the time of trial and conviction.

59. For the foregoing reasons, I do not consider that there is any likelihood, still less "inevitab[ilit]y" (*Sirbu*) of prejudice to the applicant arising from the fact that he has now "aged out" of the juvenile category and, therefore, the relief sought is not arguable because there is not sufficient or indeed any inevitable prejudice above and beyond the alleged breach of the special duty of expedition to bring the applicant within the *Donoghue* doctrine to the extent that relief by way of prohibition might arguably be available.

60. Having said that, it may be that the wording of the 2001 Act is capable of improvement in order to provide a greater continuity of procedural arrangements for offences committed when the defendant was a child. Presumably the older the child, the more serious the offence is, in general likely to be, all other things being equal, and therefore it is somewhat unfortunate that problems of interpretation and continuity of arrangements should be at their most acute during the very last stages of childhood, when it is all the more important that offending behaviour is addressed. I would respectfully venture to suggest that this aspect of the 2001 Act be examined in the context of whether any legislative refinement that could promote such greater continuity and clarity could be put in place. Certainly it would be unacceptable if alleged teenage offenders, once they crossed an undefined threshold sometime after their 17th birthday, entered some sort of free-fire zone where effective prosecution became unduly difficult until they turned 18. That is the road down which the present applicant invites the court, and it is an invitation that must be unambiguously rejected. But legislative clarification perhaps could assist in preventing even the perception of a difficulty for children in that transitional situation.

Order

61. For the foregoing reasons, I will order:-

(i) that the order pursuant to s. 45 of the Courts (Supplemental Provisions) Act 1961 restraining the publication of material tending to identify the applicant be made permanent;

(ii) that the notice party be struck out, and

(ii) that the application for leave be dismissed.