THE HIGH COURT

JUDICIAL REVIEW

2018 No. 79 J.R.

BETWEEN

T.G.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 May 2019.

SUMMARY

1. The Applicant herein seeks to restrain the further prosecution of criminal charges pending against him on the basis of prosecutorial delay. The alleged offences are said to have occurred at a time when the Applicant was seventeen years old and thus a "child" as defined under the Children Act 2001. It is contended that had the Garda investigation been conducted expeditiously, then the Applicant would have been entitled to have the charges against him determined in accordance with the Children Act 2001. This would have afforded the Applicant certain statutory entitlements in respect of *inter alia* anonymity, sentencing and probation reports. The benefit of these statutory entitlements is not now available in circumstances where the Applicant reached the age of majority prior to the trial of the offences.

2. These judicial review proceedings arise against a legislative backdrop whereby the qualifying criterion for 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). It is perhaps surprising that the legislation does not expressly address the position of an alleged offender who has transitioned from being a "child" (as defined) to an adult between the date on which the offences are said to have occurred and the date of the hearing and determination of criminal charges arising from those alleged offences. Such an interregnum will arise in a significant number of cases, even allowing for prompt Garda investigations. For example, if an offence is alleged to have been committed by an individual who is a number of weeks shy of his or her eighteenth birthday, it is unrealistic to expect that the offence would be investigated and the prosecution completed prior to that birthday. It would have been helpful if the legislation indicated what is to happen in such circumstances.

3. At all events, 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] 1 I.R. 656 and *Donoghue v. Director of Public Prosecutions* [2014] 2 I.R. 762.

4. The case law indicates that the existence of blameworthy prosecutorial delay alone 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 offences. What that may be will depend upon the facts and circumstances of any given case. Factors to be considered can include (i) the age of the accused at the time the alleged offences occurred; and (ii) the seriousness of the alleged offences.

5. For the reasons set out in detail herein, I have concluded that there was no culpable or blameworthy prosecutorial delay in the present case. The offences alleged against the Applicant arise out of a disturbance at Oberstown Children Detention Campus involving at least eight individuals. The nature of the alleged offences necessitated a detailed and complicated investigation by An Garda Síochána. I am satisfied that this investigation was carried out with reasonable expedition during the twelve-month period between the date of the alleged offences and the Applicant reaching the age of majority.

6. Lest I am incorrect in this finding, I have carried out the requisite balancing exercise *de bene esse*. There are a number of aspects of the present case which tip the balance in favour of allowing the prosecution to proceed. First, the offences occurred at a time when the Applicant was seventeen years of age and was thus close to the age of majority. As noted in *Donoghue*, the age of an accused is something to be taken into account. Secondly, the offences alleged are very serious offences. They include a charge of arson under the Criminal Damage Act 1991. The offence of arson under subsection 2(1) carries a maximum penalty of imprisonment for life. Thirdly, there is a particular public interest in the prosecution of these alleged offences as they relate to a disturbance at a children detention centre. It is essential to the rule of law to ensure that discipline and order are maintained at prisons and other places of detention. It would be inimical to this were a prosecution to be prohibited in circumstances where the only countervailing factor is the minimal prejudice to the Applicant. The only actual prejudice suffered by the Applicant is the loss of the benefit of reporting restrictions under section 92 of the Children Act 2001. This reflects a legislative choice on the part of the Oireachtas not to extend reporting restrictions to cases involving an adult charged with offences alleged to have been committed as a minor.

7. I am satisfied, therefore, that the balance lies in favour of allowing the prosecution to proceed.

8. There was some discussion at the hearing before me as to the steps, if any, which might be taken by the High Court to mitigate the loss of the statutory protections under the Children Act 2001. In particular, it was suggested that the loss of the benefit of the reporting restrictions which apply to proceedings under section 92 of the Children Act 2001 might be mitigated by the High Court making an order pursuant to Section 45 of the Courts (Supplemental Provisions) Act 1961. For the reasons set out at paragraph 59 below, I do not think that the court has jurisdiction to make such an order. I will, however, make a *temporary* order restricting the publication of material which would identify the Applicant. This order will lapse twenty-eight days after the perfection of the High Court order in this case *unless* an appeal or an application for leave to appeal, as the case may be, has been filed with either the Court of Appeal or the Supreme Court.

FACTUAL BACKGROUND

9. The Applicant has been charged with four offences arising out of a serious disturbance at Oberstown Children Detention Campus on 29 August 2016. In brief, it is alleged that the Applicant and a number of other child detainees gained unauthorised access to a roof area and caused significant damage by removing roof tiles and by setting a fire. It is also alleged that the Applicant committed an offence under Section 15 of the Criminal Justice (Public Order) Act 1994.

10. A flavour of the alleged offences is provided by the following extract from the witness statement of the Director of Oberstown Children Detention Campus (Pat Bergin) contained in the Book of Evidence.

> "[…] The public order unit withdrew, the young people remained on the roof of Trinity House where they then remained for the direction (sic). They continued to engage in violent behaviour, throwing rooftiles and other missiles. I could see that they were damaging roof tiles, and aerials and using these to further damage the building via the CCTV. All the eight youths were actively involved, moving across the roofs across a range of buildings of Trinity House. A stand off period continued where the behaviour of the eight was monitored both physically and remotely. Negotiators were attempted intermittently, but to no avail. Damage and violent behaviour continued all this time. The roof of Unit 3 was significantly damaged and compromised by the activity of the collective eight. As it got dark it became evident that a fire had been started on the roof of Unit 3. It was behind a small wall on the roof, so it was not immediately apparent. I could not see who initially lit the fire. Gardaí called the fire service who arrived on site after a period. By the time they arrived at Oberstown the fire had taken substantially hold of the roof of Unit 3. They made attempts to fight the fire but were subject of continued missile throwing by all eight youths on the roof."
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> […]
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> "This incident of the 29th has had a significant effect on all of the staff present and the wide staff body from Oberstown. The activities of the children I found to be frightening and I feared harm to the children and to others and also that significant damage or loss of life was a real possibility. Further on the 29th we had family members of children placed on the campus expressing fear for their children's safety, we had neighbours from the local ringing for fear of injury to their relations working on site. We had substantial National media interest on the potential risk to children and staff at Oberstown. Since then we have put in place substantial staff supports to deal with anxieties and fears that have arisen as a direct result of the activities of the young people on the 29th of August."

11. The chronology of the Garda investigation is discussed in more detail under the next heading below. For present introductory purposes, it is sufficient to note that the first phase of the investigation took place between the date of the incident (29 August 2016) and the end of January 2017.

12. The Applicant was arrested and interviewed on 26 January 2017. It is submitted on behalf of the Applicant that he made certain admissions at this interview, and, accordingly, that charges should have been preferred at that stage. Instead, the Garda investigation continued until May 2017. The file was then escalated within An Garda Síochána, and the relevant inspector directed further steps to be taken. The Applicant's case was subsequently referred to the Garda Youth Diversion Office on 31 July 2017. A formal direction that the Applicant was unfit for diversion was made on 14 August 2017. The Applicant reached the age of majority on 29 August 2017.

13. The investigation file was submitted to the Office of the Director of Public Prosecutions on 12 September 2017. On 12 October 2017, the DPP directed that the Applicant be charged. The Applicant was duly charged the next day (13 October 2017).

AFFIDAVIT EVIDENCE IN RELATION TO GARDA INVESTIGATION

14. Two affidavits have been filed in the judicial review proceedings setting out the detail of the Garda investigation.

15. The principal affidavit filed is that of Garda Sarah Ormond. Garda Ormond was a member of the investigation team attached to Balbriggan Garda Station. Garda Ormond sets out the chronology in relation to the investigation in detail, as follows.

> "7. I say that immediately following the involvement of the gardaí in the matter, an incident room was set up at Balbriggan Garda Station for the purposes of coordinating the investigation of the matter. I say that it was immediately apparent that due to the timescale of the standoff, the number of persons involved in the incidents of criminality on the date in question, there was a complexity to the matter in terms of piecing together when and where various incidents had occurred and by whom they had been perpetrated.
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> 8. I say that the full and proper investigation of the matter involved the gathering of CCTV, the taking of a considerable amount of statements (in excess of 230) from a number of parties, agencies and units within the Garda Síochána. The investigation inter alia involved the following steps:
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> a. Taking statements from campus staff;
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> b. Taking statements from a number of local and ordinary garda units from the Dublin region who dealt with the incident;
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> c. Taking statements from a number of gardaí from National Units including the Air Support Unit, the Public Order Units, in addition to trained negotiators;
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> d. Taking statements from members of the Dublin Fire Brigade;
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> e. Examination of exhibits at the scene;
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> f. Examination by gardaí of the content of approximately 280 hours of CCTV footage which was harvested from the closed-circuit cameras on the campus;
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> g. Establishing a job books with over 130 lines of enquiry.
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> 9. For operational reasons and to allow for the proper investigation of the matters including the interview of the suspects, the majority of the statements had to be obtained and the CCTV complied (sic) prior to the arrest and detention of any of the suspects in the matter. Clearly, given the volume of the information required, the broad spread of parties involved it took a number of months for this occur.
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> 10. I say that in addition to the considerable time and resources devoted to this incident, the investigation referred to within also coincided with a number of other extremely serious investigations being coordinated by the Incident Room in

Balbriggan which involved a number of gardaí who were also involved in the investigation of this incident.

11. I say that following a planned operation between the January 24 and 26 2017, eight youths who had been identified as having had an involvement in the incident were arrested in various locations across the country. I say that the coordinated arrest of the suspects also involved the detention and questioning of the youths. During the detention, certain exhibits including CCTV were required to be put to the youths (including the applicant herein).

12. I say specifically that the applicant was detained and questioned on January 26, 2017. I say that one of the allegations against the applicant was that he committed arson during the incident. I say and am advised that this arson was a particularly serious incident which caused significant damage. I say that while the applicant made admissions in his interview with the Gardaí, he denied playing an active part in starting the fire and his admissions sought to minimise his involvement in the incident as a whole.

13. I also say that completion of the file in the Balbriggan Incident Room required a collation of the material which had been gathered to date including all the statements taken, CCTV and material which emerged from the detention of the suspects (including the applicant) in January 2017. I say that this was a considerable task for the reasons which I have already outlined. I say that this phase of the investigation was only completed in May 2017."

16. Garda Ormond goes on then to explain that after May 2017, the investigation file was forwarded to the appropriate channels within An Garda Síochána. Inspector Carroll advised that further statements were required to be taken from members of An Garda Síochána and staff at Oberstown. Inspector Carroll also advised that an up-to-date and more comprehensive estimate of the damage caused be obtained.

17. Garda Ormond states as follows towards the end of her affidavit.

"20. I should say that for the avoidance of any doubt that your deponent along with the gardai investigating this matter were at all times acutely aware of the age of the applicant and that that he would turn 18 in August 2017. In that regard, your deponent and the investigation team ensured that the investigation file was progressed as expeditiously as possible so that it could be submitted to the GYDO, and thereafter to the office of the respondent. There was no delay in the investigation of the matter and all steps required in furtherance of the matter were done with due expedition and in cognisance of the age of the youths involved and in particular the applicant."

18. Garda Superintendent Colin Healy, a member of the Garda Youth Diversion Office ("*GYDO*") has filed an affidavit setting out the involvement of the GYDO. The Youth Diversion Programme is described as follows.

"5. The Youth Diversion Programme provides the possibility for children to receive a caution administered by a Garda Juvenile Liaison Officer (JLO) instead of the matter proceeding to Court by way of prosecution. Depending on the nature of the behaviour and the personal circumstances of the child concerned, the GYDO will (where appropriate) refer young persons to a Garda Youth Diversion Project (if one is available in their area), other clubs or projects in their community, or where the young person is out of school, arrangements can be made to attend Youth Reach or other support services that will assist the young person and/or his or her family. I say that the aim of the programme is to assist the young person in getting appropriate support and to seek to divert the child away from offending behaviour."

19. Garda Superintendent Healy then sets out the chronology and confirms that a skeleton file from the investigating Gardaí was formally received on 31 July 2017. The GYDO recommended that the Applicant was unsuitable for inclusion in the Diversion Programme for the alleged offences. The GYDO's involvement concluded on 17 August 2017.

20. A short affidavit has been filed by a solicitor in the Office of the Director of Public Prosecutions. This affidavit confirms that the investigation file was received from An Garda Síochána on 12 September 2017, and that a direction to prosecute was issued on 12 October 2017.

APPLICABLE LEGAL PRINCIPLES

21. The leading judgment on prosecutorial delay in cases involving offences alleged to have been committed by a child is that of the Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762 ("*Donoghue*").

22. The judgment indicates that the first question to be determined by a court is whether there has been culpable or blameworthy prosecutorial delay. In the event that there has been such delay, then the court must next carry out a balancing exercise.

23. On the facts of *Donoghue*, members of the Gardaí had called to the minor applicant's home where a substance was found which was believed to be heroin. The applicant was aged 16 years at the time. A weighing scales was also found. The applicant immediately took responsibility for the items, and he signed an admission to this effect. The applicant was then arrested, and, during the course of interview, he again took full responsibility for the items found. Subsequently, the items found at his home were forwarded to the forensic science laboratory for an analysis, and it was confirmed that the substance was indeed heroin. A period of one year and four and a half months elapsed between the date of the applicant's arrest and his eventually being charged with an offence under the Misuse of Drugs Act 1977.

24. The Supreme Court, *per* Dunne J., held that, having regard to all the circumstances of the case and bearing in mind the fact that the accused was a child at the time of the commission of the alleged offence, there was ample evidence before the High Court to enable the trial judge to reach the conclusion that this was a case in which there had been significant culpable prosecutorial delay.

25. As appears from the analysis of the delay at pages 770 and 773 of the reported judgment, the Supreme Court attached some significance to the fact that the criminal case was a straightforward one, and that admissions had been made by the accused.

"[25] When the overall period of delay between March 2010 and August 2011 is being considered, it is necessary to bear in mind the nature of the case (including its complexity), the need to engage with the National Juvenile Office, the period of delay and the reasons offered for that delay. This was a straightforward case on the facts where admissions had been made by Mr. Donoghue. The reasons put forward for the delay in this case are unsatisfactory. The delay in completing the investigation file was not adequately explained. I have no doubt that the statements of the two Gardai mentioned were necessary but as it appears that those statements were required in relation to the period of detention of Mr. Donoghue in Coolock Garda Station, it should have been a straightforward matter to prepare and obtain the statements."

26. The Supreme Court went on to hold 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.

> "[52] 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."

27. 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 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 92). Secondly, the 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).

28. The Supreme Court then stated its conclusions as follows.

> "[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."

29. The principles in *Donoghue* have since been applied in a number of High Court judgments. Counsel on behalf of the DPP, Mr David Staunton, BL, places some emphasis on the judgment of the High Court (Kearns P.) in *Daly v. Director of Public Prosecutions* [2015] IEHC 405, where it is stated at page 19 that there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors.

> "[…] While the importance of ensuring a speedy trial in the case of juveniles is well established, certain factors may arise in each case which determine how expeditiously this can occur and there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. In the view of the Court there was no blameworthy prosecutorial delay in this case."

30. Other High Court 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. I will discuss these judgments in context when I come to carry out the "balancing exercise" required in delay cases.

NO CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

31. The first question to be addressed by this court is whether the pace of the investigation between the date of the alleged incident (29 August 2016), and the date upon which the Applicant reached the age of majority, i.e. his eighteenth birthday (29 August 2017), involved culpable or blameworthy delay. For the reasons explained by the High Court (White J.) in *Cash v. Director of Public Prosecutions* [2017] IEHC 234, [12], in determining whether there has been prosecutorial delay, it is only appropriate to have regard to events occurring *prior* to an alleged offender having reached the age of majority.

32. Leading counsel on behalf of the Applicant, Mr Patrick McGrath, SC, has submitted that whereas the offences alleged are serious offences, it does not follow that the investigation was a complicated one. Counsel points to the fact that whereas it is said that statements were taken from some 230 witnesses, it was only considered necessary to include statements from 53 witnesses in the Book of Evidence. The witnesses consist principally of staff employed at Oberstown, members of An Garda Síochána, and of Dublin Fire Brigade. There would be no particular difficulty in identifying such witnesses, nor in arranging for statements to be taken from them. This was not a case where it was necessary to track down witnesses.

33. Counsel also draws attention to the fact that An Garda Síochána have known from the very outset that the Applicant was one of the eight individuals involved in the disturbance, and that the Applicant has since made certain admissions in his interview on 26 January 2017.

34. Emphasis is placed on the fact that the Applicant's solicitor had written to the DPP and the Superintendent of Balbriggan Garda Station on a number of occasions seeking expedition in the light of the Applicant's admissions and his impending majority. It is submitted that the criminal proceedings could have been brought before the Circuit Court promptly, and well before the Applicant's eighteenth birthday.

Decision
35. I have concluded that there has been no culpable or blameworthy delay for the following reasons. First, the nature of the alleged offences necessitated a detailed and complicated investigation by An Garda Síochána. It will be recalled that the alleged offences arise out of a disturbance at Oberstown Children Detention Campus involving at least eight individuals. The charges preferred include charges of arson contrary to Section 2(1) and (4) of the Criminal Damage Act 1991.

36. One of the issues which will be central in the prosecution of these offences is the extent, if any, to which each of the accused individuals was involved in the arson aspect of the alleged offences. Given the fast moving and confused nature of the events on the evening of 29 August 2016, it is not unreasonable to anticipate that at least some of the accused will seek to *minimise* their role in the arson aspect. It was necessary, therefore, for An Garda Síochána to investigate the matter in some detail. Whereas it is correct to say that the Applicant's identity as one of the individuals involved in the disturbance was known from the very outset, a proper investigation required more than simply identifying who was on the roof that night. Rather, it was also necessary to attempt—insofar as possible—to determine the precise actions of each of the accused. An Garda Síochána has an obligation, arising from its unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. Put shortly, An Garda Síochána have a duty to seek out relevant evidence, both exculpatory and inculpatory.

37. Secondly, and following on from the first reason, the nature of the disturbance at Oberstown on 29 August 2016 meant that there was an enormous volume of material to be considered. As explained in the affidavit of Garda Ormond, there were some 280 hours of CCTV footage to be viewed, and statements were taken from some 230 witnesses.

38. With respect, I think that it is an oversimplification for the Applicant to suggest that this task was relatively straightforward given that most of the witnesses were what might be described as State witnesses, i.e. members of staff of Oberstown, members of An Garda Síochána and members of Dublin Fire Brigade. This did not detract from the fact that taking statements from such a large number of witnesses was an enormous task. It is possible that some of the witnesses would be able to provide evidence which would pinpoint which of the accused were involved in the arson.

39. Against this background, I do not think the period between (i) 29 August 2016 and (ii) January 2017 when the alleged offenders were arrested and questioned, can be described as involving blameworthy delay. Thereafter, it was necessary to put to the individual accused the details of the allegations against them. This involved, for example, extracting from the hours of CCTV footage photographic stills purporting to show the actions of each of the individuals.

40. Once the interview process had been completed, it was then necessary to collate the various statements, and to consider whether further evidence was required. It is not unreasonable to anticipate that at least some of the accused will, in their interviews, have sought to downplay their actual role in the events of the night of 29 August 2016, especially in relation to the charge of arson. Without in any way prejudging the criminal case against the Applicant, it would be unreasonable to say that An Garda Síochána were *obliged* to accept his admissions at face value and as disclosing the full extent of his involvement. Rather, the guards were entitled to carry out further investigations to seek to test the veracity of same.

41. This process seems to have taken between the end of January 2017 and May 2017.

42. Thereafter, as explained by Garda Ormond at paragraph 14 of her affidavit, the investigation file was forwarded to the appropriate channels within An Garda Síochána. Inspector Carroll directed further steps to be taken.

43. Towards the end of July 2017, the completed investigation file was formally forwarded to the Garda Youth Diversion Office ("*GYDO*"). It should be recalled that there is a statutory requirement to consider whether a young offender can be dealt with by way of a diversion programme. This is provided for under Section 18 of the Children Act 2001 as follows.

> "18. Unless the interests of society otherwise require and subject to this Part, any child who —
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> (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."

44. Relevantly, one of the criteria under section 18 is that the young offender accepts responsibility for his or her criminal or anti-social behaviour. Counsel for the DPP, Mr Staunton, BL submitted that this necessitates awaiting the completion of the investigation file before the matter is referred to the GYDO. 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.

45. The matter was dealt with very promptly by the GYDO, and the file was returned on 21 August 2017 advising that all the youths in question were unsuitable for inclusion in the diversion programme.

46. As it happens, Garda Ormond was on annual leave at this time, but once she had returned and had sight of the decision of the GYDO, the investigation file was immediately prepared for submission to the office of the Director of Public Prosecutions. The file was submitted to the DPP on 11 September 2017, and formal directions were received by the DPP on 12 October 2017. These events occurred after the Applicant had attained the age of eighteen years.

47. In conclusion, I am satisfied that there has been no culpable or blameworthy delay. In reaching this conclusion, I have had some regard to the judgment in *Daly v. Director of Public Prosecutions* [2015] IEHC 405, where it is stated at page 19 that there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. As explained by Garda Ormond at paragraph 10 of her affidavit, a number of other extremely serious investigations were being co-ordinated by the incident room in Balbriggan Garda Station at the time.

48. I am also satisfied that the facts of the present case are entirely distinguishable from those under consideration in *Donoghue*. The alleged offence in that case was a relatively straightforward one, involving the possession by a child of a quantity of a controlled drug, namely heroin. The child had made admissions. The investigation of that offence would not have necessitated an in-depth and complex investigation as was required on the facts of the present case. It is also a point of contrast that there was only a single offender in *Donoghue*, as opposed to the eight alleged offenders the subject of the charges in the present case.

BALANCING EXERCISE
49. In circumstances where I have concluded that there has been no culpable or blameworthy prosecutorial delay, it is not, strictly speaking, necessary to go further and to carry out the balancing exercise as set out by the Supreme Court in *Donoghue*. This is because the Applicant has failed to meet the delay threshold. However, lest I be incorrect in my conclusion or lest this case be subject to appeal, I think that it is appropriate to go on to perform the balancing exercise *de bene esse*.

Loss of protections under the Children Act 2001
50. The principal prejudice alleged by the Applicant is the loss of certain procedural entitlements under the Children Act 2001. Specifically, the Applicant submits that *but for* the alleged prosecutorial delay, the charges against him would have been heard and determined in accordance with the Children Act 2001. In particular, it is suggested that if the Applicant had chosen to plead guilty, the matter could have been brought before the Circuit Court in short course and well before the Applicant had attained the age of majority.

51. I will address each of the sections relied upon by the Applicant under separate sub-headings below.

(i) Sentencing Principles
52. The Applicant submits that had the matter been determined before he attained the age of majority, he would have been entitled to the benefit of Section 96(2) of the Children Act 2001 which indicates that a custodial sentence should be imposed upon a young offender as a matter of last resort.

53. Section 96 in full reads as follows.

> "96. (1) Any court when dealing with children charged with offences shall have regard to—
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> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
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> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
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> (b) to preserve and strengthen the relationship between children and their parents and other family members,
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> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
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> (d) to allow children reside in their own homes,
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> 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.
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> (3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.
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> (4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.
>
> (5) 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."

54. There was some debate at the hearing before me as to the practical significance of the loss of Section 96(2). Counsel for the DPP suggested that the fact that the alleged offences had occurred at a time when the Applicant was a minor is something which would be taken into account in any event, i.e. even in the absence of the direct applicability of Section 96(2). Counsel relied in this regard on the recent judgment of the High Court (Twomey J.) in *A.B. v. Director of Public Prosecutions* [2019] IEHC 214. It is suggested there that a trial judge sentencing an adult in respect of offences committed as a "child" is likely to apply the principle of detention being a "last resort" to any sentence which he might impose.

> "Thirdly, as regards A.B.'s claim that he would be denied the benefit of s. 96 of the Children Act regarding a detention being a last resort, it follows from McDermott J.'s statement that it is likely that many of the factors addressed under the Children Act are likely to be considered by the sentencing judge, that the trial judge is likely to apply the principle of detention being a last resort to any sentence that he might impose."

55. With respect, I think that this paragraph, taken out of its overall context in the judgment, might overstate the legal position somewhat. Whereas it is undoubtedly the case that the fact that an offence was committed at a time when the offender was a minor is something which will be taken into account in sentencing, even without reference to Section 96 of the Children Act 2001, it is questionable whether the principle of detention being a last resort ever applies to an adult.

56. The judgment of the Court of Appeal in *Director of Public Prosecutions v. J.H.* [2017] IECA 206 addresses the applicability of a similar provision of the Children Act 2001, namely section 143. That section provides *inter alia* that a court shall not make an order imposing a *period of detention* on a child unless it is satisfied that detention is the only suitable way of dealing with the child. The Court of Appeal seems to suggest that the rationale for not imposing a custodial sentence on a child relates to the adverse consequences of introducing a child into a custodial setting. This rationale does not apply with the same force when a child has transitioned to adulthood prior to sentencing. The fact that the offence was committed by a child is, of course, relevant to the *separate question* as to the culpability of the offender. See paragraphs [13] to [15] of the judgment as follows.

> "13. 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.
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> 14. 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.
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> 15. 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."

57. It seems to follow, therefore, that the loss of the benefit of section 96, and, in particular, the inapplicability of the principle of detention being a last resort, will be a cause of prejudice in some cases. I do not think that it can simply be assumed that a similar outcome will arise from the application of general sentencing principles.

58. However, on the facts of the present case, it seems to me that there was no real likelihood of the Applicant—assuming for the purposes of argument only that he were to be found guilty of the alleged offences—receiving a non-custodial sentence. The Applicant has already been convicted of a number offences and has been detained in Oberstown. It seems likely, therefore, that, if convicted, a further custodial sentence would be imposed in any event, even if the Applicant had the benefit of being tried as a child who has the benefit of section 96. I rely in this regard on the judgments in *Smyth v. Director of Public Prosecutions* [2014] IEHC 642; *Ryan v. Director of Public Prosecutions* [2018] IEHC 44, [27]; and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296, [17], all three of which judgments appear to suggest that the putative loss of the benefit of section 96 may be of less significance in the context of an accused who already has a criminal record and who is, therefore, more likely to have received a custodial sentence even if he had the benefit of section 96.

(ii) Reporting Restrictions

59. The second protection said to have been lost is that of the reporting restrictions imposed under section 92(1). The subsection in full reads as follows.

> "(1) 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."

60. Counsel on behalf of the Applicant, Mr. Patrick McGrath, S.C., submits that section 92 must be read in conjunction with Section 258 (Non-disclosure of certain findings of guilt). Section 258 allows for criminal offences of certain classes which were committed by a person while under the age of eighteen to be what might be colloquially described as "expunged" after a period of time. Mr. McGrath, S.C. submits that the combined effect of the two sections is that a person who has committed an offence while a child will be able to have their conviction expunged in circumstances where there will not have been any reportage of same. However, the practical benefit of Section 258 would be undermined if the trial of an adult being prosecuted in respect of offences alleged to have been committed as a "child" were to be conducted without any reporting restrictions. Certainly, in the case of a trial which attracted publicity, there would be a risk that the existence of the otherwise expunged criminal convictions would be discoverable by anyone conducting a search on the internet by reference to the accused person's name. Thus, for example, if the accused applied for a job, the potential employer might locate online reference to the convictions which have formally been expunged.

61. There was some debate at the hearing before me as to whether or not the benefit of the provisions of Section 258 is itself contingent on the prosecution having taken place at the time the alleged offender was a "child" as defined. It was accepted, however, by both sides by reference to the judgment in *Forde v. Director of Public Prosecutions* [2017] IEHC 799 that the benefit is available irrespective of the accused's age at the date of trial.

> "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'.

62. Thus, if the Applicant is convicted, he will have the opportunity, notwithstanding that the case was heard after his reaching the age majority, to rely on Section 258. Of course, the practical problem identified by Mr. McCarthy, SC, in relation to publicity remains.

63. The effect of section 92 on proceedings involving an adult who is being tried or sentenced in respect of offences alleged to have been carried out when he or she was a "child" (as defined) has been considered in detail by the High Court (McDermott J.) in *Independent Newspapers (Ireland) Ltd. v. I.A.* [2018] IEHC 120.

> "43. While it is clear that the protection conferred by s. 93 continues for life in respect of a child who is prosecuted, convicted and sentenced under the age of eighteen, there is no specific provision extending those benefits when a child passes the threshold age limit of eighteen years in the course of the criminal proceedings. Thus for example, a child whose eighteenth birthday occurs in the middle of criminal trial or is convicted the day after his eighteenth birthday would not have the protection of s. 93 or the sentencing regime that would apply to a child. These specific protections under the Children Act 2001 only apply to a child – a person under eighteen years of age. In cases where offences committed by a child are only detected when they enter adulthood, he/she does not obtain the benefit of any of the provisions of s. 93 or any other provisions of the Children Act. There may be good policy reasons to vest in a court a discretion to extend the protections of anonymity in cases which overlap the transition between childhood and adulthood but this has not been addressed by the Oireachtas which has confined the protections to those under eighteen years. This is consistent

with the well-established principles of sentencing applicable to an adult who has committed an offence as a child but comes to be sentenced as an adult considered in the case law set out above.

44. The court must uphold the provisions of Article 34.1 of the Constitution that justice shall be administered in public 'save in such special and limited cases as may be prescribed by law'. The restriction on publication or reporting matters that might tend to identify a child is specifically limited to persons under eighteen years. In *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 the Supreme Court held that it was a fundamental right in a democratic State and a fundamental principle of the administration of justice under Article 34.1 that the people have access to the courts to hear and see justice being done save for limited exceptions. Any order restricting the contemporaneous reporting of legal proceedings by the press must be viewed as a curtailment of access by the people. Accordingly, any trial held in such circumstances is not a trial held 'in public' within the meaning of the provisions of Article 34. There is no discretion to order a trial otherwise than in public. However, the court also held that the exercise of rights conferred by Article 34.1 could be limited not only by acts of the Oireachtas but also by the courts where it was necessary in order to protect an accused person's constitutional right to a fair trial, a right which was superior to any rights arising from the provisions of Article 34.1. In this case the trial had concluded when the publication occurred. Thus there was no threat to the right to a fair trial. I ndeed the learned trial judge did not base her decision to continue the restriction on reporting on any perceived prejudice to the exercise of that right."

64. There was some discussion at the hearing before me as to whether the loss of anonymity could be mitigated by the trial court making an order that the criminal proceedings against the Applicant be heard otherwise than in public. An order was also sought from this court directing that the identity of the Applicant in the within judicial review proceedings not be disclosed. Both parties submitted that the court had jurisdiction to make such an order pursuant to Section 45 of the Courts (Supplemental Provisions) Act 1961. Reliance was placed in this regard on the judgment of the High Court (Humphreys J.) in *M. McD. v. Director of Public Prosecutions* [2016] IEHC 210. The judgment suggests that Section 45(1) of the Courts (Supplemental Provisions) Act 1961 is in deliberately wide terms and is not confined to proceedings relating to persons who are children at the time the matter comes before the court.

65. With respect, I have some doubts as to whether it is permissible to make an order restricting the reporting of proceedings involving an adult even in circumstances where the alleged offences occurred during a time when he or she was a "child". It seems to me that in circumstances where the Oireachtas has made express provision for restricting the reporting of criminal proceedings involving offences alleged to have been committed by children, but has omitted to extend the protection to circumstances where the child has become an adult, some weight should be given to this legislative preference.

66. It is not, however, necessary for me to decide this issue. This is because I am satisfied that—even if this court does have jurisdiction under Section 45 to direct that the judicial review proceedings be heard otherwise than in public—I would not be prepared to exercise same on the facts of the present case. The general principle is that justice must be administered in public, and even if Section 45 can be interpreted as applying to proceedings brought by adults in respect of events which occurred when they were minors, there would have to be some special feature which would justify such an order. In the present case, the alleged offences occurred at a time when the Applicant was seventeen years old, i.e. close to his age of majority, and given the serious nature of the alleged offence, there is a public interest in ensuring that any criminal proceedings are heard in public. Different considerations might apply if the alleged offender had been a young child at the time the offences were said to have occurred, or if the offences involved allegations of sexual assault. Absent those features in the present case, I would be reluctant to make the direction sought.

67. Lest I am incorrect in this, I propose to make an order *pro tem* restricting the reporting of any matter which would identify the Applicant. There is to be no reference to his name, his address or the general area from which he comes. Reference can be made to the fact that he is detained at Oberstown, and to the events of 29 August 2016. This order will lapse twenty-eight days after the perfection of the High Court order in this case unless an appeal or an application for leave to appeal, as the case may be, has been filed with either the Court of Appeal or the Supreme Court. In the event an appeal is filed, then such order is to remain in place until such time, if any, as set aside by the Court of Appeal or the Supreme Court or the appeal is dismissed. I think that it is necessary to do this, otherwise any right of appeal against my finding that Section 45 of the Courts (Supplemental Provisions) Act 1961 should not apply would be rendered nugatory.

(iii) Mandatory Probation Report

68. The third alleged prejudice is the loss of a right to a mandatory probation report under section 99. I do not regard this as a particularly serious detriment in circumstances where the trial court would, in any event, have a discretion to seek such a report. In this regard, I adopt the approach taken in *R.D. v. Director of Public Prosecutions* [2018] IEHC 164 and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296.

Summary

69. In summary, therefore, I have concluded that the principal prejudice suffered by the Applicant as a result of the alleged prosecutorial delay is that he has lost the benefit of the reporting restrictions under section 92 of the Children Act 2001. The other complaints made do not, to my mind, represent a real prejudice. In particular, I do not think that the loss of section 96 is significant on the facts of the present case where it seems to me—in the event of a conviction—that a custodial sentence is likely. Similarly I do not think that the loss of the requirement for a mandatory probation report is significant.

70. In performing the balancing exercise mandated by the Supreme Court in *Donoghue*, it is necessary to weigh this prejudice against the public interest in the prosecution of offences. There are a number of aspects of the present case which point strongly in favour of allowing the prosecution to proceed. First, the offences occurred at a time when the applicant was 17 years of age. As noted in *Donoghue*, the age of the applicant is something to be taken into account. Secondly, the offences alleged are very serious offences. They include a charge of arson under the Criminal Damage Act 1991. The offence of arson under subsection 2(1) carries a maximum penalty of imprisonment for life. Thirdly, there is a particular public interest in the prosecution of these alleged offences as they involve a disturbance at a children detention centre. It is essential to the rule of law to ensure that discipline and order are maintained at prisons and other places of detention.

CONCLUSIONS

71. There was no blameworthy prosecutorial delay in the present case. The nature of the alleged offences necessitated a detailed and complicated investigation by An Garda Síochána. I am satisfied that this investigation was carried out with reasonable expedition during the twelve-month period between the date of the alleged offences and the Applicant reaching the age of majority.

72. Lest I am incorrect in this finding, I think that the seriousness of the alleged offences (which include a charge of arson); the fact that they relate to a disturbance as a children detention centre; and the fact that the Applicant was seventeen years of age when he is said to have committed the alleged offences, are all factors which tip the balance in favour of allowing the prosecution to

proceed.

73. Accordingly, the application for judicial review is dismissed.

74. I also propose to make an order *pro tem* restricting the reporting of any matter which would identify the Applicant. I think that it is necessary to do this, otherwise any right of appeal against my finding that Section 45 of the Courts (Supplemental Provisions) Act 1961 should not apply would be rendered nugatory.

75. There is to be no reference to the Applicant's name, his address or the general area from which he comes. Reference can be made to the fact that he is detained at Oberstown, and to the events of 29 August 2016. This order will lapse twenty-eight days after the perfection of the High Court order in this case *unless* an appeal or an application for leave to appeal, as the case may be, has been filed with either the Court of Appeal or the Supreme Court. In the event an appeal is filed, then such order is to remain in place until such time, if any, as set aside by the Court of Appeal or the Supreme Court or the appeal is dismissed. The parties have liberty to apply to this court as necessary.