Neutral Citation: [2014] IEHC 33

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/975 JR

Between/

G.

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 24th January, 2014

Introduction

1. The applicant in this case was born on the 24th August, 1992. He seeks to restrain the continuation of a prosecution against him relating to two charges of serious sexual offences against a very young girl. The offences are alleged to have been committed in July 2008, shortly before the applicant's sixteenth birthday. He was not charged until four weeks before his twentieth birthday, in July 2012. It is pleaded, although not seriously argued, that the delay in charging him has prejudiced him in his defence. The main issue in the case is the claim that the delay has amounted to a breach of his right to be tried with due expedition. It is further argued that the delay constitutes a breach of the special obligation of the respondent to deal expeditiously with juvenile accused persons and has caused the applicant to lose the benefit of protections granted to such juveniles.

2. The respondent denies that there has been any blameworthy delay. It is argued that there is no risk of an unfair trial, and that such a risk is the only ground upon which relief could be granted. It is further asserted that any prejudice to the applicant in relation to the applicable sentencing regime, by reason of the lapse of time, can be taken into account by a sentencing judge.

Background to the charges

3. The charges arise out of an incident that occurred on the evening of the 5th or the early hours of the 6th of July, 2008, at a party to celebrate a family event. The applicant was the son of a family friend and was well known to the complainant. She was eight years old at the time and the applicant was, as already noted, approaching his sixteenth birthday. It is alleged that the applicant took the complainant into a bathroom, locked the door and told her to take her panties off. He then raped her vaginally and either attempted to or did penetrate her anally. The complainant appears to have told her mother on the evening of the 6th July and a complaint was immediately made to the Gardaí. An investigation commenced, led by Sergeant Patrick McGirl.

4. On the following day, the 7th July 2008, the complainant was taken to Crumlin Children's Hospital. Also on that day, the applicant's home was searched and he went to a Garda Station with his mother, where he made a voluntary cautioned statement containing admissions in relation to both this complainant and another child. This second child is referred to as ACM.

The progress of the investigation

5. The following chronology is taken from the affidavit of Sergeant Leona Tolan.

9th July 2008: A statement was taken from the complainant by means of a question and answer session.

18th July 2008: A complaint was taken from the second complainant, ACM, by means of a memo of questions and answers.

22nd July 2008: A report from Sergeant McGirl was sent to the National Juvenile Liaison Office. The report was also forwarded to the applicant's local Garda station.

5th August 2008: A blood sample was provided voluntarily by the applicant in the company of his mother.

11th August 2008: Samples from the complainant and the applicant were received by the Forensic Science Laboratory.

12th August 2008: The presence of semen in the panties of the complainant was reported.

30th August 2008: Documents (unspecified) were sent to National Juvenile Office.

2nd September 2008: A report from Sergeant McGirl and the statement of the complainant (in question and answer form) were sent to the National Juvenile Office.

September 2008: The complainant was assessed by St. Louise's Unit.

September 2008: The National Juvenile Office requested a "skeleton file" and a "suitability" report.

22nd October 2008: A report confirmed that the applicant's DNA was on the complainant's panties.

24th November 2008: St. Louise's Unit reported on the assessment of the complainant.

26th November 2008: A "suitability" report on the applicant was forwarded to the National Juvenile Office by a Sergeant from the applicant's local Garda Station.

27th November 2008: Sergeant McGirl was transferred to a different county.

28th November 2008: The National Juvenile Office acknowledged receipt of the report. It requested a report on the applicant from the Southside Interagency Treatment Team. It also requested "*a statement from the complainant if one becomes available.*"

10th and 16th December 2008: Communications between Gardaí, stated to be "*in respect of advancing the Juvenile Liaison Officer issue*". These are not exhibited.

30th April 2009: Report on ACM by Crumlin Children's Hospital.

30th June 2009: The National Juvenile Office requested a "skeleton file".

14th and 24th September and 13th and 22nd October 2009: Communications between Gardaí and the National Juvenile Office "*in respect of advancing the JLO issue.* " These are not exhibited.

12th January 2010: The National Juvenile Office confirmed that it had the file and the "suitability" report and sought the statement of the complainant. (Sergeant Tolan says that this had already been sent, and speculates that confusion may have been caused by the fact that the statement was in question and answer format. In any event, there is no evidence that the request was responded to in any fashion.)

4th April2010: the National Juvenile Office sought an "update".

18th April2010: A statement was taken from ACM.

11th May 2010: The National Juvenile Office requested the full file.

9th June 2010: The documentation relating to the case was forwarded by Gardaí to the National Juvenile Office.

17th July 2010: The National Juvenile Office communicated a direction that the applicant was not suitable for inclusion in the Diversion programme.

25th September 2011: Sergeant Leona Tolan was assigned as investigating member to "*complete the file*".

30th October 2011: Sergeant Tolan took a statement from the mother of ACM. She notes in her affidavit that this lady stated that she had informed Sergeant McGirl of the allegations in respect of her daughter on the evening of the 6th July, 2008.

10th November 2011: The National Juvenile Office issued a decision that the applicant would not be admitted to the Diversion programme in respect of the allegations by ACM.

14th January 2012: Sergeant Tolan sent the file and covering report, relating to both the complainant and ACM, to the Director of Public Prosecutions ("the respondent").

3rd July 2012: The respondent directed the prosecution of the applicant on the two charges relating to the complainant.

23rd July 2012: The applicant was arrested and charged with rape and attempted rape of the complainant.

5th October 2012: The applicant was sent forward for trial to the Central Criminal Court.

6. On the 23rd October, 2012 the applicant's solicitor wrote to the respondent requesting an explanation for the delay. The respondent replied on the 14th November, 2012, asserting that there had been no delay in the making of the complaint, the taking of witness statements or in the making of the decision to prosecute. It was stated that "*most of the relevant evidence had been collected within one month of the commission of the alleged offences.* " There is then a reference to the fact that Sergeant McGirl had been transferred and that a new investigating member had not been assigned until "September/October 2011". The letter also informed the applicant's solicitor that it was intended to replace the count of attempted anal rape with one of anal rape contrary to s.4 of the Criminal Law (Rape)(Amendment) Act, 1990.

7. Sergeant Tolan accepts on behalf of the Respondent and An Garda Siochana that the progress of the investigation was delayed by the gap between the transfer of Sergeant McGirl and the assignment of the file to her as the new investigating officer. She suggests that there was some confusion as to whether or not Sergeant McGirl was still dealing with the matter. She avers that an additional cause of delay was "*a break-down in communication*" between the Juvenile Liaison Offices in the relevant Garda Stations and the National Juvenile Office regarding the forwarding of documentation. There is no elaboration as to the nature of this "break-down" and as noted the correspondence has not been exhibited.

8. Leave to seek judicial review was granted by Peart J. on the 3rd December, 2012.

The applicant's attendance for treatment

9. After the allegations were made against him the applicant was referred by a social worker to the Southside Interagency Treatment Team ("S.I.A.T.T"). This body runs treatment programmes for adolescent boys who have sexually abused. A parallel course is offered to the parents of such boys. The Team is coordinated by representatives from St. Louise's Unit, the Health Service Executive and the Child and Adolescent Mental Health agency. It may be noted that these are all bodies with child protection responsibilities to the victims or potential victims of sex offenders.

10. The applicant and his parents attended for a number of interviews in October, November and December of 2008 as part of the assessment process for the programme.

11. The assessment report is dated the 2nd of September, 2009 but deals only with the assessment process, which culminated in the offer of a placement to the applicant and his parents on a programme which commenced in January, 2009. It sets out a detailed account of the applicant's family and personal history. His mother and step-father are immigrants and he came to Ireland at the age of 11.

12. The applicant was assessed as being in the category of "Medium Concern - Medium Strength". The "concerns" relate to risk

factors which, in the applicant's case, are significantly connected to family issues including the use of physical violence as a means of discipline. The "strengths" are positive factors which, in his case also related significantly to his family because of the attitude to his offending and the high motivation for him to receive treatment.

13. The applicant was described as "honest and detailed" in his account of his sexually abusive behaviour and "highly motivated for treatment". However, there was "a notable lack of empathy" towards his victims. Specific examples of this may be found in his inability to answer questions about whether or not the complainant had been frightened and similar topics. He demonstrated "a cold callous attitude" towards sexual offending and held certain beliefs that supported and minimised sexually abusive behaviour. Concern was also expressed about the fact that, according to his own admissions, there had been previous incidents of sexual abuse on his part.

14. However, the overall assessment was that the applicant could be appropriately treated in the community and, as mentioned, he and his parents were offered a place on a group treatment programme. This programme appears to have involved three sessions of group treatment per week for about eighteen months. When it was completed, the applicant engaged in "relapse prevention work" on a one-to-one basis for a further six months. He "graduated" from the service in December, 2011. At this point he was nineteen and a half.

15. A letter to the applicant's social worker written on the 301h January, 2012 by Judy McCarthy, Team Leader, and Rhonda K. Turner, Principal Psychologist and Co-ordinator of S.I.A.T.T. reads in relevant part as follows:

> *"K. prepared well and demonstrated enormous commitment to the relapse prevention work which he engaged in on a one-to-one basis over the last six months.*
>
> *I have made an arrangement with K. to meet with him regarding referring him to a generic counselling/psychotherapy service. This will offer him ongoing support and an appropriate forum to explore his issues in relation to his family and his experiences of physical abuse by his parents.*
>
> *Given the concerns that were present when K. started the group treatment programme offered by S.JA. T T, he has progressed well in relation to the treatment issues identified in assessment.*
>
> *K. and his family also attended [a therapy service} in 2010. S.JA.TT made this referral as it was apparent that the family could benefit from support around communication in the family, relationships and expression of anger in the family. Both [K.'s mother] and K. expressed satisfaction with this service and commented on how much it helped them.*
>
> *As part of his preparation for finishing, K. decided to rewrite his apology letters to his mother, the two children he harmed and their parents. It was evident from this that K.'s capacity for empathy has improved significantly. K. accepts full responsibility for his sexually abusive behaviour and has worked very hard to make and sustain the changes required for this. "*

16. By the time he was charged the applicant had finished school and was engaged in third level studies. He has not come to the attention of the Gardaí in any other respect.

17. The applicant has sworn a short affidavit verifying the contents of the Statement of Grounds and exhibiting the two reports referred to above. He has not denied the offences or claimed any specific prejudice in relation to any possible defence. It seems to me that this is a case in which it must be presumed that the applicant would, if put on trial, follow through on his admissions and plead guilty to one or both charges.

18. Further, there is no averment that the applicant was given any reason to believe that he would not be prosecuted or that he has been caused any particular stress or distress, beyond the norm, arising from the decision to charge him. A contention made in the written submissions, to the effect that he must have had "good reason to believe" that he would not be charged, has not been supported by any evidence. Indeed, the contrary might have to be assumed if the decision of the National Juvenile Office in July 2010 was communicated to him but there is no evidence on this point either.

19. The case therefore comes down to a single issue:- whether the delay that has occurred in the case is such, having regard to the applicant's age, as to warrant restraining its further prosecution.

Submissions

20. On behalf of the applicant, Ms. Caroline Biggs SC makes the case that a significant part of the delay was caused simply by reason of the transfer of the officer in charge of the file. As the respondent had admitted in correspondence, almost all of the necessary information was available within a month of the incident. The first decision in relation to the Juvenile Liaison procedure was not made until two years later.

21. It is submitted that the applicant, through no fault of his own, is now charged as an adult and has thereby lost the benefit of various provisions enacted for the protection of young offenders. In particular counsel refers to the regime established under the Children Act, 2001 whereby the anonymity of any accused child is safeguarded at all times, while on conviction a child may be detained only as measure of last resort. She also refers to the fact that if a child is certified as a sex offender, the resulting restrictions will endure for only half of the period applicable to an adult offender.

22. The decisions of the Supreme Court in *B.F. v DPP* [2001] 1 I.R. 656 and the High Court in *McArdle v DPP* [2012] IEHC 286, *Donoghue v DPP* (ex temp., Birmingham J., 29th January, 2013) and *Cullen v DPP* [2013] IEHC 269 are relied upon. (It should be noted that the latter two decisions are under appeal.)

23. On behalf of the respondent, Mr. Paul Anthony McDermott BL accepts, in principle, that there is an obligation to deal with young offenders expeditiously and that the fact that admissions were made does not alter that position.

24. However, he contends that it is still necessary, in seeking relief of this nature, to establish incurable prejudice. In this regard he argues that *B. F.* was decided before the Supreme Court dealt with the general issue of delay in *P. M v D.P. P.* and says that, if the proper interpretation of the former is that a minor may not be prosecuted purely because of lapse of time, it has not survived *P.M* It is contended that the distinctions made in previous times between different categories of case affected by delay (summary charges, sexual offences, execution of bench warrants and so on) should now be regarded as having been merged. There is now only one test - is there prejudice giving rise to a real risk of an unfair trial?

25. Mr. McDermott originally argued that in each of the cases relied upon by the applicant there was in fact some degree of prejudice, at least in respect of the loss of anonymity, but that because of the nature of this case the applicant would be afforded that protection in any event. Having accepted that he was wrong about that (the anonymity of an adult convicted of a sexual offence being contingent only upon whether or not identification of the accused would lead to identification of the injured party) he maintained that this in itself could not outweigh the public interest in continuing the prosecution. The public interest lies, it is contended, in establishing whether or not a rape occurred and, to some extent, in the compulsory monitoring of a sex offender within the criminal justice system.

26. It is pointed out that the applicant has not demonstrated or indeed claimed any degree of stress or anxiety and that there was nothing about the case to suggest, as in *B.F.*, that it was a "marginal decision" whether or not to prosecute.

Relevant legislative provisions
27. For the purposes of the Children Act, 2001 as amended, a person under the age of 18 is in law a child. This status confers a number of protections in relation to the criminal process which are not available to adults.

28. Firstly, where a child who is over the age of criminal responsibility and under the age of 18 accepts responsibility for criminal (or, after the Criminal Justice Act, 2006, anti-social) behaviour then, unless the interests of society require otherwise, he or she must be considered for admission to the Diversion Programme provided for in Part 4 of the Act. The Programme is administered by the National Juvenile Office of An Garda Síochána and its Director is a member of a rank not less than Superintendent. If admitted to the programme, the child may be supervised, may be the subject of conferences attended by the relevant parties and may be required to comply with an "action plan" including any reparation or rehabilitative measures thought appropriate.

29. The statutory criteria for inclusion are set out in s.23 and require, on the part of the child, the acceptance of responsibility and his or her consent to a caution and supervision by a Juvenile Liaison Officer. The Director of the Programme must be satisfied that the admission of the child would be appropriate, would be in the best interests of the child, and would not be inconsistent with the interests of society or of any victim. The views of victims are to be given "due consideration" but admission to the Programme is not dependent upon their consent.

30. Section 47 of the Act empowers the Minister for Justice to make regulations which may, *inter alia*, exclude specified types of criminal behaviour from consideration for the Programme unless, in a given case, the Director of Public Prosecution directs otherwise - no such regulations appear to have been introduced.

31. Admission to the Programme means that the child may not be prosecuted for the relevant offending behaviour. The acceptance of responsibility on the part of the child is inadmissible in any subsequent criminal or civil proceedings and may not be reported.

32. Where a child is not admitted to the Programme but is prosecuted, he or she will continue to benefit from certain measures under the Act. His or her anonymity is protected in all cases under s.93. If convicted, a child will not be deprived of his or her liberty unless a wide range of alternative, community- based possibilities have been considered and found to be unsuitable. The general principle is set out in s.96:-

> *"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."*

33. Section 143(1) emphasises this point:-

> *"The 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 ..."*

34. Young offenders are also perceived to be deserving of different treatment in the area of sexual offences. Section 8 of the Sex Offenders Act, 2001, which sets out mandatory periods of registration and monitoring for persons convicted of such offences, prescribes periods for offenders under the age of 18 of half the length of those applicable to adults.

The authorities -the right of children to a speedy trial
35. The leading authority on the issue of the special obligation to deal expeditiously with cases involving young offenders is the Supreme Court decision in *B.F v D.P.P.*, cited above. That judgment, delivered on the 22nd February, 2001, deals with events in the 1990s and pre-dates the coming into force of the Children Act of that year. It concerned allegations of oral and anal rape against two small girls, one of whom was aged seven and the other six. The incidents took place in April/May 1995, when the accused appellant had been fourteen. He was questioned within a short period after the offences and made admissions although claiming that he had not coerced the girls. As noted in the judgment, the latter factor afforded no defence. According to the court, all the necessary evidence to mount a prosecution was in the hands of the authorities by the end of May, 1995.

36. It is noted in the judgment that at an early stage in the case a referral was made to the National Juvenile Office (which at that time had been operating on a non-statutory basis for about thirty years). It responded that the offence involved was excluded from consideration for the programme unless a contrary course was directed by the Director of Public Prosecutions.

37. The appellant's parents took him to England, in circumstances that, his mother averred, involved the knowledge and approval of the Gardaí. This was denied, but undoubtedly there was no difficulty in locating him. The appellant was arrested in England two years and nine months after the date of the alleged incident. He was eventually extradited about a year later.

38. According to the court, there was really only one issue in the case- whether the undoubted delay in the making of the extradition arrangements entitled the appellant to an injunction restraining the prosecution.

39. The Director of Public Prosecutions denied that there had been undue delay, or any delay for which the State authorities were responsible, and pleaded that there was no actual or presumed prejudice to the appellant.

40. Giving the judgment of the court, Geoghegan J. said:-

> *"Before the question of prejudice is considered it is necessary to ask the question was the delay excessive and inexcusable? It is part of the submission of the appellant that in considering this issue the special circumstance of the*

age of the alleged offender must be taken into account. While there does not appear to be any authority on this precise point, I think the argument is well-founded. This was a case where on all the evidence it appears to have been a somewhat marginal decision as to whether a prosecution should be brought at all. While from the point of view of the parents of the victims the offences, understandably, seemed horrific it may well be that there was no serious criminal intent on the part of the appellant. It is obviously impossible to predict how the evidence would unfold at a trial but even upon conviction it might well be a case where a custodial sentence would not be imposed. A case of this kind should be handled with the utmost sensitivity and it is only fair to say that some sensitivity was shown in this case. But in one area there was default. It was of the utmost importance that if it was decided to proceed with charges there should be no delay so that a trial would take place while memories were fresh and while the appellant was reasonably close to the age at which he is alleged to have committed the offences. A trial of an adult in respect of an offence which he committed as a child and particularly a sexual offence takes on a wholly different character from a trial of a child who has committed such offences while a child. This is true quite independently of the different penal provisions applicable to a child or young person, a point also relied on by the appellant. There was, in my view, a special obligation of expedition in this case, but that obligation was not complied with in that the extradition proceedings were allowed to take an excessive length of time and this delay appears to be inexplicable. "

41. The court considered the classic authority on delay- *State (O'Connell) v. Fawsitt* [1986] I.R. 362, in which the decision of the Supreme Court of the United States in *Barker v. Wingo* (1972) 407 U.S. 514 was approved and it was held that

> *"... the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively; or, to express the same proposition in positive terms, that the trial will be heard with 'reasonable expedition '... "*

42. In B.F. the Supreme Court went on to say that

> *"The right of an accused to a trial with reasonable expedition is separate from, and in addition to, his right to a fair trial."*

43. Two Supreme Court judgments were cited in support of the proposition that it was not always necessary to establish either actual or presumed prejudice to stop a criminal case - *D.P.P. v. Byrne* [1994] 2 I.R. 236 and *P.C. v. D.P.P.* [1999] 2 I.R. 25. In the former, Finlay C.J. said in a passage the principle of which was accepted by the other members of the Supreme Court,

> *" ...I am driven to the further conclusion that, of necessity, instances may occur in which the delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable would give rise to the necessity for a court to protect the constitutional right of the accused by preventing the trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined. "*

44. In *P.C.*, a similar view was expressed by Keane J., who said

> *"Manifestly, in cases where the court is asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, the paramount concern of the court will be whether it has been established that there is a real and serious risk of an unfair trial: that, after all, is what is meant by the guarantee 'in due course of law'. The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired. "*

45. In *B.F*. Geoghegan J. also referred to a High Court judgment of his own, *P.P. v. D.P.P.* [2000] 1 I.R. 403 in which he had held that where there was quite clearly culpable delay on the part of the Garda authorities in relation to sexual offences which had occurred a long time ago it was particularly incumbent upon the State authorities not to contribute to further delay. In that judgment he had said

> *"I think that where there has been a long lapse of time, as in these prosecutions for sexual offences, between the alleged offences and the date of complaint to the guards, it is of paramount importance, if the accused's constitutional rights are to be protected that there is no blameworthy delay on the part of either the guards or the Director of Public Prosecutions. If there is such delay, the court should not allow the case to proceed and additional actual prejudice need not be proved."*

46. The judgment in *P.P.* then notes that this latter point was not covered by Supreme Court authority and that there was, therefore, some doubt as to the correct legal position.

47. In *B.F.*, Geoghegan J., having referred to importance of not delaying a prosecution where there had been pre-complaint delay, continued:

> *"To some extent by analogy, I also take the view that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved. "*

48. On the facts of *B.F.,* the court held that the period of two years and nine months before the arrest of the appellant in England ought not to have been allowed to elapse and that there had been altogether unnecessary delay in relation to the extradition. Accordingly, an injunction was granted against the respondent.

49. The next relevant judgments are those of Quirke J. in the joint cases of *Jackson v DPP* and *Walsh v DPP* (both unreported, Quirke J., 8th December, 2004). The applicants faced unrelated charges of violent disorder, committed when they were, respectively, 15 and 16 years old. In both cases, there had been a delay of about a year and a half before they were arrested and charged. In neither case was there evidence suggesting that the applicant's right to a fair trial had been compromised.

50. In these cases the respondent, the Director of Public Prosecutions, argued that the principle identified in *B.F*. should be applied only to sexual offences committed by a child. It was submitted that the offence of violent disorder was one in relation to which the community had a greater interest in bringing offenders to trial. In rejecting the submission and in granting relief, Quirke J. said

> *"It is no secret that persons in their late teenage years have particular vulnerabilities. These vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them.*
>
> *The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity ...*
>
> *...I take the view that where a criminal offence is alleged to have been committed by a child or young person there is always a special duty upon the State authorities (over and above its fundamental duty) to ensure the speedy trial of the child or young person in respect of the charges preferred. "*

51. The next judgment to which I have been referred is that of Dunne J. in *C. (A Minor) v D.P.P.* [2008] IEHC 39. The background to the case was one of complex difficulties in the applicant's life and it was not disputed that she was a particularly vulnerable child. When she was thirteen years old she allegedly committed an offence of arson in the family home.

52. It appears that there was a referral to the National Juvenile Office which, presumably, did not recommend admission to the Programme. A summons was applied for almost six months after the date of the incident but was never in fact served. The applicant's solicitor was aware of the matter and engaged in ongoing, lengthy correspondence with the Director of Public Prosecutions requesting the withdrawal of the charge. However, it was neither withdrawn nor brought to court until about fourteen months after the date of the incident and then only at the instigation of the applicant's solicitor. The solicitor had made it clear that, having regard to the applicant's troubled personal circumstances, the situation was urgent and that if the matter was to proceed the summons should be served expeditiously.

53. In the application for judicial review it was pleaded on the applicant's behalf, *inter alia*, that in the particular circumstances of her youth and vulnerability the delay in bringing proceedings amounted to a breach of her constitutional rights. *B.F., Walsh and Jackson* [2004] IEHC 380 were relied upon. No specific prejudice was asserted in relation to the risk of an unfair trial.

54. In granting the relief sought, Dunne J. held, firstly, that there had been blameworthy prosecutorial delay. She considered that there could be no basis for complaint in relation to the period during which the matter was being dealt with by the National Juvenile Office but there was no adequate explanation for the seven and a half months after the issue of the summons.

> *"I am satisfied that bearing in mind the special duty described by Geoghegan J and Quirke J in the decisions referred to above that in the context of this case, the State has failed to comply with that special duty. The State was aware that the applicant was a minor, that she was a particularly vulnerable minor and her solicitor was doing everything possible to persuade the Director of Public Prosecutions to withdraw the proceedings. The Director was perfectly entitled not to do so but having made the decision to proceed with the charge against the applicant, it behoved the State authorities to ensure that the matter was dealt with expeditiously ...there appears to have been no sense of urgency on the part of the State authorities whatsoever."*

55. Secondly, Dunne J. considered the issue of prejudice in circumstances where no risk of an unfair trial had been established or claimed. She referred to the judgment of Murray C.J. in *H v DPP* [2006] 3 I.R. 575, where the evolving jurisprudence relating to delay in cases involving allegations of sexual offences against children was considered by the Supreme Court. At p. 622 the test in such cases was stated as follows:

> *"The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial. "*

56. Dunne J. then reviewed the evidence grounding the contention in the case that the delay had been positively harmful to the applicant's welfare. She accepted that, while the charge was not the cause of the applicant's difficulties, the delay in dealing with it could only have exacerbated the situation and had done so to the extent that it would be unfair or unjust to put the applicant on trial. The case therefore came into the category of "wholly exceptional circumstances".

57. In *McArdle v. D.P.P.* [2012] IEHC 286, the applicant was charged with criminal damage and assault causing harm, arising out of an incident where he allegedly threw rocks at a bus and injured a passenger. The incident occurred on the 3rd February, 2007 and the applicant was at the time sixteen years old. A decision having been made by the Juvenile Liaison Office that the case was not suitable for admission to the Diversion Programme, the file was sent to the Director of Public Prosecutions in October, 2007 and directions to prosecute were given in November. The applicant was charged in January, 2008. Over the following months the defence sought psychiatric and psychological reports. In the period from October, 2008 to December, 2009 the applicant was the subject of seven bench warrants in the District Court. The last of these was executed in November, 2010 and the applicant was sent forward for trial in February, 2011.

58. The applicant, who asserted his innocence, claimed to be prejudiced in his defence by his inability to remember potential witnesses who might have assisted him and by the death of one named witness. He disputed responsibility for aspects of the delay, pointing out for example that he could not have been considered suitable for admission to the Programme given his denial of the offences. He also contended that as he was now an adult he would be at a disadvantage compared to his position when a child, both in terms of giving evidence before a jury and in terms of sentencing if convicted.

59. Hedigan J. recognised the principle established in *B.F.* that there was a special duty on the part of the prosecution to expedite criminal matters concerning children. However, he refused the relief sought. He considered, firstly, that an order prohibiting the holding of a trial must be exceptional in nature.

> *"The court must have regard to the public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished.*
>
> *Furthermore prohibition is not necessary where the trial judge can give appropriate directions and warnings on issues which arise after such a lapse of time. Such directions and warnings should normally be sufficient to ensure a fair trial. "*

60. Dealing with the delay that had occurred, Hedigan J. found that the first eight months were accounted for by the referral to the

Diversion Programme. He noted that counsel for the respondent had informed the court that it was the invariable practice to refer all matters involving minors to the Programme. However, he did find it "undesirable" that the decision took eight months to make, having regard to the special duty of the prosecution and also because the decision in the case was in fact straightforward. As far as the balance of the time was concerned, he found that the greatest part by far had been caused by the applicant himself.

61. The argument in respect of prejudice relating to witnesses was not accepted on the facts of the case. It was further considered that any difficulties in relation to a trial could be dealt with by appropriate warnings from the trial judge. As far as the sentencing regime was concerned, Hedigan J. said that it was to be presumed that a sentencing judge would take into account the applicant's age at the time of the offence.

62. In summary, Hedigan J. was not satisfied that there had been blameworthy prosecutorial delay such as to breach the applicant's entitlement to a trial with reasonable expedition or deny the applicant the opportunity of a fair trial.

63. In *Donoghue v DPP* (ex temp., Birmingham J., 29th January, 2013) the alleged offence concerned the possession with intent to supply of heroin with a value of approximately €7,560. The drugs were found in the applicant's home three days after his sixteenth birthday. He made voluntary admissions both at the time and while in Garda detention. He was not charged until about 14 months later.

64. The note of the judgment records reference to the fact that a file had been submitted to the National Juvenile Office but the bulk of the delay appears to have been attributable to the transfer of two Gardaí whose statements were required for the Book of evidence.

65. Birmingham J. approached the case on the basis that the first question was whether there had been "significant, culpable prosecutorial delay". In the circumstances of the case he was "in no doubt whatsoever" that there had been.

> *"It has long been recognised that there is a particular and special duty on state authorities to provide a speedy trial for a child or young person. That principle was first articulated in the Supreme Court decision of B.F v. D.P.P [2001] I.R. 656 where judgment was delivered by Geoghegan J. In the case of Jackson v. D.P.P. and Walsh v. D.P.P.,judgment of Quirke J. 8th December 2004, it was confirmed that the principle was of general application and not confined to sexual offences.*
>
> *What is to be expected in terms of when a trial will take place will vary depending on the nature of the offence under investigation and all the surrounding circumstances. There may well be situations where offences giving rise to issues of real complexity are investigated and the suspect is a juvenile, or a juvenile becomes a suspect during the investigation. In such circumstances that time will pass may be unavoidable.*
>
> *It is also very much in the interests of young people and indeed of society as a whole that a possible role for the Juvenile Liaison Scheme and Diversion Schemes should be explored and this may take some time. However, in that regard I agree with the views expressed by Hedigan J. in McArdle v. D.P.P. [2012] IEHC 286 that unnecessary delays, while consideration is given to this aspect, should be avoided There is, however, nothing to indicate that this was a significant aspect of the present case".*

66. Having held that the delay in the case was attributable to the prosecution, Birmingham J. went on to consider the consequences.

> *"In this regard I think it reasonable to approach the case on the basis that this was a case which in all likelihood was going to be dealt with by way of a plea of guilty. I do acknowledge that it is not unheard of for cases where there were early and comprehensive admissions recorded to be fully contested subsequently. However, while acknowledging that, I think that realistically the applicant's response in terms of signing admissions in his own home and then maintaining that approach at the Garda station meant that the strong probability was that he would follow up on his initial reaction with a plea of guilty."*

67. For the sake of completeness Birmingham J. added an express finding that there was no evidence of prejudice to the applicant's ability to contest a trial.

68. However, on the facts of the case Birmingham J. considered that the applicant should, realistically, have been charged within four to six months of the incident. Had that happened, he would have benefited from the provisions of the Children Act, 2001 summarised above. Birmingham J. said that the right to anonymity would have been of "considerable practical significance", in part because the fact that a serious offence had been committed by a boy just three days after his sixteenth birthday might render the case more than usually noteworthy. Reference was also made to the mandatory ordering of a probation report and to the provision that detention should be regarded as a measure of last resort. These were "matters of real significance". 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.

69. It must be noted that Birmingham J. considered that potentially the most significant feature of the regime no longer applicable to the applicant was the hearing under s.75 of the Act to determine in which jurisdiction the case would be heard (i.e. in the District Court or on indictment). This section does not apply to charges which by their nature must be sent forward to the Central Criminal Court, which is the situation in the instant case. However, on the assumption that the drugs charge would have been sent forward for trial on indictment, he noted that because of the delay, it would be dealt with more than two years after the offence had been committed. In this regard he said

> *"Two years in the life of a sixteen year old boy is a very significant period indeed. In a case which is going to be contested and which may end in acquittal, it is highly undesirable that a young person should have an allegation hanging over his or her head for such a protracted period If the case results in a conviction or if there is a plea of guilty, then the focus of attention is on the capacity of the court to intervene effectively and promote the rehabilitation of the young offender. If two years or more is to be lost then the court's capacity to intervene effectively will be greatly reduced.*
>
> *In summary there has been unacceptable delay which has given rise to serious consequences and accordingly I will injunct the Director from further prosecuting the case. "*

70. The final case in this line of authority is the decision of this court in *Cullen v DPP* [2013] IEHC 269. The facts of the case were so

unusual as to be of little assistance by way of analogy. For present purposes it is perhaps sufficient to say that the applicant was, at the age of thirty-nine, charged with offences arising from a serious assault committed against her father when she was fifteen. On the evidence in the case the applicant was not responsible for any of the delay, which was held to be significant and blameworthy on the part of the State authorities. However, she was also found not to have established prejudice in the sense of impairment of her ability to conduct a defence. In deciding to grant the relief sought I said:

> *"Having considered the relevant factors identified in the case, it seems to me that the matters to be given the most weight in favour of the applicant are: her age at the time of the alleged offences; the making of a decision by the Director at or about that time not to charge her until the other trial had concluded; the exceptional/apse of time since then; the absence of blameworthy responsibility on the part of the applicant for that lapse of time; the presence of blameworthy dilatoriness on the part of the prosecution authorities and the absence of any feature such as newly-obtained evidence of a significant nature.*
>
> *In favour of the respondent I must bear in mind the seriousness of the charges and the concomitant public interest in prosecuting them, along with a finding that the applicant is not prejudiced in any real sense by the unavailability of Mrs. Carolan.*
>
> *It seems to me that the overwhelming consideration is that the special duty to deal with young offenders as closely as possible to the time of their offences has been seriously breached to the extent that what is now proposed is to try a 40-year old in relation to the words and intentions (not actions) of a 15-year old in circumstances where she is not to blame for the delay. Such a trial would, as described by the supreme Court in B.F. v. D.P.P., take on a 'wholly different character' to any trial that would have been embarked upon when she was at or near the age of 15. Were she to be convicted, the purpose of the sentencing process would also be radically altered. Although many of the protections afforded to young offenders under current legislation did not exist at the time there were certain significant features such as the fact that she could have been imprisoned only in very limited circumstances. Sentencing of a girl of her age would have focussed very largely on the issue of rehabilitation, which is at this stage manifestly irrelevant. "*

71. At the time of writing this judgment, the decisions in both *Donoghue* and *Cullen* are under appeal to the Supreme Court.

Authorities - delay in cases of sexual offences against children

72. Throughout the 1990s the courts encountered for the first time a large number of prosecutions in respect of allegations of sexual offences going back for a considerable number of years. The approach to such cases evolved over time, with the focus eventually shifting away from the question of responsibility for the delay (raising issues such as the "dominance" of the accused over the complainant or "inhibition" on the part of the latter) and towards the effect of delay on the rights of the accused.

73. In *P.M v. Malone* [2002] 2 I.R. 560, the charges against the applicant covered a period of time when he was between fourteen and seventeen. The Gardaí were made aware of the allegations in 1992, when the applicant was twenty two. He was interviewed at that time and made admissions, but at that stage the complainant did not wish a prosecution to ensue. Her attitude subsequently changed and she made a formal complaint in 1998. The applicant was again questioned and made written admissions. He was eventually charged in 1999 but the precise charges which he was to face were not finalised until the following year.

74. In the High Court it was found that there was no evidence of prejudice to the applicant by reason of the delay, there being no suggestion on his part that he could not reasonably recollect the circumstances. It was noted that the issue of dominance by the alleged perpetrator over the complainant did not arise but dominance was held not to be an essential factor. The delay in making the complaint was explained by reference to family relationships and circumstances.

75. It had been submitted that if the proceedings had been brought at the appropriate time, before the applicant became a mature adult, the case would have been viewed more sympathetically by a jury. The trial judge rejected this, in part on the basis that, on the facts of the case, he could not have been prosecuted before the age of twenty-two. As quoted in the Supreme Court, the judgment went on:-

> *"The fact that a young person commits a crime and delay occurs, does not of itself per se confer immunity from prosecution. If the delay does not occur through any fault of the State and is explicable and reasonable from the point of view of the alleged victim and if the accused's ability to defend himself is not so impaired that [there}would be a real and serious risk of an unfair trial, then the trial should go ahead. "*

76. Giving the judgment of the Supreme Court, Keane C.J. referred to the right of an accused person to a reasonably expeditious trial as "an essential feature of the Anglo-American system of criminal justice for many centuries". He continued:

> *"It must be acknowledged that a reading of some of the Irish authorities in this area might suggest that the right to a reasonably expeditious trial is recognised and protected by the law solely in order to ensure the fairness of the trial process itself As it is sometimes put, it is not the delay, but the effects of the delay, which are crucial. Witnesses may die or disappear or, where they are available, their memories of events in the past may be clouded and unreliable. The defendant may experience difficulty in establishing an alibi because of vagueness and imprecision as to when events are said to have occurred.*
>
> *That such consequences may flow from a failure, however caused, to bring the accused to trial is obvious. But it does not follow that the impairment of his ability to defend himself is a necessary precondition to the successful invocation by him of the discrete constitutional right to a speedy trial. "*

77. The Court agreed with the view of the United States Supreme Court that there were three interests protected by the right to a speedy trial - the protection against the risk of an unfair trial, caused by lapse of time being one. The other two were the potential loss of liberty while a trial is pending and the anxiety and concern of the accused resulting from a significant and culpable delay in being brought to trial.

78. In its conclusions the court found that it had not been demonstrated that the capacity of the applicant to defend himself was necessarily impaired by the delay. The fact that he would be dealt with as an adult was not a material factor since that would also have been the case had he been dealt with when the complaint was first made. Nor could it be said in the circumstances of the case that prejudice could be presumed. There was no issue about bail in the case.

79. On the remaining area of protection, the Court held that it was necessary to engage in a balancing process, weighing the right of

the accused to be protected against stress and anxiety caused by unnecessary and inordinate delay against the public interest in the prosecution and conviction of those guilty of criminal offences. In such cases, the court would be concerned with the nature and gravity of the offence and the extent of the delay. On the facts of this case the court was satisfied that the right of the applicant to a reasonably expeditious trial outweighed any conceivable public interest in the continuing prosecution.

80. In *P.M v. D.P.P.* [2006] 3 I.R. 172 the applicant had been charged in December, 2000 with offences alleged to have been committed between 1982 and 1985. The complaint had been made in February, 1998 and the applicant had been arrested and questioned in July, 1999. He succeeded in his High Court challenge to the prosecution, on the basis that, while the delay in making the complaint against him was referable to his own actions and he had shown no impairment of his ability to defend himself, the delay of just under three years between complaint and charge was inadequately explained. Ó Caoimh J. held that this was blameworthy delay which had caused the applicant significantly increased anxiety.

81. On appeal, the issue to be determined by the court was identified by Kearns J. (with whom the other members of the court agreed) as being

> *"whether, in cases where a considerable period of time has elapsed between the dates of the alleged offences and the making of an initial complaint by the victim and where, in addition, there has been blameworthy delay thereafter by the prosecution, the trial should be prohibited by reason of that blameworthy delay alone, or whether the accused person should also be required to demonstrate that some interest protected by the right to an expeditious trial has been so interfered with as to entitle him to the relief sought. "*

82. The Director of Public Prosecutions accepted in his submissions that unexplained delay could not simply be disregarded. He further accepted that where there was a long delay between the commission of the alleged offences and their coming to the attention of the authorities, the latter were under a special obligation to expedite any investigation and prosecution. His principal submission was that an applicant should not be entitled to a stay upon criminal charges solely by reason of delay for which the prosecution authorities were deemed to be responsible, without establishing in addition some degree of prejudice referable to his right to an expeditious trial.

83. Kearns J. referred to the passages from the decision of Geoghegan J. in *P.P.* and the judgment of Keane J. in P.C., cited above at paragraphs 43-47. He went on to contrast these with the analysis of the Supreme Court in *P.M v. Malone*. His conclusions on the issue are set out at p. 185 of the report:

> *"I believe that the balancing exercise referred to by Keane C.J in P.M v Malone [2002} 21R. 560 is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecution delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify; the prohibition of a trial ...*
>
> *...In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief"*

84. The Court found that Ó Caoimh J. had correctly applied this test.

85. Geoghegan J. gave a short judgment in which he stated that he was in complete agreement with the analysis of Kearns J. He accepted that, notwithstanding the words used by him in *P.P.*, blameworthy prosecutorial delay did not automatically give rise to a right to an injunction- rather, his view was that where there was very serious blameworthy delay on the part of the Gardaí this was a factor to be taken into account in the balancing exercise.

86. Referring to his judgment in *B.F.*, Geoghegan J. said

> *"That was a decision of this Court in which I happened to give the judgment but it was agreed with by Keane C.J and Murphy J. Although P.P. v. Director of Public Prosecutions was referred to in the judgment, it is perfectly clear that the decision in B. F. took into account all the surrounding circumstances and the nature of the offence and not merely the prosecutorial delay. I do not think that there is any real conflict between B.F. on the one hand and P.M v. Malone cited above on the other. It is not without significance that Keane C.J sat on both courts. "*

87. In *H v. D.P.P.*, (already referred in paragraph 55 above) the Supreme Court gave a definitive ruling on that aspect of the jurisprudence which had been concerned with establishing where the blame for delay in the prosecution of sex offences against children lay. It had been a feature of judicial reviews in this area that an enquiry into the reasons for complainant delay was frequently undertaken, with expert evidence being called on issues such as dominance or inhibition. Referring to the experience gained by the courts over the previous decade, and the increased understanding of the reasons for delay in such cases, Murray C.J. said at p.620

> *"Therefore I am satisfied that it is no longer necessary to establish such reasons for delay. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-*
>
> > *'the test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in the light of the circumstances of the case.*

88. In the concluding part of the judgment, at p. 622, it was stated that

> *"The issue for a court is whether the delay has resulted in prejudice to the applicant so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial. "*

89. This was the passage, already quoted, relied upon by Dunne J. in *C.* (*A Minor*).

90. There are, therefore, two related but separate questions. The first is whether a trial would by reason of delay be unfair as a process, because of, for example, missing evidence. The second is whether it would be unfair to put the accused on trial.

Discussion and conclusions

91. The starting point for the discussion must be the acknowledged existence of the special duty imposed upon the prosecution authorities to deal expeditiously with cases against children and an examination of the rationale for such a duty. This involves, to some extent, a statement of the obvious.

92. Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult. Further, it has been accepted since, at least, the enactment of the Children Act of 1908, that the fact that these aspects of personality are still developing means that intervention at an early stage, rather a purely punitive approach, may assist in a positive outcome as the child reaches adulthood.

93. This is not to say that the law regards adults as incapable of development or change - the principle of rehabilitation is a cornerstone of sentencing and penal policy. It is an acknowledgment of the fact that a child is in the process of development. It is the policy of both the legislature and the courts, therefore, to assist in that process in a positive way where practicable. This policy is one that respects both the rights of the child as an individual and the public interest in steering a child offender into a more law-abiding path.

94. It is for these reasons that the Children Act, 2001 provides the range of protections that it does. For example, the provisions in relation to anonymity do not just protect children, guilty or innocent, from what might for them be the intolerable burden of publicity. They also ease the process of rehabilitation in the case of a guilty child, permitting him or her to grow to adulthood without having to deal with that burden.

95. The other significant aspect of childhood is that it is, by definition, a transient status. The law does not attempt to measure personal maturity with a view to deciding whether a person should be treated as a child or not, but provides that, in law, childhood ends at the age of eighteen.

96. Clearly, therefore, expedition is essential if the legislative and public policy requirements relating to child offenders are to be met. The duty to ensure expedition rests, in the first instance, on the Gardaí and the prosecution authorities. As stated in the authorities cited, it is a duty "over and above" the normal duty to ensure a reasonably expeditious trial for accused persons.

97. In my view there can be no question but that this duty has been breached in this case. A period of four years elapsed between complaint (and, indeed, admissions) and charge. The only matters offered by way of explanation are the transfer of the original officer in charge of the investigation, and the suggestion of a misunderstanding in the National Juvenile Office.

98. These explanations are not adequate. The investigation was to all intents and purposes complete before the transfer of Sergeant McGirl in November, 2008. It must be presumed that An Garda Síochána has in place protocols for dealing with files where the officer in charge has been transferred and I can only assume that there was, unfortunately, a serious failure of the system in this case.

99. No evidence has been put before the court as to the decision-making process in the National Juvenile Office, whether in general or in relation to this case. Since the Office must consider the case of every child who admits responsibility for criminal behaviour, I can only assume that a) it has a large case-load and b) it is aware of its responsibility to assist in meeting the requirement of expedition. Making due allowance for the first consideration, I find that a delay of two years in making a decision is unacceptable. On the basis of the scant information before the court I do not wish to speculate but certainly an impression is given that the investigating Gardaí and the National Juvenile Office were to some extent leaving things up to each other. The result was that the decision was made a matter of days before the applicant's eighteenth birthday.

100. The investigation into this matter was straightforward and, according to the letter from the respondent to the applicant's solicitor, was largely complete within a month. Obviously, some further time would have been necessary for the investigating Gardaí to complete the file and for the National Juvenile Office to complete its assessment. Without knowing how that Office goes about its work and without knowing whether it received any information from S.I.A.T.T. it is difficult to say how long that should have taken but I do not see any reason why the decision could not have been made in the early part of 2009. It was known at that stage that the applicant and his family were taking part in the S.I.A.T.T. programme, with which the National Juvenile Office is presumably familiar. It was hardly likely that the decision could be left until the end of an eighteen month or two year course of treatment.

101. If I am wrong about that time-scale, nonetheless it should certainly have been possible to charge the applicant at some stage in 2009. It would still have been possible for the applicant's case to have been dealt with well before he turned eighteen - the court system has sufficient flexibility to prioritise such cases. It may be noted by way of example that in the case of *The People (D.P.P.) v. D.G.* [2005] IECCA 75, a teenage boy was charged with murder, convicted after trial by a jury and sentenced within a period of one year of the date of the offence. It is certainly true that, as a matter of practicality, it will not always be possible to try child offenders as children for the reasons identified by Birmingham J. in *Donoghue* but none of those considerations arise in this case.

102. The question then is- what is the effect of the breach of duty in the circumstances? The respondent says that there can be no injunctive relief because there is no impairment of the applicant's fair trial rights and no evidence of undue stress or anxiety. She further says that any loss of Children Act rights can be taken into account by a sentencing judge.

103. I am not convinced that the respondent is correct in urging the court to find that the test in cases involving children should necessarily be assimilated to that set out in *P.M v DPP* and *H v. DPP*. To adopt that approach could be to ignore the special feature of the respondent's duty in such cases, which is that it is over and above the normal duty of expedition. That this duty confers a right on children to be dealt with expeditiously was recognised in *B.F.*, which has not been challenged in this regard. Observance of the duty is also essential to the proper operation of the Children Act and compliance with the will of the Oireachtas in relation to its provisions. The duty is not fulfilled where the rights of children to be treated as such lapse simply through inaction on the part of the prosecution authorities.

104. However, I do not suggest a revival of the concept, which does appear to have been entirely disapproved, that delay can in itself and without more entitle an applicant to an injunction. I consider, rather, that the special legal status of childhood is an interest to be protected either on a *sui generis* basis or under the general heading of the right to a reasonably expeditious trial. It seems to

me that the loss of that status through blameworthy delay on the part of the prosecution authorities may be, in itself, a matter resulting in real prejudice which may entitle an applicant to relief either on the authority of *B.F* or, if there is indeed any conflict, within the formulation of both *P.M* and *H* If a balancing exercise is to be carried out, this is therefore something that must always be a very significant factor.

105. In carrying out that exercise in this case, I consider that the matter weighing most heavily in favour of permitting a prosecution to proceed is the fact that the applicant has been charged with very serious offences against a very young girl. The respondent argues that there is a public interest in a court adjudication on his guilt or innocence of those charges. That is undoubtedly correct, but this is a case where, as a matter of reality, there has been all but a formal plea of guilty on the part of the accused. It is true that the court's experience includes cases where accused persons have resiled from admissions made to investigating Gardaí, but in this instance the applicant has, in addition, spent two years undergoing a course of treatment posited on his acceptance of guilt for his actions. The complainant and her family are not left in a situation of not knowing whether or not her veracity, and his responsibility, have been accepted.

106. Further, it seems to me that, having regard to the authorities cited above, the seriousness of the charge has a lesser impact where juvenile offenders are concerned. The charges in *B.F* were at least as serious as those in the instant case. Similarly, the fact that there are admissions, which would often be decisive in the case of an adult, may have to be looked at in a different light in the case of juveniles. This was so in *B.F* and *Donoghue*. The making of admissions at an early stage facilitates expedition of the trial process.

107. The respondent has also contended that there is a public interest in the mandatory supervision that follows conviction as a sex offender. I accept that this is correct but it would not in itself justify a prosecution.

108. In favour of the applicant, it seems to me 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. It further seems to me that to identify him at this stage could potentially have a catastrophic effect on his present activities and on his future prospects. The observations of Birmingham J. in *Donoghue* as to the newsworthiness of a serious offence committed by a young person are apposite here, and there can be no doubt as to the consequences of being named publicly as a sex offender. Even if the applicant had taken no steps towards his own rehabilitation there would have to be real concern, but in circumstances where he has worked very hard to that end it seems to me to be quite wrong to put his achievements at risk at this stage. This is both a matter of fairness to the applicant and a legitimate public policy issue in relation to his rehabilitation.

109. I therefore consider that, in the light of the breach of the special duty imposed upon the prosecution authorities to expedite case involving children and the resulting loss of legal protection on the part of the applicant, the relief sought should be granted.