# APPROVED

## THE HIGH COURT

**[2023] IEHC 739**

**Record No. 2020/425 JR**

**BETWEEN:**

**L.W.**

**APPLICANT**

**-AND-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**THE HIGH COURT**

**Record No. 2020/727 JR**

**BETWEEN:**

**L.W.**

**APPLICANT**

**-AND-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Conleth Bradley delivered on the 1st day of December 2023**

## INDEX



## INTRODUCTION

### *Preliminary*

1. The Applicant, who is the same person in each of these applications for judicial review, seeks, *inter alia*, an order of prohibition (or in the alternative an injunction)[1] prohibiting the Director of Public Prosecutions (the "DPP") from taking any further steps or further proceeding in the prosecution of: (i) two offences relating to the alleged possession by the Applicant on 10th September 2018 of a controlled drug at Collinstown Park, Clondalkin, Dublin 22 when he was 16 years and nearly 4 months of age (in Indictment Bill Number DUDP O603/20 (2020/727JR)); (ii) five offences relating to the alleged possession by the Applicant on 21st May 2018 of a controlled drug at two locations, 31

[1] In this judgment I have also addressed the relief sought pursuant to O.84, r.21(1) of the RSC 1986. The declaratory relief sought was not pursued and it may be observed that the declaration sought in D(iii), in both cases, was essentially in the form of a 'ground' and the declaratory relief under the ECHR Act 2003 was not pursued.

Méile An Rí Road, Lucan, County Dublin and Foxdene Avenue, Lucan, County Dublin, when he was just over 16 years of age (in Indictment Bill Number DUDP 0320/2020 (2020/425 JR)).

2. I heard from Mr. Padraig Dwyer SC and Ms. Jennifer Jackson BL for the Applicant and Ms. Lily Buckley BL for the DPP, and the parties agree that the same legal issues arise in each case.

3. The principles of law to be applied in applications for judicial review of this nature are well-settled and have, helpfully, been the subject of analysis and application, relatively recently, across all of the superior court jurisdictions.[2] The jurisprudence from these cases – sometimes referred to as "aged-out cases" – emphasises that the disposition of the central legal issue (*i.e.*, whether an order of prohibition should be granted to an Applicant who was charged with committing an offence as a minor but "aged-out" (*i.e.*, reached maturation) before being formally tried, due to alleged prosecutorial delay, and thus lost the protections afforded to a minor-accused (see: the Children Act, 2001)), is very much dependent on the individual facts, circumstances and chronology in each case.

[2] *Donoghue v DPP* [2014] 2 I.R. 762, *DPP v Furlong* [2022] IECA 85, *A.B. v DPP* (unreported, 21 January, 2020 Court of Appeal (Birmingham P.), *Cerfas v The DPP* [2022] IEHC 70, *L.E. v DPP* [202] IECA 101, *DK v The DPP* [2023] IEHC 273, *J.S. v DPP* [2023] IEHC 275, *Dos Santos v DPP* [2022] 252, *DPP v AO'F* [2022] IECA 122 *G v DPP* [2014] IEHC 33, *Cash v DPP* [2017] IEHC 234, *Daly v DPP* [2015] IEHC 405, *Wilde v The DPP* [2020] IEHC 385.

***Structure***

4. Given the emphasis on the facts and individual chronologies in each case (2020/ 425 JR and 2020/ 727 JR), the structure of this judgment is as follows:

   (i) Chronology: Summary of facts in 2020/425JR and 2020/727JR;

   (ii) Extension of time applications;

   (iii) Applicable legal principles;

   (iv) Arguments made on behalf of the Applicant and the DPP in 2020/425 JR and 2020 No.727JR;

   (v) Assessment & Decisions; and

   (vi) Proposed Orders (including costs).

5. The following is a summary of the main facts as they relate to the first judicial review application presented at the hearing, namely Record Number 2020/425JR.

## CHRONOLOGY: SUMMARY OF FACTS

***Record No. 2020/425 JR***

(1) The Applicant's date of birth is 13th May 2002.

(2) At the time of the alleged offences and arrest, detention and interview on 21st May 2018, the Applicant was 16 years and 8 days old. The Applicant was charged on 19th November 2019, when he was 17 years, 6 months and 6 days old. On 13th May 2020 the Applicant reached the age of majority – 18 years of age. (At the date of the hearing of this application for judicial review the Applicant was 21 years of age).

(3) On 21st May 2018 the Applicant was stopped and searched by members of the gardaí at Foxdene Avenue, Lucan, County Dublin and following this search gardaí recovered what was alleged to be a package containing diamorphine (more commonly known as heroine), two mobile phones and €550 cash. The subsequent charges (on 19th November 2019) in this regard related to alleged offences contrary to sections 3, 15, and 27(1), and 27(3) (as substituted by section 6 of the Misuse of Drugs Act, 1984) of the Misuse of Drugs Act, 1977, as amended.

(4) Following the Applicant's arrest and the execution of a search warrant, on the same date, namely 21st May, 2018, at the Applicant's residence, 31 Méile an Rí Road, Lucan, County Dublin, the gardaí found what was later valued at approximately €41,000 worth of what was alleged to be diamorphine and on 19th November, 2019 the Applicant was charged with similar alleged offences but which included an alleged offence contrary to section 15A of the Misuse of Drugs Act 1977 (as inserted by section 4 of the Criminal Justice Act, 1999) and contrary to section 27(3A) of the Misuse of Drugs Act 1977 (as substituted by section 33 of the Criminal Justice Act, 2007).

(5) A youth referral was completed on 23rd May 2018 (2 days after the 21st May 2018) by Garda John Griffin (the "first referral").

(6) During the time that the Applicant was being considered for the Garda Youth Diversion Programme, the preparation of the investigation file continued. The substances found at Foxdene were submitted for analysis to Forensic Science Ireland (hereafter referred to as "FSI") on 1st June 2018 (11 days after the 21st May 2018). The substances found at 31 Méile an Rí Road were submitted for analysis to FSI also on 1st June 2018 (again 11 days after the 21st May 2018).

(7) On 13th June 2018 Sergeant Maeve Ward made her statement.

(8) A skeleton file was requested by the Juvenile Liaison Officer on 19th July 2018 (approximately 2 months after the first referral) and this skeleton file was submitted on 11th October 2018 (approximately 5 months after the first referral and approximately 3 months after the skeleton file request) to the Juvenile Liaison Officer.

(9) On 18th July 2018 a certificate of analysis was received by the gardaí in respect of the diamorphine seized at Foxdene Avenue, Lucan and this was forwarded to Garda John Griffin on 27th July 2018.

(10) On 27th July 2018, a local Juvenile Liaison Officer was assigned to the juvenile referral.

(11) On 30th September 2018 Garda John Griffin made a statement.

(12) On 14th November 2018 a youth referral was received by the National Juvenile Office.

(13) On 20th December 2018 a suitability report and skeleton investigation file were received by the National Juvenile Office.

(14) On 2nd January 2019 the Applicant was deemed unsuitable for inclusion in the Garda Youth Diversion Programme (7 months and approximately 1 week after the first referral).

(15) On 7th January 2019 directions were received by Garda Griffin from the Garda Youth Diversion Officer that the Applicant was unsuitable for inclusion in the Youth Diversion Programme.

(16) On 27th January 2019 and 6th February 2019, Garda Griffin sent reminder requests to FSI for a certificate of analysis in respect of the items previously submitted on 1st June 2018 from 31 Méile An Rí Road (which included the alleged "section 15A" offence).

(17) On 26th February 2019 a certificate of analysis relating to the diamorphine taken from Méile an Rí Road was received by Garda Griffin from Mr. Joseph Casey.

(18) On 28th March 2019 the Garda investigation file was submitted for the directions of the DPP.

(19) The Garda investigation file was received by the Directing Officer on 5th April 2019 and the Directing Officer requested additional information on 10th April 2019.

(20) Peter Brady, Peace Commissioner, who issued the search warrant, made a statement on 27th April 2019.

(21) On 3rd July 2019 Garda Dowling made a statement which said that the cumulative estimated street valuation of the diamorphine taken from the Applicant on 21st May 2018 was approximately €43,178.38 based on an estimated value of €140 per gram.

(22) By 5th July 2019 all additional information had been received by the Directing Officer.

(23) On 9th July 2019 the DPP directed that the Applicant would be charged with the charges referred to earlier in this chronology.

(24) Between 9th July 2019 and 19th November 2019, Garda Griffin made 3 appointments with the Applicant's mother for both her and the Applicant to attend Ronanstown Garda Station for the Applicant to be charged and there was a failure to attend on each date. After failing to attend for these appointments, Garda Griffin called to 31 Méile an Rí Road, Lucan, County Dublin and the Applicant was charged on 19th November 2019 in accordance with the directions of the DPP.

(25) After appearing initially on 5th December 2019, the Applicant's application before the Children's Court on 16th January 2020 pursuant to section 75 of the Children Act 2001 (summary disposal) was refused.

(26) On 27th February 2020 the Book of Evidence was served.

(27) On 20th March 2020 the case was listed for its first mention before the Circuit Criminal Court (Court 5) in the Courts of Criminal Justice ("CCJ") during the Covid-19 lockdown. Arising from the national Covid-19 lockdown, the case was remanded, in the absence of the Applicant and his advisors, for arraignment to 16th June 2020.

(28) On 13th May 2020 the Applicant reached the age of majority – 18 years of age (prior to the arraignment date of 16th June referred to above).

(29) As stated, on 16th June 2020 the case was listed for arraignment and due to a misunderstanding, the Applicant did not appear. However, counsel appeared on his behalf and an application for second counsel was granted.

(30) On 23rd June 2020 the Applicant appeared on bail before CCJ (Court No.5).

(31) On 23rd June 2020 the Applicant's solicitor wrote to the DPP seeking clarification regarding the delay in the charge.

(32) On 23rd June 2020 the case was further remanded in the Circuit Criminal Court to 6th July 2020 for arraignment.

(33) On 29th June 2020 leave to bring the within judicial review application was granted by this court.

(34) Referring to a timeline which set out the investigation and prosecution of the matter in a reply from Garda John Griffin dated 28th June 2020, the Office of the DPP replied to the Applicant's solicitor's letter dated 23rd June 2020.

(35) The DPP's Opposition Papers in this application for judicial review were filed on 13th April 2021.

6. The following is a summary of the main facts as they relate to the second judicial review application presented at the hearing, namely Record Number 2020/727JR.

***Record No. 2020/727JR***

(1) To recap, the Applicant's date of birth is 13th May 2002. On 13th May 2020 the Applicant reached the age of majority – 18 years of age. (Again, as mentioned earlier, at the date of the hearing of this application for judicial review and delivering judgment, the Applicant is 21 years of age).

(2) On 23rd April 2020 when the Applicant was arrested and charged, he was 17 years, 11 months and 10 days of age. (The Applicant was returned for trial on the 22nd June 2020 when he was aged 18 years, 1 month and 9 days).

(3) At the time of the alleged offence on 10th September 2018, the Applicant was aged 16 years, 3 months and 28 days. In contrast to the facts of the first case (Record No. 2020/425JR), there are no admissions in this judicial review application. On this date – 10th September 2018 – the Applicant had been observed by the gardaí discarding two white clear packages along a wall. The Applicant was pursued by the gardaí but escaped.

(4) Prior to his arrest in relation to the alleged offences the subject of this judicial review application, a youth referral was made by Garda David Byrne on 14th November 2018 to the Juvenile Liaison Officer for the Juvenile Diversion Programme (the same being mandatory as the Applicant was 16 years of age).

(5) On 27th November 2018, the Applicant was arrested at St. Ronan's Avenue, Clondalkin, Dublin 22. On the same date, the Applicant was detained and interviewed, and no admissions were made.

(6) On 28th November 2018 Inspector William Casey made his statement.

(7) On 6th December 2018 Garda Marcella Shanahan made her statement.

(8) On 7th December 2018 Garda John McWeeney made his statement including that the 142.345 grams of cocaine had an estimated street value of €9,965.

(9) On 7th December 2018 Garda Neil McGrath made his statement.

(10) On 7th December 2018 the two packages of substances were submitted to FSI for analysis by Garda Sean Fitzgerald.

(11) On 11th December 2018 Sergeant Declan Birchall made his statement.

(12) The investigation file was forwarded to the Juvenile Liaison Officer, Garda David Byrne, on 14th December 2018.

(13) On 15th January 2019 the investigation file was returned as no certificate of analysis had been received.

(14) On 20th August 2019 Garda Sean Fitzgerald followed up with FSI regarding the results of the analysis of the two packages.

(15) On 5th October 2019 the certificate of analysis was received.

(16) On 10th October 2019 Dr. Audrey O'Donnell of FSI placed the outer plastic wrappings and plastic bags, which had been seized, into secure storage for the purpose of fingerprint analysis being conducted.

(17) On 6th November 2019, the investigation file was resubmitted to the Juvenile Liaison Officer with the certificate of analysis attached.

(18) On 8th November 2019, a suitability report and skeleton investigation file was forwarded to the National Juvenile Office.

(19) On 13th November 2019 the Applicant was deemed unsuitable for inclusion in the youth diversion programme.

(20) On 3rd December 2019 the investigation file was submitted to the Lucan District Office for the DPP's directions.

(21) On 23rd December 2019 the investigation file was forwarded to the DPP for directions.

(22) On 6th January 2020 directions were received by gardaí from the Office of the DPP to charge the Applicant with the alleged offences (referred to earlier).

(23) On 28th March 2020 Detective Garda Shane Farrell advised Garda McWeeney that the fingerprint analysis could not be conducted due to contamination.

(24) On 23rd April 2020 the Applicant was arrested and charged alleging that on 10th September 2018 at Collinstown Park, Clondalkin, Dublin 22 he unlawfully had in his possession:- (i) a controlled drug, cocaine, contrary to section 3 of the Misuse of Drugs Act 1977 and contrary to section 27(1) of the Misuse of Drugs Act 1977 (as substituted by section 6 of the Misuse of Drugs Act 1984); (ii) a controlled drug, cocaine for the purpose of selling or otherwise supplying it to another contrary to section 15 of the Misuse of Drugs Act 1977 (as substituted by section 6 of the Misuse of Drugs Act, 1984) and contrary to section 27(3) of the Misuse of Drugs Act 177 (as substituted by section 6 of the Misuse of Drugs Act 1984). In contrast to the judicial review application (Record No.2020/425JR) the alleged offences in this case did not involve a "section 15A" offence.

(25) On 29th April 2020 the Applicant appeared for the first time in the Children's Court when he was remanded to appear before the court again on 8th May 2020.

(26) On 8th May 2020 the Applicant's case was remanded in his absence to 11th May 2020.

(27) On 11th May 2020 the Applicant had a hearing in the Children's Court pursuant to section 75 of the Children Act 2001.

(28) On 13th May 2020 the Applicant reached the age of majority – 18 years of age.

(29) On 22nd June 2020 the Book of Evidence was served on the Applicant and the Applicant was returned for trial to the Circuit Criminal Court.

(30) On 17th July 2020 the matter was before the Circuit Criminal Court for the first time.

(31) The case was listed for arraignment before the Circuit Criminal Court (Court 5) on 8th December 2020 and 14th April 2021.

(32) The case was listed for mention on 3rd June 2021, 27th October 2021, 11th January 2022 and 22nd February 2022.

(33) There was no equivalent letter sent in this case to that sent in Record No. 2020/425JR on 23rd June 2020 where correspondence was sent to the DPP seeking clarification regarding the delay in the charges in that case.

(34) The papers comprising this judicial review application were lodged or filed on 13th October 2020.

(35) The application for leave to apply for judicial review was made before this court (Meenan J.) on 2nd November 2020 (and the High Court Order perfected on 3rd November 2020).

(36) The Applicant did not issue and serve the application for judicial review within the time prescribed in the High Court Order or on the extended period and on 28th June 2021 the court granted a return date to 23rd November 2021.

(37) The Notice of Motion in these proceedings issued on 8th November 2021.

(38) Opposition papers were filed on behalf of the DPP on 10th February 2022.

## EXTENSION OF TIME APPLICATIONS

***O.84, r.21(1) RSC 1986***

7. At the conclusion of the hearing, counsel on behalf of the DPP raised the fact that the Applicant in both judicial review applications had sought, in the reliefs outlined in the Statement of Grounds, an extension of time pursuant to O.84, r.21(1) of the Rules of the Superior Courts, 1986 (as amended) (hereafter "RSC 1986"). Counsel for the Applicant confirmed that an application for an extension of time was being made in relation to both judicial review applications.

8. In relation to the first case, Record Number 2020/425JR, on behalf of the Applicant, it was submitted that the return for trial was dated 27th February 2020; that no senior counsel had been assigned until 16th June 2020; that a letter seeking clarification in relation to the delay in bringing the proceedings was issued on 23rd June 2020; that papers were filed on 25th June 2020 and it was further submitted that last date for bringing an application for judicial review was 27th May 2020. It was submitted that the judicial review papers were lodged (filed in the Central Office) within 4 weeks of being out of time. By way of submission, the delay was sought to be explained and excused, and an application made for an extension of time, having regard to the fact that senior counsel only become involved at a late date and because of the exigencies occasioned by the unprecedented consequences of the COVID-19 national lockdown (which, it is submitted, were out of the control of the Applicant and his advisers).

9. It is noted that according to the order of this court (Meenan J.) dated 29th June 2020, the *ex parte* application for leave to apply for judicial review was not moved until 29th June 2020 which, if the operative date is being accepted as the date of the return for trial on

27th February 2020, is slightly over 4 months rather than the 3 months prescribed by O.84, r.21(1) RSC 1986.

10. In relation to the second case, Record Number 2020/727JR, it was submitted, on behalf of the Applicant, that the return for trial was dated 22nd June 2020 and that time expired on 22nd September 2020; the papers for the judicial review application were lodged or filed in the Central Office on 13th October 2020; leave to apply for judicial was made before this court (Meenan J.) on 2nd November 2020. By way of submission, the delay is sought to be explained and excused, and an application made for an extension of time, because of the exigencies occasioned by the unprecedented consequences of the COVID-19 national lockdown (which, it is said, were out of the control of the Applicant and his advisers) and due to the intervening Long Vacation (of 2 months). If the operative date is being accepted as the date of the return for trial on 22nd June 2020, the time at which the leave application was made was, again, over 4 months from the operative date rather than the 3 months prescribed by O.84, r.21(1) RSC 1986.

11. O.84, r. 21(1) RSC 1986 provides that an application for leave to apply for judicial review shall be made within three months from the date when the grounds for the application first arose. The Court of Appeal (Donnelly J.) clarified in *Heaney v An Bord Pleanála* [2022] IECA 123 that an *ex parte* application for leave is only "made" when it is moved in open court and it is insufficient, in order to "stop the clock", that the statement of grounds and verifying affidavit have been filed or lodged in the Central Office of the High Court within time. Further, O.84, r.21(5) RSC 1986 provides that an application for an extension of time shall be grounded upon an affidavit sworn by or on behalf of the Applicant which shall set out the reasons for the Applicant's failure to

make the application for leave within the period prescribed by sub-rule (1), and shall verify any facts relied on in support of those reasons.

12. The applications for an extension of time in these cases are made by general reference to the affidavits and the time periods involved (in the substantive actions) but it is noted that extensions of time were sought in the relief sections in each of the Statement of Grounds.

13. The filing of judicial review papers in the Central Office does not stop time running but judicial notice can be taken of the fact that, at the time of making these applications, some practitioners may have been under the impression that this practice did, in fact, have this effect. The delays in both instances are relatively short. In the circumstances, and due to the unprecedented consequences of the COVID-19 national lockdown which were out of the control of the Applicant and his advisers, I am prepared to exercise my discretion and I extend the time in which the applications for the orders of prohibition and injunction by way of judicial review are sought by the Applicant in these cases.

## APPLICABLE LEGAL PRINCIPLES

14. Many of the authorities referred to by Mr. Dwyer SC and Ms. Jackson BL in the submissions made to the court, on behalf of the Applicant, are analysed in the judgment of Dunne J. for the Supreme Court in *Donoghue v DPP* [2014] IESC 56, [2014] 2 I.R.

762 and by Birmingham P. for the Court of Appeal in *The People (DPP) v Furlong* [2022] IECA 85.

15. In *Donoghue v DPP*, for example, the Supreme Court (Dunne J.), whilst reaffirming the special duty owed to a minor[3] to ensure an expeditious trial, also drew an important distinction between (a) deciding whether or not there had been culpable and blameworthy prosecutorial delay, and (b) deciding whether to make an order of prohibition stopping a trial.

16. Accordingly, while the extra special duty of expedition owed to a child or young person (over and above the normal duty of expedition to ensure a speedy trial) was an important factor to be considered in deciding whether there has been culpable blameworthy prosecutorial delay, that special duty *does not*, in and of itself and without more, result in the prohibition of a trial.

17. Rather, the court must conduct a balancing exercise to establish whether there are any other matters, additional to the delay itself, resulting in prejudice to the accused to outweigh the public interest in the prosecution of serious offences.

18. These extra factors are, therefore, required to be weighed in the balance by a court in deciding whether *the public interest* in the prosecution of offences is outweighed by *the prejudice* which an accused may experience in being tried as an adult and not as a child. These factors are dependent on the facts and circumstances of each individual case.

19. These factors include, for example, the following:

    (i) the length of the delay itself;

[3] The word 'minor' is used interchangeably with 'child', 'young person' and 'juvenile.'

(ii) the age of the accused at the time of an alleged offence. This, for example, was an important factor in assessing whether the accused could have availed of the provisions of the Children Act 2001 had the prosecution been carried out in a timely manner;

(iii) the seriousness of the charge;

(iv) the complexity of the case;

(v) the nature of any prejudice relied on;

(vi) any other relevant facts and circumstances.

20. The Supreme Court (Dunne J.) stated as follows at paragraph 52 of the judgment *Donoghue v DPP*:

> "*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 eighteenth 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*."

21. The first issue that I have to address, therefore, is whether there has been culpable "blameworthy prosecutorial delay" on behalf of the prosecuting authority and its agents. An important factor in considering this first issue is the special duty owed by the State (*qua* prosecutor) to a child or young person over and above the normal duty of expedition to ensure a speedy trial. I understand this to mean that within the overall investigative and prosecutorial process, there is an express requirement to proceed with extra speed

when the accused is a child, and of a certain age, when the offences are alleged to have occurred, having regard to the date that the accused will attain their majority.

22. Having regard to the largely overlapping nature of the arguments made at the hearing of these applications for judicial review, I will, for the remainder of this judgment, follow the course adopted by counsel for both the Applicant and the DPP and focus mostly on the detail of the challenge under Record No. 2020/425 JR and address, in more summary form, the arguments made in the challenge under Record No. 2020/727 JR.

**ARGUMENTS ON BEHALF OF THE APPLICANT IN RECORD NO. 2020/425 JR**

23. The central relief pressed at the hearing of this application for judicial review is for an order of prohibition restraining the prosecution of the Applicant. In this regard it is contended on the Applicant's behalf that the failure to investigate and process the prosecution of the Applicant expeditiously has resulted in the Applicant being denied or deprived of the following benefits of the Children Act, 2001 (which are not available to an adult):

    (a) No report to be published identifying the child (section 93 of the Children Act, 2001);
    (b) 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 as a measure of last resort (section 96 of the Children Act, 2001);

(c) Where detention is contemplated, the court shall adjourn proceedings to obtain Probation Officer's report which is mandatory where a child is concerned (section 99 of the Children Act, 2001);

(d) 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 (section 143 of the Children Act, 2001).

24. Second, it is submitted on behalf of the Applicant that there is a significant difference as to how a child and adult are treated under section 15A of the Misuse of Drugs Act – an adult, for example, faces a presumptive mandatory minimum sentence of ten years (with a maximum sentence of life in prison) whereas the presumptive mandatory minimum sentence of ten years does not apply to a child.

25. It was submitted on behalf of the Applicant that relevant facts are straightforward and not complex: in summary, they comprised a stop and search, search of the accused's house and admissions being made by the accused. The Applicant was 16 years and 1 week at the time of the alleged offence and the DPP had 2 years to deal with the matter. However, the Applicant was charged on 19th November 2019 at his residence at 31 Méile An Rí Road, approximately 17 months after the alleged offence when he was 17 years, 6 months and 6 days old. It is submitted, on the Applicant's behalf, that this amounts to inordinate and inexcusable delay in breach of the well-established special duty of expedition owed to a minor-accused.

26. Counsel for the Applicant note that, in this case, the garda investigation file was submitted to the DPP for directions on 28th March 2019, the Directing Officer received the investigation file on 5th April 2019 and the direction to charge the Applicant was given on 9th July 2019. However, the Applicant was not, in fact, charged until 19th November 2019, after a delay of over four months.

27. It is contended that the making of a statement by Sergeant Maeve Ward on 13th June 2018 and the receipt of a certificate of analysis from FSI on 18th July 2018, following reminders on 27th January 2019 and 6th February 2019 (some eight months after the alleged offence), comprised the only progress in the investigation in the ten-month period between the date of the offence on 21st May 2018 and the submission of the file to the DPP on 28th March 2019. It is contended that this amounts to culpable delay.

28. Mr. Dwyer SC and Ms. Jackson BL, on behalf of the Applicant, submit that the court should view the alleged delays of the State "*in the round*" instead of focusing on the individual components of that delay on the part of the various agencies involved and the prosecuting authorities. It is submitted that each are component parts of the entire prosecution. It is stated that a delay of 17 months (between the commission of the offence on 21st May 2018 and the date of his arrest and charge on 19th November 2019) amounts to inordinate and inexcusable delay and is in breach of the special duty of expedition owed to a minor-accused, such as the Applicant. It is suggested, on behalf of the Applicant, that the DPP should demonstrate an awareness of that duty.

29. After appearing initially before the Children's Court on 5th December 2019, and then on 16th January 2020, the Applicant's application for summary disposal of the charges

against him, pursuant to section 75 of the Children Act 2001, was refused. The Book of Evidence was served on 27th February 2020, and the case listed for mention in the Circuit Criminal Court (Court No. 5) in the CCJ. Arising from the national COVID-19 lockdown, the case was remanded in the absence of the Applicant and his advisors for arraignment to 16th June 2020. It is submitted on behalf of the Applicant that there was an onus on the prosecution to expedite the prosecution of the Applicant as a child and that the prosecution must ensure a speedy trial and reference in this regard is made to a number of authorities which emphasise a "special obligation of expedition" where the accused is a juvenile at the time of the alleged offence and that this obligation applies across the whole gamut of criminal offences.[4]

30. The following points were emphasised by Ms. Jackson BL (for the Applicant) in response to Ms. Buckley BL (for the DPP).

31. First, while the youth referral was completed by Garda Griffin on 23rd May 2018, it was not until the 7th January 2019 that Garda Griffin was advised of the Applicant's deemed unsuitability for the Garda Youth Diversion Programme, some 7 months and one week prior to the receipt, on 26th February 2019, of the certificate of analysis for the substances found at 31 Méile An Rí Road which led to the 'section 15A' charge. The Applicant was charged on 19th November 2019. It is submitted that, therefore, and contrary to what was contended for by the DPP, the Applicant's exclusion from the Garda Youth Diversion Programme and the receipt date of the certificate of analysis were unrelated and not mutually informative or operating in tandem.

[4] *BF v The DPP* [2001] IESC 18, [2001] 1 I.R. 656, *Jackson & Walsh v DPP* [2004] IEHC 380; *AC v DPP* [2008] IEHC 39, [2008] 3 I.R. 398.

32. Second, it is submitted that the Applicant only had the benefit of the section 75 application, which occurred on 16th January 2020, over a year and a half after the alleged offence date. Had this occurred earlier, the Applicant would have had more time but as matters transpired there was little time left to progress through to the Circuit Criminal Court.

33. Third, it is submitted that the in period between 9th July 2019 and 19th November 2019, when the three appointments to attend Ronanstown Garda station for the purpose of charge were not kept, the gardaí could, and should have, acted sooner notwithstanding the position adopted by the Applicant's mother. (When the Applicant failed to present at the Garda Station on the third occasion, Garda Griffin called to the Applicant's address and charged him in accordance with the directions of the DPP).

34. Fourth, it was submitted by Ms. Jackson BL that the Applicant should not be forced to rush decisions of enormous magnitude because of earlier delays by the prosecution. As the Applicant only came before the Circuit Criminal Court less than two months before he reached his majority, there was no reality in seeking urgency at that late stage in the process and, similarly, as the Applicant was entitled to the presumption of innocence there was equally no reality to him pleading guilty and either seeking or being given a date during the Easter vacation.

35. Fifth, in terms of the presumptive mandatory minimum sentence of ten years under section 15A of the Misuse of Drugs Act 1977 (as amended and substituted), it is submitted that what the trial judge will or will not do should not be sought to be gainsaid

and that is why you have these matters prescribed by legislative provisions which guide the court when children are involved.

36. Sixth, in terms of the actions of FSI, it is submitted that seven bags of substances in total was not a large sample for the purpose of scientific analysis. The first certificate for the drugs seized at Foxdene Avenue was received by Garda Griffin on 18th July 2018 but no action was taken by him in relation to the outstanding certificate of analysis in respect of the substances found at 31 Méile an Rí Road until a reminder was sent by him over six months later on 27th January 2019 (and then again on 6th February 2019). It is submitted, on behalf of the Applicant, that had the reminder been sent after the first certificate was received on 18th July 2018, then the second certificate may have been received earlier and this is cited as an example of a failure to expedite matters. The second certificate was received, for example, on 26th February 2019 within three weeks of the second reminder being sent on 6th February 2019.

37. Seventh, Ms. Jackson BL, for the Applicant, submits that the Applicant has lost the benefit of the protections afforded to minor-defendants under the Children Act 2001 such as the mandatory compilation and consideration of a probationary report (which is entirely discretionary in the case of adult-defendants), the mandatory anonymisation of minor-defendants and the less-imposing atmosphere which is cultivated in a trial of minor defendants due to the fact that same are held in *camera* and conducted by the presiding judge and practitioners in informal attire.

**ARGUMENTS ON BEHALF OF THE DPP IN RECORD NO. 2020/425 JR**

38. Ms. Buckley BL, for the DPP, in her oral submissions, makes the following central points in response to the Applicant's submissions set out above.

39. First, the point is made on behalf of the DPP that the process under the Children Act 2001 *was* engaged and operating in tandem with the investigation into the alleged offences and that the chronology must be viewed in that context. The two seizures occurred on 21st May 2018, and two days later, on 23rd May 2018, youth referral was completed by Garda Griffin as mandated by the Children Act 2001 which requires that the suitability of all minor-defendants for the Juvenile Diversion programme be assessed by a Juvenile Liaison Officer. In relation to the lesser of the two alleged drugs offences, a certificate of analysis was received in respect of the diamorphine seized at Foxdene Avenue on 18th July 2018 and forwarded to Garda John Griffin on 27th July 2018. At the same time – on 27th July 2018 – a local Juvenile Liaison Officer was assigned to the juvenile referral. On 30th September 2018 Garda John Griffin made his own statement. On 11th October 2018, a skeleton file was submitted to the Juvenile Liaison Officer to ascertain if the Applicant was suitable for inclusion in the Juvenile Diversion Programme. On 14th November 2018 a youth referral was received by the National Juvenile Office. On 20th December 2018 a suitability report and skeleton investigation file were received by the National Juvenile Office. It was on 2nd January 2019 that the Applicant was deemed unsuitable for inclusion in the youth diversion programme and on 7th January directions to this effect were received by Garda Griffin.

40. It is also submitted that the time awaiting the certificate of analysis was offset by the gardaí advancing the investigation file at the same time as the Applicant was considered

for the Juvenile Diversion Programme which is a statutory protection for the benefit of juveniles.

41. Second, referring to the decision of the High Court (Simons J.) in *L.E. v DPP* [2019] IEHC 471, it is submitted that the Applicant had the benefit of a hearing pursuant to section 75 of the Children Act 2001 (summary disposal) even though the Children's Court ultimately refused jurisdiction on 16th January 2020 after his initial appearance on 5th December 2019. The High Court (Simons J.) observed in *L.E. v DPP* [2019] IEHC 471 at paragraph 17 that "…*the Applicant had had the benefit of one of the most important procedural benefits under the Children Act 2001, namely a hearing under Section 75. This provision allows the District Court to deal summarily with a 'child' charged with any indictable offence unless the court is of opinion that the offence does not constitute a minor offence fit to be tried or dealt with summarily. (There is an exception in the case of an offence which is required to be tried by the Central Criminal Court and in the case of manslaughter). This allows for the possibility of an indictable offence to be disposed of on a summary basis. On the facts, the District Court had declined jurisdiction*…".

42. It is submitted that two of the important provisions of the Children Act 2001 were available to the Applicant: first, the Juvenile Diversion Programme and, second, consideration under section 75 of the Children Act, 2001. The fact that the alleged offences involved section 15A of the Misuse of Drugs Act, 1977 (as amended and substituted) and the alleged unlawful possession of controlled drugs with a value of €13,000 made it a very serious matter and distinguished this case from the facts of the *Donoghue* case.

43. Third, it is submitted that the gardaí sought to show sensitivity by engaging with the Applicant's mother in seeking to secure his presence at the Circuit Criminal Court when he was under 18 years of age, and it has always been the practice of the prosecuting authorities to involve a juvenile's parent(s) or guardian(s). The Applicant's failure to meet appointments and attend Ronanstown Garda Station on three occasions during the period between 9th July 2019 (when the DPP issued directions to charge the Applicant) and 19th November 2019 (when the Applicant was arrested at his home for the purpose of charge) was, on at least the second occasion, due to the express non-co-operation of the Applicant's mother and was not a matter that could be visited upon the gardaí. On the first appointment, for example, the authorities were informed that this was because the Applicant had school and football commitments and that he would attend again. On the second appointment, there was an express lack of cooperation by the Applicant's mother. After failing to attend the third appointment on 19th November 2019, Garda Griffin called to 31 Méile An Rí Road, Lucan, County Dublin where it is stated that the Applicant's mother refused to co-operate and was hostile to the gardaí. On behalf of the DPP, the point is made that the four months lost here were primarily the responsibility of the Applicant's mother. The Applicant was charged on 19th November 2019 in accordance with the directions of the DPP.

44. Fourth, on 20th March 2020 the case was listed for its first mention before the Circuit Criminal Court (Court No. 5) in the CCJ during the Covid-19 lockdown. Arising from the national Covid-19 lockdown, the case was remanded in the absence of the Applicant and his advisors for arraignment to 16th June 2020. It is submitted on behalf of the DPP that if the Applicant's legal advisers wished to progress the case, they could have

conveyed the urgency of the matter at that time (or before then) but did not, when it was known that the Applicant turned 18 years of age two months later.

45. Fifth, on behalf of the DPP, particular emphasis is placed on the essential nature of the proof of a certificate of analysis in these types of alleged offences and the paramount importance of same to the investigation file submitted for the DPP's consideration. In addition, it is submitted that any delay on the part of FSI in processing samples should be considered in the context of the workload of FSI in carrying out scientific analyses of various substances involved in the myriad of alleged offences across the State. In this case, on 26th February 2019 a certificate of analysis relating to the diamorphine taken from Méile an Rí Road was received by Garda Griffin. The point is made on behalf of the DPP that FSI are the only body which can process certificates in relation to the investigation of all alleged crimes in the State. Their role, it is submitted, is vital, given that any substance submitted for analysis could very well be washing powder until it is scientifically assessed by FSI, and a certificate of analysis issued.

46. In this case there were two separate seizures, both occurring on 21st May 2018, requiring two separate certificates of analysis. Samples were provided to FSI to that end on 1st June 2018. It is submitted that, given the nature of the alleged offences, the certificates of analysis were a vital proof in the prosecution of the case and that the time taken by FSI in the circumstances, was reasonable.

47. It is submitted on behalf of the DPP that there was no blameworthy prosecutorial delay in this case and reliance is placed on the following passage from Kearns J. (as he then was) in *Daly v DPP* [2015] IEHC 405:

"*In all of those circumstances I am satisfied that the garda investigation proceeded at a satisfactory pace and that any periods of delay thereafter have been adequately explained by the respondent. <u>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</u>. In the view of the Court there was no blameworthy prosecutorial delay in this case...*" (emphasis added).

48. While the parties spent a large part of the hearing dealing with the first case presented – Record No. 2020/425 JR – the same arguments were made in the context of the challenge in Record No. 2020/727JR, and I now briefly refer to those.

**ARGUMENTS ON BEHALF OF THE APPLICANT IN RECORD NO. 2020/727JR**

49. It is submitted, on behalf of the Applicant, that at the time of the alleged offence on 10th September 2018 he was aged 16 years, 3 months and 28 days. Unlike the application in Record No. 2020/425 JR there were no admissions in this case. The Applicant was arrested on 27th November 2018 at St. Ronan's Avenue, Clondalkin, Dublin 22 for offences contrary to section 3 and section 15 of the Misuse of Drugs Act 1977 and ultimately, he was charged on 23rd April 2020. In contrast to the judicial review

application (Record No.2020/425JR) the alleged offences in this case did not involve a "section 15A" offence.

50. In summary, it is submitted that the delays set out in the chronology have not been explained by the DPP. Almost three months after the alleged commission of the relevant offences, on 7th December 2018, Garda Sean Fitzgerald submitted the substances found to FSI. On 15th January 2019 the investigation file was returned as no certificate of analysis had been received. On 20th August 2019, Garda Sean Fitzgerald followed up with FSI in relation to the substances seized, and, on 5th October 2019, a certificate of analysis was received. These are alleged to be significant delays.

51. On 6th January 2020, directions were received by the gardaí to charge the Applicant with the offences, but he was not charged until 23rd April 2020, over 3 months later. It is submitted that, at all times, the gardaí were aware of the Applicant's address and the requirement for him to attend at the Children's Court.

52. The main relief sought by the Applicant is prohibition of his prosecution. In this regard it is contended, on the Applicant's behalf, that the failure to investigate and process the prosecution of the Applicant expeditiously has resulted in the Applicant being denied or deprived of the following benefits of the Children Act 2001 (which are not applicable to an adult): No report to be published identifying the child (section 93 of the Children Act, 2001); 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 as a measure of last resort (section 96 of the Children Act 2001); Where detention is contemplated, the court shall adjourn proceedings to obtain the requisite Probation Officer's report where child is concerned (section 99 of the Children Act 2001); 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 (section 143 of the Children Act 2001).

53. Ms. Jackson BL, for the Applicant, in response to Ms. Buckley BL for the DPP, reiterates the point that on 15th January 2019 the investigation file was returned as the requisite certificate of analysis was not attached and, at that point, no decision had been made regarding the Applicant's suitability for the Juvenile Diversion Programme. It is submitted that the seven-month delay between the return of the file on 15th January 2019 and Garda Fitzgerald making an enquiry in relation to the availability of that certificate on 20th August 2019 demonstrates a lack of expedition on the part of the gardaí. It is submitted that the Applicant derived no benefit from the section 75 application before the Children's Court on 11th May 2020 as he reached his majority days later, on 13th May 2020. The point being that the knock-on effects of the earlier delays meant that there was no reality to the Applicant availing of these protections. Ms. Jackson BL, for the Applicant, points to the delay in charging the Applicant. There is a direction from the DPP on 6th January 2020 to charge the Applicant but he is not charged until three-and-a-half months later, on 23rd April 2020, notwithstanding the fact that he appeared in the Children's Court on 16th January 2020 (in relation to the alleged offences in Record No. 2020 425 JR) and, it is therefore submitted, there was ample opportunity to charge the Applicant before the 23rd April 2020.

**ARGUMENTS ON BEHALF OF THE DPP IN RECORD NO. 2020/727JR**

54. By way of a preliminary argument, Ms. Buckley BL, for the DPP, makes the point that nowhere in any of the orders of the court is there a reference to an application, or an intended application, being made under the Legal Aid - Custody Issues Scheme (formerly known as the Attorney General's Legal Aid Scheme). In summary, this provides payment for legal representation in the Superior Courts for certain types of cases not covered by civil legal aid or the Criminal Legal Aid Scheme. This is a matter on which I will hear further submissions from counsel after this judgment is delivered.

55. As mentioned earlier, the parties essentially adopted the same arguments in this case as were presented in Record No. 2020/425 JR.

56. First, the point is made, on behalf of the DPP, that this was a case where the Applicant had the benefit of the Youth Diversion Programme by being *considered for admission to same* but, as matters transpired, he was deemed unsuitable on 13th November 2019.

57. Second, it is submitted that the Applicant also had the benefit of a section 75 application before the Children's Court on 11th May 2020 which was ultimately refused by the District Court judge.

58. Again, the point is made that the processing of the Applicant under the Children Act 2001 and the investigation into the alleged offences were conducted in parallel or in tandem. For example, on 14th November 2018, prior to being questioned on 27th November 2018, the mandatory youth referral was completed by Garda David Byrne,

and he was assessed by a Juvenile Liaison Officer for the Juvenile Diversion Programme.

59. The preparation of the investigation file by Garda McWeeney and the consideration of the Applicant for the Garda Youth Diversion programme proceeded simultaneously so as to advance matters as expeditiously as possible.

60. Third, it is alleged that on 10th September 2018, within four months of the alleged seizures identified in the proceedings in Record No. 2020/425JR, the Applicant was in possession of cocaine and observed discarding packages (he was 16 years and approximately four months of age at that time).

61. In this case, because the Applicant had disputed matters (there being no admissions), the finger printing and forensic analysis was central to the case.

62. The Applicant was arrested, detained and questioned on 27th November 2018 in the presence of his mother and his solicitor, and he denied being stopped by the gardaí on 10th September 2018. On 7th December 2018, Garda John McWeeney's statement estimated 142.345 grams of cocaine to have an estimated street value of €9,965.

63. Fourth, it is submitted that the advancement of these judicial review proceedings on behalf of the Applicant was slow.

64. Fifth, the point is reiterated that all the benefits available to a minor-accused under the Children Act 2001 which are lost by "aging out", can be addressed and taken into consideration by the trial judge in the Circuit Criminal Court. It is submitted that the Applicant has not identified any other potential prejudice and, typically in alleged drugs-

related offences, there are no other civilian witnesses with the central evidence relied upon being the scientific evidence.

## ASSESSMENT & DECISIONS

***Culpable & blameworthy prosecutorial delay?***

65. The first case to be examined is that under Record No. 2020/425 JR and the following periods therein.

21st May 2018 – 29th March 2019

66. At the time of the alleged offences on 21st May 2018, the Applicant was aged 16 years and 1 week. The Applicant was charged on 19th November 2019 when he was 17 years, 6 months and 6 days old and on 13th May 2020 the Applicant turned 18 years of age. The period to be examined is just under 2 years. Factors in favour of the arguments made on behalf of the Applicant include the fact that he had just turned 16 at the time of the alleged offence and, while the charges are undoubtedly serious, they were not complex, and admissions had been made at the outset.

67. I agree that the certificate of analysis from FSI is a vital proof in both cases. The substances which were seized at Foxdene Avenue and 31 Méile An Rí Road were forwarded to FSI on 1st June 2018. The certificate of analysis for those drugs seized at Foxdene Avenue was received on 18th July 2018. However, on 27th January 2019 a request, by way of a reminder, was sent in relation to the substances found at 31 Méile an Rí Road. This is repeated on 6th February 2019. The certificate of analysis – a vital

proof – was received on 26th February 2019. Just over a month later, on 28th March 2019, the investigation file was submitted to the DPP. It is submitted on behalf of the Applicant, and I agree, that it appears from the Affidavit of Garda John Griffin in the ten-month period between the date of the alleged offence (21st May 2018) and the submission of the file to the DPP (28th March 2019), that the only actions taken by him in progressing the investigation were the taking of a statement from Sergeant Maeve Ward in June 2018 and the sending of two reminder requests to FSI in January and February 2019. On behalf of the DPP, it is emphasised how centrally important the work of the FSI is in the prosecution of offences, and how heavy workload of the FSI is, as a result. I accept that the work of FSI is vital in the prosecution of crimes across the State. However, in assessing this first issue, the authorities are clear in prescribing the matters which I must consider which include the special duty to act with expedition when it comes to a minor-accused. Accordingly, I find that the ten-month period between the alleged offences taking place on 21st May 2018 and the submission of the file to the DPP on 28th March 2019, amounted to culpable blameworthy delay on behalf of the prosecuting authorities.

<u>29th March 2019 -19th November 2019</u>

68. As just mentioned on 28th March 2019, the Garda investigation file was submitted for the directions of the DPP. The Garda investigation file was received by the Directing Officer on 5th April 2019 and additional information was requested on 10th April 2019. Mr. Peter Brady, Peace Commissioner, made a statement on 27th April 2019. On 3rd July 2019 Garda Downing, *inter alia,* estimated that the street valuation of the diamorphine allegedly taken from the Applicant on 21st May 2018 was approximately €43,178.38

based on an estimated value of €140 per gram. By 5th July 2019 all additional information had been received by the Directing Officer and on 9th July 2019 the DPP directed that the Applicant would be charged.

69. Between 9th July 2019 and 19th November 2019, three appointments were made with the Applicant's mother to attend Ronanstown Garda Station for the purpose of charge. It is submitted, both orally and in writing, on behalf of the Applicant that the Applicant could not attend the first appointment due to school and football commitments and the second appointment was not honoured because the Applicant's mother did not co-operate. It is stated that a period of over 3 months elapsed before the third scheduled appointment on 19th November 2019 and when the Applicant failed to present at the Garda station, Garda Griffin called to his address and charged the Applicant in accordance with the directions of the DPP. It is suggested that any failure by the Applicant to attend appointments which were organised during the period between 9th July 2019 and 19th November 2019 could have been met by effecting the arrest of the Applicant. It is submitted, on behalf of the Applicant, that Garda Griffin was at all times aware of the whereabouts and residence of the Applicant and there was no adequate reason as to why he did not call to the Applicant's address to charge him before a period of 3 months elapsed and in circumstances where it was clear that the Applicant's mother was not co-operating with the gardaí. On behalf of the Applicant, reliance is placed (in this context) in the following passage from the judgment of Birmingham P. in *The People (DPP) v Furlong* [2022] IECA 85 (at paragraph 23) where the court observes as follows:

> "…*While I can see the merit in allowing the principal injured party some time to recover from her ordeal, I would not have thought it unrealistic to hope that*

*the interviews with the three significant civilian witnesses could have taken place within three to four weeks of the incident, and that arrangements could have been made for the arrest by appointment of the suspect shortly thereafter. If the appointment was not kept, then Gardaí would have been in a position to arrest and detain…*".

70. It is submitted on behalf of the DPP that the behaviour of those associated with an accused is important and that it has always been the practice to involve parents, particularly where children are concerned. In this regard, the following extract from the judgment of Birmingham P. at paragraph 38 of the judgment in *Furlong* is perhaps more relevant to the issue which arises in the context of the question of the accused and his mother not keeping appointments and which supports the position posited on behalf of the DPP:

> "[38] *[i]t seems to me that a further matter that has to be weighed in the balance is the action of the accused and his mother in not keeping the appointment that had been made for an arrest by appointment on 6th October 2017. The fact that the Gardaí were prepared to proceed by way of arrest by appointment was in ease of the suspect. It is far from being to his credit that the appointment was not kept, and that no explanation was ever forthcoming for that. The failure to keep the appointment was significant in the context of the overall timetable. Later, on 23rd October, the Garda who was dealing with the investigation went on the course in the Garda College in Templemore. Had the appointment been kept, that would have meant that the investigation would have been brought to a very advanced stage some*

*seventeen days before the Garda was due to go on his course. It is possible that the remaining stages would have been completed within that time. Even if that did not happen, there would only have been a limited number of steps left that needed to be taken before the file could be submitted to the GYDO following the Garda's return from the course. Had the appointment been kept, the fact that the suspect was going to receive a sentence in the District Court and thereafter be detained in Oberstown would have had no relevance. The question of a s. 42 application would simply never have arisen.*

[39] *While one cannot be certain about this, it seems likely that had the appointment been kept on 6th October, the remaining steps could have been taken within a timetable that would have allowed a s. 75 hearing to take place before the suspect attained his majority. I regard this as a very relevant consideration...*".

71. Stepping back and taking a holistic view of the approximate two-year period, the period between 9th July 2019 and 19th November 2019 was important because the metaphorical prosecutorial clock was ticking. However, I do not find that there was culpable blameworthy delay on behalf of the prosecuting authorities in the period between 29th March 2019 and 19th November 2019. Rather, the gardaí reasonably attempted to involve the Applicant's mother in facilitating the Applicant's attendance at Ronanstown Garda Station for charge on three occasions and any delay that occurred was either because of the Applicant being unavailable on the first date and because of the lack of co-operation of the Applicant's mother on the subsequent dates.

16th January 2020- 13th May 2020

72. Thereafter the Children's Court declined to deal with the matter summarily pursuant to section 75 of the Children Act, 2001 on 16th January 2020.

73. A Book of Evidence was served on the Applicant in the District Court on 27th February 2020 and the Applicant was returned for trial to the Circuit Criminal Court and the case is mentioned on 20th March 2020, 2 months before he turns 18 on 13th May 2020. The case was listed for arraignment on 16th June 2020 and again on 23rd June 2020 but, as stated, the Applicant has already turned 18 years on 13th May 2020.

74. The point is made that the Applicant reached the Circuit Court while he was still a minor and that, had there been any urgency advocated on his behalf, that he could have pleaded guilty and been sentenced while still a minor. While due to the Covid-19 national lockdown, there was no obligation on the Applicant to attend the Circuit Court on 20th March 2020, the point is made on behalf of the DPP that, on the Applicant's behalf, an application to have the case dealt with urgently could have been made to the court or to have, if they so wished, matters such as an arraignment and sentencing addressed. It was in or around this time that it is stated that the Applicant "aged out". Events after the Applicant reaches 18 years are not relevant to my consideration of matters. While I do not find that there was any culpable blameworthy prosecutorial delay in this short period leading up to 13th May 2020 and the Applicant turning 18 years of age, I do not agree that it was reasonable in that relatively short window from the 20th March 2020 to sometime before the 13th April 2020 to have a guilty plea and a sentencing hearing progressed to finality or make an application that same be done urgently at that time.

75. As mentioned, the case was listed for arraignment on 16th June 2020 on which date the Applicant failed to appear due to a misunderstanding on his part, and he was given a new arraignment date of 23rd June 2020. On 23rd June 2020 a letter was written by the Applicant's solicitor raising the issues the subject matter of this challenge and, on the same date, the case was further remanded in the Circuit Criminal Court to 6th July 2020 for arraignment.

76. Turning to the challenge in Record Number 2020/727JR, while acknowledging the centrality of the scientific analysis to the prosecution process, there was also, I believe, one instance of culpable blameworthy delay on the part of the prosecution in the period between 7th December 2018 and 5th October 2019.

77. On 7th December 2018, Garda Sean Fitzgerald submitted the substances found earlier on 10th September 2018 to the FSI. On 15th January 2019 the investigation file was returned as no certificate of analysis was attached. On 20th August 2019, Garda Sean Fitzgerald followed up with a reminder to FSI in relation to the substances seized but it was not until 5th October 2019 that a certificate of analysis was received. This finding does not take away from the paramountcy of the role of the FSI in the investigation of alleged offences such as that alleged in these applications for judicial review. Rather, the importance of the scientific analysis is in fact underscored by this finding. In the context of the prosecution of a child for alleged offences involving drugs there is an overarching requirement for expedition and this must be communicated clearly to all those who comprise the prosecuting authority.

***The question of prohibition?***

78. Having found that there was one instance of culpable prosecutorial delay in both applications Record No. 2020/425 JR and 2020/727 JR, I now must carry out a balancing exercise between the competing objectives of (a) the prejudice which is said to be visited upon the Applicant arising from my finding of culpable or blameworthy prosecutorial delay, on one side of the scale, and (b) the public interest in having serious alleged charges investigated and prosecuted, on the other side of the scale.

79. While there are factual and chronological differences in each of the judicial review applications and whereas the challenge in Record No. 2020/425 JR contains admissions and an alleged section 15A offence, and the challenge in Record No. 2020/727 JR does not, the prejudice claimed by the Applicant in both cases because of the delay is precisely the same. In those circumstances, I will address the balancing exercise first in relation to the Applicant's challenge in Record No. 2020/425 JR.

80. As stated, the prejudice which is contended on behalf of Applicant that arises in both applications in Record No. 2020/425 JR and Record No. 2020/727JR is that – because he "aged out" on 13th May 2020 – he is denied or deprived the following benefits of the Children Act, 2001 (which are not applicable to adult-defendants):

    (i) No report to be published identifying the child (section 93 of the Children Act, 2001);

    (ii) 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 as a measure of last resort (section 96 of the Children Act, 2001);

(iii) Where detention is contemplated, the court shall adjourn proceedings to obtain a Probation Officer's report which is mandatory, where a child is concerned (section 99 of the Children Act, 2001);

(iv) 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 (section 143 of the Children Act, 2001).

81. Similar arguments were made in *Furlong, Wilde v The DPP* [2020] IEHC 385, *A.B. v DPP* (unreported, 21 January 2020 Court of Appeal (Birmingham P.)), *Cerfas v The DPP* [2022] IEHC 70.

82. In *A.B. v DPP*[5], for example, the Court of Appeal (Birmingham P.) at paragraph 16 observed, in agreeing with the High Court, that at the stage of considering sentence "*the judge in the Circuit Court would be required to have regard to the age and maturity of the appellant at the time of the commission of the offence. The judge will be sentencing him as a person who, aged fifteen and a half years, offended. Obviously, his age and maturity will be highly relevant to the assessment of the level of culpability. In these circumstances, I do not see the fact that s. 96(2) of the Children Act, which stipulates that a sentence of detention will be a last resort, and s. 99, which mandates the*

[5] Unreported, 21 January, 2020 Court of Appeal (Birmingham P.).

*preparation of a probation report, will not be applicable, as having any major practical significance.*"

83. In *M.McD v DPP* [2016] IEHC 2010 the High Court (Humphreys J.) made a distinction where the delay was years rather than months and cited Dunne J. in *Donoghue v. DPP* [2014] IESC 56, in observing that "*whether it can be determined that enough has been put into the balance to warrant prohibition 'will depend upon the facts and circumstances of any given case'*" including consideration of the seriousness of the offence concerned (see: para. 50).

84. In this case, having regard to the length of the delay, the Applicant's age on 21st May 2018, the seriousness of the charges which include alleged offences under the Misuse of Drugs legislation, and the lack of complexity of the case, it is my view that any loss of protection of the Children Act 2001 can be met by the Circuit Court judge exercising his or her powers fairly. Further, the alleged section 15A offence is a presumptive sentence and the full circumstances of the alleged offence and the age of the accused will be considered by the sentencing court in a fair manner. While there is a public interest in prosecuting an alleged offence in circumstances where admissions have resulted in seizures resulting in alleged "section 15A" offence (Record No. 2020/425 JR) there is, in my view, an equal public interest in, what might be characterised by some as the "lesser" drugs-related offences in a case such as that in Record No. 2020/727 JR where matters remain in dispute and where finger printing and forensic analysis are central to the case.

85. In weighing the prejudice which is said to arise from the loss of the above provisions of the Children Act, 2001, matters such as the age and maturity of the Applicant, whether or not a probation report should be ordered and whether or not detention is suitable, will be considered by the trial judge notwithstanding that the Children Act 2001 does not apply to the Applicant after the 13th May 2020 and accordingly I find that the Applicant will not be prejudiced in relation to those matters.

86. Section 75 of the Children Act 2001 gives the District Court jurisdiction to deal summarily with indictable offences involving children unless the court is of the opinion that the offences do not constitute minor offences fit to be tried summarily. It provides that, in deciding whether to try to deal with a child summarily for an indictable offence, the District Court shall take in to account (a) the age and level of maturity of the child concerned, and (b) any other facts that it considers relevant. On 16th January 2020 the Applicant had a hearing in the Children's Court pursuant to section 75 of the Children Act, 2001 where the District judge heard an outline of the facts including the valuation of the diamorphine seized. The District judge indicated that the case was not fit to be tried summarily and that the sentencing jurisdiction of the District Court was insufficient and that he was not prepared to accept jurisdiction.

87. In *DPP v L.E.* [2020] IECA 101, a section 75 hearing was referred to as *"one of the most important procedural benefits under the Children Act 2001."* While section 75 of the Children Act 2001 does not create a right for an accused to have a case dealt with summarily, it does provide a discretion for the District Court judge (exercising its

jurisdiction as a Children's Court) to decide the issue[6] and in this case, after appearing initially on 5th December 2019, the Applicant had the benefit of a hearing before the Children's Court on 16th January 2020 pursuant to section 75 of the Children Act 2001 and this was refused. Similarly (albeit days before he reached his majority) in the challenge in Record No. 2020/727 JR, the Applicant's section 75 application was heard and refused on 11th May 2020.

88. Accordingly, the Applicant, in both cases, has had the benefit of a hearing before the Children's Court pursuant to section 75 of the Children Act 2001, in relation to each set of alleged offences on 16th January 2020 (Record No. 2020/425JR) and 11th May 2020 (Record No. 2020/727JR). In the exercise of my discretionary jurisdiction in considering the Applicant's application for orders of prohibition by way of judicial review, and in carrying out the requisite balancing exercise, after having made a finding of culpable blameworthy prosecutorial delay, I consider that the District Court judge's decision to refuse, in the exercise of *its statutory jurisdiction*, to deal with the alleged offences summarily is a factor which militates against prohibiting the trial and favours the public interest in the trial proceeding.

89. In *DPP v L.E.* [2023] IECA 252 the Court of Appeal (Birmingham P.) accepted that the loss of anonymity, while a significant disadvantage, had to be balanced against the seriousness of the case. The charges alleged against the accused, while not complex, are serious. In this case, I have had regard to the fact that in relation to the more significant drugs seizure, on two dates, 27th January 2019 and again on 6th February 2019, Garda

[6] *The People (DPP) v Sean Furlong* [2022] IECA 85 per Birmingham P. at paragraph 28. The Court of Appeal was comprised of Birmingham P., Edwards and Binchy JJ.

Griffin sent reminder requests to FSI for a certificate of analysis in respect of the items submitted on 1st June 2018 from Méile An Rí Road. A certificate of analysis relating to the diamorphine seized from Méile An Rí Road was received by Garda Griffin on 26th February 2019, and it is contended, and I accept, that this was an essential proof and was required to be included in the file submitted for the consideration of the DPP. Any delay so found does not detract from the seriousness of the alleged offence when it comes to the balancing exercise in the context of seeking an order of prohibition. In this regard the cumulative estimated street valuation of the Diamorphine seized on 21st May 2018 was approximately €43,178.38 based on an estimated value of €140 per gram as outlined in the statement of Garda Dominic D Downing. This was an essential proof in directing a "Section 15A" alleged offence.

90. Similarly, in relation to the challenge in Record No. 2020/727JR, on 23rd April 2020 the Applicant was arrested and charged with having, on 10th September 2018 at Collinstown Park, Clondalkin, Dublin 22 allegedly unlawfully had in his possession a controlled drug, cocaine, contrary to section 3 of the Misuse of Drugs Act 1977 and contrary to section 27(1) of the Misuse of Drugs Act 1977 (as substituted by section 6 of the Misuse of Drugs Act, 1984) and allegedly had a controlled drug, cocaine for the purpose of selling or otherwise supplying it to another contrary to section 15 of the Misuse of Drugs Act 1977 (as substituted by section 6 of the Misuse of Drugs Act, 1984). While it is accepted that no complexity attaches to these alleged offences, they are serious matters which the public interest requires should be prosecuted. On 7th December 2018, Garda McWeeney's statement estimated 142.345 grams of cocaine to have an estimated street value of €9,965. As stated earlier, the finger printing and forensic analysis was central to the case as there were no admissions. On this last point, in the context of the challenge

in Record No. 2020/727JR, the Applicant was arrested, detained and questioned on 27th November 2018 in the presence of his mother and his solicitor, and he denied and disputed being stopped by the gardaí on 10th September 2018.

91. Accordingly, I consider that the loss of anonymity when weighed against the circumstances of each of the cases and the seriousness of the alleged offences in each case favours the trial of the alleged offences continuing in the public interest.

92. Mr. Dwyer SC also makes the point that all the elements that make up the "prosecuting authority" must be seen in the round, rather than in isolation or one from each other *i.e.*, the sum of the parts. His point was that there may be elements that comprise the "prosecuting state" that are guilty of delay which cannot be excused by those elements which are not. There is much to commend taking a broader and more holistic approach to the question of prosecutorial delay given that there may be examples of both "pockets of delay" and "pockets of speed" in the same investigation, or approbation and reprobation as between and amongst the different agencies and persons involved. That said, factually, the compilation of a chronology – which both parties heavily relied upon in these cases – in the first instance has the necessary consequence of highlighting what individual persons and agencies which make up the prosecuting state did or did not do.

93. The authorities do suggest that when the age of the accused is known to the prosecuting authorities, in the context of the alleged offences, the prosecution is then on notice that the clock is ticking and should, from the outset, be aware that, within a defined temporal period, the accused will reach the age of majority and all efforts should be made to ensure that the investigation and prosecutorial process is concluded before that majority is reached. It is to that end, however, that the following observations of Kearns P. in

*Daly v. DPP* [2015] IEHC 405 are applicable, "…*[w]hile 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*…".

94. In this case, while I agree that the case was serious but not complex, I do not think that it can be said that the constituent component parts of the prosecuting authority (including, for example, the gardaí and the FSI) were unaware that the accused was a juvenile who would attain his majority at a certain point in the future (in these cases 13th May 2020), or that all reasonable efforts were not made to conclude the investigative and prosecutorial process before that point was reached. I do recognise, however, the significant caseload of the FSI in terms of carrying out scientific analysis for the State as emphasised on behalf of the DPP and alluded to in a general way by Kearns P. in *Daly v. DPP* [2015] IEHC 405. While delays in the processing of certificates of analysis, a necessary proof in the alleged offences in these cases, was a significant contributing factor in finding culpable and blameworthy prosecutorial delay, this finding and the additional factors which I have set out above, and assessed as part of the balancing exercise do not, in my view, tip the balance in favour of an order of prohibition or surmount the public interest in the efficacious prosecution of alleged offences.

95. I am satisfied, therefore, that the interests of justice would not be served by prohibiting the trial of the Applicant on the alleged charges set out in the judicial review challenges in Record No. 2020/425 JR and Record No.2020/727 JR and I refuse the reliefs sought in each case.

## PROPOSED ORDERS

96. In each case, therefore, I refuse the reliefs of prohibition and injunction sought (and the declarations sought) and I will hear the parties in relation to any consequential and ancillary orders, including the Applicant's application under the Legal Aid - Custody Issues Scheme, which I understand is in relation to one of the cases only.

97. These applications came back before me on 19th December 2023 for the purpose of final orders.

98. In relation to the first case, LW v The DPP (Record No. 2020/425JR), I refuse the reliefs sought (including the remedies of prohibition, injunction and declarations), and with the agreement of the parties, I direct that the name of the applicant be anonymised and there will be no order as to costs.

99. In relation to the second case, LW v The DPP (Record No. 2020/727JR), I refuse the reliefs sought (including the remedies of prohibition, injunction and declarations), and with the agreement of the parties, I direct that the name of the applicant be anonymised and there will be no order as to costs. I am also satisfied to make a recommendation that the Legal Aid – Custody Issues Scheme be applied to the applicant in relation to his legal representation in this application for judicial review.