THE HIGH COURT

[2024] IEHC 254

[Record No.: 2017/9158P]

BETWEEN:

JUNE MOORE

PLAINTIFF

AND

THE GOVERNOR OF LIMERICK PRISON,
THE IRISH PRISON SERVICE,
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

RULING of Ms. Justice Siobhán Phelan, delivered on the 1st day of May, 2024.

INTRODUCTION

1. In these proceedings, the Plaintiff claims damages and declaratory relief in relation to an alleged breach of her rights under Article 40.3 of the Constitution and/or Articles 3 and/or 8 of the European Convention on Human Rights because of the practice of "*slopping out*" in Limerick Prison during her period of incarceration there between 2002 and 2004. It is common case that the proceedings issued 13 years after the Plaintiff was released from prison and the accrual of the alleged wrongs.

2. On this application, I am required to determine both whether it is appropriate to direct trial of objection raised by the Defendants in reliance on the Statute of Limitations, 1957 and/or delay under Order 25, rule 1 of the Rules of the Superior Courts, 1986 (as amended) as a preliminary issue and, if so, whether the Plaintiff's claim as against the Defendants for damages for breach of her rights (be they under the Constitution or the European Convention on Human Rights) is statute barred in accordance with the provisions of s. 11(2) of the Statute of

Limitations, 1957 (hereinafter "the 1957 Act") and/or by virtue of s. 3 of the European Convention on Human Rights Act, 2003 (hereinafter "the 2003 Act").

FACTUAL BACKGROUND

3. The factual background to these proceedings is set out in the pleadings and summarised at paragraphs 1-6 of the Defendants' written submissions and will not be repeated, save to note that the proceedings arise out of the Plaintiff's detention and imprisonment in Limerick Prison between February, 2003 and March 2004. A time-line is given in the Plaintiff's written submissions, which I adopt, as follows:

DATE	EVENTS
20th of February, 2003	The Plaintiff was incarcerated in Limerick Prison
25th of March, 2004	The Plaintiff was released from prison
13th of September, 2017	Gary Simpson judgment (High Court) *Gary Simpson -v- The Governor of Mountjoy Prison and Others* [2017] IEHC 561
12th of October, 2017	Plenary Summons issued.
17th of October, 2017	Statement of Claim issued.
5th of April, 2018	The Defendant entered an Appearance
14th of November, 2019	Gary Simpson judgment (Supreme Court) *Gary Simpson -v- The Governor of Mountjoy Prison and Others* [2020] IESC 52
February, 2020	The State opened a settlement scheme
26th of February, 2021	The Defendants delivered a Defence
6th of April, 2022	Christopher McGee Judgment High Court *Christopher McGee -v- The Governor of Portlaoise Prison and Others* [2022] IEHC 210
25th of May, 2023	Christopher McGee Judgment Supreme Court

	Christopher McGee -v- The Governor of Portlaoise Prison and Others [2023] IESC 14
1st of February, 2024	John O'Brien Judgment High Court

4. This timeline discloses that between March 2004 (when the Plaintiff was released from prison) and October, 2017 (when these proceedings were issued by plenary summons), no steps were taken to advance a claim arising out of the Plaintiff's conditions of detention, specifically being subjected to a practice of slopping out during the term of her detention. Indeed, it is readily to be inferred from the timing that the issue of proceedings in October, 2017 followed on the delivery of judgment of the High Court in *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561 in September, 2017.

PROCEEDINGS

5. Proceedings issued by Plenary Summons dated the 12th of October, 2017. Although a Statement of Claim purports on its face to have been delivered on the 17th of October, 2017 there is some question (which does not immediately concern me) as to whether it was served at time. An Appearance to the proceedings was entered on the 5th of April, 2018. In turn, the Plaintiff served a Notice of Intention to Proceed on the 8th of January, 2020.

6. By Notice of Motion dated the 25th of August, 2020, an application was made on behalf of the Plaintiff for judgment in default of defence. An Order was made extending time for delivery of the Defence in consequence of which motion a Defence was delivered on the 26th of February, 2021.

7. In the Defence delivered a series of preliminary objections were pleaded as follows:

(1) *"The Plaintiff's claim for damages for breach of constitutional rights is barred by virtue of Section 11(2) of the Statute of Limitations Ac, 1957 having been issued more than 6 years from the date on which the cause of action accrued.*

(2) The Plaintiff's claim for damages pursuant to Section 3 of the European Convention on Human Rights Act, 2003, is barred by virtue of Section 3(5)(a) of the said 2003 Act having been brought in respect of the alleged contravention which arose more than one year before the commencement of the proceedings.

(3) The Statement of Claim fails to disclose any facts of circumstances which will permit this Honourable Court to extend the time for the bringing of the Plaintiff's claim for damages pursuant to Section 3 of the European Convention on Human Rights Act, 2003, pursuant to Sections 3(5) of the said 2003 Act. It is denied that it would be in the inherent interests of justice to extend the time and the Plaintiff is not entitled to any extension.

(4) By way of further preliminary objection to the substance of these proceedings the Plaintiff's claim as against the Defendants should be dismissed pursuant to the inherent jurisdiction of this Honourable Court by reason of the Plaintiff's inordinate and inexcusable delay in the institution and prosecution of these proceedings.

(5) Further and in the alternative, the Plaintiffs is guilty of inordinate and inexcusable delay and/or lashes such that the Plaintiff is not entitled to maintain the proceedings herein as against the Defendants and the balance of justice requires these proceedings to be dismissed for want of prosecution.

(6) The Plaintiffs' claim is statute barred and such should be dismissed in its entirety."

8. No Reply has been delivered to this Defence.

9. By Notice of Motion issuing on the 30th of March, 2021 and returnable to the 5th of July, 2021, the Defendants sought, in essence:

I. An Order pursuant to Order 25, Rule 1 of the Rules of the Superior Courts, 1986 that the preliminary objections raised by the Defendants at 1, 2, 3, 4, 5 and 6 of the Defence be set down for hearing and disposed of by way of a trial on a point of law;

II. Further and/or in the alternative, Orders dismissing the claim pursuant to the inherent jurisdiction of the Court on delay grounds and/or for being statute barred pursuant to the State of Limitations 1957 (as amended) and/or s. 3 of the European Convention on Human Rights Act, 2003.

10. The Defendants' application is grounded on the Affidavit of Ms. Louise Boughton sworn on the 30th of March, 2021 to which no replying affidavit has been sworn on behalf of the Plaintiff. The motion was adjourned for lengthy periods of time pending the decision of the Supreme Court on the applicability of s. 11(2) of the 1957 Act (as amended) to claims of this nature in *McGee v. Governor of Portlaoise Prison & Ors.* [2023] IESC 14.

11. The hearing of this application was fixed for the 30th of April, 2024 by Hyland J. in early November, 2023. In fixing the hearing date, I am advised that the Court was advised, without demur of behalf of the Plaintiff, of the Defendants' intention to move the application for trial of the preliminary issue and, if ordered, to seek to have the preliminary issue determined together.

12. The Defendants' outline submissions in support of the application were filed on the 13th of December, 2023 and the Plaintiff's submissions in response were filed on the 11th of February, 2024. These submissions were directed to the substantive issue in relation to the 1957 Act rather than the question of whether the issue should properly be determined on a preliminary basis, seemingly reflecting a common understanding that the preliminary issue would be before me for determination if I made an order so directing.

13. By letter dated the 30th of April, 2024 delivered immediately before I sat to hear the Defendants' application, solicitors on behalf of the Plaintiff wrote with reference to the case before the Court "*this morning*" seeking consent to have the proceedings amended to seek additional reliefs as follows:

I. A declaration that before the decision of the Supreme Court in *Simpson v. Governor of Mountjoy Prison & Ors* [2019] IESC 81 (15th of November, 2019), there was no effective remedy under Irish law for breach of the Plaintiff's rights occasioned by the lack of in-cell sanitation and the practice of "*slopping out*" in the prison where she was detained.

II. A declaration that any application of a statute bar for the purpose of defeating the Plaintiff's claim or of a measure having the same effect, whether under the Statute of Limitations or the European Convention on Human Rights Act or pursuant to the inherent jurisdiction of this Honourable Court, or otherwise, would be unconstitutional or incompatible with the State's obligations and the provisions of the European Convention on Human Rights, particularly Articles 3, 6, 8 and 13 thereof.

14. The letter of the 30th of April, 2024 was brought to my attention upon sitting and it was indicated that if consent to the mooted application to amend was not forthcoming, an application for an adjournment would be made.

15. In response, not surprisingly, it was confirmed through Counsel for the Defendants that they were not consenting to the amendment of the proceedings or to an adjournment. It was further indicated in response to questions from me that although the Defendants' written submissions focussed on the claim that the proceedings were statute barred under s. 11(2) of the 1957 Act, it was also contended that the claim was barred under s. 3 of the 2003 Act in circumstances where an Order extending time under s. 3(5) of the 2003 Act had not been sought and no grounds had been advanced to support the making of such an order extending time. It was clarified, however, that the alternative relief that the claim should otherwise be dismissed in exercise of my inherent jurisdiction having regard to the inordinate and inexcusable delay in the institution and prosecution of these proceedings was secondary and not the focus of the application.

16. Counsel for the Defendants confirmed that while no Order had yet been made under Order 25, rule 1 directing trial of a preliminary issue, their application was that an order be made and that I proceed to determine the preliminary issues identified based on the papers before the Court. It was indicated that this was the basis upon which the matter had been listed for hearing. While resisting the application proceeding on the assigned hearing date in view of their mooted amendment application, Counsel for the Plaintiff did not demur from the position that insofar as the preliminary issues were concerned, they were able to deal with them should the Court consider it appropriate to proceed based on Order 25, rule 1 of the Rules of the Superior Courts, 1986 (as amended).

DISCUSSION AND DECISION

17. The practice of slopping has been relied upon by the European Court of Human Rights in finding breaches of Articles 3 and/or 8 of the Convention in a number of cases dating back to the time that the Plaintiff was in custody and shortly thereafter (see, *inter alia*, *Peers v. Greece (Application No. 28524/95)*, 19th of April, 2001), *Kehayov v Bulgaria (Application No. 41035/98)*, Judgment of 14th of April 2005), *Bakhmutsky v Russia (Application No. 36932/02)*, Judgment of 25th of June, 2009) and *Orchowski v. Poland (Application No. 17885/04)*, 22nd of October, 2009. In the Scottish case of *Napier v. The Scottish Ministers* [2004] S.L.T. 555, a combination of slopping out and prison overcrowding led to findings of inhuman and degrading treatment under Articles 3 and 8 of the Convention.

18. In the first reported Irish case of *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269 a claim for damages in respect of conditions of detention which included slopping out was advanced both on constitutional and Convention grounds. The High Court rejected the claim on both grounds following a detailed consideration of the evidence and the caselaw. The High Court found that the Strasbourg jurisprudence did not support the proposition that the practice of slopping-out *per se* was necessarily inhuman and always degrading for the purposes of Article 3 or unlawful under Article 8 in all places. Whether a breach of Articles 3 and/or 8 was established was found to depend on all the circumstances of the case. It was concluded that the cumulative effect of the conditions of detention required to be considered noting that in the successful cases relied upon from both Strasbourg and other jurisdictions there were found to be few, if any, counterbalancing positive factors as to the prison regime.

19. In rejecting the claim, it appears to have been material to the Court's considerations that the applicant in *Mulligan* did not have to share a cell at any stage and did not make significant complaints as to the way the staff dealt with the sanitation issues on a day-by-day basis in his case. It was accepted, for example, that insofar as possible requests to go to the toilet were accommodated.

20. The first case in which an Irish Court found the practice was unlawful was S*impson v Governor of Mountjoy Prison* ("*Simpson*") ([2017] IEHC 561). In the High Court the claim for damages for breach of rights under Articles 3 and 8 of the Convention advanced under s. 3 of the European Convention of Human Rights Act, 2003 [hereinafter "the 2003 Act"] was found to be largely statute barred insofar as it related to periods of detention occurring more

than one year previously. This finding was not appealed. In his judgment, White J. found a breach of constitutional rights but refused to make an award in damages and declined to consider relief under the Convention because of findings made in reliance on the plaintiff's constitutional rights.

21. In *Simpson v Governor of Mountjoy Prison* [2019] IESC 81; [2020] 3 I.R. 113; [2020] 1 I.L.R.M. 81 it was found by the Supreme Court in upholding the High Court (in a judgment delivered in November, 2019) that the practice of slopping out evidenced in that case infringed the personal rights of the citizen guaranteed by Article 40.3 of the Constitution. Damages were subsequently awarded in the sum of €7,500 for breach of personal rights protected under Article 40.3 of the Constitution measured with reference to conditions of detention occurring in the six-year period prior to the commencement of the proceedings (proceedings had issued in 2014 in respect of a period of detention occurring between February and September 2013).

22. It was observed by McMenamin J. in the Supreme Court (para. 24) that the decision not to appeal the finding that the claim under s. 3 of the European Convention on Human Rights Act, 2003 was largely statute barred was "*...was a prudent and correct decision*."

23. Following the decision in *Simpson* a Scheme of Settlement [hereinafter "the Scheme"] was introduced in February, 2020. It was a term of the Scheme that compensation in amounts measured under the Scheme would be payable on compliance with conditions of the Scheme including in material part that the claim, or at least part of it, is not statute barred. These proceedings do not comprise a challenge to the limitations of the Scheme. There is no evidence before me on this application either in relation to the Scheme, the terms thereof, its operation or any application under the Scheme on behalf of the Plaintiff. This notwithstanding I take judicial notice of the fact that such a Scheme was introduced. I am aware also that an issue is being pursued in other litigation currently live before the Superior Courts as to the lawfulness of an application of a limitation period to determine eligibility under the Scheme in consequence of which no remedy exists in respect of historic cases concerning the practice of slopping out.

24. As clear from the background outlined above, this is not the first case to come before the Courts claiming damages for breach of rights arising from the practice of slopping out in which the issue of the Statute of Limitations has arisen for consideration. Notably, and as

referred to above, in *McGee v. Governor of Portlaoise Prison & Ors.* (on appeal from the decision of the High Court in that case [2022) IEHC 210), the Supreme Court considered the net issue in that case was whether a so-called pure *Meskell* claim is one which is "*founded on tort*" so that the provisions of s.11(2) of the 1957 Act (as amended) apply.

25. In its judgment delivered in May, 2023 in *McGee* (*McGee v. Governor of Portlaoise Prison & Ors*. [2023] IESC 14, [2023] 1 I.L.R.M. 305), the Supreme Court found that where vindication of constitutional rights takes the shape of permitting a claim for damages against other wrongdoers, then such a claim is properly characterised as an action founded upon a civil wrong, and therefore, an action founded upon tort and it follows that such a claim is subject to the provisions of s.11 of the 1957 Act. This finding was made following an extensive review of the caselaw, much of which is also identified by the Defendants in their submissions on this application.

26. Since then leave has been granted in judicial review proceedings challenging the exclusion of applicants from eligibility under the Scheme in reliance on the fact that the claims are statute barred on the grounds that this exclusion means that persons subjected to a regime of slopping out in breach of rights recognised in the Supreme Court decision in *Simpson* are without an effective remedy contrary to Article 40.3 of the Constitution and/or Articles 3 and/or 6 and/or 8 and/or 13 of the Convention. I understand from what was said by counsel during the hearing before me that the reference in the letter of the 30th of April, 2024 indicating an intention to apply to amend these proceedings to "*such orders being made in similar cases*", without there identifying the cases concerned, to refer to my decision in *O'Brien v. Governor of Cork Prison & Ors*. [2024] IEHC 109 (hereinafter "*O'Brien*").

27. In the *O'Brien* case, I was dealing with an application for leave to amend a Statement of Grounds in Judicial Review proceedings in a case challenging the exclusion of the applicant from the Scheme on the basis that a condition of eligibility under the Scheme was that the claim is not statute barred, leave having originally been given by another judge based on the applicable arguability threshold. As set out in my written ruling, I granted leave to amend the Statement of Grounds to properly plead the case made to the general effect that the consequence of exclusion from eligibility under the Scheme on the basis the claim was statute barred together with the contended for fact that Irish law recognised no actionable wrong contemporaneous with the occurrence of incidents of slopping out, meant that that there was

no effective remedy for an asserted breach of rights. Of note, however, leave to amend proceedings to include a claim that s. 11 of the Statute of Limitations, 1957 (as amended) was incompatible with the European Convention on Human Rights was refused in *O'Brien*.

28. Most recently in the line of cases relating to the practice of slopping out, in a judgment delivered on the 19th of April, 2024 in *McGovern v. Governor of Limerick Prison & Ors.* [2024] IEHC 210, Simons J. considered an application for trial of a preliminary issue under Order 25 of the Rules of the Superior Court and/or a modular trial pursuant to the Court's inherent jurisdiction and/or Order 36 rule 9(1) (as amended). It is clear from the judgment that there was an open question before the Court as to the mode of trial with the Plaintiffs contesting the suitability of the case for preliminary determination and further objecting that a modular trial would lead to a duplication of costs. Unlike this case, the only question before the Court was the procedural question of whether the delay point should be resolved on a stand-alone basis in advance of a substantive hearing or whether it should be addressed as part and parcel of an omnibus hearing.

29. *McGovern* was like this present case in that it comprised a claim for damages arising from a breach of rights occasioned by the practice of slopping out (although, a separate claim was also advanced in *McGovern* that the Plaintiff was not provided, during the period of her incarceration, with adequate medical care, treatment or supervision in relation to her mental health and depression). Of note, the judgment reflects (para. 9) that an application to amend the Statement of Claim had been brought but had yet to be heard and determined. The terms of the proposed amendment are not identifiable from the judgment but I note that the solicitors on record in that case are the same solicitors on record in this case.

30. An important factor in guiding the approach adopted in *McGovern,* as clear from the judgment, was undoubtedly that the case involved disputed issues of fact. Ultimately, Simons J. did not accede to the application for a trial of a preliminary issue on the statute but instead directed a modular trial precisely "*because the material facts are in dispute*" (para. 6). Observing that the case law in relation to the trial of a preliminary issue under Order 25 emphasises that there must be agreement in relation to the material facts before a preliminary issue can be tried, he referred to *Campion v. South Tipperary County Council* [2015] IESC 79, [2015] 1 I.R. 716 (at paragraph 35) where the possibility of agreeing facts solely for the purposes of the application was identified. Simons J. noted (at para. 8) that the prevailing view

on the authorities is that, for the purposes of Order 25, the material facts must either be agreed between the parties, or, alternatively, the moving party must take the Plaintiff's case at its height for the purpose of the application.

31. Accordingly, in deciding on the application before him Simons J. proceeded on the "*working assumption*" that the proposed amendments would be permitted. In this way, he took the Plaintiff's case at its height and dealt with the application for trial of a preliminary issue and/or modular trial on the basis that the issues to be determined in the proceedings will include even the additional issues identified as part of the proposed amendments, whatever they were.

32. Central to the conclusion in *McGovern* that it was more appropriate to proceed by way of modular trial rather than by way of trial of a preliminary issue was the fact that the plaintiff's response to the statute plea in that case was that she had been labouring under a statutory disability and thus qualified for an extension of the limitation period pursuant to s. 49 of the 1957 Act. Further, it was contended that the plaintiff intended to assert, in reliance on psychiatric evidence, that she was of "*unsound mind*" within the meaning of s. 48 of the 1957 Act.

33. Notwithstanding the disputed facts and evidential issues arising which created a difficulty in dealing with the matter as a trial of a preliminary issue, in directing a modular trial, Simons J. observed that it would be unsatisfactory if a defendant who, on the face of it, appeared to have a complete defence to the proceedings by reference to the expiration of a statutory time limit was nonetheless put to the time and expense of preparing for and participating in a full trial of the action in circumstances where the proceedings might ultimately be found to be statute barred. He added (para. 34) that it is preferable that, where same can be done without causing prejudice to the other side, the question of whether the proceedings are statute barred should be determined in advance, subject to the caveat that a modular trial will not be directed unless there is a significant saving of expense, which would not normally be the case where there is an overlap in the type of evidence and argument to be heard as between two separate modules.

34. This present case is different to *McGovern* in one very material way. In this case there are no disputed issue of fact material to a decision as to whether the proceedings are statute barred or not has been identified. On the papers before me no issue has been raised in respect

of the Plaintiff's date of knowledge. It is incontrovertible that she knew she was required to slop out while in Limerick Prison at all material times and she makes no claim to have been under a disability. The plaintiff does not seek to rely on any evidence for the purpose of a determination of the statute issue and has not sworn an affidavit in almost three years since the motion issued.

35. While the Plaintiff objects to the determination of the issue against her and has sought an adjournment to bring an application to amend the pleadings, it is accepted that the matter is before me for determination as a preliminary issue based on the case as pleaded, the motion and grounding affidavit and the submissions, should I direct that it is suited for determination on a preliminary application. The main point agitated on behalf of the Plaintiff during the hearing before me was her wish to amend her pleadings in the manner described in the letter of the 30th of April, 2024 before this application is determined so that "*all matters can be dealt with together*".

36. Notwithstanding the very late indication of an application to amend the pleadings and the fact that no such application has as yet been brought, but mindful that it is appropriate to have regard to the Plaintiff's case at its height in deciding on this application, I have reflected on what effect the mooted amendment might have on the sustainability of the case as instituted and whether the interests of justice require that I adjourn this application to allow for an amendment application to be brought (noting also the Defendants' intention in such a scenario to apply for a wasted costs order) before it is determined.

37. Despite the fact that no amended draft Statement of Claim has been presented to the Court and the terms of the proposed amendment communicated by letter on the date of the hearing identify only the terms of additional declaratory relief rather than the basis upon which such relief might be claimed, it is nonetheless clear that the mooted amendment is directed to the absence of a remedy in the event that the Plaintiff's claim as currently constituted is found to be statute barred. As I read it there is no current proposal to amend the pleadings to challenge the constitutionality of s. 11(2) of the 1957 Act and/or its compatibility with the Convention, but rather it is sought to be claimed that it is the application of same which gives rise to the alleged breach. No arguments were advanced before me in relation to the strength or otherwise of the claim mooted by the proposed amendment. I note that the constitutionality of s. 11 of

the 1957 Act was considered and upheld in *Tuohy v. Courtney* [1994] 3 I.R. 1. No basis has been identified before me in argument for relitigating this issue.

38. One thing is very clear. The mooted amendment would introduce a different claim into these proceedings if the amendment application were successful. The proceedings as currently constituted comprises a straightforward claim for damages and declaratory relief for civil wrong in the form of the breach of rights occasioned by being forced to slop out during a period of incarceration in 2002-2004. The amended plea as mooted, on the other hand, requires a determination of whether Irish law provided a remedy at material times (be it within 6 years or 1 year of 2004) and whether, in the Irish context, reliance on the Statute of Limitations by the State breaches the Plaintiff's right to an effective remedy (be that under the Constitution or the Convention). The claims are therefore related but only to the extent that the claim mooted in the proposed amendment arises for determination if the Plaintiff's claim in the proceedings as currently constituted stand to be defeated on an application of statutory limitation periods.

39. It seems to me clear that the viability of proceedings based on a plea as mooted in the correspondence, should such a plea be maintained, is not prejudiced by a determination of the statute issue on a preliminary application in the manner sought on behalf of the Defendants. Without commenting on the merit of proceedings which might be maintained on the basis intimated in the mooted amendment application, a determination that the Plaintiff's claim for damages and declaratory relief for breach of her constitutional and convention rights occasioned by being caused to slop out in a shared cell situation is statute barred would not be inconsistent with the maintenance of a claim that the application of a statutory limitation period leaves the Plaintiff without a remedy.

40. Indeed, far from the Plaintiff being prejudiced, the fact that her claim in these proceedings was dismissed as statute barred could be relied upon to make the case suggested by the proposed amendment, namely, that in consequence of the application of statutory limitation periods the Plaintiff has suffered an actionable wrong based on an infringement of her right to a remedy. If anything, a determination of the preliminary issue is therefore more in ease of such claim than undermining of it.

41. Not only is the claim as currently constituted different in law to the claim mooted by way of proposed amendment but it depends on different legal argument of some novelty and

on different evidence. The case as currently constituted, if not determined to be statute barred in advance of the case being set down for hearing, would require extensive oral evidence in relation to the conditions of detention in Limerick Prison in the period 2002-2004, events occurring at least 13 years prior to the institution of the proceedings. A failure to determine the statute issue on a preliminary basis would therefore result in a trial in which significant evidence was required. The alternative case which it is now indicated the Plaintiff would like to be able to plead, presuming the amendment were allowed, could only proceed following a determination of the preliminary issue leading to a more prolonged trial. While there may be an overlap in evidence, the case to be made in advancing the amended plea would nonetheless be different.

42. In deciding to direct trial of a preliminary issue on the papers before me under Order 25, rule 1 of the Rules of the Superior Courts 1986 (as amended) and refusing to adjourn this application, I have regard to the following:

I. the question arising for determination on the application for trial of a preliminary issue is a pure question of law and there are no disputed facts material to responding to a plea that the claim is statute barred;
II. it is the type of question which is particularly suited to determination on a preliminary application and if determined in favour of the Defendants could result in significant savings in time and costs by avoiding a lengthy witness action in relation to historical matters dating to 2002-2004 (noting the *Simpson* case lasted 30 days, albeit it would presumably be shorter in this case);
III. an application to amend has only been belatedly mooted;
IV. the said application to amend has not been formally brought;
V. the said application to amend seeks to introduce an entirely different claim in proceedings that have been in being for almost seven years;
VI. this application for trial of a preliminary issue was more than three years in being before an amendment was proposed for the first time on the day of hearing;
VII. the mooted amendment involves a different legal question which falls to be determined only when the civil claim as currently pleaded has been disposed of and gives rise to different evidential considerations; and
VIII. if anything, the lack of a remedy identified in the mooted proposal to amend is brought into focus by a determination that the Defendants are entitled to invoke statutory

limitation periods to defeat the claim for damages for breach of rights occurring in the period from 2002 to 2004 in the existing proceedings;

IX. it is in the interests of the administration of justice that issues be decided efficiently and in an expeditious manner where possible;

X. the Defendants are entitled to expedition in the determination of their application for trial of a preliminary issue and whether the proceedings are statute barred.

43. These aforementioned factors combined, most particularly the nature of the purely legal issue which presents for determination and a lack of prejudice to the Plaintiff in determining a clear preliminary question of law without affording her a further opportunity to bring an amendment application by delaying the determination of this application lead me to the conclusion that it is appropriate and consistent with the proper administration of justice, including the Defendants' right to expedition, to direct the trial of a preliminary issue under Order 25, rule 1 on this application. Accordingly, I so direct. I now proceed to determine that issue without adjourning the application pending the outcome of a future application to amend proceedings.

44. Turning then to the preliminary issue itself, there is no doubt as a matter of law and on the clear recent authority of the Supreme Court decision in *McGee* which is directly on point, that the Plaintiffs' claim for damages for breach of her constitutional rights arising from being subjected to a practice of slopping out is statute barred on an application of s. 11(2) of the 1957 Act which fixes a general time limit of six years in respect of such civil wrongs. This question has been finally and conclusively determined. No basis for contending that this time limit should not apply by reason of date of knowledge or disability or otherwise is identified on the facts of this case. The constitutionality of time limits fixed under s. 11 of the 1957 Act have been upheld by the Supreme Court. Where a defendant elects to rely on a s. 11 limitation period, it is a function of the Court to apply the law.

45. The claim for breach of Convention rights is based on events the occurrence of which straddle the commencement of the 2003 Act on the 31st of December, 2003 (S.I. 483 of 2003). From the date of its commencement, there was no impediment to the maintenance of a claim based on a breach of Convention rights, presuming no other remedy, before the Irish Courts. Section 3 of the 2003 Act requires that an application for damages in reliance on that section be brought in accordance with s. 3(2) only "*if no other remedy in damages is available*". It

bears note that in *Simpson* the High Court expressly did not proceed to give relief in respect of the Convention claim because a remedy was available under the Constitution (see para. 455 judgment of White J.).

46. Accordingly, to succeed on a claim under s. 3 of the 2003 Act it would be necessary to establish that damages were not otherwise available for breach of constitutional rights based on the same facts notwithstanding the decision in *Simpson*. Even assuming this to be the case for the sake of argument, under s. 3(5)(a) a claim for damages "*shall not be brought*" in respect of alleged contraventions which "*arose more than 1 year before the commencement of the proceedings*" unless the Court is satisfied that it appropriate in the interests of justice to extend time.

47. In this case, although reference is made to an application for an extension of time, if necessary, in the body of the Statement of Claim, the Plaintiff has not sought an order under s. 3(5)(b) of the 2003 Act in the reliefs sought. Nor has she identified grounds which might be relied upon to justify an extension of time of some thirteen years in the face of a statutory limitation period of one year. Afterall, even were she to maintain that it was unclear that there was a remedy in Irish law by reason of the decision in *Mulligan*, I fail to understand why it was not clear that a remedy existed under the Convention (and therefore the 2003 Act) given the developing Strasbourg jurisprudence contemporaneous with the events complained of.

48. In circumstances where claims were being brought both before the European Court of Human Rights and the Irish Courts albeit with mixed results (for example, *Mulligan* and *Simpson*) throughout this thirteen-year period and where nothing particular to the Plaintiff's circumstances has been identified as an impediment to the bringing of proceedings within the prescribed one year period, I am satisfied that even in the very unlikely event the Plaintiff were allowed to maintain a claim for damages under s. 3 notwithstanding the fact that she had either not pursued a claim for breach of constitutional rights and/or had permitted a claim for damages for breach of constitutional rights advanced on the same factual basis to become statute barred, she cannot establish an entitlement to an extension of time under s. 3(5)(b) because she has identified no basis upon which such an extension could conceivably be granted.

49. The Plaintiff's claim instituted in 2017 based on a breach of Articles 3 and/or 8 of the Convention arising from conditions in custody involving a practice of slopping out between 2002 and 2004 is therefore clearly statute barred under the 2003 Act.

CONCLUSION

50. For the reasons given, I have concluded that it is appropriate in the proper administration of justice to determine as a preliminary issue whether these proceedings as currently constituted are statute barred. I am satisfied that this is a pure question of law. On an application of established legal principles, I find that the proceedings are statute barred under both s. 11(2) of the 1957 Act and s. 3(5)(a) of the 2003 Act and should be dismissed.