APPROVED **[2024] IEHC 330**

THE HIGH COURT
JUDICIAL REVIEW

2022 498 JR

BETWEEN

TANYA HAMILL

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 6 June 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to prohibit a criminal prosecution. The gravamen of the application is that it is unlawful for the Director of Public Prosecutions to pursue a prosecution *on indictment* against the applicant in circumstances where an earlier summary prosecution in respect of the same alleged offences had been struck out by the District Court. In particular, it is alleged that the applicant enjoyed a legitimate expectation that if a second criminal prosecution were to be pursued against her, same would occur on a timely basis and would remain before the District Court.

2. The fact that the second criminal prosecution is being pursued by way of indictment has the consequence that the maximum penalties to which the applicant would be liable, in the event of conviction, are greatly increased. The maximum term of imprisonment which may be imposed by the Circuit Court, in respect of the offences alleged, is seven years. This is to be contrasted with a maximum sentence of twelve months in the case of a summary prosecution.

3. For ease of exposition, the applicant will be referred to hereinafter as "*the Accused*" to reflect her status in the criminal proceedings (rather than her status as applicant in these judicial review proceedings). This is done in circumstances where most of the procedural history relates to events in the criminal proceedings rather than these judicial review proceedings. It should be emphasised that the Accused enjoys the presumption of innocence.

PROCEDURAL HISTORY

4. The Accused stands charged with a number of offences contrary to the Misuse of Drugs Act 1977. The offences are alleged to have occurred on 13 August 2018. On that date, a search warrant had been executed in respect of the Accused's dwelling. It is alleged that a small quantity of controlled drugs had been seized on that occasion. (The material seized is said to have consisted of alprazolam and diamorphine). The Accused was subsequently interviewed under caution by An Garda Síochána. The Accused's solicitor has indicated that the admissibility of the statement, which the Accused made to members of An Garda Síochána, will be challenged at any criminal trial.

5. The Accused has been charged with two counts of unlawful possession of a controlled drug, and two counts of the possession of a controlled drug for unlawful sale or supply.

6. The offences with which the Accused has been charged are indictable offences which are capable of being tried summarily. Offences of this type are sometimes referred to colloquially as "*hybrid offences*" or offences which are "*triable either way*". In brief, an offence of this type may be tried summarily provided that, first, the Director of Public Prosecutions makes an administrative decision to consent to summary disposal, and, secondly, the District Court accepts jurisdiction by determining that the offence is a minor one. See, generally, *Gormley v. Smyth* [2010] IESC 5, [2010] 1 I.R. 315 (at paragraphs 4 to 9).

7. If the evidence discloses, either prior to the trial or during the trial, that the offence is a non-minor offence, then the District Court is not entitled to try such an offence and is obliged, of its own motion, to decline jurisdiction. This is because the District Court has no actual or inherent jurisdiction to dispose of non-minor offences. See, generally, *Reade v. Judge Reilly* [2009] IESC 66, [2010] 1 I.R. 295. The factors to be considered in determining whether an offence is a minor or non-minor offence have recently been restated by the Court of Appeal in *Doherty v. Director of Public Prosecutions* [2023] IECA 315.

8. (For completeness, it should be noted that the taxonomy and disposal of offences at a summary level and on indictment is the subject of an appeal pending before the Supreme Court: *Doherty v. Director of Public Prosecutions* [2024] IESCDET 46).

9. In the present case, criminal proceedings were initially instituted against the Accused by way of the summons procedure ("*the first criminal proceedings*").

It has been explained, in the opposition papers, that the decision to pursue the prosecution on a summary basis had been made at the local level, i.e. without the submission of a file to the Director of Public Prosecutions for a formal direction. This was done pursuant to Section 8 of the Garda Síochána Act 2005. This section provides that any member of the Garda Síochána may institute or conduct prosecutions in a court of summary jurisdiction in the name of the Director of Public Prosecutions. The Director has published a general direction which indicates, relevantly, that she has elected for summary disposal of certain categories of offences under the Misuse of Drugs Act 1977.

10. The first criminal proceedings had been instituted by way of the issuance of four summonses from the relevant District Court Office on 22 July 2019. The summonses were made returnable before Portlaoise District Court on 21 November 2019. On that date, the District Court accepted jurisdiction.

11. Following the furnishing of disclosure material, the first criminal proceedings were listed for hearing before the District Court on 25 September 2020. This hearing date had to be vacated in circumstances where the prosecution sought time to instruct counsel. The first criminal proceedings were adjourned for hearing on 16 March 2021. On that date, the prosecution sought another adjournment, this time on the basis that the seized drugs, which were to be the central exhibit in the case, could not be located. Having heard legal argument from both the prosecution and the defence, the District Court struck the prosecution out. A decision to strike out criminal proceedings is very different from a decision to dismiss the proceedings on the merits or with prejudice. An order striking out criminal proceedings does not preclude the institution of *fresh* proceedings.

12. The Accused has sought to attach great significance to certain comments which the District Court judge purportedly made in the context of his ruling striking out the first criminal proceedings. More specifically, it is suggested that the judge had held that if the prosecuting authorities intended to re-charge the Accused, then this should be done expeditiously and within a period of no more than four weeks.

13. In the event, no further steps were taken against the Accused for a period of some eight months. Thereafter, a second set of criminal proceedings were instituted by way of the charge sheet procedure. More specifically, the Accused was arrested on 25 November 2021, charged and cautioned, and brought before Portlaoise District Court. The Accused was then remanded on bail pending the service of a book of evidence. On 17 February 2022, the District Court sent the Accused forward for trial to the Circuit Court. It should be explained that the Director of Public Prosecutions contends that the three month time-limit for judicial review proceedings began to run from this date: see further paragraphs 50 to 55 below.

14. The Accused's solicitor wrote to the Office of the Director of Public Prosecutions on 7 April 2022. In brief, the letter set out the procedural history leading up to the striking out of the first criminal proceedings on 16 March 2021. The letter then advanced an argument to the effect that the decision to abandon the summary prosecution and to direct trial on indictment had been made without reference to this procedural history, without there having been any change in circumstances and without any alteration in the substantive evidence. The letter called upon the Director to confirm that a *nolle prosequi* would be entered in respect of the charges. The letter concluded by stating that, in default of such

confirmation, the Accused reserved the right to bring an application for judicial review before the High Court. A copy of this letter was also sent to the State Solicitor for Kildare North West. The State Solicitor replied by letter dated 20 April 2022 stating that the Director was of the view, having considered the matter, that the charges as directed by her should be prosecuted on indictment and that the Director denied that there was any delay in bringing this matter to trial.

15. It has since been explained, in the opposition papers, that a file had first been sent to the Office of the Director of Public Prosecutions on 8 October 2021 and that a direction was issued on 14 October 2021. It will be recalled that the decision to institute the first criminal proceedings had been made at the local level by An Garda Síochána.

16. The within judicial review proceedings were commenced by way of an *ex parte* application for leave to apply on 4 July 2022. A statement of opposition was subsequently delivered on behalf of the Director. The Accused brought an application for the discovery of documents. This application was refused by the High Court (Bolger J.) in a written judgment on 6 December 2023: *Hamill v. Director of Public Prosecutions* [2023] IEHC 688.

17. The application for judicial review ultimately came on for hearing before me on 13 February 2024. It emerged at the hearing that a copy of the order made by the District Court on 16 March 2021 had not been exhibited. The precise terms of the District Court order, and, in particular, whether same included a stipulation that any fresh criminal proceedings would have to be instituted within a specified period of time, are relevant to the judicial review proceedings. Strictly speaking, the responsibility for putting a copy of the order before the High Court resides

with the Accused, as the applicant for judicial review. Having regard to the importance of the judicial review proceedings for the Accused, however, it would have been disproportionate to decide the case against her by reference to the technical failure to discharge this evidential burden. The omission to exhibit the District Court order is one which was capable of being readily rectified, i.e. by the High Court requesting the Registrar to procure a copy of the order from the District Court Office. I indicated to the parties that I would arrange for this to be done. A copy of the order in respect of each of the four summonses was made available to me the same afternoon. Copies were provided to the parties.

18. In each instance, the District Court order recites that the "*complaint*" was struck out. For reasons which have not been explained, the orders are all signed by a *different* District Court judge than the judge sitting on 16 March 2021 and appear to have been drawn up on 13 February 2024. Put otherwise, it appears that the orders had been drawn up by the District Court in direct response to the request made by the High Court Registrar for copies of same. The orders had not been drawn up contemporaneously with the hearing before the District Court.

19. Following receipt of the copies of the District Court order, the Accused's side arranged to have the matter relisted before me on 26 February 2024 for the purpose of a formal application to take up a transcript of the digital audio recording ("*DAR*") of the District Court hearing on 16 March 2021. This application was allowed, and an order made pursuant to Order 123 of the Rules of the Superior Courts. The transcript was duly taken up. The matter was relisted before me, on 31 May 2024, for oral submissions in respect of the content of the transcript. Judgment was reserved to today's date.

20. The transcript indicates that whereas the District Court judge did *suggest* that any fresh prosecution should be dealt with expeditiously, within a period of one month, the judge expressly stated that this suggestion was not binding.

LEGAL FRAMEWORK

21. It is well established in the case law that the Director of Public Prosecutions enjoys considerable discretion in relation to both the initial decision on whether or not to prosecute and the ancillary decision as to the precise form of any such prosecution. Relevantly, the Director enjoys a discretion to change course, as it were, and to pursue a prosecution on indictment notwithstanding an initial decision to pursue the matter by way of summary proceedings. The Supreme Court in *Kelly v. Director of Public Prosecutions* [1996] 2 I.R. 596 held that the Director of Public Prosecutions is entitled to reconsider a decision to proceed by way of summary prosecution, and to fall back on the indictable charge if she saw fit to do so, up until the point at which the accused person had been acquitted or convicted. This principle is subject to the proviso that no power of the Director can be exercised in such a way as to constitute an abuse of the right of an accused person to a fair trial.

22. Having considered the judgment in *State (O'Callaghan) v. O hUadhaigh* [1977] I.R. 42, Murphy J., writing on behalf of the Supreme Court in *Kelly v. Director of Public Prosecutions*, observed as follows:

> "It seems to me that the *ratio decidendi* of the decision of the then President was that the Director of Public Prosecutions could not exercise, or more correctly did not possess, a statutory power which would enable him to renew a prosecution in relation to the same subject matter as one terminated by a *nolle prosequi* where to do so would deprive the accused of his basic rights of justice at a criminal trial. In particular he held, on the facts of the case before him, that

> to renew a prosecution in respect of a matter which had proceeded to the point where the trial judge had adjudicated on the significant issue therein in a manner adversely to the contention of the Director and in favour of the accused would constitute such an injustice."

23. The Supreme Court, in its subsequent judgment in *Cleary v. Director of Public Prosecutions* [2011] IESC 43, [2013] 2 I.R. 48, held that a prosecution on indictment could not be pursued in respect of an offence in circumstances where an *earlier* prosecution arising out of the same alleged facts had been dismissed by the District Court. The District Court had dismissed the criminal proceedings before it in circumstances where there had been no attendance on the part of the prosecutor on the trial date. The Supreme Court, by a majority, rejected an argument on behalf of the Director of Public Prosecutions that the District Court's dismissal should be treated as being *other than* a dismissal on the merits. See paragraph 56 of the reported judgment as follows:

> "[…] The salient point is that there is an order of a court of competent jurisdiction dismissing the allegation the respondent has brought against the applicant. This order, though said to have been made without jurisdiction on a number of different grounds, has never been removed or impugned by the respondent. That, in my view, is sufficient to make the indictable proceedings against her for the self-same offence an abuse of process, and it must be so regarded to maintain the integrity of the order of the District Court, a court of competent jurisdiction."

DISCUSSION AND DECISION

24. As appears from the case law discussed under the previous heading, the Director of Public Prosecutions enjoys significant prosecutorial discretion. This discretion is not confined to the core decision of whether or not to pursue criminal proceedings but extends to the *form* of proceedings in the case of indictable offences which are triable either way. This is subject to the proviso

that the Director cannot exercise her prosecutorial discretion in a manner which would be unfair to an accused person. The Director cannot, for example, deprive an accused person of the benefit of a substantive adjudication by purporting to enter a *nolle prosequi* after a court has made a ruling which is favourable to the accused. Similarly, it would be an abuse of process for the Director to seek to institute a prosecution on indictment in circumstances where the events giving rise to the alleged offence have already been the subject of a summary prosecution which has been heard, determined and dismissed by a court of competent jurisdiction.

25. On the facts of the present case, the decision to pursue a second criminal prosecution had been reached in circumstances where the District Court had already made a ruling—to use a neutral term—in respect of the first criminal proceedings. It is necessary to consider whether this ruling amounted to a substantive adjudication such that it would be unfair to deprive the Accused of the benefit of same. As appears from the orders which have since been provided by the District Court Office, the District Court had ruled that the first criminal proceedings were to be struck out. The District Court did not, as it might in principle have done, dismiss the proceedings on the merits, i.e. with prejudice. Nor did the District Court purport to make an ancillary order directing that any fresh criminal prosecution would have to be brought within a specified period of time.

26. It is a moot point as to what the legal consequences would have been had the District Court judge included in his order a stipulation as to the timing of any fresh criminal prosecution. The position formally adopted by the Director in her opposition papers is that any such stipulation would not be binding on the

Director. With respect, the legal position would appear to be more nuanced. The judgment in *Cleary v. Director of Public Prosecutions* (cited above) indicates that an order of the District Court, even one seemingly made without jurisdiction, cannot simply be disregarded but must be challenged by way of an appeal or judicial review. It is not necessary to address this issue further, for the purpose of resolving the present proceedings, in circumstances where it is evident from the terms of the District Court order that the judge directed a strike out *simpliciter*.

27. As flagged earlier, the Accused has since been permitted to take up a copy of the transcript of the digital audio recording of the hearing before the District Court on 16 March 2021. The order allowing the taking up of the transcript was made having regard to, first, the importance of these judicial review proceedings for the Accused; secondly, the fact that the District Court orders provided are signed by a different judge; and thirdly, the affidavit evidence adduced by the Accused which might, on one reading at least, appear to suggest that the District Court judge may have intended to stipulate that any fresh criminal proceedings be brought within a four week period.

28. The transcript indicates that the District Court judge envisaged that fresh proceedings might be brought, including by way of the charge sheet procedure. The judge was concerned lest there be further delay. The judge expressed the view that if the missing exhibit, i.e. the controlled drugs allegedly seized from the Accused, were located and it was decided to prosecute again, then this should be done within a "*reasonable period of time*" of not more than one month. The judge went on to say that his observations were in "*no way binding*".

29. In summary, the transcript confirms that the District Court did not dismiss the first criminal proceedings on the merits or with prejudice. Rather, the District Court contemplated that a second set of criminal proceedings might legitimately be taken in the event that the missing exhibit were to be found. This was a strike out rather than a dismissal.

30. It should be reiterated that it is the District Court order alone which represents the record of the proceedings before that court. The District Court is a court of record and speaks through its written order (*Cleary v. Director of Public Prosecutions* [2011] IESC 43, [2013] 2 I.R. 48 (at paragraph 30)). The content of the ruling leading up to the written order could only ever be determinative if there was some error or ambiguity in the terms of the written order. There is no such ambiguity in the orders of 16 March 2021: the orders all refer to the particular complaint as having been struck out. It follows, therefore, that it is, strictly speaking, unnecessary to have regard to the transcript in this case in determining what the District Court did.

31. The legal effect of the striking out of the first criminal proceedings had been that it was open, in principle, to the Director to institute fresh proceedings. The District Court's order dismissing the first criminal proceedings did not constitute an adjudication on the merits. Nor is there anything in the District Court's order which impinges on that aspect of the prosecutorial discretion which allows the Director to determine the *form* of proceedings, i.e. summary or indictable. This is not a case where the District Court had made a substantive adjudication such that it would be unfair to deprive the Accused of the benefit of same.

32. Of course, it would have been open, in principle, to the Accused to resist any fresh proceedings on the grounds of delay. There is a well-established line of

case law which confirms that the court of judicial review may dismiss proceedings on the grounds of blameworthy prosecutorial delay. This is not, however, the case that the Accused makes.

33. The essence of the case made on judicial review is that the Accused had some sort of legitimate expectation that any fresh criminal proceedings would be confined to summary proceedings. With respect, there is no basis for such an asserted legitimate expectation. The general position is that the Director of Public Prosecutions is entitled to elect for trial on indictment up and until the point of a conviction, acquittal or other substantive adjudication. It follows, as a corollary, that no accused person can rely on the mere fact that the criminal proceedings taken against them had *initially* been brought by way of summary proceedings as precluding a change to an indictment. The form of proceedings is always subject to potential change.

34. The factual circumstances are entirely distinguishable from those at issue in *Eviston v. Director of Public Prosecutions* [2002] IESC 62, [2002] 3 I.R. 260. There, the unfairness was found to arise as a result of the giving of an unqualified representation that there would be no prosecution. It was the omission to explain to the accused in that case that the initial decision not to prosecute was amenable to internal review that was crucial to the finding of unfairness. The position was put as follows by Keane C.J. (at page 299 of the reported judgment):

> "Whether, in the particular circumstances of this case, fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment, stress and anxiety to which the presumably innocent citizen is subjected when he or she becomes the accused in a criminal process could not conceivably be, of itself, a sufficient justification for interfering with the undoubted prosecutorial discretion of the respondent. It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision

> of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to review in accordance with the procedures in his office. If those review procedures formed part of the law of the land, then, the applicant would be assumed, however artificially, to have been aware of that law. The review procedures of the respondent, however, are not part of the law: they constitute a legitimate, and indeed salutary, system of safeguards to ensure that errors of judgment in his department which are capable of correction are ultimately corrected. No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage. In the result, she was subjected to a further and entirely unnecessary layer of anxiety and stress. […]"

35. By contrast, in the present case, no representation had been made by or on behalf of the Director to the effect that criminal proceedings would not be pursued against the Accused. It is apparent from the transcript of the hearing before the District Court on 16 March 2021 that the prosecuting authorities intended to institute fresh proceedings and that the application to *dismiss* the first criminal proceedings was resisted on that basis.

36. The Accused has also sought to argue that the initial decision to prosecute is at variance with the decision to pursue the second criminal proceedings by way of trial on indictment. It is argued that there is no adequate, reasonable or objectively justifiable basis for this change in position.

37. With respect, these arguments are inconsistent with the well-established principle that the Director of Public Prosecutions enjoys a broad prosecutorial discretion. A decision of the Director is reviewable only if it can be demonstrated that it was reached *mala fides* or was influenced by improper motive or improper policy or if there are other exceptional circumstances (*Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.R. 198).

38. There is no suggestion in the present case that the decision to try the Accused on indictment has been reached *mala fides* or is improperly motivated. Rather, the contention appears to be that the decision is unreasonable. (The contention that the decision is unfair is addressed separately at paragraph 45 *et seq*. below). There is no basis for this contention. It has been explained that the decision to institute the first criminal proceedings was one which was made by An Garda Síochána as allowed for under Section 8 of the Garda Síochána Act 2005. The garda file was only referred to the Office of the Director of Public Prosecutions, for the first time, in October 2021. The decision to pursue a trial on indictment is objectively reasonable: the particulars of the alleged offences (including the value of the controlled drugs) are such that they are capable of supporting the view that the alleged offences are non-minor.

39. It should be reiterated that the Accused, at all times, enjoys the presumption of innocence. The foregoing discussion is directed solely to the question of the *reasonableness* of the Director's decision to pursue a prosecution on indictment and has nothing to say in relation to the underlying merits of the criminal proceedings.

40. The Accused contends that the Director is obliged to state reasons for her decision to pursue a trial on indictment. This contention is incorrect. It is well established that the Director is not normally obliged to give reasons for a decision as to whether to prosecute or not *unless* it can be demonstrated that such a decision was made in bad faith or under the influence of an improper motive or policy. This has been confirmed in *Eviston v. Director of Public Prosecutions* (cited above), and, more recently, in *Marques v. Minister for Justice and Equality* [2019] IESC 16 (at paragraph 19).

41. Different considerations apply to a decision to certify for a trial before the Special Criminal Court: *Murphy v. Ireland* (at paragraphs 43 and 44). This is because the Director is making the sole decision on whether a case, which would otherwise be tried before a jury, should be tried before the Special Criminal Court. The present case does not give rise to such considerations: here, the effect of the decision is that the Accused will have a jury trial.

42. It follows—as a corollary of the principle that the Director of Public Prosecutions is not normally obliged to give reasons for a decision to prosecute or not—that the Director is similarly not required to explain the *subsidiary* decision as to whether to pursue a prosecution summarily or on indictment. In each instance, the Director enjoys a broad discretion and it is not in the public interest that the Director be required to state reasons. This is, of course, subject to the "*improper motive*" exception identified in the case law above. Here, there is nothing to suggest that the decision to pursue the second criminal proceedings *by way of indictment* was made in bad faith or under the influence of an improper motive or policy. It has not been suggested, for example, that the particulars of the alleged offences are such that the decision to pursue a trial on indictment is aberrant or calls for explanation. The offences alleged are serious offences.

43. Nor can it be said that there has been a "*ramping up*" of the charges as between the first and second criminal proceedings, such as might attract the principles in *G.E. v. Director of Public Prosecutions* [2008] IESC 61, [2009] 1 I.R. 801. The same charges have been preferred each time: the only difference being that the Director has now directed trial on indictment.

44. The Accused asserts that she has been prejudiced in that she is now exposed to a potentially more severe penalty in the event of conviction. In particular,

attention is drawn to the fact that the maximum term of imprisonment for conviction on indictment for the alleged offences is seven years whereas it is only twelve months on summary conviction. With respect, this differential in potential penalties does not amount to "*prejudice*" which can be said to arise from any unfairness on the part of the Director of Public Prosecutions. Rather, it is simply a reflection of the legislative choice as to the appropriate maximum penalty for an offence of possession for unlawful sale or supply. The role of the Director is confined to deciding to pursue the prosecution on indictment. Thereafter, the question of guilt or innocence is a matter for the jury, as the tribunal of fact. In the event of conviction, it will be a matter for the Circuit Court to determine the appropriate sentence.

45. For completeness, it is necessary to address the additional case law relied upon by the Accused. This case law has been cited in support of an argument that it is both procedurally and substantively unfair for the Accused now to face a trial on indictment for offences that she was in a position to deal with summarily in the District Court on two occasions. For the reasons which follow, the case law is distinguishable.

46. The first decision cited, *Mulligan v. Judges of the Dublin Circuit Criminal Court* [1999] IESC 44, is an example of the application of the principle that once a hearing before a jury has been embarked upon, a criminal prosecution may not be struck out to facilitate the prosecuting authorities in bringing a fresh prosecution based on evidence which they could and should have called at the time of the first trial. On the facts, the Accused had been put in charge of the jury, and, on the evidence given, would almost certainly have been acquitted had the trial judge not purported to strike out the proceedings to allow the prosecuting

authorities to remedy their proofs. The Supreme Court upheld the finding of the High Court that this represented an unfair procedure which justified an order of prohibition. The facts of the present case are distinguishable: here, the District Court had never embarked upon the hearing of the criminal prosecution.

47. For similar reasons, the next judgment relied upon by the Accused, namely, *State (O'Callaghan) v. O hUadhaigh*, is also distinguishable. On the facts, the High Court held that the Director was not entitled to avoid the trial judge's ruling on the question of an amendment of the indictment by entering a *nolle prosequi* and pursuing fresh criminal proceedings. Here, there is no question of the Director having sought to avoid the ruling of the District Court. The District Court, by striking out the criminal proceedings, rather than dismissing them, allowed for the possibility of fresh proceedings.

48. The judgment in *Cleary v. Director of Public Prosecutions* is distinguishable on the grounds that the District Court, in that case, had dismissed the criminal proceedings on the merits.

49. Finally, the Accused has cited the judgment in *D.C. v. Director of Public Prosecutions* [2005] IESC 77, [2005] 4 I.R. 281 (at paragraphs 2 and 3). These passages rehearse the well-established principle that the jurisdiction of the court of judicial review to intervene and prohibit a trial is an "*exceptional jurisdiction*". This does not advance the argument in the present case.

ORDER 84 TIME-LIMIT

50. The Director of Public Prosecutions contends that time begins to run, for the purposes of Order 84, rule 21 of the Rules of the Superior Courts, from the date of the return for trial. If the Director's contention is correct, then the application

for leave was made out of time, and the Accused will have to persuade the High Court that an extension of time should be granted.

51. There has been some controversy in the case law as to the date from which time is to be calculated for the purposes of an application to restrain a criminal prosecution. In particular, there is some debate as to whether the time-limit should be calculated (i) from the date of the return for trial, or (ii) from the later date of the formal service of an indictment.

52. The Supreme Court judgment in *C.C. v. Ireland (No. 1)* [2005] IESC 48, [2006] 4 I.R. 1 (at paragraph 94 of the reported judgment) indicates that the time-limit runs from the date of the indictment. Geoghegan J. dealt with the point as follows:

> "It may well be that, because the trial judge embarked on a consideration of the substantive issues, the notice of appeal in the C.C. case does not contain any appeal relating to the time point though the notice of appeal in the P.G. case does. The time point in each case was argued before this court on appeal. I would differ with the view of the trial judge that either applicant was out of time. It is not necessary to go into the details of the periods which he considered applicable. It is sufficient to say that in neither case has an indictment yet been served. The time in my view would only commence to run from the service of the indictment. Neither application for leave to bring judicial review proceedings was, therefore, out of time."

53. Denham J. stated as follows (at paragraph 14):

> "However, these three cases may be distinguished from a situation where judicial review is sought in the currency of a criminal trial. These applications have been brought at the preliminary stage of the criminal process. No indictment has yet been laid, although the charges are known. There is an important difference between considering an application for judicial review in the currency of a trial as opposed to an application prior to the commencement of the trial, prior to the laying of an indictment. While an application for judicial review in the currency of a trial may be successful only in the most exceptional circumstances, applications for judicial review prior to trial fall into a different category. However,

> even in these latter cases it is still, inter alia, within the discretion of the court to refuse the application for judicial review on the grounds that the issue would be best met at the trial by the trial judge."

54. The correctness of the approach adopted in *C.C. v. Ireland (No. 1)* has, however, since been queried by the judgment of the High Court (Kearns P.) in *Coton v. Director of Public Prosecutions* [2015] IEHC 302. Kearns P. suggested that the time-limit issue may not have been fully argued in *C.C. v. Ireland (No. 1)*. In particular, it was suggested that the Supreme Court had not considered the fact that, in practice, an indictment may not be served until the morning of the criminal trial. If followed through to its logical conclusion, fixing the time by reference to the date of the indictment could have the result that applications to restrain a criminal prosecution could take place on the eve of the trial. Kearns P. does, however, go on to indicate that the rule is sufficiently flexible to allow for contingencies such as, for example, where material is not disclosed to the defence until late in the day.

55. The judgment of the Supreme Court in *C.C. v. Ireland (No. 1)* [2005] IESC 48, [2006] 4 I.R. 1 is binding on this court, and, accordingly, I cannot accept the Director's submission that time begins to run from the date of the return for trial. The application for judicial review has been made within time.

CONCLUSION AND PROPOSED FORM OF ORDER

56. The application for judicial review is dismissed in its entirety. As to legal costs, my *provisional* view is that the respondent, having been entirely successful in resisting the application for judicial review, is entitled to recover her costs as against the applicant. If either side wishes to contend for a different order than

that proposed, they should arrange to have the matter relisted before me on 20 June 2024 at 10.30 AM.

Appearances

Mel A. Christle, SC and Richard Wixted for the applicant instructed by JP Fitzpatrick & Co Solicitors
Conor McKenna for the respondent instructed by the Chief Prosecution Solicitor