THE HIGH COURT

[2024] IEHC 392
[Record No. 2022/601 JR]

BETWEEN:

STUART BROPHY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 2nd day of July, 2024.

INTRODUCTION

1. Special statutory provision is made for child offenders under the provisions of the Children Act, 2001 (hereinafter "the 2001 Act"). Such provision includes an enhanced possibility for summary disposal before the Children's Court under s. 75 of the 2001 Act. The benefit of this provision is lost where the young offender reaches the age of majority and "*ages out*".

2. The Applicant was a juvenile (aged 17 years and almost one month) at the time of an offence of robbery alleged to have been committed by him in April, 2019. By the time the Applicant was first brought before the Children's Court on the 9th of March, 2022, almost three years later, the discretion vested in that Court by s.75 of the 2001 Act to deal summarily with any indictable offence committed by a child was no longer applicable, as the Applicant had by then reached the age of majority. No provision has been made to extend the procedural benefit prescribed under s.75 to a person over 18 years where they were a child when the alleged offences were committed.

3. In these proceedings the exclusion of the Applicant from the special procedure available to young offenders under s. 75 of the 2001 Act is challenged as unlawful. In essence, the Applicant contends that a fundamental purpose of the 2001 Act is to provide

special treatment for juvenile offenders in the criminal justice system and to this end the s.75 hearing confers an important procedural benefit to juvenile offenders. It is argued that the exclusion of an alleged juvenile offender from this mechanism, simply because he turned 18 after the alleged offence occurred but before the prosecution of same against him, is perverse, without justification and constitutes an unlawful form of discrimination either contrary to Articles 40.1 and/or 40.3 and/or 42A of Bunreacht na hÉireann and/or Articles 6 and/or 8 and/or 14 of the European Convention on Human Rights [hereinafter "the Convention"].

FACTUAL BACKGROUND

4. It is alleged that on the 15th April 2019, at a time when the Applicant was a child for the purpose of the 2001 Act, he committed an offence of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001. He stands co-accused with an older male who was 36 years of age on the date of the alleged offence. The prosecution case is that the older co-accused entered a shop with a knife and told the shop worker to open the till. A second male, the prosecution allege to be the Applicant, entered the shop when the first male could not open the till and had the role of "*lookout*".

5. The material dates are as follows:

19 March 2002	Applicant's date of birth.
15 April 2019	Alleged offence (Applicant was 17 years and 1 month).
19 February 2020	Applicant arrested and detained.
16 February 2022	Applicant arrested for purpose of charge and station bailed.
9 March 2022	Evidence of arrest charge and caution before the Children Court.
20 April 2022	Book of evidence served on Applicant and order sending forward for trial in Circuit Court made in the District Court.
18 May and 27 July 2022	Appearances before Dublin Circuit Criminal Court Court.

6. From the foregoing chronology, it is apparent that there was a delay of almost three

years between the commission of the alleged offence and the Applicant's first appearance before the Children's Court. The Applicant was 19 years and 11 months old when the matter first came before the District Court on the 9th of March, 2022.

PROCEEDINGS

7. Proceedings were commenced by *ex parte* application for leave to proceed by way of judicial review opened before the High Court (Meenan J.) on the 19th of July, 2022. Leave to proceed by way of judicial review was subsequently ordered on the 17th of October, 2022. The primary relief sought in the proceedings is declaratory relief in reliance on Articles 40.1, 40.3 and 42A of Bunreacht na hÉireann in respect of the Applicant's exclusion from the procedural protections conferred on children under s. 75 of the 2001 Act by reason of having turned 18 years of age. He also seeks an order of *Certiorari* quashing the return for trial made on the 20th of April, 2022 and an order restraining his continued prosecution or in the alternative an order limiting the sentencing jurisdiction of the Circuit Court to that of the Children Court/District Court.

8. Although, the Applicant seeks declarations that his rights under Articles 42A and 40.3 have been breached, these claims have not been pursued save to inform the Article 40.1 argument. The crux of the Applicant's case is an alleged breach of equality provisions of Bunreacht na hÉireann and, in the event that his constitutional claim fails, the Convention.

9. The Respondents were separately represented before me and filed separate Statements of Opposition and written submissions. The First Named Respondent's Statement of Opposition was filed in July, 2023 and was followed by a Statement of Opposition on behalf of the Second and Third Named Respondents at the end of September, 2023.

10. The Respondents each plead that the application is out of time.

11. The Second and Third Named Respondents rely, in particular, on the fact that the Applicant has not established that s. 75 would have been invoked to establish summary jurisdiction in the District Court in his case in view of the seriousness of the offence alleged and his lack of engagement with the Juvenile Liaison Officer. It is denied that the Applicant has established that his rights have been breached.

12. Reliance is also placed on the presumption of constitutionality, particularly in

regulating complex areas of social policy. It is maintained that the Oireachtas is entitled to draw differentiations between differently situated classes of people in its legislative enactments. It is further pointed out that it remains open to the Applicant to make submissions before the court of trial at sentencing stage in relation to his age and maturity at the time of the offence.

ISSUES

13. Even though it is established in cases such as *B.F. v. Director of Public Prosecutions* [2001] IESC 18, [2001] 1 I.R. 656, *G. v. DPP, Donoghue v. Director of Public Prosecutions* [2014] IESC 56, [2014] 2 I.R. 762, *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020; *Director of Public Prosecutions v. L.E.* [2020] IECA 101 and *Furlong v. Director of Public Prosecutions* [2022] IECA 85 that in the case of a criminal offence alleged to have been committed by a child or young person, there is a special duty on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial, the Applicant does not in these proceedings seek to restrain his trial on delay grounds in reliance on this delay jurisprudence.

14. Rather than seek to restrain his trial on grounds of delay, instead, the Applicant squarely maintains a challenge to the constitutionality of his exclusion from the benefit of s. 75 of the 2001 Act. Issues arising on the pleadings include:

(i) whether the proceedings are time barred?

(ii) whether, but for age consideration, summary disposal under s. 75 of the 2001 Act was open on the facts and circumstances of this case?

(iii) whether the exclusion from the scope of s. 75 of the 2001 Act of persons who are alleged to have committed a crime when a child but who have turned 18 by the time the Children's Court determines the question of jurisdiction impermissibly discriminates against the Applicant contrary to Articles 40.1 and/or 40.3 and/or 42A of Bunreacht na hÉireann?

(iv) whether s. 75 of the 2001 Act is incompatible with Articles 6 and/or 8 and/or 14 of the European Convention on Human Rights by its exclusion of persons who are alleged to have committed a crime when a child but who have turned 18 by the time the Children Court determines jurisdiction?

15. Although the issue of an appropriate remedy was canvassed briefly in written submissions (with reference to *B.G. v. Judge Murphy* [2011] 3 I.R. 748 and *Lennon and Reeves and Lennon v. Disabled Drivers Medical Board of Appeal* [2020] IESC 31), the case proceeded before me on the basis that were the Applicant to be ultimately successful on any point, then the issue of remedy should be the subject of a separate hearing.

LEGAL FRAMEWORK

Constitutional Framework

16. The right of the citizen to be treated equally and the special status of the child are constitutional values enshrined in the fundamental law of our State.

17. In terms of the equality guarantee, Article 40. l of an Bunreacht na hEireann provides as follows:

> *"All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function*."

18. Introduced following constitutional amendment on the 28th of April, 2015, building on the protection of the person afforded under Article 40.3, Article 42A of an Bunreacht na hEireann makes special provision for the rights of the child by further providing:

> *"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."*

Statutory Framework

19. The Applicant is accused of the indictable offence of robbery, a serious offence. Section 14(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides that a person is guilty of robbery if he or she steals, and immediately before or at the time of doing so, and in order to do so, uses force on any person or puts or seeks to put any person in fear of

being then and there subjected to force. Special considerations arise, however, where the accused person is a child as the law provides for different treatment of children in certain circumstances.

20. Provision for differentiation between adults and children in the criminal justice system has long been recognised as arising from the different position of the child and the need to provide special protections for children. Legislative differentiation can be traced back to s. 5(1) of the Jurisdiction Over Children (Ireland) Act of 1884, later amended by the Children Act 1908. This differentiation is continued through the terms of the 2001 Act which replaces the 1908 Act and makes extensive new provision in respect of offences against children.

21. The long title to the Act provides as follows: "*An act to make further provision in relation to the care, protection and control of children…".*

22. Section 3 of the 2001 Act defines a child "*as a person under 18".*

23. One of the special measures envisaged under the 2001 Act for juvenile offenders is that juvenile offenders must be considered for admission to the Garda Diversion Programme (as provided for under s. 18 of the 2001 Act). Where a child who is over the age of criminal responsibility and under the age of 18 accepts responsibility for criminal (or, after the Criminal Justice Act, 2006, anti-social behaviour) then he or she must be considered for admission to the Diversion Programme provided for in Part 4 of the Act. The Programme is administered by the National Juvenile Office of An Garda Síochána and its Director is a member of a rank not less than Superintendent.

24. The statutory criteria for inclusion are set out in s.23 and require, on the part of the child, the acceptance of responsibility and his or her consent to a caution and supervision by a Juvenile Liaison Officer. The Director of the Programme must be satisfied that the admission of the child would be appropriate, would be in the best interests of the child, and would not be inconsistent with the interests of society or of any victim. The views of victims are to be given "*due consideration*" but admission to the Programme is not dependent upon their consent. If admitted to the programme, the child may be supervised, may be the subject of conferences attended by the relevant parties and may be required to comply with an "*action plan*" including any reparation or rehabilitative measures thought appropriate.

25. Section 47 of the 2001 Act empowers the Minister for Justice to make regulations which may, inter alia, exclude specified types of criminal behaviour from consideration for the Programme unless the Director of Public Prosecution directs otherwise. No such regulations appear to have been introduced. Admission to the Programme means that the child may not be prosecuted for the relevant offending behaviour. The acceptance of responsibility on the part of the child is inadmissible in any subsequent criminal or civil proceedings and may not be reported. Where a child is not admitted to the Programme but is prosecuted, he or she will continue to benefit from certain other measures under the 2001 Act.

26. Part 7 of the 2001 Act provides for the establishment of the Children's Court by providing that the District Court, when hearing charges against children or hearing applications for orders relating to a child at which the attendance of the child is required or when exercising other jurisdiction conferred on the Children Court is to be known as "*the Children's Court*".

27. Section 71(2) of the 2001 Act provides that insofar as practicable sittings of the Children's Court shall be arranged so that persons in attendance are not brought into contact with persons attending at other courts.

28. Provision is made under s. 72 of the Act for judges sitting in the Children's Court to be required to receive special training by the President of the District Court.

29. Section 75 of the 2001 Act vests the Children's Court with jurisdiction to deal summarily with indictable offences in the following terms:

> *"1. Subject to subsection (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.*
>
> *2. In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of-*
>
> *(1) the age and level of maturity of the child concerned, and*
>
> *(2) any other facts that it considers relevant.*

3. *The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.*
4. *In deciding whether or not to consent under subsection (3) a child may obtain—*
    a. *the assistance of his or her parent or guardian or, if the child is married to an adult, his or her spouse, or*
    b. *where the parent or guardian or adult spouse of the child does not for any reason attend the relevant proceedings, the assistance of any adult relative of the child or other adult who is accompanying the child at the proceedings.*
5. *If at any time the Court ascertains that a child charged with an offence which is required to be tried by the Central Criminal Court or with manslaughter wishes to plead guilty and the Court is satisfied that he or she understands the nature of the offence and the facts alleged, the Court may, if the child signs a plea of guilty, send him or her forward for sentence with that plea to a court to which, but for that plea, the child would have been sent forward for trial.*
6. *A child shall not be sent forward for sentence under subsection (5) without the consent of the Director of Public Prosecutions or (in relation to offences for which proceedings may not be instituted or continued except by, or on behalf or with the consent of, the Attorney General) the Attorney General's consent.*
7. *(a) Where a child is sent forward for sentence under this section, he or she may withdraw the written plea and plead not guilty to the charge.*

    (b) In that event—

    (i) the court shall enter a plea of not guilty, which shall have the same effect in all respects as if the child had been sent forward for trial to that court on that charge in accordance with Part 1A (inserted by the Criminal Justice Act, 1999) of the Act of 1967,

    (ii) the prosecutor shall cause to be served on the child any documents that under section 4B or 4C (as so inserted) of that Act are required to be served and have not already been served, and

    (iii) the period referred to in subsection (1) of the said

section 4B shall run from the date on which the not guilty plea is entered."

30. Part 8 of the 2001 Act makes special provision for proceedings in court concerning children. The Court has power, in certain circumstances, to direct that a family conference be convened. When a family conference is directed, s. 79 of the 2001 Act mandates that the conference be convened by a probation and welfare officer. The purpose of the conference is to endeavour to formulate an action plan for the child which may in turn be the subject of court direction and supervision. Section 84 envisages the possibility of the criminal proceedings against the child being dismissed if satisfied that the child has complied with the plan. Under s. 88A of the 2001 Act (as amended) children remanded in custody are remanded to a place designated as a remand centre under that provision. The Court is required to explain its decision to the child in child friendly language (s. 88A(3)).

31. An alleged offender, who is prosecuted while they are still a child, is entitled to anonymity. This is provided for under s. 93(1) as follows:

"In relation to proceedings before any court concerning a child—

i. *no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and*
ii. *no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included."*

32. The opportunity to assert a statutory right to anonymity avails an accused young offender no matter what court is seized of the case but is lost where the accused young offender ages out before the case against them is disposed of by a court.

33. Part 9 of the 2001 Act deals with the powers of Courts in relation to child offenders. The marginal note to s. 96 indicates that it is addressed to the principles relating to the exercise of criminal jurisdiction over children. Section 96 provides:

"(1) Any court when dealing with children charged with offences shall have

regard to—

(a) *the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and*

(b) *the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.*

(2) *Because it is desirable wherever possible—*

(a) *to allow the education, training or employment of children to proceed without interruption,*

(b) *to preserve and strengthen the relationship between children and their parents and other family members,*

(c) *to foster the ability of families to develop their own means of dealing with offending by their children, and*

(d) *to allow children reside in their own homes,*

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

(3) *A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.*

(4) *The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.*

(5) *When dealing with a child charged with an offence, a court*

shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

34. In this way, s. 96(2) mandates the Children's Court to consider every available option before, as a last resort, proposing a sentence of imprisonment on a "*child*". The various orders which the Children's Court may make (as set out in ss. 98, 99 and 100 of the 2001 Act) consequent upon a finding of guilt, are premised on a person being a "*child*". There is further specific provision made in ss. 108 and 110 in respect of the extent to which fines may be imposed on a "*child*" and the consequences for a "*child*" who defaults in the payment of a fine. The limits imposed on the Children's Court as to when it can make a detention order are defined in the 2001 Act by reference to the person being a "*child*".

35. Under the Scheme of the 2001 Act, if convicted, a child will not be deprived of his or her liberty unless a wide range of alternative, community- based possibilities have been considered and found to be unsuitable. While the general principle is set out in s.96, it is reinforced by s. 143(1) which emphasises that 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.

36. In contrast with the earlier provisions of the 2001 Act which do not extend benefits to child offenders who have aged out when the matter comes before the Court, s. 258 of the 2001 Act provides for non-disclosure of findings of guilt made in respect of children where the offence occurred before the offender was 18 irrespective of when the matter comes before the Court.

37. Before proceeding to consider the substantive issues arising, it is appropriate to reflect briefly on the scope of the jurisdiction under s. 75 and the nature of the benefit conferred by that provision in the light of a developing body of jurisprudence including *Forde v. DPP* [2017] IEHC 799, *DPP v. L.E.* [2020] IECA 101, *Furlong v. DPP* [2021] IEHC 326**,** *DPP v. Dublin Metropolitan District Court sitting as the Children Court and DA* and *DPP v. Furlong* [2022] IECA 85, *Doe & Ors. v. DPP* [2024] IEHC 112, where specific consideration has been given to it.

38. The 2001 Act provides for the special treatment of alleged child offenders when

compared with their adult counterparts, conferring protections in the criminal process which are not available to adults and providing for different treatment. Different procedures are prescribed for in cases in which children come before the Court accused of a criminal offence. The striking feature of the 2001 Act (commented on in multiple decisions of the Superior Courts) is that the key date for determining eligibility for the procedural entitlements prescribed in respect of child is the date of trial, not the earlier date of the alleged offence (see observations by Simons J. in *Doe v. DPP* [2024] IEHC 112 to this effect). Specifically, it has been determined that to qualify as a "*child*" for the purpose of the s. 75 jurisdiction in view of the definition of a child in s. 3 of the 2001 Act, the accused young offender must have been a child when the alleged offence was committed and remain a child when the s. 75 jurisdiction is exercised by a court (see in this regard detailed consideration of the statutory scheme by Faherty J. in *Forde v. DPP* [2017] IEHC 799).

39. This has the practical consequence that almost all the procedural entitlements provided for under the 2001 Act are only available during the currency of an accused person's childhood. The principal exception is the provision made, under s. 258 of the 2001 Act, for the expunging of certain findings of guilt. The different approach taken in s. 258 of the 2001 Act assumes a particular significance when considering the issue in these proceedings because it clearly demonstrates choice on the part of the Legislature to extend protections in respect of child offending to persons who are no longer children from which it is clear that the exclusion of aged out children from the scope of the balance of the 2001 Act is a deliberate policy choice and not an accidental omission.

40. For its part, s. 75 of the 2001 Act has been recognised as one of the most important procedural benefits under the 2001 Act. In summary and as apparent from the terms of s. 75 set out above, it provides that the Children's Court may 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 summarily or, where the child wishes to plead guilty, to be dealt with summarily.

41. Although, s 75 of the 2001 Act has been the subject of consideration in a growing number of cases (principally prosecutorial delays cases), this is the first case in which the regime has been challenged as to its constitutionality. The s. 75 jurisprudence is nonetheless informative in that certain clear findings regarding the operation and effect of s. 75 of the

2001 Act have been made. Thus, it has been confirmed that s. 75 does not create a right for an accused to have a case dealt with summarily. Rather, it provides a discretion to the judge of the District Court which might result in this course of action being taken (per Birmingham P. in *Furlong v DPP* [2022] IECA 85, at para. 28).

42. The operation of s. 75 of the 2001 Act was further discussed in *DPP v. Dublin Metropolitan District Court sitting as the Children Court and DA* (High Court, 12th of November, 2021) where Ferriter J. noted that in the ordinary course, when an accused is charged with an indictable offence and is before the District Court for same, the accused must be sent forward for trial unless the case is being dealt with summarily (s.4A, Criminal Procedure Act, 1967). The general rule is that in the case of indictable offences, the DPP can elect as between trial on indictment and summary disposal. He observed (at paras. 31-32):

> *"A significant feature of s.75 is that it does not provide for the DPP to elect as between trial on indictment or summary disposal when the accused is a "child" within the meaning of the Children Act, 2001. Rather, the District Court sitting as the Children Court is effectively conferred with the statutory power to make that election, subject to the informed consent of the accused child and subject to the satisfaction of the criteria specified in the section."*

43. In deciding whether to try or deal with a child summarily for an indictable offence, the court is required to take account of (a) the age and level of maturity of the child concerned, and (b) any other facts that it considers relevant. If the Children's Court accepts jurisdiction, the maximum custodial sentence which can be imposed is twelve months. This statutory cap undoubtedly represents a significant advantage for the child offender facing prosecution.

44. From the case-law, it is clear that the legislative intent in making special procedural provision for children has been to shield the child during the criminal process having regard to the particular considerations arising in relation to children notably necessary adjustments to provide for effective participation and the desirability, wherever possible, of allowing education, training or employment to proceed without interruption, the relationship between children and their families to be preserved and strengthened and of children remaining in their own homes (see, for example, *Doe v. DPP* [2024] IEHC 112).

European Convention on Human Rights

45. The Applicant further contends that his exclusion from the benefit of the s. 75 procedural benefit results in discriminatory interference with his fair trial rights safeguarded under Article 6 and/or 14 of the Convention. Article 14 provides as follows:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

46. In Application no. 24724/94 *T v. UK* (or the related case of *V v. UK*) the European Court of Human Rights referred to Article 14(4) of the International Covenant on Civil and Political Rights (1966) (at para. 49 of the judgment) which provides that:

> *"In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."*

47. The European Court of Human Rights observed that this provision is in broad correspondence with Article 6 of the European Convention on Human Rights. I understand the Applicant to contend, in reliance on this line of jurisprudence, that Article 6 applies to ensure that the special interests of child offenders are safeguarded within the criminal justice system. The Applicant further relies on his privacy and dignity rights under Article 8, again in conjunction with his right not to be discriminated against in the exercise of Convention rights under Article 14.

Convention on the Rights of the Child and International Instruments

48. Whilst the UN Convention on the Rights of the Child (hereinafter "the CRC") does not form part of domestic law (except insofar as certain aspects of it are given practical effect through legislation), it is noteworthy that Ireland signed the CRC on the 30th of September, 1990 and ratified it on the 28th of September, 1992.

49. Article 3.1 of the CRC states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative, authoritative, or legislative bodies, the best interest of the child shall be a primary consideration."

50. Article 37 (a) and (b) provides:

"States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time .."

51. Article 40(1) provides:

"1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

52. Article 40(2) provides for a range of particular measures including at Article 40(2)(vii) the right of the child to have his or her privacy protected at all stages of the proceedings.

53. Article 40(3) of the UN Convention on the Rights of the Child requires State Parties:

"to seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular,

(a) *The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;*

(b) *Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."*

54. Article 40(4) provides:

"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

55. Separately, the UN Committee on the Rights of the Child's *General Comment No. 24 (2019) on children's rights in the child justice system* (18th of September 2019) states that the child justice system should apply to all who are alleged to offend when under the age of 18, and that there should be a "*non-discriminatory*" full application of the system to all such persons. The General Comment opens with recognition that:

"Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults."

56. Under the heading "Application of the Child Justice System", it further states:

29. The child justice system should apply to all children above the minimum age of criminal responsibility but below the age of 18 years at the time of the commission of the offence.

30. The Committee recommends that those States parties that limit the applicability

of their child justice system to children under the age of 16 years (or lower), or that allow by way of exception that certain children are treated as adult offenders (for example, because of the offence category), change their laws to ensure a non-discriminatory full application of their child justice system to all persons below the age of 18 years at the time of the offence (see also general comment No. 20, para. 88).

31. Child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process.

32. The Committee commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

57. The Committee further recommends (para. 35) the continuation of child justice measures for children who turn 18 before completing a diversion programme or non-custodial or custodial measure. It is recommended that the child be permitted to complete the programme, measure of sentence and not be sent to centres for adults.

58. Consistent with Article 40(2)(vii), paras. 66 to 71 of General Comment No.24 made recommendations in relation to the full respect of privacy rights and elaborate that "*there should be lifelong protection from publication regarding crimes committed by children*" (para. 70).

59. Later in its recommendations, the Committee addresses the organisation of the child justice system and recommends the establishment of child justice courts either as separate units or as part of existing courts.

EVIDENTIAL BASIS FOR THE EXERCISE OF S. 75 JURISDICTION

60. These proceedings are grounded on several affidavits sworn by the Applicant's solicitor. Affidavits in reply have been sworn by a Garda Juvenile Liaison Officer appointed in respect of the Applicant in August, 2020 at a time when consideration was being given to his inclusion in the Diversion Programme and by a garda member of the investigating team.

61. From the affidavit evidence it appears that the Applicant was identified from CCTV footage downloaded on the date of the alleged offence. Despite this the Applicant was only arrested 10 months later, a month before his eighteenth birthday in February, 2020. The delay between April, 2019 and February, 2020 is explained as arising in circumstances where the investigating member was off duty for eight weeks with a fractured wrist and by reason of difficulties in making contact with the Applicant, notwithstanding that the Applicant appeared on a number of occasions before the Children's Court on an unrelated matter during this period. Following an interview in February, 2020, the Applicant was released from detention pending a file being sent to the National Juvenile Office. Due to the Applicant's age, the investigating guard made a referral under the Garda Youth Diversion Programme in August, 2020. Delays in this referral being made may have been contributed to by the fact that the investigating guard contracted Covid-19 in April, 2020 and isolated at home for four weeks.

62. Notwithstanding the referral made it appears there was no proper engagement with the Juvenile Liaison Officer on the part of the Applicant. Following failed efforts to meet with the Applicant, the Juvenile Liaison Officer made a report in April, 2021 confirming his opinion that the Applicant was not suitable for inclusion in the Juvenile Diversion Programme. Ultimately a decision was made not to include him in the Programme in August, 2021.

63. While the Juvenile Diversion Programme was under consideration and pending final decision, a series of statements were taken, although this appears to have occurred only in March and April, 2021. There were some delays occasioned in questioning the Applicant's co-accused who was in custody during some of the period, necessitating a warrant under s. 42 of the Criminal Justice Act, 1999.

64. Once all statements were taken, the investigation was then processed internally within An Garda Síochána before being referred to the First Named Respondent in December, 2021. Following this, directions were received to initiate a prosecution leading to the arrest of the Applicant on the 16th of February, 2022 for the purpose of charge. The Applicant was admitted to recognisance on that date requiring him to appear before the District Court on the 9th of March, 2022. In this way, a full two years after the Applicant's arrest for questioning in February, 2020, the Applicant was arrested for the purpose of charge and station bailed to

appear before the Children's Court on the 9th of March, 2022.

65. It was confirmed to the District Court on the occasion of the Applicant's first appearance on the 9th of March, 2022, that the First Respondent had directed trial on indictment. As the Applicant had attained his majority the District Judge had no jurisdiction to conduct a s. 75 hearing and while the Respondents rely in opposition on the fact that an application was not made, it is clear there is no merit to their arguments in this regard in circumstances where it is common case that the Children's Court would not have jurisdiction, a position which could not be circumvented by submission.

66. The Applicant was remanded on bail to the 20th of April, 2022 when a Book of Evidence was served and the return for trial was made sending the Applicant forward for trial before Dublin Circuit Criminal Court. The Applicant appeared before the Dublin Circuit Criminal Court on the 18th of May, 2022 and was remanded to the 27th of July, 2022 for arraignment.

67. The Applicant's solicitor deposes to the practice in the Children's Court in relation to s. 75 hearings. He confirms that in his experience the Children's Court has accepted jurisdiction on a range of serious indictable offences in respect of which summary jurisdiction would be refused for an adult offender. The Applicant's solicitor confirmed that had the s. 75 procedure been available to the Applicant, he could have made the case that the Court should exercise its discretion under s. 75 in the light of the particular circumstances of the case which included evidence as to the Applicant's diagnosed disability and mental health issues, vulnerability, educational background and level of maturity as substantiated by a number of private and sensitive reports exhibited before me.

68. The Applicant's solicitor confirmed that he is now exposed to a maximum sentence of life imprisonment as opposed to 12 months in the Children's Court under the 2001 Act. The Applicant's solicitor also referred to the fact that there was a full right of appeal with *de novo* hearing from the Children's Court but only a more limited appeal from the Circuit Court to the Court of Appeal.

DISCUSSION AND DECISION

69. I propose to address the time issue first before proceeding to consider the substantive

issues in the order in which they have been identified above.

Time Issue

70. The Respondents assert that these proceedings issued out of time because Order 84 Rule 21(1) of the Rules of the Superior Courts 1986 (as amended), requires that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. It is contended that the grounds for relief first arose on the 9th of March, 2022, when the direction as to trial on indictment was conveyed to the District Court. The application for leave which was moved in July, 2022 was outside a period of three months from same.

71. The Applicant disagrees, relying on the decision of the Supreme Court in *C.C. v. Ireland* [2006] 4 I.R. 1 where it was indicated that the time limit in a criminal matter runs from the date of the indictment. It is further pointed out that the only order of *certiorari* that is sought is in respect of the return for trial, which order was made on the 20th of April, 2022. As these proceedings were filed on the 14th of July, 2022 and opened on 19th of July, 2022, within three months of that date, it is contended that no time issue arises. Separately, it is argued that the declaratory relief sought in respect of s.75 is not time-limited.

72. The Respondents refer to the decision in *Waters v An Garda Siochana & Others* [2021] IEHC 551 where Simons J. held that the three month time limit applied to declaratory relief under the European Convention on Human Rights Act, 2003 where the proceedings had commenced by way of judicial review. The Respondents also rely on the decision of Kearns P. in *Coton v DPP* [2015] IEHC 302 in which he was critical of the reasoning of the Supreme Court *C.C. v Ireland* [2006] 4 IR 1 because of the potential for very late applications for leave to proceed by way of judicial review where the service of the indictment is relied upon as fixing the date from which time runs rather than the date of return for trial. Kearns P. advocated practitioners should treat the date of the return for trial rather than the formal service of the indictment as the date from which time runs for the purposes of Order 84, rule 21 of the Rules of the Superior Courts, 1984 (as amended).

73. It is accepted by the Respondents that the order sending the Applicant forward for trial was made within three months of the date of the application for leave, but they nonetheless

maintain that there is no basis on which it could be said that this date (i.e. 20th of April 2022) is the date on which the grounds first arose given that the Applicant's case is based on the absence of the availability of s.75 rather than anything contained within the book of evidence served upon him on the 20th of April 2022. It is submitted that *C.C.* should not be read as setting any general rule in all judicial reviews regarding criminal matters as to when grounds for judicial review first arise.

74. I am not persuaded by the Respondents' arguments in relation to time. Even treating the return for trial, rather than the service of the indictment, as the point from which time runs (as exhorted by Kearns P. in *Coton*), these proceedings are within time. The first order drawn in respect of the Applicant was the return for trial dated the 20th of April, 2022. This is the formal order on foot of which the prosecution of an offence against the Applicant is sent forward to the Circuit Court. The time for challenging this order runs from the date upon which it was made and these proceedings were commenced within three months of that date.

75. Furthermore, the decision of the Supreme Court in *C.C.* is binding on me, a conclusion also reached by Simons J. in *Doe & Ors. v. DPP* [2024] IEHC 112, a case involving consideration of s. 75 of the 2001 Act in which a similar objection was made on behalf of the DPP on time grounds. In his judgment, Simons J. referred (at para. 101) to the debate in the case-law as to whether time should be calculated from (i) the date of the return for trial, or (ii) the later date of the formal service of an indictment. He concluded, as I do, that the Supreme Court judgment in *C.C.* was binding on him and accordingly the proceedings were brought within time (see para. 104).

76. Quite apart from the three-month rule specified under Order 84, rule 21, that rule also exhorts promptitude in seeking leave to proceed by way of judicial review. In the overall scheme of the history of this case, it cannot seriously be said that there has been a lack of promptness on the part of the Applicant of the kind which could disentitle him to relief by way of judicial review quashing a return for trial despite having moved within 3 months of the making of the said order. In consequence the objections made that these proceedings are time barred must fail.

Whether section 75 protection could ever have availed the Applicant?

77. Although the Court found in *Forde v. Director of Public Prosecutions* [2017] IEHC 799 that s. 75 is inapplicable in the case of an accused who has reached the age of eighteen years prior to the Children's Court having decided on whether to accept jurisdiction, thus the Applicant is unable to avail of these provisions because a condition precedent to eligibility is absent, it cannot be concluded that the Applicant is denied the benefit of summary trial before the Children's Court because of his age alone. There is no entitlement to have the matter dealt with in the Children's Court even if under 18 years of age when the matter comes before the Court. Instead, the Court exercises a discretion in accordance with the criteria identified under the section. The Children's Court is only entitled to accept jurisdiction if the judge is satisfied that the particulars of the offences alleged are such that, even taking the case at its height, the range of penalties which might realistically be imposed would exclude a custodial sentence of more than twelve months.

78. In circumstances where s. 75 confers a discretion rather than an entitlement to the benefit of the Children's Court accepting jurisdiction, the most an accused person can assert is an entitlement to the benefit of the procedure under s. 75 provided he comes before the Children's Court while still under the age of 18. While the entitlement is therefore to apply rather than to the benefit of a decision to accept jurisdiction in the Children's Court, significant advantages potentially flow for a young offender where the Judge is satisfied to exercise the s. 75 jurisdiction. Not least, in the case of an adult accused, the District Court can only deal with the alleged offence by way of summary trial in circumstances where the Director of Public Prosecutions has consented (which she has not in this case). By contrast, had the Applicant been charged while he was still under the age of eighteen years and the Children's Court were satisfied to deal with the matter, the Director of Public Prosecutions would have had no such veto. The maximum penalty for an offence triable summarily before the Children's Court is also less and the young offender enjoys the possibility of the charges against him being dealt with other than by the recording of a conviction for an offence where the matter is retained before the Children's Court.

79. It is contended on behalf of the Respondents that the Applicant was unlikely to obtain the benefit of the disposal of the charges against him in the Children's Court under s. 75 even if still underage in the light of the seriousness of the charges and the circumstances of the offence and that for this reason he should not be entitled to relief in these proceedings. It seems to me that this argument sets too high a bar to access to the court to maintain a challenge

of this nature. In my view the Applicant is not required to persuade me that the Children's Court would otherwise have likely accepted jurisdiction under s. 75. To establish a sufficient interest to maintain these proceedings, the Applicant need only demonstrate (in line with the approach as the Court of Appeal in *DPP v. Furlong* [2022] IECA 85 (at para. 33)) that there was a reasonable prospect of the Judge in the Children's Court accepting jurisdiction under s. 75 but for the Applicant's age.

80. Based on the evidence adduced on behalf of the Applicant, I accept that in practice the Children's Court deals with most indictable offences against children where the young offender is still a child when the matter comes before that Court. As the Applicant's solicitor has averred on affidavit (not controverted), the Children Court accepts jurisdiction even in serious cases (he cites examples). In deciding whether to deal with the matter summarily were legal authority to do so established, the Children's Court would have been obliged to take account of the Applicant's age and level of maturity in accordance with s. 75(2). There is ample material to support the exercise of a s. 75 jurisdiction, were it extended to aged out children, in the reports which have been exhibited on behalf of the Applicant. A cogent case could have been made in respect of the Applicant's age, maturity and his alleged role in the offence to ground the exercise of a s. 75 jurisdiction if it could be extended to an aged-out child. Therefore, even though the charges against the Applicant are serious, I am satisfied that the Applicant's case is one in which jurisdiction might well have been accepted under s.75 but for the Applicant's exclusion on age grounds. He therefore had a reasonable prospect of persuading the Children's Court to accept jurisdiction under s. 75 of the 2001 Act but for his age.

81. In view of my finding as to the strength of the case to be made on the basis of evidence as to age and maturity and the nature of the offence, I am satisfied that the Applicant has established standing to challenge his exclusion from eligibility to apply for an important procedural benefit on age grounds. As he has been denied a s. 75 hearing which might have resulted in a decision that the case proceed before the Children's Court, the Applicant is entitled to complain in these proceedings that his exclusion on age grounds, with the result that it was not open to him to seek to persuade the Children's Court to retain seisin of the matter, constitutes the loss of a procedural benefit which is recognised in the authorities as a substantial or significant benefit (see, for example, *Director of Public Prosecutions v. L.E.* [2020] IECA 101, para. 30) in breach of his constitutional rights and/or rights safeguarded

under the Convention consequent upon an age-related exclusion.

Constitutional Considerations arising from the Rights of the Child

82. There are undoubtedly special constitutional considerations in cases where children are accused of criminal offences. Whatever form proceedings may take, the trial process must enable a child to participate to the extent which could reasonably be expected of a child. This is not dissimilar to protections required under the European Court of Human Rights as found in *Application no. 24888/94 V v. UK* [2000] 30 EHRR 121 (and related case of *T v. UK*) where the requirement for special treatment for children deriving from the Convention is clearly related to their experiences as a child of the criminal justice system. Appropriate safeguards are required to ensure effective access to the Court and a fair hearing for the child participant. Under the Convention the safeguards envisaged are directed to considerations which arise from the fact that the participant in the process is a child at the time of participation.

83. From the legislative scheme of the 2001 Act, it is clear that the 2001 Act reflects recognition on the part of the Legislature's that special duties are owed to children who find themselves as participants in the criminal justice system. The 2001 Act addresses the special needs of children by adapting the criminal process to make it more suitable to participation by a child in the process with due regard to the interests of the child. Legislation of this type is contemplated by and consistent with Article 42A of Bunreacht na hÉireann which envisages that effect will be given to the child's special constitutional rights through legislation.

84. While Article 42A would not appear to have an immediate direct application to the issues arising in this case because the Applicant is no longer a child, a potential relevance to the issues arising in these proceedings might arise if Article 42A were to be interpreted as establishing that a child offender has a right to be treated as a child throughout the criminal process even having aged out. Such a construction would serve to bolster an equality argument because any difference in treatment resulting from a failure to extend the benefit provided in s. 75 to aged out children would involve an interference with a constitutionally protected right. This would in turn attract a higher degree of scrutiny than would a policy decision resulting in the exercise of legislative choice which does not in and of itself interfere with other fundamental constitutional rights.

85. The only authority or support advanced by the Applicant for the proposition that he enjoys a constitutional right to be treated as a child throughout the criminal process (and it seems to me that this was not, in fact, seriously contended for), deriving from the fact that he was a child when the offending behaviour occurred, is the UN Convention on the Rights of the Child and more specifically a 2019 General Comment from the UN Committee on the Rights of the Child interpreting the Convention. The argument made is not compelling in law.

86. As a matter of international law, such Comments are not binding on signatories of the Convention, but rather are for guidance purposes (see Keller and Grover, *'General Comments of the Human Rights Committee and their legitimacy'* in Keller and Ulfstein, *UN Human Rights Treaty Bodies Law and Legitimacy* (2012) confirming, at p.129, that it is commonly acknowledged that General Comments are not legally binding). Even assuming for the sake of full consideration of the case made on behalf of the Applicant that the CRC provides for a right to be treated as a child throughout the criminal process in the manner contended, it is undoubtedly the case that the CRC does not in any event have the force of law in Ireland. In *McD v. L* [2010] 2 IR 199 it was recognised with regard to the European Convention on Human Rights that international agreements do not have direct effect save if the Oireachtas provides. Regarding the CRC specifically, in *Minister for Justice v. Bednarczyk* [2011] IEHC 136 Edwards J. stated (p.4) that "… *the Court is constitutionally prohibited from directly applying, or giving direct effect to, article 3.1 of the UNCRC*".

87. Considerable caution is required when reliance is placed on international treaty provisions in contending for a particular reading of Irish law. The dangers in treating international agreements as a direct interpretative source in Convention cases were discussed in *Donnelly v. Minister for Social Protection, Ireland & Ors.* [2022] IESC 31. More recently, in *Odum v. Minister for Justice and Equality (No. 2)* [2023] IESC 26, O'Donnell CJ observed (at para. 21) that he would not accept, at least without considerably more developed argument, that the content of international instruments to which Ireland is a signatory or a party, may be used to assist in the interpretation of the Constitution merely on the basis that the Constitution is said to be a living instrument. He further observed that while it may be useful to have regard to international instruments, any interpretation of the Constitution must respect its express terms.

88. The weight of authority binding on me is, therefore, clear in relation to the limited value of the General Comments to the CRC on my deliberation on the Article 42A issue. The CRC is of assistance only in informing proper consideration of what might be embraced within the umbrella of the rights of the child under Article 42A in much the same manner as occurred in *N.H.V. v. Minister for Justice* [2018] 1 I.R. 246 at 318 where reference was made to a General Comment by the UN Committee on Economic, Social and Cultural Rights by the Supreme Court (at para. 17) in its consideration of the right to work under the Constitution.

89. Accordingly, any interpretation of the Constitution must respect its express terms and in the absence of authority establishing that the rights of the child safeguarded in Article 42A subsist after the child has aged out nothing in the language of Article 42A, supports this conclusion. It is my view that Article 42A is effective in preserving the rights of the child *qua* child. It embraces a right on the part of the child to participate effectively in the criminal process in a manner which ensures that they understand the process. Article 42A, properly construed in the light of the language used, protects the right of a child to be treated as a child within the justice process as provided for by law. Status as a child is also relevant to capacity impacting on the question of mitigation and considerations of what constitutes an appropriate sanction in view of the stage of a child's development given that imprisonment involves removal from family with potential consequences for emotional and educational development.

90. The provisions of the 2001 Act discharge an obligation on the State under Article 42A *vis-à-vis* children within the criminal process. The scheme of the 2001 Act insofar as it excludes adults from benefits there provided for children is therefore entirely consistent with the protection and vindication of children's rights envisaged by the terms of Article 42A.

91. I have not been persuaded that it is correct to construe Article 42A as providing for a lifelong right to be treated as if still a child in the criminal process in relation to offending which occurred when a child once the child has aged out. It seems to me that such a construction of the constitutional protection afforded in Article 42A is not open on the language used which clearly relates to the person when a child and recognises the rights of the person as a child. Insofar as it also embraces the right of the child to have its different capacity at the time of offending recognised in any ensuring criminal process, any such right

is not transgressed by the absence of procedural benefits of the type envisaged under s. 75 once the child attains adulthood because it remains a requirement on the sentencing judge to have regard to factors such as age and maturity arising from status as a child when offending behaviour occurred when sentencing (both pursuant to Article 42A and 40.3 and perhaps also Article 38.1, although this was not canvassed in argument). Furthermore, the sentencing judge retains a wide discretion as regards appropriate sentence in view of a broad range of factors including the age and maturity of the young offender without the necessity for a s. 75 benefit.

92. As a final observation, it is not clear to me that the CRC envisages a requirement to extend protections which relate to the fact that the accused person is still a child when appearing before the Court as opposed to protections which relate to a reduced level of criminal responsibility attaching to a child by reason of age and maturity at the date of the offence. If it is the latter, then such obligation would appear to be largely addressed by the obligation on the judge to have regard to these factors at sentencing stage and the discretion afforded to a judge in relation to sentencing in view of these factors such that no support may be derived for the Applicant's case in reliance on the CRC, even if I were free to accord it legal significance absent implementation in domestic law.

Right to Equal Treatment

93. Notwithstanding my view that the Applicant has no right under Article 42A to the same benefits conferred under s. 75 on a child offender who is still a child, it is manifest that he is treated differently within the criminal justice system to others who share the common feature that they were all children when offending behaviour occurred. This difference in treatment arises by reason of the fact that he is no longer under the age of 18. This undoubtedly amounts to difference in treatment on the basis of age, prompting the question as to whether this difference in treatment is contrary to Article 40.1 of the Constitution which safeguards a right to be held equal before the law.

Is difference in treatment unlawful as contrary to Article 40.1 of Bunreacht na hÉireann?

94. The State Respondents maintain that Article 40.1 does not avail of the Applicant for any of several reasons.

95. In a primary submission it is maintained that the Applicant has not demonstrated Article 40.1's threshold requirements are engaged as age is said by the Respondents not integral to personhood. This is an argument made drawing on previous case-law most particularly *Minister for Justice and Equality v. O'Connor* [2017] IESC 21. The argument made brings into clear focus the question of whether age is a protected ground under Article 40.1 and, if so, the nature of the test to be applied.

96. In *Minister for Justice and Equality v. O'Connor* O'Donnell J. noted that Art. 40.1 forbids unequal treatment "*as human persons*" observing (at para. 20) that in consequence differences of treatment were referable to immutable human characteristics such as race, gender or sexual orientation or matters of intimate personal choice intrinsic to a person's sense of themselves as a human person such as religion or marital status, are to be carefully scrutinised. The Respondents contend that age is not such a characteristic.

97. From my reading of the decision in *Minister for Justice and Equality v. O'Connor,* I doubt that O'Donnell J. intended his identification of characteristics to be determinative of the full range of personal characteristics that require to be protected under Article 40.1, particularly as Article 40.1 itself is silent in this regard. In his judgment, O'Donnell J. does not purport to prescribe a closed list of human characteristics that qualify for protection but rather gives examples of the types of characteristics which attract protection.

98. Indeed, such an interpretation of his decision would not sit comfortably with his earlier judgment in *Murphy v. Ireland* [2014] 1 I.R. 198 in which O'Donnell J. observed that the fact that the guarantee of equality before the law is expressed in terms of equality "*as human persons*", was "*problematic in the early period of constitutional interpretation*". In *Murphy* O'Donnell J. explained that the phrase is increasingly understood as intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which are central to their identity and sense of self and which on occasions have given rise to prejudice, discrimination or stereotyping. He further observed that matters such as gender, race, religion, marital status and political affiliation, are not all immutable characteristics but can nevertheless be said to be "*intrinsic to human beings' sense of themselves*". In his view, differentiation on any of these grounds, while not prohibited, must be demonstrated to comply with the principles of equality concluding (para. 34) that "*this is the sense in which the principle of equality is most commonly employed in constitutions and international instruments."*

99. In his more recent judgment in *O'Meara v. Minister for Social Protection* [2024] IESC 1, Hogan J. observes that '*new life*' has been breathed into Article 40.1 in decisions such as *Murphy v. Ireland* [2014] 1 I.R. 198. This is clear too from the judgment of O'Donnell J. in *Minister for Justice and Equality v. O'Connor*, which the Respondents rely on to contend that age is not captured as an incident of personhood, by the manner in which O'Donnell J. looked beyond personal characteristics in his judgment in that case and referred instead to the "*essence*" of an equality claim as the sense of injustice that someone experiences when a person similarly situated is being treated differently and normally more favourably and if the circumstances are suggestive of a discriminatory ground related to a person's human personality. It is therefore clear that the judgment in *O'Connor* does not advocate a narrow construction of Article 40.1 limiting the scope of protection in a manner which excludes less favourable treatment on age grounds from scrutiny under that provision, as has been contended on behalf of the Respondents.

100. The question of age discrimination contrary to Article 40.1 has been directly before the Superior Courts on surprisingly few occasions. Principal amongst these small number of cases are the decisions in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, *J.D. v Residential Institutions Redress Committee* [2010] 2 ILRM 181, *M.D. (A minor) v. Ireland* [2012] IESC 10 and *B v. Director of Oberstown Children's Detention Centre & Ors.* [2020] IESC 18.

101. The seminal decision is that of the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*. In that case, the Supreme Court (Hamilton CJ) noted that while discrimination based on age "*would not, at first sight fall within the ambit of Article 40.1*" and that classifications based on age could not be regarded as, of themselves, constitutionally invalid (at p. 346) as discrimination based on age was not clearly within the ambit of Article 40.1 (at p. 347), nonetheless the old and young are entitled "*to protection against laws which discriminate against them*".

102. Addressing the separate exclusion of certain categories of public service employees from the age discrimination provisions of the Bill, the Court made it clear that, in its view, discrimination on the grounds of age fell "*into a different constitutional category from distinction on grounds such as sex or race*" (p. 349). Accordingly, the compatibility of the

age-related legislative exclusion in the 1996 Bill under scrutiny with Article 40.1 in *Re Article 26 and the Employment Equality Bill 1996* was not resolved on the basis that Article 40.1 afforded no protection against less favourable treatment on grounds of age. Instead, age was treated as falling into a category of case where a difference in treatment was not *per se* discriminatory but became so if it could be characterised as irrational or arbitrary.

103. Accordingly, less favourable treatment on grounds of age would be unlawful as discriminatory and contrary to Article 40.1 if it resulted in arbitrary, irrational or unfair distinctions between persons otherwise sharing the same characteristics. On the basis that the age limit of 65, which was excluded from protection under the Bill, reflected the threshold at which a significant number of the population left the workplace, the Supreme Court said that the choice of such a threshold "*could not plausibly be characterised ... as irrational or arbitrary*" (p.347 to 348).

104. Similar reasoning underpinned the decision of the Supreme Court in *J.D. v Residential Institutions Redress Committee* [2010] 2 ILRM 181 where it was observed (Murray CJ.) that classifications based on age cannot be regarded as, of themselves, constitutionally invalid. This decision cannot properly be read as excluding discrimination on age grounds from protection under Article 40.1 but rather as an acknowledgement that classifications contained in legislation on age grounds are not in themselves invidious, unfair or, in the legal sense, discriminatory but may be so found if shown to be arbitrary, irrational or unfair. After noting in *J.D.* that it was for plaintiffs to "… *demonstrate a prima facie basis for the claim that the classification is discriminatory*" (p.189), Murray C.J. concluded (p.190) that in deciding as a matter of policy to establish a special scheme of redress for abused children the Oireachtas necessarily had to define the scope and limits of its application. The Supreme Court was satisfied that the choice of an age limit of 18 constituted a legitimate legislative designation of the persons who naturally and normally have been described as children. The definition of '*child*' as a person under the age of 18 years therefore represented an objective classification, containing no element of discrimination. It was neither arbitrary nor irrational.

105. In *M.D. (A Minor) v. Ireland*, the Supreme Court rejected a challenge brought to provisions of the Criminal Law (Sexual Offences) Act 2006, which made certain conduct a criminal offence when engaged in by a male under the age of 17 but not when engaged in by a female under 17. This was described as amounting to a limited immunity for girls in the

one area of sexual activity that could result in pregnancy. As the adverse effects of underage sexual activity were not the same for boys as for girls, the distinction was found not to be irrational. The judgment of the Supreme Court, delivered by Denham C.J., describes the fundamental constitutional question as being whether it was for the Oireachtas or the Court to make a judgment as to whether the risk of pregnancy justified the exemption of girls but not boys. The conclusion was that decisions of such sensitivity and difficulty were matters for the Legislature since courts should be deferential to the Legislature on social policy.

106. In *B v Director of Oberstown Children Detention Centre & Ors.* [2020] IESC 18, the Supreme Court considered almost the reverse argument to the one in this case, namely, whether the provisions relating to remission of a prison sentence, which applied to adults, and which included the possibility of obtaining enhanced remission, were discriminatory insofar as such favourable remission provisions were not available in identical terms to child offenders, who were sentenced to a period of detention in a juvenile detention centre. In examining this issue, O'Malley J, delivering the judgment of the court, noted that the 2001 Act was "*a comprehensive and radical overhaul, of the law governing the juvenile criminal justice system*". She noted that a wide variety of procedures and processes had been put in place that had as their objective the diversion of children away from crime and from the formal criminal justice system. She went on to note that the 2001 Act also envisaged prosecution and punishment, including deprivation of liberty. The court noted that the core contention put forward by the applicant in that case, was that he had not been treated equally *vis-à-vis* adults, who, he maintained, were in objectively the same situation as him, in that they were undergoing custodial sentences.

107. The Supreme Court held that that claim could only be successfully maintained if the rationale of the 2001 Act, which distinguished clearly between children and adults, was to be challenged and undermined. The Court noted that the Oireachtas had determined that children up to the age of 17 years, should be treated differently to adults, because of their age. It was held that in so doing, the Oireachtas had clearly acted on the basis of a perceived difference, that was seen as relevant in the context of the criminal justice system, in the capacity and social function of adults and children. The Court noted that there was undoubtedly a constitutional imperative to protect children. Since the Constitution left it to the Oireachtas to decide when the status of childhood would end, the differential treatment could only be challenged on the basis that it was, in principle, unconstitutionally invidious; the Court held

that that argument had not been made out in the case before it. The Court further held that there was a rational justification for the difference in treatment between adults and children serving sentences of imprisonment. The Court held that the presumption of the legislature, that the differences that existed between children and adults called for different regimes, had not been shown to be factually incorrect or unfair in principle.

108. It is clear from each of these cases where age related discrimination arose for consideration that measures which provide different treatment on grounds of age are precluded as contrary to Article 40.1 if they are demonstrated to be invidious, unfair or discriminatory but that the Court is deferential to the Legislature on matters of policy.

109. Two recent Supreme Court judgments which apply Article 40.1, namely, *Donnelly v. Ireland* [2022] 2 I.L.R.M. 185 and *O'Meara v. Minister for Social Protection* [2024] IESC 1, although not directed to the question of age discrimination, are very helpful in further elucidating the field of application of Article 40.1 as it has developed through the case-law.

110. The Supreme Court in *Donnelly* distinguished between cases where the discrimination is based upon matters that are "*intrinsic to human self"* or "*where it particularly affects members of a group that is vulnerable to prejudice and stereotyping*" as requiring a level of "*close scrutiny"* and general discrimination involving less favourable treatment through legislative classifications. In *Donnelly*, O'Malley J. set out the following propositions where the issue before the Court is a challenge based on equality as opposed to other substantive rights (at para. 188):

> *"The authorities do demonstrate support for the following propositions:*
>
> *(i) Article 40.1 provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
>
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1.*
>
> *(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
>
> *(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*

(v) *Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.*

(vi) *The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case."*

111. At para. 189, O'Malley J. further set out the elements of a successful claim for breach of a person's right to equality under Article 40.1:

> *"It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in Brennan and approved a number of times in this Court is consistent with the analysis in Dillane. The statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose."*

112. In *Donnelly*, the Supreme Court confirms a test which is capable of being applied across a broad range of classifications based on personal traits or characteristics, albeit without emptying the requirement to give special protection to personhood by making clear that discrimination upon matters intrinsic to the human sense of self will be subjected to "*close*" or "*more intense*" scrutiny. The Supreme Court's meaning in so doing is clarified earlier in the judgment in O'Malley J.'s treatment of the decision of the Supreme Court in *Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417 and O'Donnell J's judgment in *Murphy v. Ireland*, both cases in which it had been affirmed that certain classifications would be "*closely scrutinised*" (*Fleming*) or "*must be demonstrated to comply with the principles of equality*" (*Murphy v. Ireland*).

113. It is recalled that in *Fleming*, the appellant contended, *inter alia*, that the law making it an offence to assist a person to commit suicide discriminated against disabled persons, who might, by reason of their disability, require assistance to end their lives. The scope of the

guarantee under Article 40.1 was the subject of detailed consideration. In her judgment in *Donnelly*, O'Malley J. referred to that part of the judgment in *Fleming* (p.451) where it was found that if a law makes a distinction on its face between citizens, it may be necessary, depending on its context, to inquire into its justification. It was held:

> *"More generally, a law will be closely scrutinised if it classifies people by reference to such classes as race, religion, gender or nationality. These are categories where, as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice…as the case of M.D. (a minor) v. Ireland [2012] IESC 10, [2012] 1 I.R. 697 shows, a distinction based on gender may be so closely related to the very nature of gender difference that it is justified. Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify."*

114. The Supreme Court returned to the phrase in "*human persons"* in *O'Meara* where it was noted that the phrase in Article 40.1 refers not only to those immutable characteristics of human beings but also choices made in relation to their status, which are central to their identity and sense of self, and which have on occasion given rise to prejudice, discrimination, or stereotyping (para. 19). Delivering a concurring judgment, O'Donnell C.J., stated that the concept of equality involved not only treating like cases alike and unlike cases unalike, but also that where differentiation was made, that it was made and justified by reference to the manner in which the comparators are unalike.

115. Although the constitutionality of a mandatory retirement age was not before the Court in *Mallon v. Ireland* [2024] IESC 20 when addressing the question of compatibility of a mandatory retirement age with the requirements of EU law, Collins J. observed in his judgment for the Supreme Court in that case that there is no indication in the Supreme Court's more recent Article 40.1 jurisprudence (referencing *Murphy v Ireland* [2014] IESC 19, [2014] 1 IR 198, *X v Minister for Social Protection* [2019] IESC 82, [2021] 3 IR 528, *Donnelly v Minister for Social Protection* [2022] 2 ILRM 185 or *O'Meara v. Minister for Social Protection* [2024] IESC 1) that age is to be regarded as a "*suspect*" ground. By this Collins J. in *Mallon* is understood to mean that age differentiation has not been found to be on grounds which would automatically give rise to a requirement for a close level of scrutiny.

116. It is true that the case-law does not identify age differentiation as automatically suspect but the position is more nuanced than excluding age as a ground which could warrant close scrutiny. In *Fleming*, Denham C.J. in her judgment for the Supreme Court refers to age as a category which may be "*suspec*t".

117. In *Donnelly* O'Malley J. explained that grounds are considered "*suspect*" when a differentiation based on such grounds may be the result of either irrational prejudices or groundless assumptions, but she took great care not to import classifications of characteristics or traits observing that even within core category of characteristics of human personality, some grounds of discrimination are more offensive than others. Instead, while O'Malley J. explains the concept of "*suspect*" categorisations in *Donnelly* and her judgment makes clear certain types of different treatment will, depending on the context, warrant a higher level of scrutiny, the test developed in *Donnelly* is a general test which applies whether a so-called "*suspect*" ground is present or not, the only difference being the level of scrutiny required by the Court. O'Malley J. is careful to not to import the jurisprudence concerning that classification in other jurisdictions which she notes "*may have the potential to result in overly rigid differentiations between the applicable standards of review*." In taking care not to attach a prescriptive significance to "*suspect*" categorisations, O'Malley J. states (at para. 193) that:

> *"context is relevant here, and also that some grounds of discrimination, even within the core category of characteristics of human personality, are more likely to be offensive than others and thus require more intense scrutiny."*

118. In *O'Meara*, O'Donnell C.J. appears to go slightly further by expressly including age in a list of immutable characteristics linked to the essence of the human personality when he stated (at para. 19):

> *"Marital status is different from other possible discriminatory grounds which attract particular scrutiny. It is not an immutable characteristic linked to the essence of human personality, such as gender, race, ethnicity, or age. Nor is it necessarily the subject of prejudice, or and nowadays, stereotyping."*

119. Accordingly, while the Supreme Court has not categorised age as an automatically "*suspect*" ground, the case-law acknowledges that difference treatment on age grounds "*may*

be" suspect.

120. When I reflect on age and its importance to the person I recognise that it is not immutable in the same way as characteristics such as race and it is not an "*intimate personal choice*" in the same way that religious or political beliefs might be, but it is nonetheless immutable in the sense that age is a status which cannot be changed by election. Age is however integral to personhood and life and a human characteristic which is known to result in stereotype and give rise to prejudice. Indeed, it is for this reason that EU law prohibits age discrimination and specific statutory measures have been adopted in the State to provide a remedy in respect of discriminatory treatment on discriminatory grounds which include age in employment and access to goods and services. It is expressly included in the list of discriminatory grounds identified in Article 21 of the Charter of Fundamental Rights of the EU. It seems to me that age is "*intimate*" in the sense that it is at the very heart of our physical being. Whilst it continues to change, it is also immutable in the sense that it is inevitable as it occurs. It reflects a stage of life which is unalterable by choice. I find it difficult to see age as other than part of the essence of a person, albeit it is also "*the great leveller*" because aging and the stages of life happens for everyone.

121. In the main, however, the approach of the Supreme Court in the *Murphy* line of jurisprudence culminating most recently in the decisions in *Donnelly* and *O'Meara*, has not been tied to so-called "*suspect*" classifications with focus on the limiting language of "*human person*" in the manner seen in early jurisprudence but to consider whether the allegedly discriminatory treatment relates to matters central to the person's identity and sense of self. It may therefore be gleaned from dicta in *Murphy v. Ireland* [2014] 1 I.R. 198 and more recent decisions that as the case-law has evolved, a wider scope of application than one confined narrowly to a confined category of immutable characteristics and in favour of inclusion of matters integral to personhood or one's sense of self has been endorsed by the Supreme Court in a way which makes a finding that age is protected as part of human personhood less significant.

122. This recent caselaw endorses a more liberal approach to the Article 40.1 guarantee in a manner which is not slavish as to whether an unenumerated protected ground inherent in the human person is present but permits focus on the link between matters integral to the person, the impact or effect of the different treatment, whether the different treatment is properly

related to its purpose or results in unfair or invidious treatment without justification. As observed by O'Donnell J. in *Murphy v. Ireland* [2014] 1 I.R. 198, Article 40.1 is in general terms and accordingly it may be that significant differentiations between citizens, although not based on any of the grounds he had listed in that case may still fall foul of Article 40.1, if they cannot be justified. He stated that the principle of equality, in general terms, requires that like persons should be treated alike, and different persons treated differently, by reference to the way they are distinct.

123. The authorities establish that exclusion on age grounds does not necessarily or even usually impute some constitutionally illegitimate consideration resulting in an irrational distinction causing some people to be treated as inferior for no justifiable reason. Difference in treatment on age grounds is less likely to be offensive than, for example, difference of treatment on grounds of sex or race. This, however, does not mean that it is not a difference of treatment on grounds inherent to the person. Nor does it necessarily mean that a difference in treatment on age grounds is always benign and therefore immune from review under Article 40.1 of the Constitution. Where such differences occur, they warrant scrutiny to ensure that groundless assumptions or prejudices have no role in determining the legal rights of the individual. In the case of an exclusionary measure, the level of scrutiny is informed by context and the apparent justification or lack of justification for the exclusionary measure.

124. The careful and nuanced treatment of the age ground demonstrated in the case law, the coherence of which was probably undermined by the problematic approach to the protection of personhood, arises in no small measure from the fact that it is widely acknowledged that differentiating between categories of people based on age routinely occurs in life and in legislation. In protecting age in a different way, as seen in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, Article 40.1 recognises that legislative classifications are often based on cut-offs including age-related classifications which on their own are not *per se* unlawful as discriminatory.

125. By reason of the general way the test is expressed in *Donnelly* and *O'Meara*, whether or not age is "*immutable*" or core to "*personhood*", as I have found, is now less important than suggested by the Respondents' submission to the effect that age related difference in treatment falls outside the ambit of Article 40.1. The careful test enunciated in *Donnelly*, is a test which is expressed in general terms and is capable of general application where discrimination

contrary to Article 40.1 is alleged.

126. I have concluded that the case-law is supportive of the Applicant's claim that discrimination on age grounds comes within the scope of protection of Article 40.1. In consequence, I am satisfied that Article 40.1 protects against invidious age discrimination and this is clearly established in the case-law. It is also clear, however, that age is protected within the ambit of Article 40.1 in a manner which acknowledges that all personal characteristics are not the same and do not engage the inner sense of self of a person in the same way. Context is clearly important and age is frequently used as a means of making legislative classifications for rational objectives unconnected with prejudice or stereotype and in a manner which is considered entirely legitimate and lawful under Article 40.1.

The Test to Apply under Article 40.1 to Differentiation on grounds of age in s. 75

127. In view of my conclusion that age is protected within the ambit of Article 40.1, I must proceed now to subject the exclusion of the Applicant from s. 75 of the 2001 Act to scrutiny on the basis that age and the Applicant's status as a child when the offence was committed are protected characteristics under Article 40.1. Difference of treatment on age grounds attracts a level of scrutiny tailored to the fact that such difference may be suspect or may be easily explained. Benefits granted by reference to age may be easily justified but this is context dependent.

128. As the test has developed through the caselaw it seems that the questions for me now are whether the Applicant has demonstrated that:

(i) by reason of a legislative classification he is treated differently because of his age than another similarly situation person would be; and
(ii) the legislative classification, which benefits from a presumption of constitutionality and proper deference to the role of the Legislative in making policy choices, is not for a legitimate purpose as it is arbitrary, capricious or irrational (including in the sense that it is improperly rooted in stereotype or prejudice), or
(iii) that the statutory classification is not relevant to the legislative purpose because it is incapable of supporting that purpose and is therefore unfair.

Application of the Test

129. Like persons should be treated alike and different persons treated differently, by reference to the manner in which they are distinct. The conferral of a benefit such as the s. 75 procedure on a class of people is only capable of being considered discriminatory against the excluded class if the excluded class is similarly situated. Indeed, even where differently treated classes are similarly situated, it is not unlawful where a legitimate (in the sense of non-arbitrary and rational and fair) legislative purpose is served and the statutory classification is relevant to that purpose and capable of supporting it. Accordingly, the point of departure in applying this test is the identification of an appropriate comparator, an exercise which is not always straightforward and on which there was no agreement in this case.

The Appropriate Comparator

130. It is apparent that the Applicant is a person who is alleged to have committed an offence under the age of 18, but who was not prosecuted until after 18 and was thereby excluded from the application of s.75 of the 2001 Act. Had he been prosecuted while still under the age of 18; he could have benefitted from the statutory protection of s.75. The Applicant maintains that the appropriate comparator is a child, whereas the Respondents identify adult offenders as the comparator. Clearly, the Applicant is not in the same position as a young offender who comes before the Children's Court whilst still a child, but he is the same insofar as he was a child when the offending behaviour occurred.

131. On any view there is an obvious difference between the two categories of offender: one is still considered a child and the other is not. In treating the Applicant, now an adult, differently to the child offender who is still a child when the matter comes to Court, the Legislature is not treating similar situations differently in a manner which of itself would trigger a requirement for close scrutiny of the measure under Article 40.1. The classification of a child as a person under the age of 18 is an objective categorisation which does not contain an obvious or apparent element of discrimination. It does not carry any manifest indication of arbitrariness or irrationality.

132. Although the fact that there is an obvious and real difference between the persons

who are treated differently on grounds related to their personhood is obviously an important consideration, I am immediately satisfied from the context that this is not a case which warrants a high level of close or intense scrutiny bearing in mind that the Legislature is clearly entitled to legislate with due regard in a general way to differences of capacity and social function. Such differences are clearly at play in the case of s. 75 of the 2001 Act. This alone, however, is not necessarily dispositive of the Article 40.1 claim. As was noted by O'Donnell CJ. in *O'Meara* at para 14:

> *"... The concept of equality involves not only treating like cases alike, and unalike cases unalike, but also that where a differentiation is made, that it is made and justified by reference to the manner in which the comparators are unalike."*

133. On the Applicant's argument both he and his under-age child offending comparator share the characteristic that they were both underage when the offending behaviour occurred and it is the fact of their age at the time of the offending behaviour which gives rise to the need for special or different treatment. The Applicant is similarly situated because, like the comparator young offender, he too was underage when the offence was allegedly committed. Reduced legal responsibility due to age and maturity is a consideration which relates to the situation when the offence was committed, rather than when the matter comes before the Court. This argument is predicated on the purpose of the legislation being to vindicate the rights of the child offender referrable to status as a child at the time of offending. Some further scrutiny is therefore required because the two categories of juvenile offender are the same in a material way, namely both were children at the time offending behaviour occurred.

Whether Legislative Purpose Legitimate and Classification Relevant to Purpose

134. The question which next presents is whether it has been demonstrated, regard had to the presumption of constitutionality and the deference due to the Legislature in matters of policy, that the different treatment complained of is not properly related to a legitimate legislative purpose but instead based on a groundless assumption or prejudice which has no proper role in determining legal rights or, otherwise put, whether the difference in treatment (namely the exclusion from the s. 75 procedural benefit) is incapable of being rationally justified by reference to the manner in which the comparators are unalike (namely, the fact that one is still legally a child and the other an adult albeit both were children when offending

behaviour occurred).

135. On the Applicant's case, if the purpose for which the "*benefit*" has been provided is to reflect the possible lesser responsibility of the child offender (as the requirement to consider age and maturity in making a decision under s. 75 suggests) and vindicate the rights of the child, as they contend it should in line with the rights of the child as advanced by the UN Committee, then it is unlawfully discriminatory to exclude protections for the child offender when they turn 18 before the conclusion of the s. 75 process. The Respondents maintain, however, that the purpose is directed to the appropriate mode of trial and punishment, ensuring the child's proper participation in the process and regard for the child's right to respect for their education and family relationships rather the questions of capacity or responsibility.

136. The opposing positions adopted on behalf of the Applicant and the Respondents reflect an old debate. In his book, *Juvenile Justice* (2005: Thomson Round Hall)(cited by Faherty J. in *Forde v. DPP* [2017] IEHC 799 at para. 43), Dermot Walsh observed (before the development of much of the jurisprudence on this question) that the provisions of the 1908 and 2001 Act for determining the age of a child brought before the court did not necessarily determine the time at which the age of the child is relevant prompting the author to state:

> *"Certainly if there were an issue of capacity of the child to commit the offence, it is submitted that the court would have to concern itself with the age of the child at the time the offence was committed. If the issue were the appropriate mode of trial or punishment, then the appropriate time would presumably be the point at which the child was brought before the court."*

137. The parties' respective positions as to whether s. 75 is underinclusive hinge to an important degree on the purpose of s. 75 of the 2001 Act and whether it is intended to provide a benefit related only to the age of the accused when offending behaviour occurred, rather than his age when the matter comes before the Court. To properly scrutinize the different treatment given the extent to which the comparators are in a similar position, it is necessary to consider the purpose of the statutory measure which excludes the Applicant on age grounds.

138. Considering the terms of s. 75 of the 2001 Act and the scheme of the 2001 Act,

however, it seems to me that this is one of those instances when the objectives of the legislation and the basis for it are clear from the terms of the legislation itself and its context.

139. Quite apart from the fact that it is logical and appropriate to limit the extent to which indictable offences can be disposed of summarily having regard to Article 38 of the Constitution and considerations such as the rights of victims and of society, the purpose of the procedural entitlements in the 2001 Act has been considered in numerous cases. Indeed, as Faherty J. observed in *Forde v. DPP* [2017] IEHC 799 (at para. 44) commenting on the contrasting possible purposes identified by Dermot Walsh in his book in the extract quoted above, subsequent jurisprudence on the 2001 Act bears out that the 2001 Act is directed to the appropriate mode of trial or punishment and not the capacity of the child at the time the offending behaviour occurred. It has repeatedly been found that the procedural entitlements under the 2001 Act are intended, primarily, to shield a child participant from aspects of the criminal process rather than to reflect a broader principle that criminal wrongdoing by a juvenile offender should be treated differently.

140. In his decision in *Doe v. DPP* [2024] IEHC 112, Simons J. illustrates this distinction by reference to the reporting restrictions under s. 93 of the 2001 Act. These reporting restrictions are only available for as long as the accused person is under the age of eighteen years. The practical effect of this is that if an accused person "*ages out*" during the course of a criminal trial or prior to the hearing of an appeal, then they lose the right to anonymity. Simons J. found that the legislative intent insofar as anonymity provisions are concerned is obviously that a child, who is participating in a criminal trial, should be shielded from media coverage, not that an adult, alleged to have committed a crime as a child, should be shielded from media reporting when prosecuted as an adult. An adult only obtains lifelong anonymity in relation to criminal proceedings under s. 93 of the 2001 Act if criminal proceedings are concluded prior to their reaching the age of eighteen years.

141. When consideration is given to most of the procedural protections prescribed under the 2001 Act a similar conclusion that, in the main, they are intended to address the exigencies of a child who is a participant in the criminal legal process is unavoidable. Addressing the purpose of s. 143 of the 2001 Act (mirroring the imperative under section 96(2) that a period of detention should be imposed only as a measure of last resort) in *D.P.P. v. J.H.* [2017] IECA

206, Mahon J. reflected on the fact that s. 143 is primarily designed to ensure that the detention of a child offender should be a sanction of last resort because such detention is likely to disrupt the child's normal development and education and thereby hamper the opportunity for the child to achieve adulthood in what might be described as normal circumstances. These considerations clearly have no application to the aged out juvenile offender. He added (at paras. 13 to 15):

> *"Undoubtedly also, there is the concern that places of detention facilitate children getting into bad company and paving the way towards criminality in adulthood. The same concerns will not however necessarily be present (if indeed present at all) in circumstances where a child offender is being sentenced as an adult. In such a case, a sentencing court is free to approach sentencing in a different and less constrained manner than if the offender was still a child. In such circumstances, the court is not concerned, in general terms, with the potential detrimental effect of a custodial sentence on the offender, at least to the same extent as it would in the case of a child."*

142. It seems to me that these words are also apposite in describing the purpose of s. 75 of the 2001 Act. Like s. 143, its' primary purpose and *raison d'être* springs from the stage of life and needs of the child at the time the matter comes before the Court. Applying similar reasoning to that seen in cases such as *Doe v. D.P.P.* [2024] IEHC 112 and *D.P.P. v. J.H.* [2017] IECA 206, it is clear to me from the legislative scheme and the terms of s. 75 that a primary intention of the Legislative in introducing s. 75 of the 2001 Act was to shield a child from an adult court environment and adult offenders and to make provision for cases to be dealt with in a child sensitive manner by a judge with access to specialist services and training (see also ss. 71, 72 and 96 in this regard).

143. Patently, the legislative purpose of s.75 is to deal with indictable offences in a court of summary jurisdiction i.e. the less formal setting of the Children Court, separate and distinct from the adult indictable courts. Section 75 of the 2001 Act operates within a legislative scheme which provides for consideration of the impact which detention would have on the development of the child, their relationship with their family and effects on education. In common with most of the procedural protections prescribed under the 2001 Act, s. 75 is intended to address the exigencies of a child who is a participant in the criminal legal process. The fact that the measure is intended to address the exigencies of a child who is a participant

in the criminal legal process is clear from the terms of the Legislation and has been widely recognised in the caselaw. The statutory age classification is manifestly relevant to this legislative purpose and supports that purpose. As in *B v. Director of Oberstown Children Detention Centre & Ors.* [2020] IESC 18, the presumption of the Legislature that the differences that exist between children and adults call for different regimes has not been shown to be factually correct or unfair in principle. There is a constitutional imperative to protect children and providing differently for children within the criminal justice system is clearly in furtherance of that constitutional purpose and not unlawfully discriminatory as against adults.

144. I agree with Simons J. when he says (most recently in *Oscar (a Pseudonym) v. DPP* [2024] IEHC 279) that if and insofar as these protections are not available to an adult, this is in consequence of a deliberate legislation policy which considers that adults do not require such protections even in respect of crimes alleged to have been committed when they were a child. The "*rights*" lost by the aged out juvenile offender by his or her exclusion from s. 75 were therefore never intended for adults.

145. I am satisfied that the apparent overriding purpose of the 2001 Act generally and s 75 specifically is to create a special system of criminal justice for juvenile offenders. This is a valid legislative objective, consistent with the State's obligations under the Constitution and under international law. In devising this system, the Oireachtas has drawn distinctions based on the age of the young offender when they appear before the Court. The legislative choice to shield children within the criminal process apparent both in the terms of s. 75 and the general scheme of the 2001 Act is both rational and objectively justifiable. Insofar as these protections are not available to the Applicant, *qua* adult, that is in consequence of a deliberate legislative policy which considers, on rational grounds, that adults do not require such procedural protections. Where the primary purpose of s. 75 has not been demonstrated to be to provide special treatment to recognise a juvenile offender's lesser culpability and promote rehabilitation, the fact that the benefit is not extended to include the aged out juvenile offender is not objectionable as discriminatory. As observed in *J.D. v Residential Institutions Redress Committee* [2010] 2 ILRM 181, the definition of a child as a person under the age of 18 represents an objective classification.

146. It is relevant to a consideration of personal rights under Articles 40.3 and/or 42A, also invoked on behalf of the Applicant, that the now adult young offender is not precluded by reason of non-inclusion in s. 75 of the 2001 Act from making submissions at sentencing stage in relation to the fact that the offence was committed whilst a child. This remains a highly relevant consideration for an aged-out child. As noted by Simons J. in *Doe & Ors. v. DPP* [2024] IEHC 112 (at para. 75), where a young offender is convicted as an adult, the sentencing judge is required to have regard to any educational, emotional or social difficulties suffered by that individual as a child which might have impaired their ability to appreciate the consequences of their actions.

147. It is well established that the Oireachtas are entitled to draw distinctions between certain classes of persons. Indeed, it is a necessary incident of legislating that they are required to do so. Such distinctions are immune from challenge on equality grounds for so long any distinction drawn does not fall foul of the tests in *Donnelly*. Policy formulation necessarily involves bright line distinctions and cut-off points. While a different policy could have been adopted, this is insufficient to ground a discrimination finding. As explained by the Supreme Court in *M.D. v Ireland* [2012] 1 IR 697, in upholding criminal legislation despite it treating teenage boys and girls differently, the Oireachtas made a choice, and such a legislative decision reflects a social policy on the issue and the approach taken was one the legislature was entitled to take.

148. Applying the test in *Donnelly*, I cannot accept the argument made on behalf of the Applicant that different treatment involved here, namely the exclusion of a particular class of child from the s.75 jurisdictional hearing, is arbitrary, capricious and irrational. There may be differing views as to the appropriateness of the legislative policy choice made. The Applicant's argument that there should instead have been an approach focused on the date of the alleged offence as this would better reflect the special considerations which apply in respect of criminal wrongdoing by juvenile offenders who lack the intellectual, social and emotional understanding of adults may not be without its own force but this is not a relevant consideration for me. As noted by Simons J. in *Doe & Ors. v. DPP* [2024] IEHC 112 (at para. 48), it is *"quintessentially a matter for the legislature and not the courts to make such policy choices".*

149. I reject the submission made on behalf of the Applicant that there is no difference in social function between children who are alleged to have committed offences under the age of 18 depending on whether they come before the courts as children or adults. The purpose of the 2001 Act is to put in place a different system for child offenders who are children both when the offence is committed and when the matter comes before the Court. The legislative intent is plainly to address the exigencies of a child who is a participant in the criminal process. The fact that the same protections are not available to adults who offended as children is a deliberate legislative policy which is rationally open on the basis of a view that adults do not require the same procedural protections because they are at a different stage of the emotional and educational development. Where the basis for this is based on the objective of protecting a child from exposure to the adult criminal justice regime then it is entirely rational for that system to apply where the child offender is still a child when the matter comes before the Court but not otherwise. It follows that there is a rational basis to treat classes of child offender differently based on their age when the matter comes before the Court.

150. The justification for the application of s. 75 to children is both obvious and framed in a way which has not been shown to be unfairly under-inclusive as has been contended on behalf of the Applicant. The Applicant's legal representative will still have an opportunity to address the trial Court on the Applicant's age, level of maturity, or any other factors relevant to the Applicant's degree of culpability in respect of the indictable offence alleged against him. The fact that the alleged offences occurred at a time when the accused was a child under the age of eighteen years is something which must be taken into account by a sentencing court in any event even in the absence of the direct applicability of provisions such as ss. 75 and 96(2) of the 2001 Act.

151. I am satisfied that no constitutional frailty inheres in s. 75 of the 2001 Act by reason of the fact that the Applicant, having been being sent forward for trial, is now exposed to a greater sentence than applies in the Children Court (12 months' imprisonment). This is because the difference in treatment is based, for sound policy reasons, on the age of the child offender when the matter comes before the Court. The Applicant is not in the same position as the underage child offender. Furthermore, there is a rational basis linked to the age of the young offender at the time of trial which justifies the difference in treatment. While it is a fact that had the Applicant been tried in the Children's Court, he would have the right to a *de*

novo appeal to the Circuit Court, but having been sent forward to the Circuit Court his right to appeal is more limited, I do not find that this results in any constitutional infirmity where the difference in treatment is based, for policy reasons which result in a legitimate legislative choice, on the age of the child offender when the matter comes before the Court.

152. Further, insofar as unconstitutional unfairness is concerned, the case-law demonstrates that the power of the Court to restrain a trial where prejudice has arisen from prosecutorial delay including when prosecutorial delay deprives a young offender of the benefit of s. 75 of the 2001 Act (see *B.F. v. Director of Public Prosecutions* [2001] IESC 18, [2001] 1 I.R. 656 and *Donoghue v. Director of Public Prosecutions* [2014] IESC 56, [2014] 2 I.R. 762). In *Donoghue*, the Supreme Court held that the trial judge was correct to attach significance to the fact that the accused would not have the benefit of certain protections of the 2001 Act. The power to restrain a trial in cases involving prosecutorial delay is a protection against unfairness arising from unwarranted delays in the process.

Is difference in treatment unlawful as contrary to the European Convention on Human Rights?

153. In addition to challenging his exclusion from the s. 75 procedural benefit as unconstitutional, the Applicant contends that his exclusion from the s.75 procedure is also a form of unlawful discrimination violating Article 14 of the Convention, read with Articles 6 (right to a fair trial) and 8 (right to respect for one's private life).

154. In making the argument that his exclusion from the s. 75 regime is discriminatory on age grounds, the Applicant relies on the UK Supreme Court judgment in *McLoughlin* [2018] UKSC 48 where Baroness Hale re-iterated the four questions arising in the context of a purported breach of Article 14 of the Convention as follows:

- **(i)** Do the circumstances "*fall within the ambit*" of one or more of the Convention rights?
- **(ii)** Has there been a difference in treatment between two persons who are in an analogous situation?
- **(iii)** Is that difference in treatment on the ground of one of the characteristics listed or "*other status*"?
- **(iv)** Is there an objective justification for that difference in treatment?

155. Article 6 makes no specific reference to the child accused and their rights. Nonetheless, it has been found to apply to safeguard the rights of a child within the criminal process. In his concurring judgment in *V. v. UK* finding that the trial of two 11 old boys in an adult court was in breach of Article 6 of the Convention, Lord Reed observed:

> *"Children who commit crimes present a problem to any system of criminal justice, because they are less mature than adults. Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood. One consequent difficulty lies in deciding whether children are sufficiently mature to be held responsible for their actions under the criminal law. If children are held criminally responsible, they then have to be tried; but ordinary trial procedure will not be appropriate if a child is too immature for such procedure to provide him with a fair trial. If children are tried and convicted, they then have to be sentenced; but it will not be appropriate to sentence them in the same way as an adult, if their immaturity has the consequence that they were less culpable or that reformative measures are more likely to be effective."*

156. From the decision in *V v. UK*, it is clear that the procedural safeguards available to child offenders within the criminal justice system may be subjected to review for compliance with Article 6 of the Convention. Lord Reed observed that in order for the right to participate in the criminal process protected under Article 6 to be respected in cases involving children, the conditions under which the trial is held (including the procedure followed) have to be such as will permit such participation, taking into account the age, level of maturity and intellectual and emotional capacity of the child concerned. He stated that this interpretation of Article 6 is also in accordance with developments in international law: a number of relevant texts, including treaties accepted as binding by the United Kingdom and other member States (such as the UN Convention on the Rights of the Child, Article 40, and the International Covenant on Civil and Political Rights, Article 14(4)), require child offenders to be treated in a manner which takes account of their age and the desirability of promoting their rehabilitation.

157. Decisions such as that of the European Court of Human Rights in *Application No. 24888/94 V v. UK* [2000] 30 EHRR 121 (and the related case of *T v. UK*) tend to confirm that

the requirement for special treatment for children deriving from the Convention relates to their experiences as a child of the criminal justice system. It has been found by the European Court of Human Rights that appropriate safeguards are required to ensure effective access to the Court and a fair hearing for the child participant. These authorities do not extend to a proposition, however, that the Convention protects a right to the same procedural safeguards as applied to children when appearing before the Courts as an adult in respect of alleged juvenile offending. Instead, the safeguards envisaged are directed to considerations which arise from the fact that the participant in the process is a child at the time of participation.

158. Apply the test in *McLoughlin* [2018] UKSC 48, as I was invited to do on behalf of the Applicant, I am satisfied that the s. 75 procedure engages the exercise of rights protected under Article 6 of the Convention albeit without there being any basis for concluding that provision for a special procedure is in contravention of that Article when the case-law is supportive of different treatment of children for the purpose of ensuring their effective participation in the criminal process. Likewise, although I am not satisfied that a relevant authority has been identified, I am prepared to accept for argument purposes only (as it is not necessary for me to decide the question) that considerations of age and maturity as well as provision for detention with potential interference with family rights may fall within the ambit of protection of Article 8.

159. For the sake of full consideration, I therefore propose to proceed on the basis, without deciding that Articles 6 and/or 8 considerations are engaged, to consider whether the exclusion of the Applicant from the s. 75 procedure may ground a claim for discrimination based on Articles 6 and/or 8 together with Article 14 of the Convention.

160. Although "*age*" is not expressly identified as a protected ground in Article 14 of the Convention, the words "*other status*" are generally given a wide meaning in the caselaw of the European Court of Human Rights. Their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent and have also been found to embrace "*age*" as recognised in cases such as *Application no. 25762/07 Schwizgebel v. Switzerland* (at para. 85) and *Application no. 17484/15 Carvalho Pinto de Sousa Morais v. Portugal* at para. 45.

161. Accepting therefore for the purpose of this analysis and an application of the test in *McLoughlin* that (i) may be met, and (iii) may also be met in view of the jurisprudence of the European Court of Human Rights which establishes that Article 14 has a broad scope of application insofar as the different treatment of a person occurs on grounds of status (which in this case I consider to be capable of embracing the status of age, or of turning into adulthood) is related to other Convention rights, I nonetheless do not consider that the Applicant meets either (ii) or (iv).

162. It seems to me with regard to (ii) that it has not been demonstrated there has been difference in treatment between two persons who are in an analogous situation. The Applicant and his young offender comparator who is under the age of 18 are not in the same position as one is now an adult and the other is still a child and special considerations arising from the exposure of a child to the criminal justice system arise which require warrant treatment. Furthermore, I am satisfied that the different treatment complained of by the Applicant is, in any event, objectively justified and cannot be found in breach of Article 14 with the result that criterion (iv) is not met.

CONCLUSION

163. While the Applicant has lost the chance of having his case dealt with by the Children Court, this is because he is no longer a child. It is true that he had no opportunity to plead guilty and to be dealt with summarily in accordance with s.75(2) of the 2001 Act due to his age when the case was brought before the Children's Court. This is a procedural benefit which is not available to aged out child offenders when the matter comes before the Court because the purpose of the provision is to protect children from being prosecuted in the regular courts, not adults. The Oireachtas is entitled to treat people differently on grounds of age as long as this is done for a legitimate purpose and where limiting the benefit to under 18 is relevant to and supports that purpose.

164. Accordingly, while the Applicant was sent forward to the Circuit Criminal Court as an adult and will now be tried in the more formal setting of the Circuit Court by jury trial with attendant delays, stress and anxiety by reason of the fact that he had turned 18 when the matter came before the Court, this does not result in an unconstitutional unfairness in view of the differences between the Applicant and the under-age offender who remains a child and given that a proper justification exists for treating the Applicant differently to those child offenders

who are still children when the matter comes before the Court. The exclusion of the Applicant from s. 75 on age grounds is not arbitrary or capricious or irrational. The protections prescribed under the 2001 Act were never intended for adults but were intended to shield children from the full rigours of the criminal process in an adult court. Making special provision for under age offenders who are still children when the matter comes before the Court is a legitimate and rational legislative choice and is not unconstitutional as contrary to Articles 40.1 and/or 40.3 and/or 42A.

165. On the basis of a similar process of reasoning, I am satisfied that there has not been a breach of the Applicant's rights under the Convention under Articles 6 and/or 8 and/or 14.

166. In view of these findings, I refuse the relief sought and dismiss the proceedings. I will hear the parties in respect of the form of my final order and any consequential matters if these cannot be agreed.