APPROVED **[2024] IEHC 523**

THE HIGH COURT
JUDICIAL REVIEW

2024 672 JR
2024 731 JR

BETWEEN

NOAH MUSUENI
DAVID AMAH

APPLICANTS

AND

IRELAND AND THE ATTORNEY GENERAL
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 September 2024

INTRODUCTION

1. This judgment is delivered in respect of a challenge to the constitutional validity of the statutory sentencing regime for the offence of murder. The principal ground of challenge advanced is that the legislation breaches the guarantee of equality under Article 40.1 of the Constitution of Ireland. The challenge centres on the differing treatment afforded to otherwise similarly situated juvenile

offenders depending on their age as of the date of sentencing. A juvenile offender who has "*aged out*" prior to the date of sentencing falls to be sentenced as an adult, with the consequence that there is a mandatory life sentence in the case of murder. The applicants contend that a distinction based on a juvenile offender's age as of the date of sentencing (as opposed to their age as of the date of the commission of the offence) does not advance a legitimate legislative purpose and/or is arbitrary, capricious or irrational. It is further contended that Part 9 of the Children Act 2001 is constitutionally under-inclusive.

NOMENCLATURE

2. A "*child*" is defined, under the Children Act 2001, as meaning a person under the age of eighteen years. The following shorthand will be employed throughout this judgment to describe the various categories of individuals who may be affected by the sentencing regime under the Children Act 2001.

"*Juvenile offender*": an individual who had committed a criminal offence while under the age of eighteen years. This term will be used irrespective of whether the individual is subsequently sentenced as a child or as an adult.

"*Juvenile trial participant*": a juvenile offender who is still under the age of eighteen years as of the date of their criminal trial.

"*Juvenile detainee*" or "*child detainee*": a juvenile offender who is being detained at a children detention school pursuant to a detention order.

"*Convicted child*": a juvenile offender who has been tried and convicted prior to reaching their eighteenth birthday.

"*Aged out child*": a juvenile offender who reached the age of eighteen years prior to their criminal trial and thus cannot avail of most of the safeguards under the Children Act 2001.

PROCEDURAL HISTORY

3. This judgment is delivered in respect of two separate sets of judicial review proceedings. In each instance, the applicant has been charged with an offence of murder arising out of events alleged to have occurred in Blanchardstown, County Dublin on 24 December 2023. Each applicant had been under the age of eighteen years as of the date upon which the alleged offence is said to have been committed. Each applicant has since turned eighteen years of age and is thus no longer a "*child*" for the purpose of the Children Act 2001. The applicants will be tried as adults. As such, if either applicant is convicted of an offence of murder, he will be liable to a mandatory sentence of imprisonment for life.

4. It is not necessary, for the resolution of these judicial review proceedings, to rehearse the details of the alleged offence further. It is sufficient to the purpose to record that each applicant represents an "*aged out*" child for the purpose of the Children Act 2001, i.e. a juvenile offender who is no longer entitled to avail of many of the statutory safeguards under the Act by dint of their not being a "*child*" (as defined) as of the date of their criminal trial.

5. It should be emphasised that each applicant enjoys a constitutional presumption of innocence. The fact of their having pursued these judicial review proceedings should not be misinterpreted as involving any concession on their part. Rather, the proceedings are prophylactic in nature and are intended to address the contingency of a conviction following a fully contested criminal trial.

6. Leave to apply for judicial review was granted, in each set of proceedings, on 1 July 2024. The time for the exchange of pleadings was abridged and the proceedings allocated a priority hearing date of 30 July 2024. Judgment was reserved to today's date.

7. It has been possible to resolve these proceedings on the equality guarantee ground under Article 40.1. It is unnecessary, therefore, to consider the alternative arguments by reference to Article 38.1, Article 40.3 and Article 42A. It is also unnecessary, having regard to the principles in *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71, [2010] 1 I.R. 635, to consider the claim for a declaration of incompatibility under section 5 of the European Convention on Human Rights Act 2003.

LEGISLATIVE REGIME

8. Section 2 of the Criminal Justice Act 1990 provides that a person convicted of murder shall be sentenced to imprisonment for life. Under the Parole Act 2019, a person serving a sentence of imprisonment for life shall not be eligible for parole until they have served at least twelve years of that sentence.

9. The Supreme Court held, in *Lynch v. Minister for Justice, Equality and Law Reform* [2010] IESC 34, [2012] 1 I.R. 1, that the fixing of a mandatory sentence for murder is constitutionally valid. In doing so, the Supreme Court rejected an argument that the prescription of a mandatory life sentence entailed a usurpation of the powers of the judiciary. See paragraphs 49 and 50 of the reported judgment as follows:

> "[…] the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have

> its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified.
>
> In this case however s. 2 of the Act of 1990 applies to the crime of murder. For the reasons already indicated that crime has always and legitimately been considered to be one of profound and exceptional gravity and, in the court's view, one for which the State is entitled to impose generally a punishment of the highest level which the law permits. Given that it is an offence which is committed when, and only when, a person is unlawfully killed and that the person so doing intended to kill or cause serious injury, it is one which can therefore properly be differentiated from all other crimes, including manslaughter."

10. As explained below, the Oireachtas has made a related policy choice to exempt a certain class of juvenile offender from the mandatory life sentence otherwise applicable for an offence of murder.

11. Section 156 of the Children Act 2001 provides that no court shall pass a sentence of imprisonment on a child or commit a child to prison. The parties are agreed that the requirement to impose a sentence of imprisonment for life for an offence of murder does not apply in circumstances where a juvenile offender is convicted and sentenced while still a child, i.e. under the age of eighteen years. Although not expressly stated in legislation, this derogation arises as a necessary implication of the interaction between section 156 of the Children Act 2001 and section 2 of the Criminal Justice Act 1990. The prohibition on *imprisoning* a convicted child for any offence results in the disapplication of the requirement to impose a sentence of *imprisonment* for life for an offence of murder. Instead, the appropriate sentence for a convicted child is to be determined by reference to the sentencing principles prescribed under the Children Act 2001.

12. The legal position is summarised as follows in Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) (at §9.57): a child convicted of

murder may be sentenced to such period of detention, including life, as the court thinks fit in the circumstances. As O'Malley observes, the failure to make express provision, in the Children Act 2001, for children convicted of murder is surprising.

13. The fact that the Legislature has not expressly addressed the sentencing rules governing a juvenile offender who is being sentenced as a child for murder has left a number of ancillary issues unresolved. In particular, there is some debate as to whether it is permissible to impose an indeterminate period of detention, with a proviso for review by the court. This issue is currently under consideration by the Supreme Court in *People (DPP) v. C.C.* [2024] IESCDET 40. This appeal is fixed for hearing on 8 October 2024. The uncertainty in relation to these ancillary issues does not, however, affect the issue at the core of the present proceedings. That issue is whether, having allowed a certain category of juvenile offender a derogation from the mandatory life sentence, it represents unlawful discrimination to deny this benefit to other similarly situated juvenile offenders based solely on their age as of the date of sentencing.

14. It is necessary next to consider the sentencing principles under the Children Act 2001 in a little more detail, with a view to identifying the differing treatment afforded to a juvenile offender who is convicted and sentenced while still a child as compared to a juvenile offender who has "*aged out*" prior to being sentenced. This distinction is crucial to the analysis of the constitutional challenge.

15. Section 96(2) of the Children Act 2001 provides as follows:

> "(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."

16. As appears, this aspect of the sentencing principles reflects the special considerations applicable where a penalty is being imposed upon a person who is still a child as of the date of sentencing. As discussed at paragraphs 46 to 48 below, this aspect of the sentencing principles reflects the distinction in capacity and social function between an adult prisoner and a child detainee. These considerations are not directly applicable to an adult who is being sentenced in respect of an offence committed as a child.

17. Section 96(3) of the Children Act 2001 provides as follows:

> "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."

18. The proviso under the subsection, i.e. "*unless the penalty is fixed by law*", might, if read in isolation, be thought to have the effect of disapplying the sentencing principles under the Children Act 2001 in the case of murder by reason of the fact that a penalty is fixed by law, i.e. a mandatory life sentence. As explained earlier, however, the conventional wisdom is that this is overridden by the provisions of section 156 of the Children Act 2001.

19. The default sentencing principle under section 96(3) is that the age and level of maturity of the juvenile offender should be taken into account in determining the nature of any penalty imposed. It is apparent from the case law of the Court of Appeal discussed below that it is the child's age and level of maturity at the time of the commission of the offence which is to be taken into account.

20. It is long since established that the sentencing principles under the Children Act 2001 are only directly applicable in circumstances where a juvenile offender is convicted and sentenced while still under the age of eighteen years. The contingency of a child "*aging out*" prior to the determination of an appeal is addressed separately: see paragraphs 27 to 29 below.

21. For ease of exposition, the second of the two dates, by reference to which the applicability of the sentencing principles under the Children Act 2001 is to be determined, will be described in this judgment as "*the date of sentencing*" (in contradistinction to the date of the commission of the offence). It should be explained that it is not necessary, for the resolution of the present proceedings, to address the potentially difficult question of a juvenile offender who has "*aged out*" between the date of conviction and a subsequent sentencing hearing. In particular, it is not necessary to decide whether the sentencing principles are fixed by the date of conviction, or, alternatively, by the date of sentencing. Here, the applicants have already "*aged out*", i.e. prior to the commencement of their criminal trial. It follows that, in the event they were to be found guilty, they would be convicted and sentenced as an adult.

22. A juvenile offender who has "*aged out*" prior to sentencing by the court of trial loses the benefit of the sentencing principles under section 96(3). However, other than in the case of murder, this does not cause any actual prejudice in most

instances. This is because, in practice, the sentencing court will apply equivalent sentencing principles by analogy. This approach is illustrated by the judgment of the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020. Birmingham P. stated as follows (at paragraph 16):

> "I agree with the High Court judge that if the stage of considering sentence is reached, then the judge in the Circuit Court would be required to have regard to the age and maturity of the appellant at the time of the commission of the offence. The judge will be sentencing him as a person who, aged fifteen and a half years, offended. Obviously, his age and maturity will be highly relevant to the assessment of the level of culpability. In these circumstances, I do not see the fact that s. 96(2) of the Children's Act, which stipulates that a sentence of detention will be a last resort, and s. 99, which mandates the preparation of a probation report, will not be applicable, as having any major practical significance."

23. There is a principled distinction between those aspects of the sentencing principles which are unique to a convicted child, and those which are also relevant to an adult who is to be sentenced in respect of offences committed while they were a child. In the case of the former, the focus is on the fact that the person to be sentenced is still a child. It is necessary to consider the impact which detention would have on the development of the child, their relationship with their family and their educational development. In the case of the latter, the focus is on the fact that the offence was committed at the time the offender was a child. The sentencing judge would be required to have regard to the offender's age and level of maturity at the time of the commission of the offence. In assessing maturity, the sentencing judge would be 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.

24. This dichotomy is illustrated by the judgment of the Court of Appeal in *Director of Public Prosecutions v. J.H.* [2017] IECA 206. Having referenced section 143 of the Children Act 2001, which mirrors the imperative under section 96(2) that a period of detention should be imposed only as a measure of last resort, Mahon J. stated as follows (at paragraphs 13 to 15):

> "Section 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. Undoubtedly also, there is the concern that places of detention facilitate children getting into bad company and paving the way towards criminality in adulthood.
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> 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.
>
> What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentencing court is required to access the offender's level of maturity at the time of the commission of the offence and to accordingly access his culpability as of that time."

25. The practical effect of this case law can be summarised as follows. The sentencing principles prescribed under the Children Act 2001 are not directly applicable to an adult who is to be sentenced in respect of offences committed while they were a child. Nevertheless, the sentencing court will, generally, be required to have regard to the age and level of maturity of the individual at the time of the commission of the offence. Put otherwise, a principle analogous to

that expressly stated under section 96(3) of the Children Act 2001 forms part of the general principles of sentencing applicable to an adult.

26. The foregoing analysis does not extend to an offence of murder committed by a juvenile offender who "*ages out*" prior to the sentencing date. Such a person falls to be sentenced as an adult. The express terms of section 2 of the Criminal Justice Act 1990 exclude the possibility of the sentencing court imposing a sentence other than imprisonment for life. The sentencing court does not have any *discretion* to impose a lesser sentence having regard to, relevantly, the age and level of maturity of the "*aged out*" juvenile offender as of the time of the commission of the offence. The consequence of this is that the date of the criminal trial assumes a crucial significance in the context of the offence of murder. In contrast to other types of offence, the age of the juvenile offender as of the date of their conviction/sentence determines whether their age and level of maturity as of the time of the commission of the offence can be taken into account as a mitigating factor.

27. For completeness, it should be explained that special provision has been made for a juvenile offender who "*ages out*" during the course of an appeal, i.e. a juvenile offender who had been convicted and sentenced by the court of trial while still a child but who subsequently turned eighteen prior to the conclusion of an appeal to the Court of Appeal. The current rules were introduced under section 62 of the Criminal Justice (Miscellaneous Provisions) Act 2023 which amends section 3 of the Criminal Procedure Act 1993.

28. In circumstances where a juvenile offender "*ages out*" prior to sentencing by the Court of Appeal, the ordinary rule is that the appellate court may impose a sentence which could have been imposed by the court of trial had the convicted

person, counterfactually, attained the age of eighteen years at the time when the sentence or order was so imposed. Put otherwise, save in the case of murder, the "*aged out*" child is sentenced as an adult by the appellate court. This addresses the difficulty which would otherwise flow from a requirement that the appellate court be confined to imposing the same type of penalty as the court of trial. The only custodial sentence which the court of trial could have imposed would have been a detention order under the Children Act 2001. This sentence would not be available to the appellate court by reason of the fact that the juvenile offender had "*aged out*" in the interim: the sentence available to the appellate court would be a sentence of imprisonment. On a literal reading, a rule which restricted the appellate court to imposing the same type of sentence as could have been imposed by the court of trial would create a legislative lacuna whereby neither a detention order nor a sentence of imprisonment would be available. (cf. *People (DPP) v. P. McC.* [2018] IECA 309). The legislative amendments introduced under the Criminal Justice (Miscellaneous Provisions) Act 2023 remove any such lacuna.

29. Relevantly, the ordinary rule is subject to a specific exception in the case of murder. It is expressly provided, under the amended section 3(11) of the Criminal Procedure Act 1993, that where the appeal against sentence is in respect of a sentence imposed on a person convicted of murder before the person has attained the age of eighteen years, the appellate court may, notwithstanding section 2 of the Criminal Justice Act 1990, impose such sentence or order as it considers appropriate. Put otherwise, provided that a juvenile offender had been sentenced by the court of trial as a child, he or she continues to be immune from the mandatory life sentence even if he or she "*ages out*" prior to appeal.

ARTICLE 40.1

30. Article 40.1 of the Constitution of Ireland 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."

31. The principles governing a claim that there has been a breach of the equality guarantee have recently been summarised by the Supreme Court in *Donnelly v. Minister for Social Protection* [2022] IESC 31, [2022] 2 I.L.R.M. 185 (*per* O'Malley J., at paragraphs 188 and 189):

> "The authorities do demonstrate support for the following propositions:
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> (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.
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> It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in [*Brennan v. Attorney General* [1983] I.L.R.M. 449] and approved a number of times in this Court is consistent with the analysis in [*Dillane v. Attorney General* [1980] I.L.R.M. 167]. 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."

32. The approach to be adopted in the case of a "*pure*" equality claim, i.e. a claim where a claimant does not allege that a substantive right of theirs has been breached but rather that it is unfair, to the point of constitutional invalidity, to confer a benefit on others while excluding them, is summarised as follows (at paragraph 192):

> "What might be termed a 'pure' equality claim may arise where the legislature has decided to confer a benefit on a class of persons, and the plaintiff is aggrieved at being excluded because he or she has at least some relevant similarity with those who are included. But the legislature is entitled to make policy choices, and therefore must be entitled to distinguish between classes of persons. To refer again to the text of Article 40.1, the equality guarantee is not to be interpreted as meaning that the State shall not, in its enactments, have 'due regard' to differences of physical and moral capacity, and of social function. I consider, therefore, that the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be 'fairer'."

33. In *O'Meara v. Minister for Social Protection* [2024] IESC 1 (at paragraph 14), O'Donnell C.J. explained that 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.

DISCUSSION

34. In order to determine whether there has been a breach of the equality guarantee, it is necessary to identify a comparator against whom the complaining individual's treatment can be contrasted. The exercise is described as follows in *O.R. (A minor) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533 (*per* O'Donnell J., at paragraph 241 of the reported judgment):

> "[…] Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement."

35. Here, the comparison is between (i) a juvenile offender who committed an offence of murder while they were under the age of eighteen years and had been convicted and sentenced while still a child; and (ii) a juvenile offender who committed an offence of murder while they were under the age of eighteen years but who had "*aged out*" prior to the date of sentencing. The comparators are similarly situated in that each committed an offence of murder while a child under the age of eighteen years. The comparators are unalike only in respect of

their age as of the date of sentencing: one is still legally a child, the other an adult.

36. The difference in treatment, which eventuates from this distinction, can be summarised as follows. An individual in the latter class will, if convicted, be sentenced to imprisonment for life whereas an individual in the former class will have the benefit of a sentencing regime which allows the sentencing court to take into consideration, as mitigating factors, that individual's age and level of maturity at the time of the commission of the offence in determining the nature of any penalty imposed.

37. The gravamen of the constitutional challenge is that, in circumstances where the Legislature has recognised that the age and level of maturity of a juvenile offender are relevant considerations in sentencing, there is no objective justification for treating one class of juvenile offender less favourably by reference only to the happenstance of their age as of the date of sentencing. In particular, it is said that moral culpability is a "*static*" consideration which is fixed by reference to the juvenile offender's age as of the time of the commission of the offence.

38. In analysing the constitutional challenge, it is salutary to recall that it is, in principle, legitimate to discriminate on the grounds of age in determining the appropriate penalty for an offender. This point may be illustrated by reference to the judgment of the Supreme Court in *B. v. Director of Oberstown Children Detention Centre* [2020] IESC 18, [2023] 2 I.R. 191. The issue there was whether a juvenile detainee at a children detention school was entitled to the benefit of the same rules in relation to the remission of sentence as an adult prisoner would be. The Supreme Court held that it was legitimate to distinguish

between juvenile detainees and adult prisoners, respectively, when determining a regime for the remission of sentence. The difference in treatment was objectively justified having regard to the difference in terms of capacity and of social function of adults and children in the context of the criminal justice system.

39. The Supreme Court (*per* O'Malley J.) made the point that the type of incentives appropriate for children will be different from the longer-term incentives appropriate for adults. See paragraphs 74 and 75 of the reported judgment as follows:

> "When one compares those penal regimes, it will be seen that the incentives to engage in positive behaviour while in custody differ significantly. An adult given a sentence of three years, for example, knows that with ordinary good behaviour his sentence will be reduced by nine months. He also knows that if he engages in authorised structured activities, he may be granted a further three-month reduction. A prisoner serving a long sentence will know that he will not be assessed by the Parole Board for at least seven years. For a person commencing a sentence these are all relatively long-term objectives.
>
> Under the regime created by the [Children Act 2001], on the other hand, certain goals will be achievable far more swiftly. A child may be told: 'Behave well this month and you will get a mobility trip. Behave well next month and you may get an overnight at home' and so on. The scheme of incentives is incremental, and geared towards relatively short-term steps, according to the planned management of the individual child's sentence. If successful, the child may be able to return home or to suitable accommodation in the community long before the expiry of the sentence."

40. The Supreme Court observed that it had not been argued by the applicant in that case that the system of incremental incentives and planned release under the regime operated by the children detention school was not more suitable for the reality of dealing with young persons than the system of long-term incentives available to adult prisoners.

41. The Court of Appeal addressed another aspect of the different regimes applicable to adult prisoners and child detainees, respectively, in its judgment in *M. v. Director of Oberstown Children's Detention Centre* [2020] IECA 249. The applicant in those proceedings had been subject to what were described as "*separation measures*" following upon his having engaged in threatening behaviour. In particular, for a number of days, the applicant had been restricted in his association with fellow detainees and in his participation in communal recreational activities. The applicant contended that an adult prisoner, who had been subject to similar restrictions, would have been entitled to specified safeguards under the Prison Rules 2007. It was further contended that the failure to extend such safeguards to a child detainee represented unconstitutional discrimination.

42. The Court of Appeal rejected the constitutional claim, holding that there are "*fundamentally different*" challenges and objectives arising in a children detention school such as render comparisons with the rules and regimes in adult prisons "*wholly misplaced*". The difference in treatment was held to reflect the material distinction in capacity between a child detainee and an adult prisoner.

43. An example of a case falling on the other side of the line is provided by *Byrne v. Director of Oberstown School* [2013] IEHC 562, [2020] 2 I.R. 338. This was another remission of sentence case. Crucially, however, the comparison there was not as between a child detainee and an adult prisoner, but rather as between two classes of child detainee. More specifically, the comparison was as between a child detained at St. Patrick's Institution, on the one hand, and a child detained at a children detention school, on the other. The distinction being that, by dint of St. Patrick's Institution coming within the definition of a "*prison*", a child

detained there had the benefit of remission of sentence. This benefit was not afforded to a child detained in a children detention school.

44. The High Court (Hogan J.) held that the difference in treatment between the two classes of comparator turned on an *arbitrary* feature, namely, the venue of detention. The matter was put as follows at paragraphs 40 and 41 of the reported judgment:

> "Here it is the fact that the applicant is detained in one venue (Oberstown) rather than in another (St. Patrick's Institution) which precludes him from being released at a significantly earlier date than would otherwise be the case. This differing treatment in relation to a matter as fundamental as personal liberty is, in the words of Finlay C.J. in *Cox v. Ireland* [1992] 2 I.R. 503 at p. 524, 'impermissibly wide and indiscriminate', not least in circumstances where, at least in the eyes of [the Children Act 2001], there is no essential difference between detention at Oberstown on the one hand as opposed to St. Patrick's Institution on the other.
>
> It follows, therefore, that the failure to provide for the application of the remission rules to Oberstown cannot be objectively justified. In the circumstances, this failure must be adjudged to be a clear breach of the precept of equality before the law in Article 40.1."

45. As will be elaborated upon shortly, the difference in treatment complained of in the present case is also predicated on an arbitrary feature, namely, the age of the juvenile offender as of the date of sentencing.

46. The foregoing case law confirms that it is legitimate to discriminate on the grounds of age in determining the appropriate penalty for an offender (including remission of sentence), provided that the difference in treatment is objectively justified. The difference in treatment will be objectively justified where it is predicated on the social function and capacity of a child as a (potential) detainee. The purpose of, and practicalities of, detaining a child are very different from those entailed in imprisoning an adult. This is reflected throughout the Children

Act 2001. The Act recognises that the detention of a child has the potential to adversely affect that child's education and their relationship with their parents and other family members. To this end, it is expressly provided, under section 96(2), that 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. A period of detention should be imposed only as a measure of last resort. It is not permissible to commit a child to prison (section 156). This reflects the concern that such an adult prison would be a hostile environment for a child and to commit them to an adult prison might well undermine their rehabilitation and education.

47. Crucially, these legislative provisions reflect the peculiar circumstances of a juvenile offender who is to be sentenced and detained while still a child under the age of eighteen years. By definition, the offence which has resulted in the detention order is an offence which will have been committed by a child, with the reduced moral culpability which that may entail. This reduced moral culpability is not, however, the focus of these specific legislative provisions. Rather, they are directed to the exigencies of detaining a child in custody. The focus is on educational needs and family relationships. There is no necessity to extend these legislative provisions to an adult who is being sentenced in respect of offences which he or she committed while under the age of eighteen years. The legislative provisions are unique to a child detainee; they are not appropriate for an adult prisoner.

48. This aspect of the sentencing principles reflects the distinction in capacity and social function between an adult prisoner and a child detainee. There is, however, a separate strand to the sentencing principles which reflects *another* distinction, namely the distinction in moral culpability as between a juvenile offender and an adult offender. The Legislature has recognised that, even in the case of the heinous offence of murder, a more nuanced approach to sentencing is appropriate where the offender is a child under the age of eighteen years. The sentencing court is allowed to take into consideration, as mitigating factors, that individual's age and level of maturity at the time of the commission of the offence in determining the nature of any penalty imposed.

49. The logic underlying this strand of the sentencing principles is that the moral culpability of a juvenile offender may be less than that of an adult offender, having regard to the age and level of maturity of the former. More specifically, a juvenile offender may, at the time of the commission of the offence, lack the insight and understanding of an adult because their cognitive capacity and psychosocial development is less advanced.

50. In the case of murder, the benefit of this sentencing principle will be lost if the juvenile offender "*ages out*" prior to being sentenced. There is no rational basis for distinguishing between juvenile offenders on this ground. The fact that a juvenile offender has reached the age of eighteen years prior to being sentenced does not affect their moral culpability. A juvenile offender's age as of the date of trial would only ever be relevant to the exigencies of why and how a custodial sentence might be imposed. As discussed above, the education and family factors which militate against a custodial sentence in the case of a child do not apply to a juvenile offender who is sentenced as an adult.

51. The State respondents have sought to justify the differing treatment as follows in their written legal submission:

> "To illustrate the point, where someone is prosecuted many years, perhaps decades, after the fact for an offence committed when they were a child, the judge in passing sentence will have regard to their age and culpability at the time of the offence, but also cannot lose sight of the fact that the person they are sentencing is now an adult. Even though their culpability at the time of the offence may not have changed with the passing of years, many factors that would have been highly relevant to sentencing at the time of the offence may have little bearing by the sentence date; these would include the fear of disrupting the accused's development, the scope for intervention, the increased focus on rehabilitation, and so on.
>
> No such lengthy period of time has elapsed here. However, absent from the Applicants' submissions is any recognition of the fact that they are no longer in the same position as a *child* who is being sentenced for murder. The fact that both they and the child who is still a child may have had lower culpability than an adult at the time of the offence is only one factor which had to be borne in mind by the Oireachtas in determining the penalty for aged out juvenile offenders who are convicted of murder."

52. With respect, this argument proves too much. The submission correctly identifies the legitimate legislative purpose underlying the distinction made between a juvenile offender and an adult offender, namely that a child who commits murder may have less moral culpability. The submission then seeks to rely on this purpose to justify a *second* distinction made under the legislation, namely the distinction made between two subsets of juvenile offenders, by reference to their age as of the date of sentencing. This is a *non sequitur*. It is precisely because moral culpability is not affected by the date of sentencing—a proposition which is tacitly acknowledged in the written legal submission—that the second distinction made under the legislation is arbitrary. Far from treating their lesser moral culpability as a factor which had to be borne in mind in

determining the penalty for "*aged out*" juvenile offenders, the legislation jettisons it.

53. Whereas the points made in the written legal submission might offer a justification for denying an "*aged out*" child the benefit of the principles outlined in section 96(2) of the Children Act 2001, all of which are directed to the fact that the person being sentenced is still a child, the submission does not justify the denial of the benefit of the principles outlined under section 96(3).

54. It is correct to say—as the State respondents do—that the Legislature enjoys a considerable margin of appreciation in deciding on how the criminal justice system should apply to a young offender. The policy choice to define a "*child*" as a person under the age of eighteen years—rather than, say, seventeen years—is one which is primarily a matter for the Oireachtas. See, by analogy, *J.D. v. Residential Institutions Redress Review Committee* [2009] IESC 59, [2010] 1 I.R. 262, [2010] 2 I.L.R.M. 181. There, the Supreme Court held, in the context of a scheme of redress directed to individuals who had been abused while resident in a scheduled institution, that the definition of a "*child*" as a person under the age of eighteen years, rather than twenty-one years, represented an objective classification, containing no element of discrimination. Crucially, however, eligibility for the scheme of redress was to be determined by reference to the individual's age at a date relevant to the legislative purpose, i.e. the date of their residence in a scheduled institution.

55. In summary, there is no objective justification for the differing treatment afforded to a juvenile offender depending on the happenstance of their age as of the date of sentencing. The point can be illustrated by taking the example of two youths. Suppose that the two youths are the same age and carry out a murder

jointly while under the age of eighteen years. Further suppose that, for logistical reasons, separate trials are directed, and that the chronology is such that one youth is sentenced prior to reaching his eighteenth birthday, with the other youth being sentenced as an adult. The effect of the legislation is such that only the first youth would be entitled to rely on his age and level of maturity as a mitigating factor. The second youth would be subject to a mandatory life sentence. The difference of treatment eventuates notwithstanding that the two youths are the same age and were found guilty of the same murder. Crucially, this difference in treatment is logically incapable of supporting the legislative purpose underlying this strand of the sentencing principles, namely that the potential that the moral culpability of a juvenile offender may be less than that of an adult offender should be taken into account in sentencing.

MISCELLANEOUS

56. For completeness, it should be recorded that no argument has been advanced in these proceedings to the effect that age is not a characteristic or attribute subject to the equality guarantee. Had such an argument been raised, I would have rejected same for all of the reasons eloquently expressed by the High Court (Phelan J.) in *Brophy v. Director of Public Prosecutions* [2024] IEHC 392. The judgment in *Brophy* is also of interest in that it provides an example of a difference in treatment, which is predicated on the grounds of age, being upheld as constitutionally valid. The case concerned the provisions of section 75 of the Children Act 2001. This allows for an enhanced possibility for the summary disposal of indictable offences. The section is not available in the case of an "*aged out*" child. The High Court held that it was legitimate to discriminate by

reference to the age of the juvenile offender as of the date of trial in circumstances where the legislative intention was to shield a juvenile trial participant from an adult court by making provision for cases to be dealt with in a child-sensitive manner by a District Court judge with access to specialist services and training. The primary purpose of the section was not to recognise a juvenile offender's lesser moral culpability. It was for this reason, then, that the age as of the date of trial was the relevant age.

57. On a separate point, there was some discussion at the hearing before me as to the implications, if any, to be drawn from the treatment afforded to those who "*age out*" during the course of an appeal. As explained at paragraphs 27 to 29 above, a juvenile offender who had been sentenced by the court of trial as a child, continues to be immune from the mandatory life sentence even if he or she "*ages out*" prior to their appeal being heard and determined.

58. Counsel on behalf of the applicants sought to rely on this as an example of the piecemeal nature of the legislation and submitted that the under-inclusive nature of the sentencing regime might be an unintended consequence. It is correct to say that the Supreme Court in *O'Meara v. Minister for Social Protection* [2024] IESC 1 (*per* O'Donnell C.J., at paragraph 35) observed that the piecemeal development of the legislation at issue in that case had resulted in a form of social protection payment which did not conform to any clear and justifiable principle. The same type of observation does not hold good for the legislative amendments in relation to criminal appeals. The amendments perpetuate the irrational distinction, which is implicit under the Children Act 2001, between the date of the commission of the offence and the subsequent date

of sentencing by the court of trial. Put otherwise, the recent amendments are symptomatic of, rather than causative of, the constitutional infirmity.

CONCLUSION

59. The Oireachtas in the exercise of its legislative powers may choose, in particular cases, to impose a fixed or mandatory penalty for a particular offence. The Supreme Court has previously held that the fixing of a mandatory sentence of imprisonment for life for an offence of murder is constitutionally valid: *Lynch v. Minister for Justice, Equality and Law Reform* [2010] IESC 34, [2012] 1 I.R. 1.

60. The Oireachtas has made a related policy choice to exempt a certain class of juvenile offenders from the mandatory life sentence otherwise applicable for an offence of murder. The details of that policy choice are matters in respect of which the Oireachtas enjoys a considerable margin of appreciation. In particular, the decision to define a "*child*" as a person under the age of eighteen years—rather than, say, seventeen years—is one which is primarily a matter for the Oireachtas.

61. However, having made a policy choice to exempt certain juvenile offenders from the mandatory life sentence, the Legislature must embody same in legislation which complies with the constitutional guarantee of equality. Where a differentiation is made between otherwise similarly situated comparators, it must be justified by reference to the manner in which the comparators are unalike. For the reasons explained, the difference in treatment afforded to juvenile offenders, in terms of sentencing for the offence of murder, is not justified by reference to their respective ages as of the date of sentencing.

62. The statutory classification must be for a legitimate legislative purpose. The purpose underpinning section 96(3) of the Children Act 2001 is to allow for the (potential) difference in moral culpability between a juvenile offender and an adult offender to be taken into account in sentencing. This is to be allowed even in the case of the heinous crime of murder.

63. The statutory scheme actually entails two age-based classifications insofar as it applies to an offence of murder. The first classification distinguishes between juvenile offenders and adult offenders. The discretionary sentencing principles are only available to juvenile offenders; an adult offender is subject to a mandatory sentence of imprisonment for life. The second classification distinguishes between two subsets of juvenile offenders, by reference to their age as of the date of sentencing.

64. The first classification advances a legitimate legislative purpose which reflects the distinction in capacity and social function between an adult and a child in terms of their moral culpability for a criminal offence. The second classification is not rationally connected with any legitimate legislative purpose. Indeed, it cuts against the underlying purpose of section 96(3) of the Children Act 2001 by denying the benefit of the discretionary sentencing principles to a subset of juvenile offenders by reference to an *arbitrary* point of distinction, namely the fact that they have reached the age of eighteen years prior to being sentenced. The *current age* of a juvenile offender does not affect their moral culpability as of the time of the commission of the offence of murder.

65. It follows, therefore, that the sentencing regime for an offence of murder, as currently formulated, does not comply with the guarantee of equality under Article 40.1 of the Constitution of Ireland.

66. It had been agreed between the parties at the hearing on 30 July 2024 that submissions on the form of relief should be deferred until after the court had ruled on the substance of the constitutional challenge. These proceedings will be listed before me, for mention only, on 9 October 2024 at 10.30 o'clock to fix a date for the hearing of submissions.

Appearances

Seamus Clarke SC and Keith Spencer for the first applicant instructed by Connolly Finan Fleming Solicitors
Mark Lynam SC and Oisín Clarke for the second applicant instructed by Connolly Finan Fleming Solicitors
Remy Farrell SC and Joe Holt for the first and second respondents instructed by the Chief State Solicitor
Feichín McDonagh SC and Kieran Kelly for the third respondent instructed by the Chief Prosecution Solicitor