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THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 72

Court of Appeal Record Number: 2020/130

High Court Record Number: 2011/11826P

Haughton J.

Ní Raifeartaigh J.

Collins J.

BETWEEN/

GERARD MARTIN FULHAM

APPELLANT

- AND -

CHADWICKS LIMITED, INDEPENDENT NEWSPAPERS (IRELAND) LIMITED AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT delivered by Mr. Justice Robert Haughton on the 12th day of March 2021

Introduction

1. This is an appeal from an order of Barton J. dated 31 January 2020 in which he found that the appellant ("Mr. Fulham") was not entitled to a trial by jury, and ordered that the proceedings be struck out as being frivolous and vexatious and disclosing no cause of action and being bound to fail.

2. In a judgment delivered *ex tempore* (Haughton J.) on 18 January 2021, this court dismissed the appeal insofar as the first and second named respondents are concerned ("Chadwicks" and "INIL" respectively), with costs ordered to be paid by Mr. Fulham, and reserved its decision in relation to the appeal against the third and fourth named respondents ("the State").

Background

3. There is no material dispute in relation to the background facts. Mr. Fulham was a building contractor who in the course of his business ordered and was supplied goods and materials by Chadwicks, and also advertised in INIL's publication.

4. Mr. Fulham failed to make contractual payments that were due, and on 11 April 2005 Chadwicks obtained judgment in default against him in the Circuit Court for €14,245.63. On that date Chadwicks also obtained an Execution Order against Mr. Fulham's goods, which did not lead to any recovery, and on 8 December 2005 Chadwicks obtained an Instalment Order from the District Court mandating monthly payments of €400 by Mr. Fulham. When that was not complied with, on 12 January 2007, Chadwicks issued a Summons returnable to the District Court seeking the arrest and imprisonment of Mr. Fulham pursuant to s. 6 of the Enforcement of Court Orders Act, 1940.

5. The relevant part of s. 6 in relation to the hearing of a Committal Summons in the District Court following failure to comply with an instalment order, then provided[1] that –

> "(b) on the hearing of an application under the next preceding paragraph of this section, the Justice may, if he so thinks proper but subject to the next following paragraph of this section, order the arrest and imprisonment of the debtor for any period not exceeding three months, and thereupon the debtor shall be arrested and imprisoned accordingly."

6. When Chadwicks' Committal Summons came on for hearing before the District Court on 2 March 2007 there was no appearance by Mr. Fulham, and an order was made pursuant to s. 6(b) committing Mr. Fulham to prison for 7 days, with a stay on the order. By letter dated 12 March 2007 Chadwicks' solicitors wrote to Mr. Fulham informing him of the Committal Order of 2 March 2007, and that it was being forwarded by the District Court to the Inspector of Dundrum Garda Station for execution on 16 May 2007.

7. Independently of that INIL had obtained a Decree against Mr. Fulham in the District Court on 18 October 2004 in the sum of €4,158.97 in respect of advertising in the Independent Directory. Thereafter on 10 February 2005 INIL obtained an Instalment Order in the District Court requiring Mr. Fulham to pay €400 per month. Mr. Fulham failed to comply with that order, following which on the application of INIL on 2 December 2005 the District Court made an order pursuant to s. 6(a) of the 1940 Act committing Mr. Fulham to prison for two days.

8. Pursuant to these two Committal Orders Mr. Fulham was imprisoned in Mountjoy Prison from 21 December 2007 to 28 December 2007. It is regrettable that this occurred over the Christmas period,

[1] As a result of the decision in *McCann v The Judge of Monaghan District Court & Ors.* [2009] 4 I.R. 200, which is discussed later in this judgment, s.6 was found to be invalid having regard to the Constitution and has since been substituted by section 2 of the Enforcement of Court Orders (Amendment) Act, 2009 which introduces new procedures and safeguards. A debtor can only now be imprisoned where the creditor establishes that the debtor's default is not due to his or her inability to pay but is due to wilful refusal or culpable neglect.

and there can be little doubt but this imprisonment caused Mr. Fulham, and his family, great upset and distress.

9. It is however important to note that Mr. Fulham did not appeal or legally challenge any of the orders made in the District Court which resulted in his imprisonment. Indeed, he does not appear to have engaged with the District Court, or with Chadwicks or INIL, in any meaningful way. It is also worth noting that Mr. Fulham does not make the claim that he was not served with notice of the District Court hearings, or of the Instalment Orders or Committal Orders.

The *McCann* case

10. In a decision handed down on 18 June 2009 (Laffoy J.) in *McCann v The Judge of Monaghan District Court & Ors.* [2009] 4 I.R. 200) it was held that s. 6 of the Enforcement of Court Orders Act, 1940 was invalid having regard to the provisions of Articles 34, 40.3° and 40.4.1° of the Constitution.

11. The background facts were that Ms. McCann was a single women with two children, and a member of the travelling community. By her own admission she was a "bad reader"; she had a history of alcohol abuse and psychiatric illness. She was reliant on social welfare. Judgment was obtained against her for €18,063 by Monaghan Credit Union, who in due course obtained an instalment order for €82 per week. She was duly served with the application to Monaghan District Court for the instalment order, and the committal summons that followed when she made no payments. In 2005 she was ordered to be imprisoned for 1 month unless the arrears of €5658 and costs were paid. An Garda Síochána held off arresting her for long enough for her to get legal advice. She made an application to extend time to appeal the District Court committal order, which was refused, following which proceedings were initiated in the High Court.

12. Ms. McCann sought to challenge the validity of the order committing her to prison for one month. She also (following amendment of the Statement of Claim at the trial) challenged the constitutionality of s. 6.

13. Ms. McCann further claimed that s.6 was incompatible with the State's obligations under the European Convention on Human Rights 1950 ("the Convention"), citing *inter alia* article 6.2 ("Everyone charged with a criminal office shall be presumed innocent until proven guilty according to law") and article 1 of Protocol no.4 ("No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation"). In an alternative argument she also relied on article 5(1) of the Convention:

> "…No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or an order to secure the fulfilment of any obligation prescribed by law…"

As a result the Human Rights Commission was permitted to participate in the proceedings as an *amicus curiae*, and the judgment records at some length the arguments made by counsel for the plaintiff and by the Commission in relation to incompatibility

The State parties did not seek to stand over the 2005 order, but did defend the constitutional validity of the legislation, and compatibility. The Credit Union was a notice party, and also did not oppose an order of *certiorari* quashing the instalment order on the ground that it was contrary to natural justice by reference to the plaintiff's personal circumstances, in particular that she suffered from a depressive illness of a recurrent nature, and had educational inadequacies which the Credit Union implicitly accepted as an explanation for her failure to engage with the enforcement process. The State advocated for *certiorari* of the committal order and remittal to the District Court, and relied on

the Credit Union's undertaking to agree to a variation of the instalment order. On this basis the State argued that the proceedings were moot.

14. Laffoy J. rejected this contention as it did not address the substance of the plaintiff's complaint, and she went on to decide the constitutional challenge. She held, at p. 255 –

> "[149] There are fundamental deficiencies in s. 6 which render it invalid having regard to the provisions of the Constitution because it violates the debtor's constitutional guarantee of fair procedure.
>
> [150] First, on its proper construction, it confers jurisdiction on the District Court to make an order for the arrest and imprisonment of a defaulting debtor even if the debtor is not present before the court and even if the judge is not in a position to determine whether the absence of the debtor is due to a conscious decision.
>
> [151] Secondly, it confers jurisdiction to order the arrest and imprisonment of an impecunious debtor without there being in place some legislative or administrative scheme under which the District Court is empowered to make provision for the legal representation of the debtor at the expense of the State.
>
> [152] Thirdly, s. 6 is also invalid in that, while it recognises that an order for arrest and imprisonment should only issue if the default on the part of the debtor is attributable to wilful refusal or culpable neglect, it expressly puts the onus on the debtor to disprove such conduct on his part."

The third reason was a reference to s. 6(c) which placed an onus on the debtor to show to the satisfaction of the District Judge that the failure was due to neither wilful refusal nor culpable neglect.

15. At paragraph 158 of her decision Laffoy J. stated –

> "[158] Having in place an effective statutory scheme for enforcement of contractual obligations, including the payment of debt, is unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society. The means by which effectiveness is achieved may reasonably necessitate affording a creditor a remedy which entitles him or her to seek to have a debtor imprisoned, but such means will constitute an infringement of the debtor's right to personal liberty guaranteed by Article 40.4.1 unless they pass the proportionality test."

Laffoy J. then identified two respects in which s. 6 was a disproportionate interference with the right to liberty: - firstly, there was an absence of fair procedures that would allow a debtor who is unable to discharge the arrears, to avoid imprisonment. Secondly, where a debtor had some resources to meet a debt, s. 6 failed to impair the debtor's right to liberty as little as possible, leaving imprisonment as a last resort where less severe measures have been considered. In the *McCann* case the plaintiff was not guilty of deliberate or culpable failure to discharge the Instalment Order – she was simply unable to discharge the arrears.

16. As Laffoy J. found that s.6 was invalid having regard to the provisions of the Constitution, she did not find it appropriate for her to consider the further claim for a declaration of incompatibility with the Convention under s.5 of the European Convention on Human Rights Act, 2003 ("the Act of 2003") , because that section only confers jurisdiction "where no other legal remedy is adequate and available" (para. 168 of her judgment).

17. Laffoy J then noted that s.3(2) of the 2003 Act, which provides that a person who has suffered injury, loss or damage as a result of a contravention by any organ of the State of its Convention obligations, confers such entitlement only "if no other remedy in damages is available" While Ms. McCann had not expressly invoked s.3, she had expressly claimed damages for breach of her constitutional rights. Laffoy J stated:

"[169] …It is not possible at this juncture, for the purposes of the application of s.3(2) of the Act of 2003, to determine whether a remedy in damages for breach of her constitutional rights will be available to the plaintiff. Therefore, until such time as it is determined whether the plaintiff has a remedy in damages for breach of her constitutional rights, it is not necessary, and it would be inappropriate, to determine whether the making of the 2005 order was in contravention of the duty of the judge of the District Court or any other organ of the State to perform his or its functions in a manner compatible with the State's obligations under the Convention and, in particular, with article 1 of protocol no.4, which was primarily invoked on behalf of the plaintiff However, depending on the position adopted by the State parties, that may still be an issue."

In fact no further substantive hearing took place in the *McCann* case as the damages claim was settled between the plaintiff and the State parties and that issue was struck with no further order on 9 October, 2009.

These proceedings

18. Some two and a half years after the delivery of the judgment in the *McCann* case, and some four years after his imprisonment, Mr. Fulham commenced these proceedings by Plenary Summons issued on 21 December 2011, claiming "damages for breach of natural rights and Constitutional rights… for the unlawful imprisonment of the plaintiff in Mountjoy Prison in or about December 2007". He delivered a Statement of Claim on 27 January 2012. Having recited the history of District Court orders that led to his imprisonment he pleads as follows: -

"3. The plaintiff was suffering from serious health issues and was in regular contact with St. Vincent's Hospital Donnybrook, Dublin 4. When the plaintiff was released from Mountjoy Prison the plaintiff suffered severe physical and mental problems arising out of

his unlawful incarceration in prison and absent [*sic*] from his wife and children over the Festive Season in that year 2007.

4. The said first and second named Defendants have never apologised to the Plaintiff or his family for what is a fundamental breach of his Constitutional and Natural Rights.

5. The fourth and fifth named Defendants are sued in their capacity of the State and its Legal Agents of the State in carrying out the unlawful incarceration of the Plaintiff."

In the prayer Mr. Fulham claims special damages, exemplary damages and costs.

19. Mr. Fulham has at all times acted on his own behalf, and appeared unrepresented in the High Court and before this court. It is notable that in the Statement of Claim there is no pleading relating to the Convention, or the Act of 2003, and no claim for related declaratory relief or damages for breach of Convention rights.

20. Only INIL raised a Notice for Particulars, seeking *inter alia* particulars of the alleged breach of natural and fundamental rights (query no. 5), "what causes of action the Plaintiff asserts against" INIL (no. 6) and "each and every legal wrong which the Plaintiff alleges against" INIL (no. 7). In response to no. 5 Mr. Fulham replied –

"This is not a Notice for Particulars 'May I respectfully suggest that you read the judgment of Judge Mary Laffoy of the 18th June 2009'"

In response to queries 6 and 7 the reader was simply referred to Mr. Fulham's Statement of Claim.

This made it clear that Mr. Fulham's claim was prompted by and based on the *McCann* decision, and he confirms this in the affidavit which he swore on 26 September 2019 in response to the respondent's several applications to dismiss his action. In paragraph 11 of that affidavit he states –

> "I say that I make my application to this Honourable Court based on my rights as a citizen of the Republic of Ireland and also as a citizen of a country which is a signatory to a member of the Human Rights Organisation and Europe and that my claim is based upon a High Court precedent High Court Record Number 2006/4300P and by the Honourable Justice Laffoy and it is this particular case and/or determination that created a precedent insofar as it found that the imprisonment of person in respect of an alleged debt together with an instalment order was unconstitutional and a severe breach of the plaintiff's Natural Law and Constitutional Law and as such the Defendant's attitude was unconstitutional and a severe breach of the Plaintiff's Natural Rights and Constitutional Rights."

Mr. Fulham's interpretation of what was decided in *McCann* goes beyond what was in fact decided, particularly having regard to the statement of Judge Laffoy at para.158, quoted above, in which she made it clear that it is a reasonable and legitimate objective of legislation to enforce contractual obligations, including empowering a court to impose imprisonment, *provided* the legislative measure passes the test of proportionality.

21. A full defence was delivered on behalf of the State on 12 November, 2012. A full defence was delivered on behalf of Chadwicks on 5 December 2012, which also pleads that the claim is "frivolous, vexatious and/or an abuse of process". The case seems to have been dormant for some five years until Mr. Fulham served Notice of Intention to Proceed on 16 February 2017 and in due course brought a motion for judgment in default of defence against INIL. Time was extended and INIL delivered their defence on 12 June 2018. This pleads preliminary objections to the proceedings, as being frivolous or vexatious or bound to fail, as being an "impermissible collateral attack on judicial orders made in 2007 which were not appealed or challenged by the plaintiff", and that the case as pleaded discloses no stateable or maintainable cause of action against INIL.

Motions to Dismiss

22. In July, 2019 all the defendants issued Notices of Motion against Mr. Fulham seeking to have his proceedings struck out pursuant to O. 19, r. 28 as being frivolous and/or vexatious, or alternatively pursuant to the inherent jurisdiction of the court to dismiss on the basis that the proceedings disclose no reasonable cause of action, are an abuse of the process, or bound to fail. The applications are grounded on an affidavit of Nicole Dillon Solicitor sworn on 24 July 2019 on behalf of Chadwicks, an affidavit of Eileen Burke Solicitor sworn on 31 July 2019 on behalf of the State, and an affidavit of Kieran Kelly Solicitor sworn on 31 July 2019 on behalf of INIL. In response to these Mr. Fulham swore one composite affidavit on 26 September 2019. The court has considered all these affidavits, and further mention will be made of Mr. Fulham's affidavit later in this judgment, but in essence he disputes that his claims are frivolous or vexatious, and he submits that the motions themselves are vexatious and a waste of time given that defences have been delivered and a Notice of Trial served. Mr. Fulham could be forgiven for thinking that these motions were a co-ordinated approach by the three respondents, but there is nothing *per se* wrong with that even though it meant that Mr. Fulham faced three sets of counsel in the High Court and this court.

23. Mr. Fulham served a Notice of Trial on 10 July 2019, and sought a trial by judge and jury. It appears that in the High Court Mr. Fulham accepted in the course of the hearing that he had no statutory right to a jury trial, but he invited the court to find that he had such an entitlement on equitable grounds. This explains why much of the judgment in the High Court (Barton J.) addresses the right to trial by jury in civil cases, as well as dealing with the motions to dismiss.

The High Court

24. In his written judgment in the High Court delivered on 20 December 2019 Barton J. concluded firstly that as Mr. Fulham's claim was for damages for violation of constitutional rights *simpliciter*, rather than a claim for false imprisonment, he had no entitlement to a jury trial. Secondly, he found that Mr. Fulham's claims against all defendants were frivolous, vexatious and bound to fail on the

basis that at the time of Mr. Fulham's incarceration s. 6 of the 1940 Act enjoyed a presumption of constitutionality and –

> "27. … A party who chooses not to challenge but acquiesces in the alleged unlawfulness of a statutory provision on which the proceedings are grounded and that have reached finality will not afterwards be permitted to rely on a subsequent declaration of unconstitutionality and finding of invalidity to found a cause of action in damages."

In so doing the trial judge followed the principle enunciated by Murray CJ in *A. v The Governor of Arbour Hill Prison* [2006] 4 IR 88 ("the *A. Case*"), which will be discussed later in this judgment. In dismissing the action against all defendants the trial judge also ordered that Mr. Fulham pay the costs of the motions and proceedings including any reserved costs, but placed a stay on that order which, having regard to the lodgement of the appeal by Mr. Fulham, continues until the delivery of this judgment.

Notice of Appeal

25. In his Notice of Appeal Mr. Fulham raises four grounds: -

(1) The failure to allow Mr. Fulham's case to be heard in full by a judge and jury breached his constitutional rights, was contrary to common law, and natural law, and void.

(2) The trial judge breached Mr. Fulham's "rights to fair procedure and in particular his right to an audience and to be heard in full", and in hearing the respondents in full and "as a team".

(3) "The learned Justice erred in law and fair play and procedure in allowing the matter before him be interrupted on three separate occasions in order to allow the honourable Justice Eager to hear separate matters before the Court as the Courtroom just happened

to be double booked through a clerical error. These interruptions occurred both in the morning session and again in the afternoon, the Applicant strenuously objected to the matter proceeding in this manner as these interruptions would cause serious confusion to the Applicant in making his submissions to the Court, however on the request of all the respondents together the Honourable Justice proceeded with the motions before the Court together with the interruptions leaving the Applicant in a severe disadvantageous position in attempting to respond to the Respondent's applications and in the deliverance of his submissions to the Court."

(4) The trial judge erred in not taking into account "the seriousness of the Applicant's case" in terms of his detention in prison for seven days over the festive season and being kept away from his family, in circumstances which were found to be unconstitutional in the *McCann* case.

Mr. Fulham then sets out certain "legal principles" in reference to Constitutional rights and fair procedures, and cites Articles 40.1°, 40.3.1°and 40.3.2 of the Constitution. In para. 4 of the Notice, in which an appellant is required to set out the "Order(s) sought", Mr. Fulham mentions Art. 13 of the European Convention on Human Rights and says "the Applicant requests on a point of law that the Court of Appeal refers the matter on to the European Court of Human Rights under Article 13".

26. It is not necessary to refer to the respondents' Notices other than to mention that the State's Notice traverses Mr. Fulham's Grounds, and asserts that his fair procedures points are unfounded and without merit, and that at no point before the High Court did Mr. Fulham maintain that the manner in which the proceedings were heard was oppressive or unfair to him or conducted in a disorganised or interrupted fashion, and that "Mr. Justice Barton actually enquired of the Appellant whether he felt he had been afforded all opportunities to make his case, and he answered that he had".

The DAR motion, and fair procedures

27. Mr. Fulham issued his own Notice of Motion before this court on 14 December 2020 "seeking a copy of the 'DAR' [digital audio recording] transcript of the High Court hearing of the above matter by the Honourable Justice Barton which was held on the 14 October 2019…". This was supported by an affidavit which he swore on 14 December 2020 indicating that he had attended a call over in this court on Friday 11 December 2020 at which he requested from this court (Costello J.) a copy of the DAR and said that he would pay for the costs of the transcript. Unfortunately however Mr. Fulham had not taken up the transcript when this matter came on for hearing before this court on 18 January 2021. Mr. Fulham explained that he was unable to pay the deposit, but that he did intend to rely on the transcript.

28. It transpired that the appeal had been listed for directions before Costello J. on some three occasions during Michaelmas Term 2020 – on the first Friday in October, on 11 December 2020 and on 18 December 2020. It was not disputed that Costello J. made it clear to Mr. Fulham that he was entitled to take up the DAR, but equally made it clear to him on both 11 and 18 December that the date fixed for hearing this appeal would not be changed. Further, on 11 December Costello J extended the time for Mr. Fulham to lodge his written submissions, which by that stage were a number of weeks late. It also emerged that financial resources were not an issue raised by Mr. Fulham in December 2020.

29. Mr. Fulham furnished the Court with a Transcription Request Form of *Epiq Global*, a firm that produces transcripts of court hearings. This provides an estimate for the relevant transcript of €472.50 plus VAT, with a deposit requirement of €571.72 for the "Standard Turnaround". The requirement of such a large deposit had come as a surprise to Mr. Fulham.

30. Interestingly, this document also indicates that the case start/finish times in respect of the hearing in the High Court on 14 October 2019 were as follows: -

> "11:01 – 11:06; 11:16 – 11:17; 12:04 – 13:15; 14:32 – 14:55."

From this it is apparent that in the High Court before Barton J. the case was heard initially for a five minute period, then for a one minute period at 11:16, and then for an uninterrupted period of over an hour from midday until 13:15 when presumably the court broke for lunch. The case was then resumed at 14:32 and ran on for another approximately 30 minutes before it was completed. From this it may be inferred that there were brief mentions early on, but that the motions did not start in earnest until around midday, and continued, with only an extended lunchbreak, without further interruption until 14:55. What is more, Mr. Fulham would have had the benefit of the extended lunchbreak in which to reassemble his thoughts and his papers in preparation for the afternoon session. Mr. Fulham also did not dispute that the trial judge enquired of him whether he felt he had been afforded all opportunities to make his case, and that he answered that he had. In these circumstances this court was not prepared to grant Mr. Fulham an adjournment to allow him, over an unspecified period, to arrange the finance necessary to take up the DAR. He had, in the court's view, ample opportunity to do this in advance of the hearing, and he was at all times well aware that the date fixed for hearing of the appeal would not change. The court was also influenced in this by the hearing timeline indicated by the Transcription Request Form.

The court therefore ruled against any adjournment, and in the circumstances, in the absence of a Transcript, there was no evidential basis upon which Mr. Fulham could pursue his objections to the effect that he was not afforded fair procedures in the High Court. It is also worth pointing that the trial judge reserved judgment, and in his written judgment he sets out the facts clearly, and records the position taken by Mr. Fulham (paragraph 5), and his submissions (paragraph 6), and in paragraph

29 the trial judge refers to Mr. Fulham's "undoubted sense of injustice" in a manner that suggests that Mr. Fulham's response to the motions was fully and carefully considered by the trial judge.

31. Mr Fulham lodged written submissions dated 4 January 2021, and these were read and considered by this Court, and indeed were fully opened to the Court by Mr. Fulham in his oral submissions. To the extent that they relate to Mr. Fulham's complaints about fair procedures in the High Court, and as I have stated earlier, there was no evidence before the court that would support them, particularly in the absence of the Transcript, and in my view that aspect of his appeal must be rejected. Apart from that the Submissions repeat his Grounds of Appeal, rely on the decision of Laffoy J. in the *McCann* case and further allege that his rights as a European citizen were breached under Art. 13 of the Convention. He submitted that the State parties "allowed themselves to be used as debt collectors for private companies and punished the Appellant with criminal sanctions." He concludes his written submission with the following –

> "If it is the Court of Appeal [sic] decision to dismiss the appellant's appeal then I would plead with the Court to state my case on to the European Court of Human Rights under Article 13."

Unfortunately Mr. Fulham did not address the decision in the *A. Case*, which was relied on by the respondents in the High Court and in their written and oral submissions to this court, in his written or oral submissions.

32. I delivered an *ex tempore* decision on 18 January 2021 giving the decision of the court to dismiss Mr. Fulham's appeal so far as the respondents Chadwicks and INIL were concerned. It is clear that both those entities in obtaining judgment in the courts, in obtaining instalment orders in the District Court and in obtaining committal orders which in due course led to Mr Fulham's incarceration, were acting at all times within the law. Mr. Fulham was not able to point to any tort or other legal wrong

on the part of Chadwicks or INIL. Insofar as Mr. Fulham pleaded that Chadwicks or INIL breached his constitutional rights, it was clear that Mr. Fulham could not succeed against them on that ground. The Committal Orders were made *bona fide* by properly constituted District Courts pursuant to s. 6 of the Enforcement of Court Orders Act, 1940 in the course of the administration of justice, and neither of the respondents engaged in any wrongful act or omission in applying for committal orders, or in seeking the enforcement of the orders by lodging them with An Garda Síochána for execution. Nor was there any pleaded or other claim that Chadwicks or INIL acted in deliberate or conscious violation of Mr. Fulham's constitutional rights. Accordingly the court affirmed the decision of the High Court in relation to Chadwicks and INIL insofar as that ordered that the proceedings against them be struck out as being frivolous and vexatious and disclosing no cause of action and being bound to fail.

The appeal in respect of the State

33. The key submission of the State is that the finding of unconstitutionality in *McCann* cannot retrospectively render the imprisonment of Mr. Fulham unlawful or retrospectively give rise to an infringement of his constitutional rights or a right to damages.

34. The State relies on the decision in *A. v The Governor of Arbour Hill Prison* [2006] IESC 45. In that case the applicant was convicted in the Circuit Criminal Court on 15 June 2004 on a plea of guilty of unlawful carnal knowledge of a child contrary to S. 1(1) of the Criminal Law Amendment Act, 1935 and was subsequently sentenced to three years imprisonment. It was common case that the indictment on foot of which the applicant was charged was a one-count indictment. He contended that his detention was unlawful on the basis that on the 23 May 2006 the Supreme Court in *C.C. v Ireland* [2006] IESC 33 declared s.1(1) to be inconsistent with the Constitution (because it did not allow for a defence that an accused person was honestly mistaken as to the age of the child). Accordingly the applicant sought release from custody pursuant to Art. 40.4.1° of the Constitution.

35. It will be noted that the applicant confined his case to contending that his detention was unlawful because s.1(1) of the 1935 Act was inconsistent with the Constitution He did not argue that his conviction and detention were incompatible with the Convention.

36. In the High Court Laffoy J. granted the application and ordered the applicant's release from detention, finding that since the Supreme Court had struck down the pre-1937 statutory enactment in its entirety it ceased to have legislative existence in 1937, and therefore the offence with which the applicant was charged did not exist in law when he was charged and when he was purportedly convicted and sentenced.

37. The Supreme Court allowed the appeal and ordered the re-arrest of the applicant. In a seminal decision the court held that there was neither an express nor an implied principle of retrospective application of unconstitutionality in the Constitution. It was not a principle of constitutional law that cases which had been finally and decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and of no effect. On the contrary, once finality had been reached and the parties had in each case exhausted their actual or potential remedies, the judicial decisions in their cases must be deemed valid and lawful. Murray CJ held: -

> "35. The common law has never conceived as consistent with any ordered administration of justice that previously decided and finally determined cases could necessarily be set aside or reopened in the light of a new precedent notwithstanding the historical view of the common law, expressed by Blackstone in his Commentaries, that Judges *"discover"* the law as it truly is and that overruled precedents were misrepresentations of the law and were never law. *"For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law"* (Blackstone's Commentaries 1, 69). In modern constitutional systems we have moved on from that perception of the law, at least in its purest form, but even when viewed through Blackstone's prism the common law did not

envisage absolute retroactivity of judicial decisions and did not permit previous cases, even though finally determined on principles that were "never law" to be reopened. As Judge Richard Posner, writing ex-judicially, observed, *'Pure retroactivity is rare' (The Problems of Jurisprudence*, 1993).

36. Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position**.**

37. Only a narrow approach based on absolute and abstract formalism could suggest that all previous cases should be capable of being reopened or relitigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a court of appeal should be set aside or, where possible, retried in the light of subsequent decisions where such subsequent decision could be claimed to provide a potential advantage to a party in such a retrial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could

have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.

38. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

Quoting with approval Henchy J. in *Murphy v The Attorney General* [1982] IR 241 at p. 314, Murray CJ continued at para. 40: -

"40. The law is too old and too wise to be applied according to a rigid abstract logic or a beguiling symmetry. As Henchy J. pointed out above for centuries the law has known general principles and transcendent considerations, such as the public interest, which is another way of saying the common good, restricting retrospectivity, especially the setting aside of judicial decisions already finally decided, even though the law on which they are founded is later held to be invalid.

41. It has never been held, and as far as I am aware never been argued the matter might well be considered beyond argument, that the common law rule that judicial decisions do not retrospectively apply to cases already decided is in any way inconsistent with the Constitution."

38. Although the *A Case* concerned a criminal conviction, in these passages Murray CJ does not differentiate between judicial decisions on the criminal side *i.e.* convictions leading to imprisonment or other penalties on foot of legislation subsequently found to be invalid, and judicial decisions on the civil side, including decisions resulting in imprisonment such as the procedure in issue in the present case. Later in his judgment Murray CJ sets out the following principles: -

"114. It follows from the principles and considerations set out in the cases, which I have cited, that final decisions in judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon by parties because of its status as a law considered or presumed to be constitutional, should not be set aside by reason *solely* of a subsequent decision declaring the Act constitutionally invalid. [underlining added]

115. The parties have been before the courts. They have, in accordance with due process, had their opportunity to rely on the law and the Constitution and the matter has been decided. Once finality has been reached and the parties have in the context of each case exhausted their actual potential remedies the judicial decision must be deemed valid and lawful.

116. Save in exceptional circumstances, any other approach would render the Constitution dysfunctional and ignore that it contains a complete set of rules and principles designed to ensure 'an ordered society under the rule of law' in the words of O'Flaherty J.

117. I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the *ab initio* principle to the exclusion of all others."

39. Murray C.J. refrains from indicating what might amount to "exceptional circumstances" that might result in a departure from the general principle, instead stating:

"119. As I have made clear we are addressing here the question of absolute or automatic retrospectivity on previously decided cases since that is the essential premise of the applicant's argument. If one is to qualify such retrospective effect it goes without saying that it must be done in a manner and to an extent which is consistent with constitutional justice including the

fundamental rights of individuals. There is no doubt that where to draw the line in limiting retrospective effect is a difficult question for the courts. One will not find a simple formula for all circumstances or all classes of cases, even in those countries such as those which I have mentioned, which make express provision for limiting retrospectivity or in other words the temporal effects of judgments. It is a complex question often resolved on a case by case basis, as has been also pointed out in a number of the cases of this court which have been referred to."

40. As can be seen from paragraph 114 the Chief Justice expressly extends these principles to civil as well as criminal cases. Further emphasising his reasoning, in his Conclusion at para. 123 the Chief Justice stated –

"122. In light of the considerations outlined above, the judgments and *dicta* of this court to which I have referred, I am satisfied that the Constitution permits, if not requires, a distinction to be made between a declaration of invalidity of an Act and the retrospective effects of such a declaration on previous and finally decided cases.

123. There are transcendent constitutional reasons why a declaration of constitutional invalidity as regards a Statute should not in principle have retrospective effect so as necessarily to render void cases previously and finally decided and determined by the courts, which reasons include the interests of the common good in an ordered society, legal certainty and the need to avoid the incoherence and injustice which would be brought to the system of justice envisaged by the Constitution if the approach argued for were adopted."

41. Murray C.J. was the only member of the court to touch, briefly it must be said, on the question whether this principle of non-retrospective effect would breach the Convention. He refers to the decision of the European Court of Human Rights in *Marckx —v- Belgium* [1979] 2 EHRR 330 para.

58, a case which condemned a Belgian law because it wrongly deprived children born out of wedlock of inheritance rights, in which the European Court of Human Rights stated, at p.353:

> "The European Court of Human Rights interprets the Convention in the light of present-day conditions but it is not unaware that differences of treatment between 'illegitimate' and 'legitimate' children, for example in the matter of patrimonial rights, were for many years regarded as permissible and normal in a large number of Contracting States (see *mutatis mutandis*, para. 41 above). Evolution towards equality has been slow and reliance on the Convention to accelerate this evolution was apparently contemplated at a rather late stage. …Having regard to all these circumstances, the principle of legal certainty, which is necessarily inherent in the law of the Convention as in Community Law, dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment. Moreover, a similar solution is found in certain Contracting States having a constitutional court: their public law limits the retroactive effect of those decisions of that court that annul legislation."

42. Murray C.J. observed at page 121. –

> "Even though the European Court of Human Rights condemned the Belgian law because it breached the fundamental rights of Alexandra Marckx because of a restriction on her inheritance rights as a child born outside of wedlock, it found it not only acceptable but necessary to limit the retrospective effect of its decision in the interests of a fair and coherent administration of justice rather than permit it to be distorted by the abstract concept of absolute retrospectivity. In doing so it followed the norms of constitutional adjudication in other European countries."

43. The decision in *Marckx* was made in a certain context, of inheritance rights and the 'evolution towards equality' in the late 1970's, that is quite different to Mr. Fulham's claim arising out of imprisonment for failure to pay debt. The observation of Murray C.J. was *obiter* and there was no finding, as such, by the Supreme Court, that the principle of non-retrospective effect would not, or could never, breach fundamental rights protected by the Convention. This is not an issue that was raised by Mr. Fulham or argued before this court and in my view is an issues that remains to be considered more fully in an appropriate case .

44. The other judges of the court in the *A Case* broadly agreed with the judgment of Murray C.J. In his judgment Hardiman J. reviewed earlier cases on the effect of a declaration of constitutional inconsistency or invalidity of a statute, and quoted extensively from the judgment of Henchy J. in *Murphy v. The Attorney General* [1982] I.R. 24, approving *inter alia* the following passage at page 321:

> "In other words, it has been found that considerations of economic necessity, practical convenience, public policy, the equity of the case and such like matters may require that force and effect be given in certain cases to transactions carried out under the void statute"

And in support for the proposition that the court should not attempt lay down a rigid general rule as to what proceedings under an invalid statute will be given force and effect, Hardiman J quoted Henchy J. at p.315:

> "In this judgment I deliberately avoid any general consideration of the broad question as to when, and to what extent, acts done on foot of an unconstitutional law may be immune from suit in the Courts; for any conclusion I might express would in the main be *obiter*. In any event, I think experience has shown that such constitutional problems are best brought to

solution, step by step, precedent by precedent, and when set against the concrete facts of a specific case".

In a section headed *'Piggybacking'* Hardiman J. notes that counsel for A. "was unable to point to any instance of the successful invocation of a declaration [of invalidity] based on a *jus tertii* with regard to a past or closed legal dealing, process or transaction" (paragraph 244). He went to observe –

> "246. The discussion just concluded coercively demonstrates that a relief, including relief under Article 40.4.2° in relation to acts done under or in consequence of an unconstitutional statute, may be resisted on grounds arising from 'the concrete facts of a specific case'. These facts may exhibit one or other of the grounds on which relief has been refused in the cases to date, described in the reports as (*inter alia*) preclusion, estoppel, acquiescence, delay, public policy, equity, impracticability and the impermissibility of a *volte face* by a litigant, all of which (perhaps with more) might also be described as abuse of process.
>
> 247. All of these things are widely recognised in the general law as factors which may prevent success in litigation or may even affect a person's ability to pursue a claim for legal redress….
>
> …
>
> 250. Accordingly each of the factors enumerated may, in an appropriate case, be central in the protection of the rights of others, or of the community as a whole, as well as those of the applicant. To put this another way, they may in an appropriate case be central to the achievement of the common good and of that justice and true social order prominently mentioned in the Preamble to the Constitution, relied upon by counsel for the respondent in his argument on this appeal. Whether this is so in the case of this applicant is the subject of the next section of this judgment."

45. In his judgment Geoghegan J. at para. 291 states –

> "In conclusion, I am of the view that concluded proceedings whether they be criminal *or civil*, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened. As I have already indicated, I am prepared to accept that there may possibly be exceptions. But in general it cannot be done. Nor as Murray CJ and Hardiman J. have pointed out is there any precedent for a collateral challenge of this kind. I am also firmly of the opinion that if the law were otherwise there would be a grave danger that judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which in the view of Walsh J. and endorsed by O'Higgins CJ should not happen." [Emphasis added]

Again, as can be seen Geoghegan J. was at pains to extend the general principle against retrospective effect to civil, as well as criminal proceedings.

Discussion

46. Mr. Fulham has not pleaded or pointed to anything that could be regarded as "exceptional circumstances". In his written and oral submissions he did not point to any circumstance that would take his case outside of the general principle enunciated in the *A. case*. He did not raise any argument as to why the general principle against retrospective effect should not apply to his claim. He does not, for instance, attempt to suggest that at the time he was incarcerated the State was aware of the procedural frailties later found by Laffoy J. to exist in the application of s. 6, or that the State consciously or deliberately having such knowledge allowed the first and second named respondents to invoke that section and obtain Committal Orders. Nor does he raise any argument based around his pleaded claim of "fundamental breach of his Constitutional and Natural Rights."

47. In truth Mr. Fulham did not address any arguments to the principles enunciated in the *A case,* and the fact that he was unrepresented and does not possess the skills of a lawyer or advocate did not help his cause. That being said, there are limits to the extent to which the court can of its own motion raise arguments on behalf of a lay litigant, not least because fair procedures require advance notice of arguments so as to afford a real right of reply to the opposing party.

48. There can be no doubt but that in his pleaded claim Mr. Fulham seeks to reopen the validity of judicial decisions made under a statutory provision which at the time enjoyed a presumption of constitutionality, and that he does so solely on the basis of the subsequent decision in *McCann* declaring s.6 unconstitutional. That attempt at retrospective application is the sort of 'piggybacking' that Hardiman J. in the *A. case* considered would be impermissible.

49. Also of importance is Mr. Fulham's choice to do nothing before or at the time of his incarceration. He could have appealed the committal orders; he could have challenged their validity, or the constitutionality of s.6; but he did not avail of any of these opportunities. Some two years lapsed after the *McCann* decision (and four years after his imprisonment) before he commenced these proceedings, seeking, as they do, to unravel at least two decisions of the District Court. As the trial judge commented in paragraph 30 –

> "…any system of law would be rendered at least less effective and at worst chaotic by legal uncertainty if it was constantly beset by the retrospective setting aside of decisions in concluded litigation, intended to be final, by reason of a declaration or finding of invalidity in subsequent proceedings."

50. In conclusion on this issue, in my view the trial judge was correct to find in paragraph 27 of his judgment that he was bound by the principles set out in the *A. case,* and to find that the declaration of unconstitutionality in *McCann* did not have retrospective effect upon which Mr. Fulham could

rely, and that Mr. Fulham's claim for damages for breach of constitutional or natural rights is 'frivolous and vexatious' (in the legal sense of that term) and discloses no cause of action/is bound to fail. Just as the *A. case* was binding on the trial judge, so it is binding on this court.

Article 13 of the European Convention on Human Rights

51. For completeness I address this briefly because, although not mentioned in his Statement of Claim, in his Notice of Appeal Mr. Fulham refers to Article 13 of the European Convention on Human Rights and states "the Applicant requests on a point of law that the Court of Appeal refers the matter on to the European Court of Human Rights under Article 13". In his written submission he also refers a number of times to breach of his rights under Article 13, and requests this Court to state a case to the European Court of Human Rights.

52. Article 13 is headed "Right to an effective remedy" and reads: -

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

53. Mr. Fulham's invocation of Article 13 is misconceived, because the question whether a person is deprived of an effective remedy does not fall to be considered in the abstract; it can only arise in the context of identified violation of 'rights or freedoms' enshrined in the Convention. No breach of Convention rights or freedoms is pleaded by Mr. Fulham. His request for a reference to the European Court of Human Rights is also misconceived as no jurisdiction to make such a reference to that court is vested in the High Court or in this court.

54. It is in any event difficult to see how it could be said that domestic law did not afford him an effective remedy within the meaning of Article 13. Section 6 as it stood at the time did afford him

an opportunity to contest the instalment orders and the application for committal orders, and he also had a right of appeal to the Circuit Court. While s.6 was found to be invalid under the Constitution the question of whether it might nevertheless have been a process with sufficient safeguards to constitute an "effective remedy" for an impecunious debtor for the purposes of Article 13 has never been decided. Most obviously it would also have been open to him to have brought proceedings in the High Court, similar to those brought by Mrs. McCann, seeking to challenge the validity of the District Court orders and the constitutionality of s.6, or indeed seeking an order of *habeas corpus* under Art. 40 of the Constitution, before or during such incarceration. Further as mentioned later in this judgment a claim for damages could have been pleaded under s.3 of the Act of 2003.

Amendment

55. While Mr. Fulham's claim as pleaded in his Statement of Claim does not disclose any cause of action/is bound to fail, it remains to be considered whether it admits of some amendment that might allow his case to continue, such as an amendment to plead a claim to damages pursuant to s.3 of the European Convention on Human Rights Act, 2003. The jurisdiction to amend in these circumstances was recognised by McCarthy J. in *Sun Fat Chan v Osseous Limited* [1992] 1 IR 425 where he stated –

> "By way of qualification of the jurisdiction to dismiss an action at the Statement of Claim stage, I incline to the view that if the Statement of Claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed." (page 428)

That case concerned a specific performance action in respect of an agreement for the sale of land which was subject to the purchaser obtaining full planning permission within six months. The

permission not having been obtained the defendant applied to the High Court for an order dismissing the action under the inherent jurisdiction of the court. The plaintiff argued that the vendor encouraged, assisted or did not hinder the purchaser's efforts to obtain planning approval *after* the six-month period had elapsed, and that an estoppel arose. McCarthy J. rejected this argument, considering that it was based effectively on an implied term in the contract which he concluded could not have arisen on the contract before him. This was not therefore a case in which the court permitted an amendment.

56. The Supreme Court returned to this theme in *Lawlor v Ross* [2001] IESC 110, an application to dismiss proceedings which concerned a claim that a binding contract for the sale of land had been concluded. Overturning the decision in the High Court, the Supreme Court decided that the proceedings should be dismissed. Fennelly J. considered that "the plaintiff's claim in the current case is so deeply flawed that it cannot succeed" on the basis that "an integral part of the agreement of 5th March, 1997 was that how the entire joint venture was to be financed was left over for discussion at a later date". He held that the parties remained in negotiations so long as they had not agreed finance, and there was no concluded contract. At paragraph 38 he commented: -

> "It is also clear, and I accept, that the Court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case. Furthermore, it may be difficult to succeed on such a motion based only on the absence of a note or memorandum which satisfies the requirements of the Statute of Frauds. Something may be found on discovery. It is different where, as in *Barry v Buckley,* there is a note but it is headed *'subject to contract.* "'

However, as in *Sun Fat Chan,* the court did not in fact use this jurisdiction to amend to "save the action".

57. These two decisions were cited with approval Clarke J. (as he then was) in *Moffitt v Agricultural Credit Corporation plc* [2007] IEHC 245, where he stated:

> "3.1 … It is well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success. (See the judgments of McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and Fennelly J. in *Lawlor v. Ross* (Unreported, Supreme Court, Fennelly J., 22nd November, 2001 at p. 10)."

In that case the ACC had brought the proceedings in the Circuit Court against Mr. Moffitt and obtained judgment, and subsequently a well-charging order and order for sale against his lands. Mr. Moffitt, initially as a lay litigant, then brought proceedings in the High Court alleging that the order for sale of his lands was statute barred and void. In response to that claim ACC as defendant brought a motion to dismiss his claim. Clarke J. found that *as currently pleaded* the issues in the proceedings were *res judicata,* but that the plaintiff had "articulated a number of arguments concerning the validity or effect of the well charging order and order for sale which, it has to be said, do not arise from the pleadings as currently constituted." These issues while not *res judicata* were closely related to the issues raised in the other proceedings. Clarke J stated that if Mr. Moffitt had had the benefit of legal advice at the time of those proceedings he would have had no hesitation in determining that the attempt to raise them in the proceedings before him would have been an abuse of the process, under the principle in *Henderson v Henderson* (1843) 3 Hare 100. However he went on to consider the intention expressed by the plaintiff's lawyers to apply for an amendment to litigate these new but related issues. He considered some latitude should be allowed to Mr. Moffitt, and was influenced by the fact that these were "pure issues of law". Clarke J concluded:

> "4.12 In all of those circumstances I have come to the view that the sort of special circumstances identified by Hardiman J. in *A.A.* exist in this case and that it is appropriate to allow some latitude to Mr. Moffitt. However it is clear that the proceedings as presently constituted cannot continue. It is also clear that the issues concerning the original orders of the Circuit Court cannot be permitted to be litigated. The only two issues which, in my view, are not caught by the *res judicata* doctrine are the two issues which I have just identified. As those issues are pure issues of law I am minded to direct that they be tried as a preliminary issue of law on the basis of agreed facts."

58. More recently, in *Daragh v Daragh* [2018] IEHC 427 McDonald J. in summarising the strike out jurisdiction refers to *Chan v Osseous Ltd* and *Lopes v Minister Justice* [2014] 2 IR 301, and referring to the possibility that a claim might be saved by amendment, stated (at paragraph 36):

> "…I would add that, in my view, if this principle is to be applied in any particular case, an intimation would have to be given by the plaintiff or his legal representatives that the plaintiff proposes to amend the claim."

59. This caselaw gives little guidance as to the principles that should apply to the exercise of the jurisdiction to permit an amendment to 'save the action' or whether they differ in any significant way from the principles to be applied in 'ordinary' cases where parties seek to amend the pleadings. It does however suggest that the claimant or his/her lawyers will usually be required to intimate an intention to amend, and at least the general nature of the amendment suggested, in response to the motion to dismiss..

Discussion

60. It must be emphasised at the outset that neither in the High Court nor in this court did Mr. Fulham ever seek an amendment to his Statement of Claim, and still less did he suggest what form

this might take. He also did not intimate any intention to apply for an amendment. Moreover, the possibility of an amendment to 'save the action' was not raised or addressed (not surprisingly) by counsel for the State in their written or oral submissions[2], and only arose briefly on questioning from the court.

61. This meant that there was no legal argument in relation to the principles that should be applied to the exercise of the jurisdiction to consider an amendment to 'save the action' in dismissal motions, and no caselaw was opened to the court. In particular the court was not addressed on the limits of such a jurisdiction, and whether the court may contemplate an amendment that pleads an entirely new cause of action. Nor was the court asked to consider amending in circumstances where a newly pleaded action, even if based on facts already pleaded, would be *prima facie* statute barred. I make these comments because a claim of breach of Convention rights would be both a newly pleaded action and *prima facie* statute barred.

62. A claim pursuant to s.3 of the 2003 Act must be brought within one year of the contravention, although this period may be extended by the Court "in the interests of justice" (s.3(5)). The possibility also exists, under s.3A[3], to bring an action in the Circuit Court for compensation, limited to the jurisdiction of that court, for being "unlawfully deprived of his or her liberty as a result of a judicial act". A s.3A claim must be brought within one year of a finding of unlawful deprivation of liberty by the High Court, Court of Appeal or Supreme Court (again this time bar be extended by the Circuit Court "in the interests of justice" (s.3A(5)).

63. In *McCann*, the plaintiff explicitly pleaded claims under the 2003 Act, referencing specific Articles of the Convention (Articles 5,6,7 together with article 1 of Protocol 4). No such claim is

[2] It was mentioned briefly in paragraph 36 of INIL's written submission where it was observed that "The claim is so fundamentally misconceived that it is incapable of being put right by way of amendment." It was not mentioned at all in the State's written submissions.
[3] Inserted after s.3 of the 2003 Act by s.54 of the Irish Human Rights and Equality Commission Act, 2014.

before the court in these proceedings, and none was ever intimated by Mr. Fulham. Further, such a claim would be *prima facie* statute barred one year after Mr. Fulham's imprisonment – and would have been three years barred by the time Mr. Fulham commenced these proceedings. Accordingly at the outset it would necessitate an application by Mr. Fulham to extend time under s.3(5). Although there was one medical report exhibited by Mr. Fulham, in truth there was no evidence before us which could be said to constitute a possible basis for an extension of time. This reinforces my view that this is not an occasion when this court should contemplate exercising its jurisdiction to amend the pleadings to allow a possible claim to proceed.

64. As for a s.3A claim, this could only be initiated in the Circuit Court after a finding by a superior court of unlawful deprivation of liberty – of which there is none to date - and again at the outset an extension of time would be required. It could not therefore be a matter for this court at all, even if an amendment of the pleadings were being contemplated.

65. For all of the reasons set out above, I am of the view that this is not an appeal in which this court should, of its own motion, attempt to rescue Mr. Fulham's action by contemplating or permitting an amendment to the pleadings. The question when and in what circumstances this may be done is a topic that requires full argument and consideration in an appropriate future case.

66. Finally, as I have concluded that the trial judge was correct in law to dismiss Mr. Fulham's claim for failing to disclose a cause of action/on the basis that his claim is bound to fail, it is not necessary for this court to consider the comprehensive discourse by the trial judge in relation to the right to a trial by jury, and his conclusion that Mr. Fulham had no such right even if his case could be pursued.

67. I would therefore also dismiss this appeal as against the State.

Costs

68. In the High Court the trial judge awarded the respondents their costs. This court has already awarded Chadwicks and INIL their costs of this appeal, with a stay until the determination of the balance of the appeal in this reserved judgment.

69. As this appeal was also wholly unsuccessful as against the State, it follows that the High Court order in relation to costs should not be disturbed, and the State is entitled to its costs of the appeal. I would propose to so order unless Mr. Fulham within 14 days from the delivery of this judgment indicates by email or otherwise in writing to the Office of the Court of Appeal that he wishes to contend for some other order as to costs. If he does so indicate, this court will schedule a short costs hearing, but Mr. Fulham should be aware that in the event that his contentions are unsuccessful he may be ordered to pay in addition the costs of that costs hearing.

70. Ní Raifeartaigh and Collins JJ having read this judgment have indicated that they are in agreement with it and the proposed orders.