[2019] IEHC 782

THE HIGH COURT

[2015 No. 1675 P.]

BETWEEN

MICHAEL O'CALLAGHAN

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 14th day of March 2019

1. The plaintiff's claim is that the defendants are liable to him in damages for miscarriage of justice and/or in the alternative for breach of his constitutional rights and/or breach of his rights under the European Convention on Human Rights ("the Convention").

Background

2. The plaintiff was prosecuted in Cork Circuit Court in respect of offences arising out of the robbery of a post office in Cork City on 26th March, 2009. He was arrested on 14th April, 2009 and charged with robbery on the following day. He was brought before Cork District Court on 16th April, 2009 and was remanded in custody. On 11th June, 2009, he was further charged with a firearms offence. The book of evidence was served on 16th June, 2009. The plaintiff was arraigned on 8th February, 2011 and pleaded not guilty. His trial ran in Cork Circuit Court before a judge and jury between 8th and 15th February, 2011.

3. There were three principal strands of evidence against the plaintiff which were adduced in evidence before the jury:

   (a) Eye witness evidence of a Mr. B.G. who had given a statement to gardaí that he saw one of the raiders take off his balaclava and throw it into the canal. This witness did not give clear evidence as to his recollection of events on the date of the robbery. Upon application to the trial judge, his statement was admitted under s. 16 of the Criminal Justice Act, 2006.

   (b) Statements of the plaintiff, in particular his failure to tell gardaí that he had visited the post office earlier on the date of the robbery.

   (c) DNA evidence relating to the balaclava that was found at the canal. This DNA evidence connected the plaintiff to the balaclava (although it also connected two other persons to the balaclava).

4. At the close of the prosecution case, the plaintiff applied for a directed acquittal on the basis that he had no case to answer. The trial judge refused to direct an acquittal. The matter was left to the jury. On 15th February, 2011, the plaintiff was convicted. He was duly sentenced to ten years' imprisonment.

5. On 18th February, 2011, the plaintiff filed a notice of appeal against his conviction and filed his grounds of appeal on 24th February, 2011. The Court of Criminal Appeal requisitioned the trial transcript on 9th March, 2011 and it was received on 30th March, 2011. It was approved by the trial judge on 7th April, 2011. It was furnished to the plaintiff's solicitors on 26th April, 2011. On 4th July, 2011, the plaintiff's solicitors lodged a motion to amend the grounds of appeal. This motion came too late for the matter to

appear in the court's case management list and so was adjourned to the 28th November, 2011 case management list.

6. On 28th November, 2011, the plaintiff amended his grounds of appeal by consent, with the leave of the Court of Criminal Appeal. The plaintiff's appeal submissions were filed on the same date. This was the trigger for the matter to get into the Court of Criminal Appeal's list to fix dates.

7. The appeal duly appeared in the list to fix dates on 5th December, 2011. On that date it was fourteenth in the list of conviction appeals of which three appeals got hearing dates. In the March 2012 list, the plaintiff's appeal was listed eleventh. No case in the list received a hearing date on that occasion. At the next list to fix dates on 14th May, 2012, the appeal was again listed eleventh in the list of conviction appeals of which one was given a hearing date. In the list for 16th July, 2012, the plaintiff's appeal was tenth on the list. No case in the list got a hearing date on that occasion. By the next list to fix dates on 17th December, 2012, the appeal was sixth of the conviction cases of which four received dates for hearing. On 11th March, 2013, the appeal was fifth in the list and it secured a hearing for 18th April, 2013.

8. The appeal was duly heard by the Court of Criminal Appeal on 18th April, 2013 and judgment was reserved. Judgment was delivered on 31st July, 2013 and it was ordered that the conviction be quashed on the ground that the case should not have been allowed to go to the jury based on the evidence. The judgment of the Court was delivered by Murray J. who found as follows:

> *"41. ...the Court is satisfied that there was no evidence on which a jury properly directed could rationally find beyond reasonable doubt that one of those persons rather than another was the person who was wearing [the balaclava] at the time of the robbery.*
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> *42. In the course of his submissions to the trial judge that the case should not be allowed to go to the jury counsel for the defence submitted that there was not sufficient evidence to satisfy any properly directed jury to reach a conclusion beyond reasonable doubt that the person whose cells were found on the garment was the person who wore the garment during the commission of the offence. It is true that tis submission was a detail among many other submissions made in relation to the evidence.*
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> *43. For the reasons stated above, the Court is satisfied that there was not a sufficient evidential basis from which a jury, properly directed, even if they accepted the evidence before it, could conclude beyond reasonable doubt that the applicant rather than any of the other, unnamed, persons who had been in contact with the balaclava material committed the offence.*
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> *44. As already explained, the other evidence was not a basis upon which a jury could link or identify the applicant as a person who committed the offence. Insofar as any*

inferences could be drawn from any of that evidence it was certainly too tenuous a basis for concluding that the applicant was one of the persons who committed the offences.

45. For these reasons the Court is of the view that the case should not have been allowed to go to the jury on the basis of the evidence, in particular the evidence, and therefore that the verdict for the jury should be considered unsafe and set aside."

9. The Court of Criminal Appeal did not direct a retrial.

10. At the time of his arrest in 2009, proceedings were pending against the plaintiff in respect of an unrelated matter. He was sentenced to three years' imprisonment in relation to this unrelated matter on 19th June, 2009. He appealed that sentence. On 10th May, 2010 the sentence was affirmed by the Court of Criminal Appeal but backdated to 7th May, 2009. That sentence concluded on 7th August, 2011. There was thus an overlap of over five months between the period the plaintiff spent in custody in relation to the unrelated matter and the period spent in custody by reason of his conviction and sentence following the trial in February, 2011. By the time of his release by the Court of Criminal Appeal on 31st July, 2013, the plaintiff had spent 23 months, three weeks and three days in custody in respect of the conviction quashed by the Court of Criminal Appeal on 31st July, 2013, inclusive of the five-month overlap referred to above.

11. The within proceedings issued on 27th February, 2015.

12. The plaintiff seeks damages on three grounds:

    (i) Damages for a miscarriage of justice;

    (ii) Damages for breach of constitutional rights;

    (iii) Damages pursuant to s. 3(2) of European Convention on Human Rights Act, 2003 ("the 2003 Act").

13. The claim for damages under (i) is said to arise by reason of the plaintiff's wrongful conviction from the error of the trial judge in failing to direct his acquittal. The claim for under (ii) is said to arise from what the plaintiff alleges was the defendants' failure to afford him a trial with reasonable expedition. Under (iii), the plaintiff claims damages for miscarriage of justice and delay.

Alleged "miscarriage of justice"

The plaintiff's submissions, in summary

14. In essence, the plaintiff contends that the judge's failure to accede to the application for a directed acquittal, and his subsequent conviction, as a result of which he was incarcerated for almost two years until released by the Court of Criminal Appeal constitutes a miscarriage of justice.

15. It is the plaintiff's contention that the Criminal Procedure Act 1993 ("the 1993") Act did not abolish the right of a victim of miscarriage of justice to seek damages through the courts. It is argued that the 1993 Act provides an alternative, streamlined method of seeking compensation for a miscarriage of justice for a narrow category of victims, by application to the Minister on foot of a court order. Counsel for the plaintiff points to s. 9(2) of the 1993 Act which provides:

> "(2) A person to whom subsection (1) relates shall have the option of applying for compensation or of instituting an action for damages arising out of the conviction."

16. It is thus contended that the right to institute an action seeking damages arising from a miscarriage of justice survived the enactment of the 1993 Act. The plaintiff contends that that right is enjoyed not only by persons falling within the statutory scheme but also by those victims of miscarriage of justice who fall outside the legislative scheme.

17. The plaintiff's case is that as someone who appealed his conviction and has had his conviction overturned because the case should never have gone to the jury he should not be disadvantaged in his claim for damages albeit that he does not come within the second pre-condition set down in 1993 Act. It is submitted that if the plaintiff can establish wrongful conviction and/or a miscarriage of justice, he should be entitled to damages. The plaintiff relies on *Pringle v. Ireland* [1999] 4 IR 10 in this regard.

18. The plaintiff submits that having regard to the factual background in his case, his wrongful conviction stemmed from a "*grave defect with the administration of justice*" of the sort contemplated in *Conmey v. DPP* [2014] IECCA 31, *DPP v. Meleady (No. 3*) [2001] 4 IR 16 and *DPP v. Hannon* [2009] 4 IR 147. He also cites *The People (Director of Public Prosecutions) v. Pringle* (No. 2) 1997 2 I.R. 225 in aid of his submissions.

19. In all of the circumstances, the plaintiff contends that he falls within the recognised definition of miscarriage of justice. Albeit that he falls outside the 1993 Act, it is submitted that the plaintiff has been the victim of an egregious miscarriage of justice.

20. Counsel argues that what makes the plaintiff's case exceptional as to constitute a miscarriage of justice is the finding of the Court of Criminal Appeal that the case should never have gone to the jury.

21. As to the exceptional nature of a withdrawal of a case from the jury, counsel points to the dictum of Edwards J. in *The People (Director of Public Prosecutions) v. M.* [2015] IECA 65:

> *"49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.*

50. This Court considers that the matter is well put in the following quotation from Archbold, Criminal Pleading Evidence & Practice 2014 at page 484, where the authors state:

> *"In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function."*

51. Further, in The People (Director of Public Prosecutions) v M. (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the Galbraith principles ought properly to be applied:

> *'If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law, the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case.'"*

22. It is submitted that the plaintiff's wrongful conviction arose from the error of law of the trial judge in failing to direct his acquittal and allowing the case to go to the jury. It is not the plaintiff's case that the trial judge ought to be personally liable for the miscarriage of justice; it is acknowledged and accepted that judges have personal immunity for actions committed while exercising their judicial function. It is the plaintiff's contention however that the State must be held liable for the error of the trial judge.

23. It is further argued that any denial to the plaintiff of his right to seek compensation constitutes invidious discrimination such as would breach Article 40.1 of the Constitution. The plaintiff submits that to distinguish between a miscarriage of justice arising from a mistake of the trial judge identified on appeal and a miscarriage of justice evident from a "newly discovered fact" identified on appeal would be an invidious discrimination which would not be justified.

The defendants' submissions, in summary

24. The defendants contend that the plaintiff seeks to identify a novel cause of action not hitherto recognised in the State. They argue that the quashing of the conviction by the Court of Criminal Appeal on the basis that that court came to a conclusion different to that of the trial judge cannot of itself amount to a cause of action. The plaintiff focuses, in effect, on the failure of the trial judge to accede to an application for a direction as the basis for his action for damages. Counsel for the defendants queries as to why the plaintiff's case should be viewed any differently to a case where the Court of Appeal quashes a conviction based on a confession that was wrongly procured, where a conviction is overturned because of a defective warrant or where someone later acquitted has spent a period of time in custody. Counsel asks why those individuals would feel less aggrieved that the plaintiff.

25. It is submitted that there is a further question mark over the scope of the action advocated by the plaintiff. Will it apply only to a trial judge's mistakes or will it apply to the Court of Appeal where the decision of that court refusing to overturn a conviction is itself overturned by the Supreme Court?

26. While the plaintiff describes what occurred in his case as an error by the trial judge, the defendants' position is that the trial judge made a ruling with which the Court of Criminal Appeal disagreed.

27. The defendants query whether the cause of action advocated by the plaintiff applies also to civil cases - would for example an individual involved in a child custody dispute be entitled to pursue a claim for damages for the time spent without his or her children in circumstances where a custody ruling is overturned on appeal? A question arises as to whether the cause of action advocated by the plaintiff is to mirror the 1993 Act in all respects save the issue of a newly discovered fact. The question also arises as to whether the plaintiff is contending that the Court would, in an non-statutory cause of action, have to formulate an identical miscarriage of justice test to that set out in the 1993 Act or identify a different test? Counsel also queries the rationale for the passing of the 1993 Act if, as the plaintiff contends, there exists the non-statutory cause of action advocated by the plaintiff.

28. A further issue is the nature of the obligation the State is said to have breached. Is it the obligation of the State to ensure that no judge ever makes a mistake? Counsel submits that if that is the case, it would obviate entirely the need for appellate structures. Alternatively, is it, as the defendants contend, the State's obligation to set up an independent judiciary and an independent appellate structure, which, it is submitted, the plaintiff availed of.

29. It is the defendants' contention that the plaintiff has not been the subject of a miscarriage of justice; rather what he has had is a carriage of justice. In the first instance, there was a garda investigation which has not been impugned in these proceedings. Thereafter, an independent officer of the State, the Director of Public Prosecutions (DPP) decided that

there was enough evidence to prosecute. That decision has not been impugned and the DPP has not been named as a defendant in the proceedings. Furthermore, the plaintiff has had the benefit of a fair trial in which he had the benefit of legal representation, where the trial judge heard the arguments that were made and made decisions. The plaintiff had the benefit of a jury and the jury issued their verdict entirely independently. The plaintiff then had the benefit of an appeal to the Court of Criminal Appeal which took a different view to the trial judge and considered that the evidence was not sufficient such that it could safely have been left to the jury.

30. Counsel submits that all of the foregoing is evidence of the criminal justice system working properly. It is further submitted that any time the plaintiff spent in detention was on foot of a court order that was valid at the time. In this regard, counsel points to Article 5 of the Convention which provides that detention can be justified by a court order.

31. The defendants argue that in principle the plaintiff's case was not a rare and unusual form of injustice, nor was it so as a matter of fact. This is evidenced by the contents of the plaintiff's notice of appeal. The complaint about the trial judge's direction was ground no. 4 of eight grounds of appeal. That particular ground merited only a small portion of the submissions made on the plaintiff's behalf to the Court of Criminal Appeal. Moreover, the fact that the Court of Criminal Appeal decided the case on one issue is not unusual.

32. Furthermore, there is no suggestion that any application was made by the plaintiff before the trial commenced under s. 4(e) of the Criminal Procedure Act, 1967. It would appear that it was only after the Court of Criminal Appeal's judgment that the plaintiff is maintaining that his case amounts to a miscarriage of justice.

33. Counsel submits that if the cause of action advocated by the plaintiff is recognised, the plaintiff would succeed in obtaining damages without any court having certified a miscarriage of justice which, under the 1993 Act, is one of the first stages before any compensation can arise.

34. Contrary to the plaintiff's argument, *Pringle v. Ireland* [1999] 4 IR 10 is not authority for the proposition that a cause of action such as that advocated by the plaintiff exists independently of the 1993 Act.

35. It is further contended that the plaintiff's case does not approach a miscarriage of justice in the sense that that concept has been considered in *Conmey v. Director of Public Prosecutions, Director of Public Prosecutions v. Meleady and Director of Public Prosecutions v. Hannon.*

36. It is also the defendant's submission that the decision in *Kemmy v. Ireland* [2009] 4 IR 74 is a complete answer to the plaintiff's claim. Contrary to the plaintiff's suggestion, *Kemmy* remains good law.

37. It is also submitted that no issue of equality before the law arises in this case.

Considerations

38. In essence, the first head of the plaintiff's claim for damages is that the State through its judicial organ is liable for a miscarriage of justice in circumstances where the trial judge was found to have erred in allowing the case to go to the jury.

39. The plaintiff contends that by virtue of his case having been let to the jury he was the victim of a manifest wrongful conviction. As a result, he maintains that he is entitled to ask the Court to compensate him for a wrongful conviction akin to a miscarriage of justice under the 1993 Act. The first question to be determined, therefore, is whether there exists a cause of action for miscarriage of justice outside of the 1993 Act.

40. I turn firstly to what is provided for in the 1993 Act.

41. The 1993 Act established a limited statutory compensation scheme for victims of "miscarriage of justice".

42. The primary aim of the 1993 Act is designed for persons who have had a criminal trial, who have appealed unsuccessfully to the Court of Criminal Appeal (now the Court of Appeal), and who then wish to come back to the Court of Appeal and say that there has been a new fact or newly discovered fact.

43. It is undoubtedly the case that the State's miscarriage of justice legislation only deals with a certain category of person. They are people who can point to a new or newly discovered fact. However, the identification of that particular category of person was not made by the Irish State; this identification appears in Article 3 of Protocol 7 to the Convention which provides that Contracting States must provide compensation for wrongful conviction where there is a new or newly discovered fact which shows conclusively that there has been a miscarriage of justice.

44. Similar wording is found in Article 14.6 of the International Covenant and Civil Political Rights. Contrary to the plaintiff's argument that what has occurred in his cases arbitrary and discriminatory, historically it would appear to be the case that the concept of a miscarriage of justice has been confined to a certain category of cases. In enacting the 1993 Act, the State was fulfilling its international obligations by identifying that class of persons.

45. Effectively, the Oireachtas has provided a remedy for damages for miscarriage of justice in the 1993 Act. I am satisfied that this remedy is in conformity with the State's obligations under Article 3 of Protocol 7 to the Convention to provide compensation for wrongful convictions based on the discovery of a new fact.

46. In summary, the salient provisions of the 1993 Act are as follows:

Section 2 provides for review by the Court of Appeal of alleged miscarriage of justice. Section 3 provides for the Court of Appeal's jurisdiction in relation to appeals including the quashing of the conviction with no further order or quashing the conviction and ordering a retrial. Pursuant to s.3(3), the Court of Appeal may, inter alia, direct a new garda investigation and/or direct the production of documents and witnesses for examination. Section 5

deals with summary determination. Section 6 extends the provisions of the 1993 Act to court martials. Sections 7and 8 provide for a pardon procedure. Section 9 deals with compensation for miscarriage of justice and sets out a relatively complex formula for the assessment of such compensation.

47. In essence, two categories of persons are covered by s.9 of the 1993 Act:

> Section 9(a): persons who have had their conviction quashed by the Court of Appeal or who have been acquitted on a retrial;
>
> Section 9(1)(b): persons who have been pardoned by the President pursuant to a recommendation of the Minister under s. 7 of the Act.

48. For the purposes of compensation under s. 9(1)(a), two preconditions are necessary. The first pre-condition is that the applicant must have had his conviction quashed by the Court of Appeal on the basis of an application under s. 2 of the Act or on appeal, or he or she has been acquitted in any re-trial: s. 9(1)(a)(i). The second pre-condition is that the Court of Appeal or the court of retrial, as the case may be, must have certified that a newly discovered fact shows that there has been a miscarriage of justice: s. 9(1)(a)(ii).

49. As a person who has had his conviction quashed on appeal, the plaintiff satisfies the first pre-condition. It is accepted by all concerned however that the second pre-condition as set out in the 1993 Act clearly removes the plaintiff's case from the scope of the statutory compensation scheme since his conviction was overturned by the Court of Criminal Appeal not on the basis of a "newly discovered fact" but because the appellate court found that the trial judge had erred in allowing the case to go to the jury. The plaintiff is thus precluded from applying to the Minister for Justice for compensation under the 1993 Act.

50. The plaintiff relies on s.9(2) of the 1993 in support of the submission that a right of action for a miscarriage of justice exists outside of the 1993 Act. I am not persuaded by the plaintiff's submission in this regard. A reading of s. 9 of the Act as a whole shows that the right to institute proceedings referred to in s.9(2) is, inter alia, contingent on the Court of Appeal or a court of retrial having certified that a newly discovered fact shows that there has been a miscarriage of justice. Section 9(2) is not therefore a statutory recognition of an existing common law or other right of action to claim damages for a miscarriage of justice.

51. I accept the defendants' argument that the phrase "miscarriage of justice" in the 1993 Act is a statutory phrase which has to be read in the light of the concept of a newly discovered fact. It is also the defendants' position that when the Court of Criminal Appeal opines (as it has in a number of cases) that a case should only be withdrawn from the jury if there is a risk of wrongful conviction, they are not necessarily using that phrase so as to equate with the concept of a miscarriage of justice under the 1993 Act. The defendants submit that the phrase "wrongful conviction" may be used by the Court of Criminal Appeal in terms of identifying the test for granting a direction and assisting trial

judges in deciding whether they should or should not grant a direction. By and large, I accept this to be the case.

52. As support for his claim that the right to institute an action arising from a miscarriage of justice survived the enactment of the 1993 Act and exists independently of the 1993 Act, the plaintiff relies on *Pringle v. Ireland* [1999] 4 I.R. 10. In *Pringle*, the plaintiff had been convicted and served a number of years for offences which were subsequently quashed on an appeal. He sought damages for negligence, breach of duty, and failure to vindicate his constitutional rights. He had been refused a certificate of miscarriage of justice by the Court of Criminal Appeal. The defendants argued that he was therefore barred from asserting his claim to damages. The plaintiff asserted that he was entitled to pursue his claim for damages notwithstanding that he did not fulfil the pre-requisites of s. 9 of the 1993 Act. In *Pringle*, O'Donovan J. opined:

> *"I do not think that it follows that a person who, for whatever reason, has not obtained the certificate provided for in the section is precluded from pursuing an action for damages through the courts…"*

53. Based on the foregoing *dictum*, it is submitted that the plaintiff is entitled to pursue his claim for damages notwithstanding that he is not entitled to a s. 9 certificate. Counsel for the plaintiff asserts that any contrary conclusion would represent a failure to vindicate the plaintiff's constitutionally protected fundamental rights to personal liberty, bodily integrity, property and economic rights including private and family life, trial in due course of law and good name with which it is claimed there has been wrongful interference.

54. The issue which arose in *Pringle* was whether the 1993 Act correctly interpreted would bar the action being maintained in *Pringle*. Ultimately, O'Donovan J. determined that the 1993 Act was not seeking to bar any other type of proceedings; the fact that the right to compensation under the Act was only triggered by someone who obtained a certificate and the fact that a person applied but failed to get a certificate did not of itself bar a person from seeking a non-statutory remedy.

55. For the purposes of the present case, counsel for the defendant submits that *Pringle* did not suggest that such a remedy actually existed, as that was not the issue before the court in that case. Thus, it is the defendants' contention that *Pringle* is not authority for the view that there is a cause of action for miscarriage of justice outside of the 1993 Act.

56. As far as the plaintiff's reliance on the dictum of O'Donovan J. in *Pringle v. Ireland* is concerned, I note that the questions which O'Donovan J. was required to answer were (a) whether the plaintiff by his conduct in submitting to the jurisdiction of the Court of Criminal Appeal in an application for a certificate pursuant to s. 9 of the 1993 Act had thereby exercised the option afforded to him by s.9(2) of the 1993 Act, and (b)if the plaintiff had exercised his option pursuant to s.9(2), was he thereby barred from seeking to assert his negligence and breach of duty claim against the defendants.

57. O'Donovan J. answered the first question in the negative, in effect he found that the plaintiff had not as a matter of fact exercised his option under s.9(2) as he had not been granted a certificate of miscarriage of justice. Given this finding, O'Donovan J. was also obliged to answer the second question in the negative. While I accept that O'Donovan J. went on to opine that the plaintiff was not precluded from pursuing an action for damages in the courts, it remains the case that the learned judge stated that he was not deciding that question as it was not necessary for him to do so. In those circumstances, I do not accept that *Pringle v. Ireland* is authority for the proposition that a cause of action for *miscarriage of justice* exists outside of the 1993 Act. I also accept the defendants' submission that the factual matrix in *Pringle v. Ireland* was different to that in the present case. In the former, the plaintiff had succeeded in having his conviction quashed on the basis that a newly discovered fact had rendered it unsafe (albeit he did not obtain a certificate). Moreover, the claim being brought in *Pringle v. Ireland* was one in negligence (a recognised tort), which is not the situation in the present case.

58. It is contended by the plaintiff that the two consistent threads can be identified running through the relevant case law on miscarriage of justice. Firstly, proof of innocence is not required to establish a miscarriage of justice. Secondly, a miscarriage of justice may be certified where there has been a "*grave defect with the administration of justice". (Conmey v. Director of Public Prosecutions, Director of Public Prosecutions v. Meleady No. 2 and Director of Public Prosecutions v. Hannon* refers)

59. In particular, counsel for the plaintiff refers to *Conmey v. Director of Public Prosecutions* where Hardiman J. opined:

> *"42. Accordingly, there is no universally applicable definition of "miscarriage of justice" available to be applied in the present case. But the previously decided cases do offer illustrations of "miscarriage". Thus, in Pringle, cited above and later approved in Wall, also cited above, one of the definitions of miscarriage is that it arises "where there has been a grave defect in the administration of justice, brought about by members of the State".*
>
> *43. Further in Wall, it is held that the phrase "miscarriage of justice" is "not confined to the question of actual innocence, but extends to the administration of justice in a given case".*
>
> *44. In Hannon also cited above, the dictionary meaning of the phrase "miscarriage" was discussed, and it was noted, firstly, that the phrase (except in a medical context) is to be regarded as rare or indeed archaic. On the authority of Smeton v. Secretary of State for Health [Queen's Bench Division, The Times, May 2, 2002] it was held that the phrase was formerly used "to convey a variety of meanings including misdemeanour or misdeed, mismanagement or failure of an enterprise, or a blunder, as well as its use in the medical or obstetrical sense. The phrase "miscarriage of justice" is defined in the Oxford English Dictionary as "a failure of the judicial system to attain the ends of justice".*

60. It is the plaintiff's contention that the reasoning in *Conmey* (and *Hannon*) must apply not only to those miscarriages of justice which fall under the 1993 Act but also to those applicants who fall outside of the statutory scheme and have no option but to seek compensation through the courts.

61. In the course of his submissions, counsel for the plaintiff referred the Court to the *dictum* of O'Flaherty J. (writing for the Court of Criminal Appeal) in *The People (Director of Public Prosecutions) v. Pringle* (No. 2) 1997 2 I.R. 225:

> "*If in a given case the court were to reach the conclusion that a conviction had resulted in a case where a prosecution should never have been brought in the sense that there was no credible evidence implicating the applicant, that would be a case where a certificate most likely should issue.*" (at p. 230)

62. It is also submitted that this reasoning was expressly approved by Blayney J. in the Supreme Court. (at p. 235).

63. I note however that in the course of his judgment, Blayney J. went on to state, at p. 236:

> *"Since the applicant's conviction was quashed under s.3 of [the 1993 Act] is there any reason why he should be treated differently from any other applicant whose conviction has been quashed in an appeal brought under that section in accordance with the normal appeal procedure? Such an applicant would not be entitled to compensation. But if the term "miscarriage of justice" were held to apply to the applicant's case the applicant would be entitled to compensation. If the term were to be construed in this way, the result would in my opinion be to prefer unfairly an applicant who succeeded in having his conviction quashed because of a newly discovered fact over an applicant whose conviction was quashed on some other ground. In my opinion this could not have been intended by the legislature as it would result in an injustice. It seems to me, accordingly that the mere fact of the applicant's conviction having been quashed as being unsafe and unsatisfactory could not on its own entitle the applicant to a certificate that there has been a miscarriage of justice."*

64. Albeit that I do not consider the above dictum as clear authority for the proposition that no right to damages for a miscarriage of justice exists unless a person comes within the ambit of the 1993 Act since in *The People (Director of Public Prosecutions) v. Pringle (No. 2)* the Supreme Court was obviously only considering the parameters of the 1993 Act, it is nevertheless of note that Blayney J. opined that *"the mere fact of the applicant's conviction having been quashed as being <u>unsafe and unsatisfactory</u> could not on its own entitle the applicant to a certificate that there has been a miscarriage of justice."* (emphasis added) To my mind, this is relevant in circumstances where, in the present case, in quashing the plaintiff's conviction on the basis that the case should not have been allowed to go to the jury, the description given by the Court of Criminal Appeal of the verdict was that it was "unsafe". I note that there is no suggestion in the judgment of the Court of Criminal Appeal that it viewed the plaintiff's case as a miscarriage of justice. I

also note the defendants' submission that the plaintiff does not cite a single case in which damages were awarded for a miscarriage of justice on any other basis outside of the 1993 Act.

65. With regard to the plaintiff's reliance on *Conmey* and *Hannon*, counsel for the defendants submit that the plaintiff has not pleaded a grave defect in the administration of justice and that the height of his case as pleaded is that "the miscarriage of justice …arises from the trial Judge declining to grant a direction when the Director of Public Prosecutions had failed to establish a *prima facie* case, and the perverse verdict of the jury resulting in his wrongful conviction…and the imprisonment on foot of that conviction alone for 23 months, 3 weeks and 3 days".

66. While I do not think the plaintiff's case should turn on any pleading point, I accept the defendants' submission that a ruling by the trial judge in respect of which a higher court disagrees is not necessarily tantamount to a grave defect in the administration of justice. The judicial system has never offered a system under which a court of appeal will never disagree with a decision made by a trial judge. The fact that a higher court may disagree with the lower court's finding and, accordingly, quashes a conviction does not necessarily render what went on in the court below a grave defect in the administration of justice.

67. It is also the plaintiff's case that the fact that the Court of Criminal Appeal did not order a retrial must be viewed by this Court as the Court of Criminal Appeal having implicitly recognised that the plaintiff's case fell into the category of a "grave defect in the administration justice". Counsel for the plaintiff describes the Court of Criminal Appeal's decision not to order a retrial as a rare occurrence.

68. The defendants contend that there is an element of rewriting of history in the plaintiff describing his case as "a rare and unusual injustice". The defendants submit that this suggestion is wrong as a matter of principle and as a matter of fact. Counsel submits that there is nothing special about winning in the Court of Criminal Appeal on the issue of a direction and that the mere fact that the appellate court disagreed with the trial judge as to how substantial the evidence was does not necessarily equate to a miscarriage of justice. I accept this to be the case. To my mind, this is clear from the *dictum* of Blayney J. in *The People (DPP) v. Pringle* quoted above.

69. The Court heard testimony from Ms Geraldine Manners, Registrar to the Court of Criminal Appeal in the period 1987 to 2014 save for a period of two years from 2010-2012. In the course of her testimony, Ms Manners was cross-examined as how frequently the issue of no retrial being directed by Court of Criminal Appeal occurred.

70. Ms Manners testified that for the year 2009 there was no case where a conviction was quashed that a retrial was not ordered. She did not give figures for 2010. She confirmed that the annual court report for 2011 showed that in cases where convictions were quashed by the Court of Criminal Appeal, retrials were directed in five cases, there were no retrials in six cases. In 2012, retrials were directed in four cases and no retrial in one

case. For 2013, in respect of six cases where convictions were quashed, retrials were directed in three cases and no retrials were directed in the other three cases.

71. To my mind, it is not possible for the Court to reach any definite conclusions as regards the number of cases where the Court of Criminal Appeal did not order a retrial. Suffice it to say, however, that based on the information that was put before the Court, I am not persuaded that the fact that no retrial was ordered in the plaintiff's case is as rare and exceptional an event as the plaintiff makes it out to be. Even if I am in error in this regard, I remain of the view that the fact that there was no retrial directed by the Court of Criminal Appeal is not of itself an indicator of a cause of action for miscarriage of justice subsisting outside of the 1993 Act.

72. In the course of his submissions, counsel for the defendant pointed to the suggestion at paragraph 1 of the plaintiff's replies to particulars that some cause of action might arise as a result of the trial judge declining to grant a direction "when the Director of Public Prosecutions has failed to establish a *prima facie* case". The defendants say that it is not clear from the plaintiff's replies whether this is a separate claim as against the DPP, a joint claim as against the trial judge and the DPP or a claim against the trial judge only. In any event, counsel submits that to pursue such a claim, the plaintiff would have been required to join the DPP as a defendant in the within proceedings.

73. I do not understand the plaintiff to be pursuing a claim against the DPP. As the plaintiff has not joined the DPP as a party in the within proceedings, I accept the defendants' argument that to fix liability on the State by reference to some perceived frailty on the part of the DPP would amount to an impermissible collateral attack on the DPP in circumstances where the plaintiff has not sought to sue her directly. Moreover, I accept the defendants' argument that there is no suggestion in the plaintiff's pleadings or written submissions that in dealing with the case the DPP failed in the duties required of her as set out in the DPPs *Guidelines for Prosecutors* (4Ed, October, 2016).

74. In the within action, the plaintiff does not assert any recognised torts such as negligence, malicious prosecution or misfeasance in a public office. Notably, the plaintiff does not make a claim in negligence against the garda investigation: nor does he sue for misfeasance. In particular, he does not maintain that any entity, be that the gardaí, the DPP or the trial judge, acted with either malice or reckless indifference, which are the ingredients of the tort of misfeasance.

75. In *Cromane v. Minister for Agriculture* [2016] IESC 6, the Supreme Court has made it clear that misfeasance is usually the appropriate tort where it is claimed executive action has caused a person damage. It is also well established that one cannot circumvent the limits of the recognised torts by asserting a claim of breach of constitutional rights. Moreover, *Keating v. Crowley* [2010] 3 I.R. 648 is authority for the proposition of the State is not liable for acts done *bona fide* by a judge.

76. By reason of the matters set out above, I am satisfied that the fact that the plaintiff does not come within the remit of the 1993 Act does not, of itself, give rise to a cause of action for miscarriage of justice.

77. In essence, the plaintiff's conviction was quashed by the Court of Criminal Appeal on the basis that the trial judge, acting within jurisdiction, should not have allowed the case to go to the jury.

78. No cause of action against a judge exists under Irish law in relation to such an error or ruling on the part of the judge except where malice or mala fides is pleaded against the judge, which has not been done in these proceedings.

Kemmy v. Ireland

79. The plaintiff's claim for damages based on miscarriage of justice of justice arising from his wrongful conviction is maintained as against the State. The defendants contend that the decision in *Kemmy v. Ireland* [2009] 4 IR 74 is a complete answer to the plaintiff's claim. They argue that in light of the decision in *Kemmy*, the plaintiff cannot be said to have made out any claim which is recognised in law and that, accordingly, the Court is bound to apply *Kemmy* based on the doctrine of *stare decisis* as set down in Re: *Worldport* [2008] IESC 68.

80. The position in *Kemmy* was that the plaintiff had been convicted at trial of rape and sexual assault. He appealed his conviction. The complaint made was that the trial judge had not afforded the accused a fair trial in circumstances where, after being out for one and half days, the jury had returned and raised questions about the evidence given by the complainant. The jury wanted to see a transcript of her evidence. The trial judge did not give them a transcript but instead read out the trial judge's note of the complainant's evidence. By the time the appeal was heard the plaintiff had completed his sentence. The appeal was allowed by the Court of Criminal Appeal on the basis of an unfairness in the judge's charge and because the judge had provided only a summary of the complainant's evidence to the jury after they had requested that the transcript be provided. The Court of Criminal Appeal found as fundamentally unfair that the trial judge had read out a note of the complainant's evidence without balancing it by reminding the jury of the evidence in the accused's favour. The Court of Criminal Appeal quashed the conviction. No re-trial was directed. The plaintiff duly applied to the High Court for damages for infringement of his fair trial rights.

81. In his consideration of the claim for damages subsequently brought by Mr. Kemmy, McMahon J. noted that as the conviction had not been quashed on the grounds that a newly discovered piece of evidence showed there had been a miscarriage of justice, Mr. Kemmy was not eligible to apply for compensation under the 1993 Act. The claim for damages was described by McMahon J. as one for damages against the State for infringement by the State, through its judicial organ, of Mr. Kemmy's constitutional right to a fair criminal trial. McMahon J stated that it was important to emphasise that what was at issue was a "fair trial". He stated:

"Had the Court of Criminal Appeal found that the trial judge had merely committed an error of law, counsel for the plaintiff conceded at the hearing that he would not have brought the action."

82. In Kemmy, a declaration was also sought that any common law rule of law purporting to grant judges immunity from suit in respect of acts done in the performance of their judicial duties was unconstitutional insofar as it purported to deny the plaintiff a right to seek damages against the State. McMahon J. described the question to be considered, as follows:

"[21] The question for this court therefore, would appear to be whether the State can be sued in such cases when the organ of government involved is the judiciary? And additionally, is the answer affected by the constitutional guarantee of the independence of the judiciary and the personal immunity which the judiciary enjoy from civil action?"

83. McMahon J., accepted that the State could be sued for damages in tort and may be held vicariously liable for the torts of some of its subordinates. He further held that the State may itself be primarily and directly liable in damages in other types of actions and for breach of constitutional obligations. However, he dismissed the plaintiff's claim on the basis that the judiciary was independent in the exercise of judicial functions and subject only to the Constitution and to the law. McMahon J. concluded that to make the State liable for the wrongs of the judiciary would represent an indirect challenge to the personal immunity of the judiciary. He further concluded that the State could not be held directly liable for judicial error given that by providing an appeal procedure, and by enacting a 1993 Act, the State had guaranteed the plaintiff's right to a fair trial.

84. McMahon J. addressed the issue of judicial immunity in the following terms:

"[23] The immunity which a judge enjoys from civil suit by a disappointed litigant is well established in the common law and has been accepted in this jurisdiction in several cases. Although frequently described as absolute, the judge may be successfully sued personally in extreme cases, where, for example, he accepts a bribe to decide a case in a particular way. I need not concern myself here with such extreme conduct for two reasons. Firstly, the judge is not personally sued in this case, and secondly, the facts before the court show that the trial judge has unlimited jurisdiction and merely exercised an honest discretion with which the Court of Criminal Appeal did not agree. The case law clearly establishes that the judge cannot be personally liable in such a case."

85. In the present case, the plaintiff does not gainsay that there is no personal liability on the part of the trial judge.

86. In *Kemmy*, reliance was placed by the plaintiff on the decision of the Privy Council in *Maharaj v. A.G. of Trinidad and Tobago* (No. 2) [1979] AC385:

"The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s. 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice."

87. After a detailed consideration of Maharaj and other jurisprudence of the common law jurisdictions of Trinidad and Tobago and New Zealand, McMahon J. concluded:

"[52] From the above exposition it is clear that the independence of the judiciary is a fundamental value in western democracies. The immunity from suit for the judiciary is a necessary corollary of this set of values. This immunity has developed in the common law context where the starting point on the liability of the State was expressed in the absolute rule that "the King can do no wrong". To make the State liable now for the wrongs of the judiciary would in effect represent a late indirect challenge on the personal immunity of the judiciary. The jurisprudence on the matter is too well settled to permit any such oblique subversion."

88. The principle that the State cannot be made liable for the wrongs of the judiciary was recently reiterated by Barrett J. in *Hussain v. Taxing Master Rowena Mulcahy* [2018] IEHC 280:

"To seek to impose on Ireland some form of liability for the wrongs of the judiciary (and by extension taxing masters) would be to commence down a dangerous path, in effect permitting a 'late indirect challenge' on the personal immunity of the judiciary (and the immunity of taxing masters). As McMahon J. observes, 'the jurisprudence on the matter is too well settled to permit any such oblique subversion.'" (at para.15)

89. The argument was also advanced in *Kemmy* that the State was vicariously liable for the failure of the trial judge to afford the plaintiff a fair trial. After a detailed analysis of that argument, McMahon J. concluded that it was *"wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the master/servant terminology developed for the purposes of imposing vicarious liability for tortious acts or omissions"* (at para. 59)

He went on to opine:

"Accordingly, in my view, the State cannot be vicariously liable for the errors which a judge may commit in the administration of justice. This conclusion holds in respect of errors which may be described as errors within jurisdiction, and afortiori in respect of errors which are outside the judge's jurisdiction, including those committed, mala fides, for which of course, in extreme cases, the judge may lose his personal immunity."

90. McMahon J. next addressed the question as to whether the plaintiff could successfully maintain an action for damages directly against the State for the failure of a trial judge in a criminal case to afford a fair trial. He stated, inter alia, as follows:

"[64] In the present case, the plaintiff states that denial of a fair trial by the trial judge was accepted by the Court of Criminal Appeal and it specifically used language to that effect. Bearing in mind the wording of Article 40.3.1 quoted above, and the independence of the judiciary established in the Constitution, one must pose the question, how is it alleged that the State has failed the plaintiff in this case? As expressed in the words of Article 40.3.1, the State's duty to guarantee the plaintiff a right to a fair trial is not an absolute one, but is a guarantee to respect, defend and vindicate the plaintiff's right to a fair trial "as far as practicable". Apart from the constitutional provisions which guarantee the independence of the judiciary, the State has also enacted legislation establishing the Court of Criminal Appeal to which convicted persons may appeal if dissatisfied with their criminal trial. In the present case the plaintiff successfully availed of this opportunity. Moreover, the State has enacted the Criminal Procedure Act 1993, which also enables a trial to be reviewed if new evidence subsequently comes to light. It is my view that the State has acted reasonably to guarantee, respect and defend the plaintiff's right to a fair trial in these circumstances. The truth is that the State cannot "in" or "by its laws" do much more than it has done, because of the constitutional independence guaranteed to the judiciary and because of the theory of separation of powers. The plaintiff has not shown to the court what more the State could lawfully do to secure more fully his right in the circumstances of this case.

[65] In addressing whether the State is directly or primarily liable in such a situation for the "unfair trial" caused by judicial error, to use the plaintiff's words, one must also look more closely at the term "unfair trial". When the Court of Criminal Appeal quashed the order of the trial judge it was passing judgment on the actual trial conducted before the trial judge. The Court of Criminal Appeal having considered the judge's handling of the trial, made what it considered to be the appropriate corrective orders. In effect it made "fair" that which had been "unfair". When the plaintiff brings the matter before this court now, in a civil action, in my view he cannot limit the phrase "unfair trial" artificially to the stage of the process heard by the trial judge. As far as this court is concerned in determining whether there has been an "unfair trial", consideration must be given to the totality of the legal process from start to finish. When one takes this holistic view of the process one has to conclude that even if there was unfairness at the earlier stage it has been corrected and the end result of the process is not now unfair.

[66] The State cannot guarantee that no error will ever occur in the judicial process. The judges it appoints are human and inevitably will make mistakes. In these circumstances, it is incumbent on the State to provide for a corrective mechanism to address these errors. This is the appeal process. In my view, failure by the State to do so would be a breach of its obligations to guarantee "as far as practicable" the

citizen's right to a fair trial. But by doing so, the State has fulfilled its obligation under the Constitution."

91. The question of making the State liable in damages for judicial errors was addressed by McMahon J. as follows:

> *"[75] To make the State liable in such a situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine his independence as guaranteed by the Constitution. It would introduce an unrelated and collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might, for example, encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "a chilling effect".*
>
> *[76] The fundamental reason for supporting this conclusion, however, is that when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the State in these circumstances, he is not even acting on behalf of the State. He is not doing the State's business. He is acting at the behest of the people and his mission is to administer justice. In most cases he is merely exercising his discretion and his actions cannot amount to "torts" at all. For the most part he is immune from civil liability. From this perspective, the State is not directly involved with his activities, does not write his mission and cannot intervene with the judge's exercise of his functions. While in one sense, it may be appropriate to describe the judiciary as an organ of government in the broad constitutional representation of the State, in another sense, when exercising its jurisdiction, the judiciary is truly decoupled from the State. In a sense, there are two principals involved at a constitutional level in the administration of justice, and if the judiciary is immune from suit it seems logical that the State when facilitating the exercise of judicial power through the judiciary should also be entitled to State immunity in that regard.*
>
> *[77] In a constitutional sense, the State merely provides the scaffolding for judicial activity. The State is no longer involved once the judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the State's liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that I have already rejected."*

92. As can be seen, the decision in Kemmy is structured on the concept of judicial immunity, and on the basis that the State cannot be vicariously liable for the actions of a judge carried out in the course of his or her duties, nor indeed directly liable in that regard, coupled with the recognition that the concept of a fair trial included the availability of an appellate structure.

93. I accept the defendants' contention that McMahon J.'s conclusions are as compelling now as they were in 2009. As far as the present case is concerned, the wrong done to the plaintiff has now been righted given that the Court of Criminal Appeal has acquitted him. He has had the benefit of the totality of the criminal process. By reason of the quashing of his conviction, he has attained *"the ends of justice*". As stated by Denham J. in *F.X. v. The Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280:

> *"[67] The existence of an appeal procedure capable of correcting errors is itself a part of the due course of law. In The State (McDonagh) v. Frawley [1978] I.R. 131, at p. 136, O'Higgins C.J. observed that when a person is detained for execution of sentence after a conviction on indictment he is prima facie detained in accordance with law, and:-*
>
> > *"The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with*
> >
> > *corpus merely because some defect or illegality attaches to his detention. The phrase means that there must be such default of fundamental requirements that the detention may be said to be wanting in due process of law.""*

94. In the course of his submissions, counsel for the plaintiff argued that albeit that the plaintiff's case bears some features similar to *Kemmy*, his case is nonetheless entirely distinguishable. He contended that *Kemmy* was inapplicable to the plaintiff's case on the basis, firstly, that there were several key distinctions between the plaintiff's case and *Kemmy* and, secondly, on the basis that the principles enunciated in *Kemmy* have been overtaken by subsequent developments in the Court of Justice of the European Union (ECJ) and the European Court of Human Rights ("ECtHR").

95. In the first instance, counsel contended that the judicial error in issue in *Kemmy* was entirely different to that at stake in the plaintiff's case. In *Kemmy*, the conviction was quashed by reason of unfairness, whereas in the present case, the Court of Criminal Appeal ruled that there was no evidence on which a jury, properly directed, could rationally have convicted the plaintiff on the basis of the evidence. Counsel for the plaintiff asserts that, in contrast, there was no suggestion in *Kemmy* that a jury could not rationally have convicted Mr. Kemmy: it was simply that there was a question mark over how he was convicted at his trial.

96. Counsel also argued that a second distinction between the plaintiff's case and *Kemmy* also arose relating to the issue of a re-trial. It was submitted that there was an obvious practical reason for the appellate court not to order a re-trial in *Kemmy*, namely that the sentence imposed had already been served by the time the conviction was quashed. In contrast, the plaintiff had served only part of his sentence. It is thus submitted that the decision of Court of Criminal Appeal not to order a re-trial in the plaintiff's case is of much greater significance in that it reflects the egregious nature of the wrong perpetrated on

the plaintiff, who was deprived of his liberty for nearly two years in respect of a crime for which he should never have been convicted.

97. In all the circumstances, and given what I have outlined earlier in this judgment, I am not persuaded that the distinguishing factors relied on by the plaintiff detract from the principles outlined in *Kemmy*.

The impact of rulings by the ECtHR and the ECJ on Kemmy

98. In the course of his submissions, counsel for the plaintiff contended that *Kemmy* has to be read in light of the decision of the ECJ in *Kobler v. Austria* [2004] 2WLR 976.

99. In *Kobler*, the ECJ held that Member States must be held liable for violations of EU law attributable to the judicial branch of government and that judicial independence was not exempt from the State being held to account for these infringements:

> *"42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.*
>
> *43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.*
>
> *48. It should be added that, although considerations to do with observance of the principle of res judicata or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damage caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility. Indeed, application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion, even if subject only to restrictive and varying conditions.*
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> *49. It may also be noted that, in the same connection, the Human Rights Convention and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the*

infringement stems from a decision of a national court adjudicating at last instance (2000) 33 EHR 1093.

50. It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation."

100. While it is not suggested by the plaintiff that the trial judge breached EU law in allowing the case against the plaintiff to go to the jury, reliance is nevertheless placed on the *Kobler* judgment in as much as the principle of judicial immunity identified in *Kemmy* has been expressly rejected by the ECJ. The plaintiff submits that in *Kobler*, the ECJ dismantled and rejected many of the reasons cited in *Kemmy* for the application of the principle of judicial immunity.

101. Insofar as the plaintiff's claims that *Kobler* has dismantled *Kemmy* such that it no longer remains good law, it is to be noted that *Kobler* concerned a decision in a civil action regarding the remuneration of university professors, and in particular provisions of EU law prohibiting discrimination in remuneration on grounds of nationality. I accept the defendants' submission that this context is critical for an understanding of the judgment in *Kobler*. Moreover, in *Kobler*, the judicial decision in question was one made by the court of last instance from which there was no appeal. This was one of the critical factors in the decision of the ECJ:

"34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice".

102. Contrary to the circumstances which pertained in *Kobler*, the within proceedings concern a court of first instance applying domestic law in criminal proceedings in respect of which a full right of appeal is provided for under Irish law. Counsel for the defendants argues that this difference must be borne in mind when considering the relevance of the plaintiff's reliance on *Kobler*. I accept the defendants' submission in this regard. To my mind, there is no comparison between what obtained in *Kobler* and the plaintiff's circumstances. In *Kobler*, the ECJ was dealing with a situation where the applicant's rights were thwarted by the failure of a court of last instance to make a reference to the ECJ. It

was in that context that the ECJ, in line with its jurisprudence as to how the EU Treaty is to be interpreted, imposed liability on the relevant Member State. I fail to see how the conclusions arrived by the ECJ in *Kobler* are applicable to the present case, as a matter of principle, and indeed in circumstances where no issue of EU law arises in the present case.

103. Counsel for the plaintiff also contended that the finding of McMahon J., in *Kemmy*, that the State cannot be directly or primarily liable for an unfair trial caused by judicial error has now been called into question by the ruling of the ECtHR in *McFarlane v. Ireland* [2011] EHRR 20. In *McFarlane,* the applicant had complained that criminal proceedings which had lasted ten years and six months were incompatible with the "reasonable time" requirement laid down in Article 6(1) of the Convention. In the course of its judgment, the ECtHR had occasion to consider the concept of judicial immunity.

104. At para. 121 of its judgment, it opined:

> *"There is a relevant distinction to be drawn between the personal immunity from suit of judges and the liability of the State to compensate an individual for blameworthy delay in criminal proceedings attributable in whole or in part to judges."*

105. The plaintiff asserts that the foregoing has resonance for his case and applies to his case in the context of the defendants' liability for the wrong perpetrated on the plaintiff by reason of the failure of the trial judge to properly consider the application for a direction and the failure to remove the case from the jury.

106. The defendants contend that contrary to the plaintiff's submissions, *McFarlane* is not authority for the proposition that a person is entitled to damages just because their conviction has been overturned. In *McFarlane*, the ECtHR noted that the criminal charges against the applicant had been dismissed *"so that he could no longer claim to be a victim of a violation of the right to fair proceedings*". (at para. 77) The ECtHR thus deemed the complaint in that regard inadmissible. Counsel for the defendants submits that the European Court's ruling in this regard confirms that McMahon J.'s decision in *Kemmy*, namely that "*…the State will not compensate for the error committed by the judge which does not amount to a breach of a constitutional right*" (at para. 67) and that the remedy for error of fact or law by a trial judge is to appeal to a higher court remains good law. I agree with the submissions of the defendants in this regard.

107. In my view, given that the plaintiff's conviction has been overturned by the Court of Criminal Appeal, he has no basis to apply what was said by the ECtHR on the issue of delay in criminal proceedings to the claim he makes with regard to wrongful conviction/ miscarriage of justice. Insofar as his conviction has been quashed, he stands in the same position as the applicant in *McFarlane* whose claim as to unfairness in his trial was deemed inadmissible by the ECtHR by virtue of the fact that the criminal charges against him had been dismissed. In essence, with regard to the claimed liability of the State for the actions of the trial judge, there is no basis for the plaintiff to rely on para. 121 of the

ECtHR's ruling in *McFarlane* in circumstances where what was under consideration in *McFarlane* was the liability of the State for the *delay* in the processing of the criminal proceedings, not the liability of the State for a wrongful conviction based on error of law or fact or other unfairness in the criminal process which had been corrected.

Summary

108. As already referred to, the requirement under Article 3 of Protocol 7 to the Convention to provide compensation for a miscarriage of justice arising by dint of a newly discovered fact has been given effect through the enactment of the 1993 Act. An essential ingredient of the 1993 Act is that an applicant for compensation under the Act must have a certificate of miscarriage of justice based on a newly discovered fact. The plaintiff does not have such a certificate. To my mind, leaving aside the delay claim being advanced by the plaintiff (discussed elsewhere in this judgment), the plaintiff has not established a "general" requirement at common law, or under the Constitution, to provide compensation for persons like the plaintiff who have spent time in custody while criminal proceedings are ongoing even where those proceedings are ultimately discontinued against an individual by virtue of a successful outcome on appeal.

109. It is further of note that in compliance with Article 5 of the Convention, s. 3A of the 2003 Act, as inserted by s.54 of the Irish Human Rights and Equality Commission Act 2014, allows a person to sue for damages where it has been found that they have unlawfully been deprived of their liberty by virtue of a "judicial act", which is defined as "an act of a court done in good faith but in excess of jurisdiction". In the present case, there is no suggestion that the trial judge acted in excess of jurisdiction in depriving the plaintiff of his liberty. Thus, this remedy cannot apply to the factual matrix in the present case which, in any event, arose prior to the provision of the remedy set out in s.3A of the 2003 Act.

110. In respect of his conviction, absent a certificate of miscarriage of justice under the 1993 Act, or *mala fides* on the part of the trial judge such as might give rise to an action for misfeasance against the judge personally, or the plaintiff being able to invoke the provisions of s.3A of the 2003 Act (which does not arise here), the remedy available to the plaintiff in respect of his convictions was, in accordance with Art 38 of the Constitution, the appellate structure as provided for in law and which the plaintiff has availed of. I base my finding in this regard on the *ratio* of McMahon J. in *Kemmy* which I am satisfied remains good law.

111. Furthermore, albeit that that the plaintiff does not seek to challenge the 1993 Act as unconstitutional, I am satisfied to accept the defendants' submission that the 1993 Act enjoys the presumption of constitutionality and is not invalid for reason of not covering "errors" by trial judges in circumstances where there exists an appellate structure to correct such errors where they occur. Accordingly, no issue of equality before the law arises in the present case.

112. For the reasons set out above, the plaintiff's claim for damages for miscarriage of justice is rejected.

Delay- Alleged breach of the plaintiff's constitutional and Convention right to an expeditious trial

113. The second limb of the plaintiff's claim for damages relates to what is said by the plaintiff to be the systemic delay in the hearing of the appeal of his conviction and sentence. The plaintiff lodged his appeal on 18th February, 2011. It was heard by the Court of Criminal Appeal on 18th April, 2013. Judgment was delivered on 31st July, 2013 and the plaintiff was duly released on that date.

114. The plaintiff contends that the delay in hearing his appeal occurred in the context of a "systemic backlog" in the Irish courts system. This systemic backlog was reported on in May 2009 by the Working Group on a Court of Appeal. That report found an "institutional bottleneck at Supreme Court level" which generated undue delays. With regard to the Court of Criminal Appeal, the report noted that the number of appeals received had risen from 114 in 1995 to 237 in 2000, and again to 302 in 2008.

115. It is submitted that the delay which occurred in respect of the plaintiff's appeal to the Court of Criminal Appeal breached his constitutional right to a trial with reasonable expedition, and was in breach of the plaintiff's Article 6 rights under the Convention such that a claim for damages arises against the defendants pursuant to s.3(1) and (2) of the 2003 Act.

116. The Court heard testimony from Ms Manners as to the manner in which the plaintiff's appeal was processed. She testified that in the course of her duties as Registrar, on each list to fix dates she prepared a schedule of available dates for the presiding judge (Hardiman J.) then in charge of the list to fix dates. The presiding judge was provided with a short briefing note of each case. By and large, cases in the list to fix dates was dealt with seriatim based on available dates. Ms. Manners testified that in Hilary term 2012, there were 20 dates available and the majority of those dates were given over to clearing a very serious backlog of sentence appeals. Any priority that was available was given to sentence appeals because of a fear the sentence would already be served by the time the appeal was heard. This was particularly so in the context of a person appealing a very short sentence. In essence, priority was given to custody cases. If it transpired that it was an appeal against a conviction where there was a suspended sentence or where, as in a lot of cases, the sentence was already served, practitioners would be told that custody cases had to get priority.

117. According to Ms Manners, Hardiman J. routinely expressed the concern of the judiciary in relation to the backlog in the system. She testified that delays in extant in the Supreme Court list impacted on the availability of Supreme Court judges to sit on the Court of Criminal Appeal. She stated that if either Supreme Court or High Court judges were unavailable to sit in the Court of Criminal Appeal, this impacted on the sitting of that court. She agreed that by the time the Court of Appeal was set up in 2014, there was a

very significant backlog of appeals to be heard, namely some 3,000 civil cases and some 660 criminal appeals.

118. Ms. Manners testified that in March 2013 (when the plaintiff had secured his hearing date for his appeal), Hardiman J. observed that there were a total of 209 matters in the list seeking a hearing date in circumstances where there were only seven hearing dates to be given out at that time.

119. Insofar as it might be suggested that the plaintiff contributed to the two-year delay before his appeal came on for hearing, Ms. Manners testified that in her experience, the fact that the plaintiff had sought in July 2011 to amend his grounds of appeal did not add to the delay in his appeal getting a hearing.

120. It was also the case that Hardiman J. would hear any practitioner who applied for an expedited hearing and that he would prioritise appeals based on length of sentence. However, the longer the sentence the less likely one would get an expedited appeal. As already set out, this was explained by Ms Manners on the basis that, by and large, priority would be given to those serving short sentences for fear that their sentences would be served before their appeals were heard. Ms Manners also stated that whilst the delays in the Court of Criminal Appeal were excessive they were not approaching anything in the region of ten years.

121. There was no record of the plaintiff applying for an expedited hearing. In Ms. Manners' view, there would have been no reality in the plaintiff's legal advisors applying for priority given the length of his sentence. She agreed however, in cross-examination, that there was nothing to stop an appellant from applying for priority.

Considerations

122. The right of an accused to an expedited trial in a criminal matter is well established in Irish law. In *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513, Finlay C.J. held that the State has *"an obligation to protect the right of an accused person to an expeditious trial as a positive constitutional right..."*

123. The issue of compensation for delay in criminal proceedings has also exercised the Irish courts on a number of occasions. It was addressed by the Supreme Court in *McFarlane v. DPP* (2008) IESC 7, 4IR 117. There, Geoghegan J. opined:

> *"In the absence of a firm ruling to the contrary by the European Court of Human Rights, I think that the concept should be kept within tight limits and should be more or less confined to a situation where there is a positively negligent system or negligent failure of system within the resources that exist of administering criminal justice."* (at para. 10)

124. In his judgment in McFarlane, Fennelly J. remarked:

> *"It is clearly not possible for this Court, having an appellate function only, to pronounce in the abstract on whether damages would be available as a remedy*

...Any such claim would have to be made in the High Court in the first instance. The Act of 2003 might be relevant." (at p.146)

125. In the same case, with regard to what might constitute compensatable reasons for delay, Kearns J. opined:

> *"Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or overcrowded courtrooms might weigh less heavily but must nonetheless be considered, given that the ultimate responsibility for such circumstances rests with the State rather than the defendant."* (at pp.162-163)

126. In *Kemmy*, McMahon J. impliedly, if not expressly, recognised the constitutional right to an expedited criminal trial and the possibility of a claim for damages arising if there is delay. At para. 72 he stated:

> *"The real problem in the plaintiff's case was that there was an inevitable delay between the original trial and the hearing of the appeal in the Court of Criminal Appeal. Before the effective mechanism took effect the plaintiff had served his sentence. But by definition an appeal can only come on after the original trial and such a delay cannot be avoided. Even if the appeal had been organised on the day of the trial, the plaintiff's complaint, even if his appeal had been successful, would in principle be the same, albeit his damages for detention would be for a much shorter period. But there has been no allegation of inordinate delay in the hearing of the appeal by the plaintiff in this case and absent this, the State cannot be faulted on this account."*

127. In *G.C. v. DPP* [2012] IEHC 430, Hogan J. addressed the issue of damages in the following terms:

> *"23. In addition to declaratory relief, I see no reason at all why the court should not be able to make an award of damages in appropriate cases as a remedy for such a breach. It is true, that as Fennelly J. noted in TH v. Director of Public Prosecutions[2006] IESC 48, [2006] 3 I.R. 520 , 540, in nearly all such cases "the principal objective has been to seek to prevent his trial from proceeding", so that in practice claims for damages are either not made or not pressed. That is the case here, where the relief claimed is that of prohibition and there is no separate claim for damages. Yet it is not in doubt but that an accused has a constitutional right to an early trial by virtue of Article 38.1. It is equally clear that at common law there was no power to award damages for a breach of the constitutional right to an early trial.*
>
> *24. The purpose of the action for damages for breach of constitutional rights is to supply a remedy for such breach where none has otherwise been provided either by common law or by statute (cf. the comments of Henchy J. in Hanrahan v. Merck,*

Sharp & Dohme Ltd.[1988] I.L.R.M. 629 , 636). In those circumstances, applying standard Meskell principles (Meskell v. Coras Iompair Éireann[1973] I.R. 121), the existence of a jurisdiction to award damages for a breach of this constitutional right would not seem to be in doubt, at least as a matter of principle in an appropriate case. If the jurisdiction has not been availed of to date, it is because in truth applicants in cases of this kind are determined to secure an order of prohibition rather than damages.

128. The issue of damages for delay was also addressed in *Nash v. DPP* [2016] IESC 60. The focus of the Supreme Court was the question of whether it was possible in principle and appropriate in the circumstances of that case to award an accused in a criminal trial damages as a result of significant delay in the criminal process. As stated by Clarke J. *"[t]hat question arises in respect of the right to a timely trial conferred by the European Convention on Human Rights and also by the Constitution."*

129. The legal basis for damages for delay under the 2003 Act was described by Clarke J. in Nash in the following terms:

"2.1 Since the coming into force of the European Convention on Human Rights Act 2003 ('the 2003 Act') it is clear that, at least at the level of principle and at least in many cases, a claim can be maintained in damages against an organ of the State (as defined in that Act) in respect of a breach of the rights conferred by the ECHR.

2.2 Section 3(2) of the 2003 Act provides that a person who suffers loss or damage as a result of a failure by an organ of the State to perform its functions in a manner compatible with the ECHR may 'if no other remedy in damages is available' be awarded damages if a court of competent jurisdiction considers it appropriate".

130. After reiterating the principle of a constitutional right to a timely trial (as found by Hogan J. in *G.C.*), and that absent any appropriate remedy provided by the common law or by statute damages may lie for a breach of a constitutional right, Clarke J. went on to state:

"2.8 It is, therefore, clear that the constitutional right to a timely trial has been well established for many years. Given that it has also been clear that, in an appropriate case, damages can be awarded for the breach of a constitutional right, it has been clearly established for some time in our jurisprudence that there is, at least at the level of principle and in some circumstances, an entitlement to damages for breach of the constitutional right to a timely trial. However, just as in the case of a claim for damages for breach of the similar right guaranteed by the ECHR, there may well be questions as to the precise circumstances in which such an entitlement to damages may arise."

131. As to the entitlement to damages for delay under the Constitution,

Clarke J. opined:

"5.1 The same factual backdrop is highly material to a consideration of whether Mr. Nash could be entitled to damages for breach of his rights under the Constitution. For the reasons already addressed it has been clear for some time that, at the level of principle, a potential claim for damages for breach of a right to a timely trial arises under the Constitution. For the reasons identified in the case law to which reference has already been made, I am satisfied that the Constitution does guarantee a right to a timely trial. There may, of course, be questions as to whether there has been a breach of that right in the circumstances of a particular case and also as to what person or body may be regarded as having contributed to the breach of the right concerned. In the party led courts system which applies in common law countries, the principal obligation for progressing proceedings lies on the parties themselves. However, the courts system provides mechanisms to enable any party who is dissatisfied with the pace of litigation to seek an appropriate intervention by the court to ensure that the litigation progresses at an appropriate pace.

5.2 In that context it may, of course, be necessary to identify the extent to which a party or the parties may be responsible for the failure of the process to be conducted and concluded in a timely fashion. It will, of course, be necessary to assess the role of the accused in any possible delay. In a party led litigation system it will always be necessary to assess the extent to which any party has made use of available mechanisms (such as appropriate procedural motions or applications for priority) which are designed to accelerate the process or prevent excessive delay. However, in the context of criminal proceedings, one of the parties will almost invariably be the State in some guise or other being most commonly the D.P.P. A failure on the part of the prosecuting authorities to progress criminal proceedings in a timely fashion is likely to derive from a failure on the part of the prosecuting authorities themselves or on the part of those investigating authorities, such as the police, on whom the prosecuting authorities rely for the finding and presentation of much of the evidence. In addition, it may be necessary to consider the extent to which it may be possible to award damages in respect of delay caused by a failure within the courts system itself. The immunity traditionally attaching to the courts or judges would require careful consideration. However, in addition to that it may be that there could be cases where, on a proper analysis, any delay within the courts system might properly be attributed to a failure on the part of the State itself to provide adequate resources to enable the courts system to deliver trials which met the constitutional requirement of timeliness. I note all of these points for three purposes.

5.3 The first is to emphasise that there is, in principle, an entitlement to damages for breach of the constitutional right to a timely trial.

5.4 The second is to indicate that the precise parameters of the circumstances in which it may be appropriate to award such damages would require very careful consideration in the light of a proper analysis of all material facts connected with

the litigation in question. The issues noted earlier in this judgment are, doubtless, but some of the issues which might require to be determined in an appropriate case.

5.5 But the third point is that a proper consideration of the question of whether damages for breach of the constitutional right to a timely trial should be awarded would require a detailed consideration as to the reasons why there was a lapse of time between when it might be said that the process began and the final decision of the Court. In the criminal context that would require a detailed consideration of the reason for the lapse of time between the beginning of the criminal process (however that might be defined) and the trial of the accused. In order for there to be even a potential claim in damages for breach of the constitutional right to a timely trial it would be necessary that there be evidence to demonstrate a sufficient level of culpability on the part of the State or persons or entitles for whom the State might be regarded as answerable. The question of whether damages for breach of the constitutional right to a timely trial should be awarded is not a matter which can be considered in a vacuum. It necessarily is highly dependent on all the circumstances of the case.

5.6 It should also be noted that there may well be a range of further considerations which it may be appropriate for the court to take into account. The primary remedy for delay is to seek an appropriate order requiring that the matter be speeded up or, if the delay creates a sufficient risk to the right to a fair trial, to prohibit that trial. Furthermore, it is necessary to have regard to a range of rights including the right of the community in respect of the prosecution of criminal offences but also, importantly, the rights of victims of crime or those who assert that they are victims. It may well also be necessary to consider in detail the precise level of delay which might legitimately give rise to a claim in damages and the extent to which it might be necessary to establish significant consequences of the delay for the accused in question in order that damages would be considered to be a necessary remedy for the purposes of meeting in an appropriate fashion any breach of constitutional rights established. For these, and doubtless other, reasons, it should not be assumed that every case of delay must necessarily convert into a claim in damages. While the parameters will require to be worked out on a case by case basis it may well be that the circumstances in which damages can actually be recovered may turn out to be relatively rare although it is impossible at this stage to give any true assessment on that question."

132. In the instant case, clearly the remedy of prohibition (as referred to in *G.C.* and *Nash*) cannot avail the plaintiff since his trial has long since ended. Given that the plaintiff's complaint is the delay which arose between the conclusion of his trial and the hearing of his appeal, and absent any remedy at common law or under statute (save as provided for in the 2003 Act), as a matter of principle his case falls to be considered in the context of whether a breach of his right to an expeditious trial as provided for in Article 38 of the Constitution has occurred.

133. Albeit acknowledging that a person has a right under the Constitution to claim damages for delay in the criminal process, it is the defendants' position is that the plaintiff's circumstances do not meet the necessary threshold either under the Constitution or the Convention.

134. Counsel for the defendants also contends that in Nash, the emphasis was on "significant" delay which, it is submitted, is not the position in the present case.

135. As regard the constitutional right to an expeditious trial, essentially, the defendants maintain that the facts of the present case, when looked at as a whole, do not amount to significant, culpable or egregious delay such as would merit a finding that the plaintiff's right to a trial within a reasonable timeframe was breached.

136. Counsel for the defendant submits that while the plaintiff has adduced evidence of a delay of two years and two months in getting his appeal on for hearing, he has not advocated what the appropriate timeframe was for the hearing of his appeal given the number of appeal grounds raised, the issues raised in his appeal submissions, or indeed the steps taken in the case.

137. Counsel also submits that in *G.C.*, Hogan J.'s consideration of damages as a remedy was in the context of a sixteen-year delay from the time of an alleged sexual assault. In contrast with the position in *G.C.*, the defendants say that the relevant period in the instant proceedings is the eighteen months between the plaintiff's appeal of his conviction being listed for the first time in the list to fix dates and the determination of the appeal. The question to be addressed is whether this is the sort of *"inordinate and blameworthy delay"* envisaged by Hogan J. in *G.C.* as amounting to a breach of the plaintiff's constitutional right to an expeditious trial.

138. The defendants also point to the fact that no particular complaint is made by the plaintiff about the criminal process in which he was involved until it gets to the appellate stage.

139. I accept the defendants' argument that this is not a case where the plaintiff is claiming that the garda investigation took too long or that the trial was unduly delayed or indeed that the appellate court took too long to deliver its judgment.

140. I am also satisfied that there are no grounds for any complaint of delay in the progress of the appeal from the time of the lodging of the appeal on 18th February, 2011 until its listing in the list to fix dates on 5th December, 2011. During this time, the plaintiff filed his grounds of appeal (24th February, 2011) following which the Court of Criminal Appeal requisitioned and received the trial transcript (9th and 30th March, 2011 respectively), obtained approval thereof from the trial judge (7th April, 2011) and furnished it to the plaintiff's solicitors (26th April, 2011). The next step in the proceedings was the lodging by the plaintiff's solicitors of a motion to amend the grounds of appeal. Following the Summer recess, this motion duly appeared in the Court of Criminal Appeal's case management list on 28th November, 2011 when the grounds of appeal were amended by

consent. The plaintiff's legal representatives duly filed the appeal submission on the same date. This step precipitated the appeal into the Court of Criminal Appeal's list to fix dates.

141. While the plaintiff was in custody for a period in excess of four years before his release on 31st July, 2013, what cannot be lost sight of is that his detention from February, 2011 was, on its face, in accordance with law albeit that his conviction was ultimately quashed by the Court of Criminal Appeal.

142. With regard to the two years and two months from the filing of the appeal until the plaintiff got his appeal on for hearing in April 2013, the defendants contend that that the plaintiff cannot say that there was nothing happening whilst the matter was before the Court of Criminal Appeal. They argue that it was never the case that the plaintiff's appeal was in limbo: it regularly appeared in a list to fix dates so that it was under the supervision of the Court of Criminal Appeal. As testified to by Ms. Manners, Hardiman J. had a note about each of the appeals advising as to the particulars of each respective appeal. Accordingly, at all times the matter was being regulated by the Court of Criminal Appeal. I am satisfied that this is a factor of which the Court must take account. It is of some significance that the plaintiff's appeal was under regular review between November, 2011 and March, 2013 when he obtained a hearing date.

143. By and large, I accept the defendants' argument that the maximum period of time in respect of which the plaintiff can complain is eighteen months, this being the timeframe from the time his appeal went into the list to fix dates until the finalisation of the appeal.

144. Even if the defendants did not so contend, in any event the progression of the steps in the appeal from its inception suggests that that is the relevant timeframe for the purpose of the plaintiff's complaint, i.e. from when the appeal was listed in the Court of Criminal Appeal's list to fix dates on 5th December, 2011 to the plaintiff's eventual release on 31st July, 2013. It seems to me that the crux of the plaintiff's case turns on what was happening or indeed not happening during this period.

145. By reference to the decision of the Supreme Court in *Devoy v. Director of Public Prosecutions* [2008] IESC 13 (a case involving a delay of sixteen months in rectifying a return for trial for which no adequate explanation was given), the defendants submit that a period of some eighteen months is not the sort of *"inordinate and blameworthy delay"* envisaged by the courts as amounting to a breach of the constitutional right to an expeditious trial. The defendants assert that there is nothing to suggest that the delay *"deviated from the norm"* in relation to the hearing of appeals and they contend that the plaintiff's written submissions accept this to be the case.

146. In *Devoy*, the applicant sought to prohibit his trial on the basis of acknowledged prosecutorial delay. For the purposes of the necessary balancing test in order to determine whether the trial should be prohibited, Kearns J. stated that such delay *"must be seen as significant and blameworthy as to warrant the application of the balancing test".* He went on to state that *"the period of blameworthy delay must be very substantial before a court intervenes to actually stop a trial"*.

147. Of course, that case concerned pre-trial delay where the remedy of prohibition was potentially available to an accused, unlike the present case here. Nevertheless, the dictum of Kearns J. is instructive as it is echoed to some degree in *Nash* where Clarke J. refers, *inter alia*, to "*significant*" delay (at para. 5.7) and *"a sufficient level of culpability on the part of the State or persons or entities for whom the state might be regarded as answerable…"* (at para. 5.5)

148. The report of the Working Group on a Court of Appeal (May 2009) reported on a "systemic backlog" in the Irish Courts system. It also noted the increase in the number of appeals to the court of Criminal Appeal between 1995 and 2008, as referred to earlier in this judgment. Undoubtedly, therefore, the general situation with regard to appeals in the Court of Criminal Appeal was far from ideal. In the course of her evidence, Ms Manners testified to the concern expressed by Hardiman J. in relation to the backlog of appeals in the Court of Criminal Appeal during the currency of the plaintiff's appeal.

149. Notwithstanding the undoubted systemic delays in the courts process between 2009-2014, as reported on by the Working Group on a Court of Appeal, I note that during the relevant timeframe there were mechanisms available within the Court of Criminal Appeal whereby a person could seek to speed up the process. There was a facility to apply for priority and/or bail. This was testified to by Ms Manners.

150. In *Nash*, Clarke J. stated that one of the questions that has to be addressed in determining whether there has been a breach of the constitutional right to an expeditious trial is the extent to which a person (including the accused) or any other body may be regarded as having contributed to the breach of the right. He noted that *"[i]n a party led litigation system it will always be necessary to assess the extent to which a party has made use of available mechanisms (such as appropriate procedural motions or applications for priority) which are designed to accelerate the process or prevent excessive delay*".

151. There is no basis in the present case on which it could be suggested that the plaintiff through any *action* on his part can be said to be responsible for the delay in getting his appeal on for hearing. While he sought and succeeded in amending his appeal grounds some months into the appeal process, I accept Ms Manner's evidence that that did not contribute to the delay in getting his appeal on for hearing.

152. The defendants however point to the plaintiff's failure to make an application to the Court of Criminal Appeal for priority. They contend that it is difficult to see how the plaintiff could be relieved of the obligation to at least make such an application. This is a factor to be considered, to my mind. While the plaintiff has adduced evidence through Ms. Manners that any such application might not have stood a good chance of success, it remains the case that the plaintiff did not make an application for priority. To my mind, it was a matter for the Court of Criminal Appeal to determine the merits of any particular application and thus I cannot find as a fact that any such application would have been to no avail.

153. Thus, based on the dictum of Clarke J. in *Nash*, and despite Ms Manners' testimony that there would have been no reality in the plaintiff applying for priority given that priority was afforded on the basis of length of sentence (i.e. the longer the sentence the less likelihood of priority), it seems to me that at the very least it behoved the plaintiff to make an application for priority for his appeal, whatever the outcome might have been, particularly in circumstances where much emphasis has been put by the plaintiff upon the basis on which his conviction was ultimately quashed.

154. It is also submitted by the defendants that the plaintiff did not apply for bail. They assert that in circumstances where the plaintiff is emphasising the fact that his conviction was quashed by the Court of Criminal Appeal on a discrete issue it begs the question as to why the plaintiff did not apply for bail on the issue of the frailty of the DNA evidence.

155. I accept the defendants' submission in this regard. While I accept that it is difficult to get bail post-conviction, and that bail would only ordinarily be granted if an appellant could point to a discrete point of appeal, it remains the case that the plaintiff did not apply for bail, either generally or on the issue of the DNA evidence. Thus, the fact that there were mechanisms available to the plaintiff to seek to speed up the appeal process and/or at least to seek his release on bail (which was theoretically possible at least after August, 2011 when his sentence for the unrelated matter ended) pending his appeal are factors which the Court must take account of in deciding whether the delay in this case was significant and inordinate and culpable.

156. It is also the case that the applicant brought an Article 40 application. This is relevant to the Court's consideration of the issue of delay.

157. The Article 40 application was based in large part on the Supreme Court's decision in *Damache Director of Public Prosecutions* [2012] IESC 12. Based on *Damache*, the plaintiff contended that his conviction (and hence his detention) had been rendered unlawful. In his Article 40 proceedings the plaintiff also raised and litigated one of his grounds of appeal that was then before the Court of Criminal Appeal, namely the question as to whether the return for trial was valid. Counsel for the defendants submits that in the context of the plaintiff having made an Article 40 application wherein he cited one of his grounds of appeal, he cannot say that during the two-year period while he awaited a hearing date for his appeal that he was unable to ventilate one of his appeal points. The defendants point out that after the resolution of the Article 40 proceedings, the plaintiff resolved to apply to amend his grounds of appeal to include the *Damache* point. Albeit that there was in fact no further application to amend the plaintiff's grounds of appeal post the Article 40 application, it remains the case that even at the time of the Article 40 application the plaintiff was contemplating widening his appeal grounds before the Court of Criminal Appeal.

158. All in all, for the purposes of the matters in consideration in the within proceedings, I do not find that anything in particular turns on the fact that the plaintiff instituted Article 40 proceedings.

159. In addition to relying to established jurisprudence of the Irish courts on the right to an expeditious trial, by way of support for his claim that there was a breach of his constitutional rights, the plaintiff relied on the case law of the ECtHR on the right to a trial within reasonable time as guaranteed by Article 6 of the Convention.

160. Pursuant to s.4(a) the 2003 Act, judicial notice must be taken of the Convention provisions and of all declarations, decisions, advisory opinions and judgments of the ECtHR under the Convention when a breach of Convention rights is alleged and where the court is interpreting and applying those Convention provisions pursuant to s. 2 of the 2003 Act. Section 2(1) provides:

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions"

Section 2 of the 2003 Act does not cover the Constitution.

161. I accept however that when considering the delay in this case in the context of a claim by the plaintiff of a breach of his constitutional rights, the Court can be guided by the principles laid down in the jurisprudence of the ECtHR save where there is a conflict between those principles and domestic law. I do not perceive any discernible conflict between the principles laid down by the ECtHR and the right under the Constitution to an expeditious hearing (and appeal) in respect of criminal charges brought against an individual. It is thus appropriate for the Court to have regard to the approach taken by the ECtHR to the issue of delay in the criminal process.

162. While the ECtHR has not set any specific time limits for the processing of criminal cases, it has consistently held that Contracting States are obliged to organise their legal systems in such a way as to ensure the reasonably timely determination of legal proceedings (*Price and Lowe v. U.K.* [2003] ECHR 409 refers). *Price* was a case where the civil proceeding in their entirety lasted for twelve years.

163. On 10th September, 2010, the ECtHR delivered its judgment in *McFarlane v. Ireland* [2011] 52 EHRR 20. The majority of the Court found that the excessive length of criminal proceedings against the applicant amounted to a violation of Article 6 of the Convention and the absence of an effective domestic remedy for unreasonably long proceedings amounted to a violation of Article 13 of the Convention.

164. The Court held:

> *"An effective remedy for delay in criminal proceedings must, inter alia, operate without excessive delay and provide an adequate level of compensation. Article 13 also allows a state to choose between a remedy which could expedite pending proceedings or a post factor remedy in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a*

compensatory remedy might be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist. In such circumstances the Court considers that the Government has not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time."

165. It further held:

The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute. In criminal matters, the "reasonable time" referred to in Art 6(1) began to run as soon as a person is 'charged'. 'Charge', for the purposes of Art 6 (1), might be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'".

166. Counsel for the plaintiff points out that the plaintiff's case was processed by the courts between 2009 and 2013 at the peak of the "systemic backlog" identified by the Working Group. It is submitted that in those circumstances, and in contrast to *Kemmy*, the appellate procedures operative at the time of the plaintiff's conviction did not provide him with an effective remedy. With reference to this argument, I am satisfied that the plaintiff does have a remedy, namely the right to claim damages for a breach of his constitutional right to an expeditious trial.

167. Counsel for the plaintiff further points out that at the time of the ECtHR's judgment in *McFarlane*, the Court of Criminal Appeal was sitting one day per week save for one week at the end of Michaelmas term and Hilary term when the court sat every day for a week to hear sentence appeals.

168. In *Healy v. Ireland* (application no. 27291/16, judgment of 18th January, 2018), the ECtHR held as follows:

"A temporary backlog of court business does not entail a Contracting State's international liability if it takes appropriate remedial action with the requisite promptness. However, according to the Court's established case-law, a chronic overload of cases within the domestic system cannot justify an excessive length of proceedings … nor can the fact that backlog situations have become commonplace …"

169. The ECtHR has also stressed that where persons are in detention throughout the criminal proceedings, special diligence is expected on the part of the courts dealing with the case to administer justice expeditiously: (*Abdoella v. The Netherlands* [1995] 20 EHRR 585 and *Kalashnikov v. Russia* [2006] 36 EHRR 34 refers)

170. Relying on the aforesaid jurisprudence, the plaintiff contends, applying the ECtHR's test as to the reasonableness of the length of proceedings, that the following factors are relevant:

- The criminal case against the plaintiff was not particularly complex. It arose from a recently committed robbery in a post office in an urban setting.
- The plaintiff was charged with just two offences arising from a single incident, and was tried alone.
- The case raised no issues of national security nor was any unusual expertise required.
- The trial was concluded within one week.
- The plaintiff did not substantially contribute to the length of the proceedings. All periods of excessive delay are attributable to the defendants and their agents.

171. It is submitted that taking those factors into consideration, and having regard to the fact that the plaintiff was incarcerated throughout the criminal proceedings, it is inescapable that the length of the criminal proceedings breached the plaintiff's constitutional and Convention right to a trial with reasonable expedition. It is further submitted that given that in *Barry v. Ireland* and in *McFarlane v. Ireland* the State argued that a person has a right to seek damages arising from a breach of the constitutional right to a trial with reasonable expedition, it would be inconceivable if the State were to argue to the contrary in the present proceedings.

172. I do not understand the State's position to be that a right to a trial with reasonable expedition does not exist. Rather, the defendants' position is that in the instant case, the plaintiff has not brought himself within the jurisprudence of the ECtHR on the issue of delay in criminal proceedings. The defendants rely on the factors already outlined earlier in this judgment.

173. They further submit that unlike many of the applicants before the ECtHR, the plaintiff's criminal proceedings had no impact on his liberty for part of the time he was in custody given that he had begun a drug sentence on 7th May, 2009 for an unrelated matter which ended on 7th August, 2011 and which thus overlapped by some four to five months with the sentence imposed on the plaintiff in respect of the offences for which he was convicted on 15th February, 2011.

174. The defendants repeat their contention that there was no period of inactivity at any stage with regard to the plaintiff's appeal: his case was regularly listed before the Court of Criminal Appeal to see if a hearing date could be assigned. It is again submitted that on any of those occasions, the plaintiff could have applied for priority or bail. The defendants say that in all the circumstances the relevant period of time in the plaintiff's case is not comparable to any of the periods set out in the ECtHR's jurisprudence. It is submitted that the plaintiff, on whom the onus of proof rests, cannot establish a breach of Article 6 of the Convention.

175. The defendants thus contend that there has been no failure to act in accordance with the State's obligations under the Constitution or indeed the Convention. Counsel also points to the fact that what the ECtHR's jurisprudence refers to is "culpable" failure on the part of some element of the State apparatus which could be said to deprive a person of his right to a reasonably expeditious or timely trial. It is further submitted that, as stated by Clarke J. in Nash, *"the primary focus of the [European Court of Human Rights] jurisprudence is on the period between the formal commencement of a criminal process and the trial."*

176. In my view, insofar as the plaintiff seeks to rely on *McFarlane v. Ireland* in aid of the submission that his rights under the Constitution were breached, it must be noted that the period of time identified by the ECtHR in that case which gave rise to a breach of Article 6 of the Convention was ten and a half years from the date of the applicant's arrest to the date of his acquittal by the Special Criminal Court. In the plaintiff's case, the time period in total is some four years and three months, including the first two years in respect of which the plaintiff makes no complaint as to delay. I do not find, therefore, that there is a valid basis for a comparison to be made between the plaintiff's case and that of the applicant in *McFarlane,* particularly when as regards the latter case, the criminal proceedings had commenced a significant period of time after the impugned events. As observed by the ECtHR:

> *"As regards the conduct of the relevant authorities, the Court has noted the particular obligation of expedition on the State when criminal proceedings begin a significant period of time after the impugned events … and the following periods of delay have been assessed in light of that obligation".* (at para. 151)

177. In contrast to *McFarlane*, the robbery which gave rise to the plaintiff's conviction occurred on 26th March, 2009. The plaintiff was arrested on 14th April, 2009 and charged on 15th April, 2009. Thus, unlike the applicant in *McFarlane*, criminal proceedings against the plaintiff began very soon after the impugned events.

178. As already stated, in *McFarlane* a breach of Article 6(1) was found in circumstances where the overall length of proceedings was ten and a half years. In *Barry v. Ireland* [2005] ECHR 18273/04, the proceedings lasted ten years and four months. In *Healy v. Ireland*, application no. 27291/16 (a judgment of 18th January, 2018), the period in issue was eleven years and nine months. In the latter case, the ECtHR noted that the appeal proceedings lasted for five years and four months, and in particular included a *"lengthy period of inactivity*" which lasted for more than four years. In the instant case, there was no discernible period of inactivity; the plaintiff's appeal was regularly listed before the Court of Criminal Appeal to see if a hearing date could be assigned. It is also the case that on those dates the plaintiff could have applied for priority but did not. In all the circumstances, I cannot find that the plaintiff's circumstances were on par with the aforesaid jurisprudence of the ECtHR.

179. I am also satisfied that there the plaintiff's reliance on the decision of the ECtHR in *Abdoella* is misconceived. In that case, the applicant had been under arrest for four years

and four months before the investigative/judicial procedure in the Netherlands came to an end. During that period on two occasions he had appealed to the Supreme Court in the Netherlands in respect of various issues. On both occasions the lower court in the Netherlands failed to transmit documents to the Supreme Court. As can be seen from its judgment, this factor exercised the ECtHR. It opined:

> "*The time required on both occasions for the transmission of the documents to the Supreme Court totals more than 21 months of the 52 which it took to deal with the case. The Court finds such protracted periods of inactivity unacceptable, especially where in the present case the accused is detained. They go well beyond what can be considered reasonable.*" (at para. 24).

180. The defendants also submit that there is no basis for the plaintiff's reliance on *Kalashnikov v. Russia.* In that case, a person was on remand for a lengthy period of time i.e. from February 1995 to August 1999 in what was described as inhuman and degrading prison conditions. In circumstances where there was pre-trial detention in such conditions the delay was held to be in breach of the Convention.

181. Unlike the situation that pertained in *Kalashnikov*, the plaintiff was not in pre-trial detention. That being said, of course it behoved the State authorities to ensure that the criminal process (which includes the appeal process) was conducted with reasonable expedition.

182. However, albeit that the plaintiff's appeal process took some two years before he got an appeal hearing, I do not find, having regard to the matters which I have already alluded to earlier in this judgment, that the delay which undoubtedly occurred in the hearing of the plaintiff appeal was so egregious, unreasonable or culpable on the part of the defendants so as to constitute a breach of the right to an expeditious trial as guaranteed by the Constitution. Having regard to the guidelines set out in G.C and Nash, and having taken account of the ECtHR's jurisprudence to which the Court was referred, and having taken account of what the Court considered were the relevant factors in the plaintiff's case, including the fact that there were mechanisms available to the plaintiff to seek to either speed up his appeal or apply for bail, notwithstanding the overall two-year delay from the filing of the appeal to the plaintiff's eventual release, I am not satisfied that it has been established that there has been "*a sufficient level of culpability on the part of the State*" such as deprived the plaintiff of his constitutional right to an expeditious trial, and which would warrant an award of damages.

The plaintiff's claim under the 2003 Act

183. The plaintiff seeks damages for pursuant to Section 3 of the 2003 Act. It would appear that damages are being sought by the plaintiff under this provision in respect of his miscarriage of justice claim and the delay in the hearing of his appeal.

184. Section 3 provides, in relevant part:

"(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate."

185. The defendants submit that although the plaintiff is within time to mount a claim for damages in respect of his constitutional rights, he is out of time for the purposes of any claim for damages under the 2003 Act in circumstances where he did not institute the within proceedings until 27th February, 2015. In this regard, counsel points to the provisions of s.3(5) (a) and (b) of the 2003 Act which provides a limitation period of one year which the court can extend if it appears to the court to be appropriate to do so in the interests of justice.

186. The defendants point out that no notice of motion on affidavit has ever been placed before the Court to lay down the factual basis for an extension of time under s.3(5)(b) of the 2003 Act. No evidence has been adduced by the plaintiff citing any hurdle which prevented him from bringing his case within the one -year period provided in s.3(5)(a) of the 2003 Act.

187. It is submitted that bearing in mind that the plaintiff contends that his case constitutes a miscarriage of justice, and in circumstances where he was legally represented at all stages of his criminal trial including when he filed his grounds of appeal, when he brought his Article 40 proceedings, and when he filed his written submissions for the appeal, there is no possible reason as to why he could not have instituted the within proceedings within the period of twelve months following his conviction on 15th February, 2011. It is submitted that the plaintiff was at all relevant times aware of the basis of his miscarriage of justice claim (the frailties in the evidence against him) as his counsel had made submissions to the trial judge in this regard.

188. The defendants also contend that as far as the delay in the hearing of the plaintiff's appeal is concerned, he failed to make his claim under the 2003 Act within one year of the appeal being finalised, as he ought to have, pursuant to s.3(5)(a) of the 2003 Act.

189. Given that some seven years have elapsed since the plaintiff was convicted and sentenced, some five years since his appeal was determined and some three and a half years since the within proceedings were instituted, the defendants contend that there is no basis upon which the Court should extend the time period, particularly in circumstances where no such relief was sought in the pleadings.

190. The defendants' second specific objection to the plaintiffs' claim under the 2003 Act is that the plaintiff has instituted the proceedings against Ireland: the plaintiff has thus sued

the State and not any organ of the State. It is submitted that the State cannot be an organ of itself. It is also submitted that whilst the plaintiff has sued the Attorney General as representing the State, it is not suggested that the Attorney General had any hand, act or part in any of the matters relevant to the within case. The defendants point out that the plaintiff has not sued the Gardaí or the DPP who could be described as organs of the State. Moreover, the 2003 Act specifically excludes the court as being an organ of the State. It is thus submitted, in circumstances where the plaintiff's claim is essentially that the trial judge allowed evidence to go to a jury when he should not have and that the plaintiff's appeal was not progressed through the courts as quickly as it should have been, that the plaintiff has no cause of action against an "organ of the State" pursuant to s.3(2) of the 2003 Act. The cause of action provided by that provision is against an "organ of the State" but not the State itself.

Considerations

191. Clearly the plaintiff's claims under s.3 of the 2003 Act are statute barred.

The question which arises is whether the Court should extend the requisite statutory period "in the interests of justice". In the first instance, I accept the defendants' submission that the plaintiff has not put forward any basis as to why the claim was not made within the requisite timeframe, even if that timeframe were to be considered to start to run from the date of the plaintiff's release, which I find to be the requisite date.

192. The plaintiff seeks an extension for the first time in his written submissions. His counsel repeated the request in oral submissions, without putting forward any explanation for the delay in initiating a claim under the 2003 Act.

193. Given that a substantial part of the plaintiff's claims in the within proceedings alleges delay on the part of the State, the Court was not minded to accept the defendants' submission that an extension of time should not be granted.

194. There remains however the question of whether the plaintiff's claim under the 2003 Act is properly constituted. Overall, I accept the defendants' contention that it is not. The plaintiff has sued the State, not an organ of the State as envisaged by s.3(1) of the 2003 Act. "Organ of the State" is defined in s.3(1) as:

> "including a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both of such Houses or a court) which is established by law or through which any of the legislative, executive, or judicial powers of the State are exercised."

195. To my mind, to hold the proceedings as constituted against "Ireland" as coming within the 2003 Act would be to give direct effect to the provisions of the Convention which is not the purpose or effect of the 2003 Act. (*Gorry v. Minister for Justice* [2017] IECA 282 refers).

196. I agree with the defendants' submission that insofar as the plaintiff has joined the Attorney General as an "organ" of the State, it has not been explained how the Attorney General has failed to act in accordance with the State's obligations under the Convention.

197. In all the circumstances, I find that the claim in damages as presently made under the 2003 Act not to be properly constituted.

198. Lest that I am in error in finding that the plaintiff has not sued an organ of the State, and that the plaintiff's s.3 damages action is in fact properly constituted, I will address the claim made by the plaintiff for damages for miscarriage of justice under s.3 of the 2003 Act.

199. At para. 2 of his Replies to Particulars, it is pleaded that the case being advanced against the defendants is, *inter alia*, that "the plaintiff is prevented from seeking compensation [for his period of detention] as his conviction was overturned on the basis that the Circuit Court Judge was in error and should have directed his acquittal rather than on the basis of a "newly discovered fact".

200. It seems to me that the State's Convention obligation which is being put in issue can only refer to Article 3 of Protocol 7 to the Convention which obliges the State to provide compensation for wrongful conviction where there is a newly discovered fact which shows conclusively that there has been a miscarriage of justice. The State has given effect to its Convention obligation by enacting the 1993 Act, as discussed earlier in this judgment. Given that the plaintiff has acknowledged that his circumstances did not come within the type of case provided for in the 1993 Act which itself replicates the requirements of the Convention, I fail to see what breach of the Convention on the part of the defendants can be said to arise.

201. Insofar as the plaintiff grounds his claim for damages for delay on the provisions of s.3(1) and (2) of the 2003 Act, in its consideration of the plaintiff's constitutional claim, the Court has made specific reference to the jurisprudence of the ECtHR on the issue of delay in criminal trials and found that the plaintiff's circumstances did not amount to a breach of the Constitution or Article 6 of the Convention.

202. For the reasons set out herein, the plaintiff's claim is rejected.