# THE HIGH COURT
## JUDICIAL REVIEW

**[2024] IEHC 109**

**[RECORD NO. 2021 / 768 JR]**

**BETWEEN:**

**JOHN O'BRIEN**

**APPLICANT**

**AND**

**GOVERNOR OF CORK PRISON, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL**

**RESPONDENTS**

**IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**NOTICE PARTY**

**RULING of Ms. Justice Siobhán Phelan, delivered on the 1st February 2024.**

### INTRODUCTION

**1.** These Judicial Review proceedings commenced in August, 2021 and concern the rejection of the Applicant's claim under a non-statutory compensatory scheme for prisoners subjected to a practice of "*slopping out*" i.e. having no in-cell sanitation which claim relates to a period of detention ending in 2014 [hereinafter "the Scheme"]. The claim was rejected under the terms of the Scheme on the basis that the claim was statute barred. The matter came before me on the 29th of January, 2024 on application on the Applicant's behalf pursuant to Order 84, rule 23 of the Rules of the Superior Court, 1986 for leave to amend his Statement of Grounds.

### BACKGROUND

**2.** The practice of slopping has been condemned by the European Court of Human Rights in contributing to findings of breaches of Articles 3 and/or 8 of the European Convention on

Human Rights (hereinafter "the Convention") in a number of cases (see, *inter alia*, *Peers v. Greece* (Application No. 28524/95, 19th of April, 2001), *Kehayov v Bulgaria* (Application No. 41035/98, Judgment of 14th of April 2005), *Bakhmutsky v Russia* (Application No. 36932/02, Judgment of 25th of June, 2009) and *Orchowski v. Poland* (Application No. 17885/04, 22nd of October, 2009. In the Scottish case of *Napier v. The Scottish Ministers* [2004] S.L.T. 555, a combination of slopping out and prison overcrowding led to findings of inhuman and degrading treatment under Articles 3 and 8 of the Convention.

**3.** In *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269 a claim was advanced both on constitutional and Convention grounds. The High Court rejected the claim on both grounds following a detailed consideration of the evidence and the caselaw. The High Court found that the Strasbourg jurisprudence did not support the proposition that the practice of slopping-out *per se* was necessarily inhuman and degrading for the purposes of Article 3 or unlawful under Article 8 in all places and at all times. Whether a breach of Articles 3 and/or 8 was established was found to depend on all the circumstances of the case. It was concluded that the cumulative effect of the conditions of detention required to be considered noting that in the successful cases relied upon from both Strasbourg and other jurisdictions there were found to be few if any counterbalancing positive factors as to the prison regime. In rejecting the claim, it appears to have been material to the Court's considerations that the applicant in *Mulligan* did not have to share a cell at any stage and did not make significant complaints as to the manner in which the staff dealt with the sanitation issues on a day-by-day basis in his case. It was accepted, for example, that insofar as possible requests to go to the toilet were accommodated.

**4.** A fundamental issue which goes to the heart of these proceedings is whether the decision in *Mulligan*, which was not appealed, should be read as establishing that there was no remedy in Irish law for those subjected to a practice of slopping out whilst in detention when that case was decided or whether it should be read as a decision on the facts and evidence in that case which did not preclude an action for breach of constitutional rights in all cases where persons in detention were subjected to a slopping out regime.

**5.** In *Simpson v Governor of Mountjoy Prison*[2019] IESC 81; [2020] 3 I.R. 113; [2020] 1 I.L.R.M. 81 ("*Simpson*") it was found in the judgment delivered in November, 2019 that the practice of slopping out evidenced in that case infringed the personal rights of the citizen

guaranteed by Article 40.3 of the Constitution. Damages were awarded in that case in the sum of €7,500 for breach of personal rights protected under Article 40.3 of the Constitution measured with reference to conditions of detention occurring in the six-year period prior to the commencement of the proceedings (proceedings had issued in 2014 in respect of a period of detention occurring between February and September 2013). It is also relevant that the claim for damages for breach of rights under Articles 3 and 8 of the Convention advanced under s. 3 of the European Convention of Human Rights Act, 2003 [hereinafter "the 2003 Act"] was found to be largely statute barred insofar as it related to periods of detention occurring more than one year previously. This finding was not appealed, and it was observed by McMenamin J. in the Supreme Court (para. 24) regarding the decision not to appeal that "*this was a prudent and correct decision*."

**6.** Following the decision in *Simpson* a Scheme of Settlement [hereinafter "the Scheme"] was introduced in February, 2020. It was a term of the Scheme that compensation in amounts measured under the Scheme would be payable on compliance with conditions of the Scheme including in material part that the claim, or at least part of it, is not statute barred.

**7.** The Applicant made two applications under the Scheme in respect of a period of detention in Cork Prison between March, 2013 and April, 2014 when he was required to share a single cell with at least one other prisoner without in cell sanitation in consequence of which he was obliged to engage in the practice of "*slopping out*". His first application was presented through a former solicitor in November, 2020 and was refused on the 17th of November, 2020 on the basis that he was statute bared. On the 4th of March, 2021, the solicitors for the Applicant in the within proceedings applied afresh. By letter dated 27th of May, 2021 his application was again rejected on the basis that his claim was statute barred. The Applicant seeks to quash this decision or in the alternative seeks relief arising from the exclusion of the Applicant from the scope of the Scheme.

**8.** The application for leave to proceed by way of judicial review was opened *ex parte* on the 11th of August, 2021. By order made on the 22nd of November, 2021, the Applicant was granted leave to seek relief in the terms identified in the Statement of Grounds on the basis of the grounds there set out. I do not propose to recite these in full save to observe that the primary relief was an order of *Certiorari* quashing the decision to exclude the Applicant from the Scheme and Declaratory Relief to the effect that the exclusion of the Applicant from the said

scheme violated his rights under Articles 3, 8 and 13 of the Convention contrary to s. 3 of the 2003 Act. The sole identifiable legal ground advanced in the Statement of Grounds is that at paragraph E(6) namely that the effect of the decision is that the Applicant, having suffered an admitted breach of his rights under Article 40.3 of the Constitution and Articles 3 and 8 of the Convention suffered a breach of his right to an effective remedy under Article 13 of the Convention by reason of his exclusion from the Scheme. The basis for the assertion that there has been an admitted breach of Articles 3 and 8 of the Convention is not specified. It is not expressly pleaded that there was no effective remedy in Irish law when the Applicant was in custody albeit the factual grounds recited refer to the decision in *Simpson*, without asserting that it established a remedy in Irish law for the first time. Damages were not claimed in the Statement of Grounds on foot of which leave was granted. It is striking that while Article 13 of the Convention is referred to, no reference is made to a right to an effective remedy protected under the Constitution.

**9.** In the Statement of Opposition separately filed in February, 2022, it is admitted that during periods of the Applicant's detention in the 2013-2014 he shared a single prison cell with at least one other prisoner without in cell sanitation. It is admitted that by reason of his detention on a regime without in cell sanitation that a breach of his rights protected under Article 40.3 of the Constitution occurred. It is further admitted that this breach is actionable and capable of giving rise to a claim in damages. It is pleaded, however, that any such action is statute barred by reference to s. 11 of the Statute of Limitations Act, 1957 (as amended) (hereinafter "the 1957 Act"), which provides for a six-year limitation period.

**10.** Notably, it is not admitted that the Applicant suffered a breach of his rights under Articles 3 and/or 8 of the Convention by reason of his prison conditions. The only admitted breach is a breach of Article 40.3 of the Constitution. Further reliance is placed by the Respondents on s. 3(5) of the 2003 Act which identifies a one- year limitation period for damages claims under that Act, albeit with a power to extend time.

**11.** Although this case was originally listed for hearing in March, 2023 it was adjourned on the Respondents' application pending the determination of the Supreme Court appeal in *McGee* v. *Governor of Portlaoise Prison & Ors.* (on appeal from the decision of the High Court in that case [2022) IEHC 210). The net issue in that case was whether a so-called pure *Meskell* claim is one which is "*founded on tort*" so that the provisions of s.11(2) of the 1957 Act (as amended)

apply, an issue with obvious implications for the case made on behalf of the Applicant.

**12.** The judgment of the Supreme Court was delivered in May, 2023 (*McGee* v. *Governor of Portlaoise Prison & Ors.* [2023] IESC 14, [2023] 1 I.L.R.M. 305. Following an extensive review of the caselaw the Supreme Court found that where vindication of constitutional rights takes the shape of permitting a claim for damages against other wrongdoers, then such a claim is properly characterised as an action founded upon a civil wrong, and therefore, an action founded upon tort. It follows that such a claim is subject to the provisions of s.11 of the 1957 Act.

**APPLICATION TO AMEND**

**13.** Following delivery of the judgment of the Supreme Court in *McGee* in May, 2023, the Applicant sought to amend the Statement of Grounds to include a claim for damages under s. 3 of the 2003 Act and relief by way of a Declaration of Incompatibility in respect of s. 11(2) of the 1957 Act under s. 5 of the 2003 Act.

**14.** In the absence of consent from the Respondents to the amendments sought, a Notice of Motion issued. The matter comes before me on an opposed application for leave to amend the Statement of Grounds on foot of a motion dated the 4th of August, 2023 grounded on the Affidavit of the Applicant's solicitor and seeking leave to proceed on foot of a draft amended Statement of Grounds which includes additional relief, specifically:

1. A claim for damages pursuant to s. 3 of the European Convention on Human Rights Act, 2003;
2. A declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003 that s. 11 of the Statute of Limitations Act, 1957 (as amended) is incompatible with Ireland's obligations under the European Convention on Human Rights including without prejudice to the foregoing, Article 6 and/or Article 13.

**15.** It bears repetition that the case as originally pleaded relies on a breach of obligation to provide the Applicant with an effective remedy under Article 13 of the Convention and a breach of the Respondent's duty under s. 3 of the 2003 Act to perform their functions in a manner

compatible with the State's obligations under the Convention by way of a challenge to the decision under the Scheme to exclude the Applicant's claim and seeking to compel acceptance of the application under the Scheme but without the grounds pleaded contending that the Respondent erred in law in treating the claim as statute barred and/or without seeking a declaration of incompatibility or damages under ss. 3 and 5 of the 2003 Act in the terms now sought. Article 6 of the Convention was not previously identified. The right to an effective remedy under the Constitution (engaging consideration of Articles 34 and 40.3 of the Constitution) has not been invoked either in the case as currently constituted nor on the application for leave to amend.

**16.** In a replying affidavit to the motion the application to amend is opposed on delay grounds in that the additional relief was not sought when the original leave application was moved and it is now almost ten years since the period of incarceration ended. It is contended that the claim for relief under s. 3 is both statute-barred under s. 3(5) of the 2003 Act and out of time having regard to the requirements of O.84, r.21 of the Rules of the Superior Courts. The case is made on replying affidavit that an order extending time had not been sought and no basis for extending time had been identified. It is objected that while it is sought to introduce entirely new relief, no new grounds are advanced to justify the pleas sought to be introduced. It is further objected that the case sought to be made is one which ought more properly to be advanced in plenary proceedings, particularly as it is contended that the Applicant is required to establish *locus standi* for the claim he makes more generally.

**17.** In an affidavit in response to the Respondent's replying affidavit, the Applicant's solicitor has expanded the claim for relief to include an order extending time, if necessary, pursuant to the provisions of O.84. R.21(3) and/or s. 3(5)(b) of the 2003 Act and has sought to identify grounds which it is contended provide a basis for extending time. He has not furnished an amended Statement of Grounds in which an extension of time is identified as a relief on foot of grounds set out in the Statement of Grounds, although this would have been appropriate and helpful. It is further contended that the plea seeking relief under s. 5 of the 2003 Act is included as a matter of prudence contending that it need not be expressly pleaded as the 2003 Act allows the High Court to grant such a declaration of its own volition.

**APPLICABLE LAW**

**18.** Order 84, rule 23 of the Rules of the Superior Court sets out the procedure to amend Judicial Review pleadings:

> *"A copy of the statement in support of an application for leave under rule 20, together ·with a copy of the verifying affidavit must be served with the notice of motion or summons and, subject to sub-rule (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.*
>
> *The Court may at the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with any new matter arising out of an affidavit of any other party to the application.*
>
> *Where the applicant or respondent intends to apply for leave to amend his statement, or to usefi1rther affidavits he shall give notice of his intention and of any proposed amendment to every other party.* "

**19.** In support of the application, I have been referred to a number of decisions on behalf of the Applicant including *Keegan v Garda Siochana Ombudsman Commission* [2012] 2 I.R. 580; *W.T v Minister for Justice and Equality* [2016] IEIHIC 108 and *W (B) v Refugee Appeals Tribunal and Others (No.l)* [2015] IEHC 725 in which the principles governing an application to amend a Statement of Grounds in judicial review proceedings are addressed. I have also been referred to decision of Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126.

**20.** The case of *Keegan v Garda Siochana Ombudsman Commission* [2012] 2 IR 580 concerned an appeal to the Supreme Court in relation to a refusal by the High Court to amend a statement of grounds. Fennelly J, on behalf of the court, allowed the amendment and noted that the amended ground sought must be " *... at least be an arguable one"*, and that the *" ...appellant should not, without good reason, be deprived of the right to argue a very significant point of law. The balance of justice weigh clearly in favour of granting the amendment".*

**21.** In a judgment of Humphreys J., *W (B) v Refugee Appeals Tribunal and Others (No.l)* [2015] JEHC 725, he held:

> *"In any application to amend proceedings, it is clear that the interests of justice and the protection of the applicant' right of access to the courts are of paramount importance, as is the need for the court to ensure that the real issues in dispute are determined (see Keegan v. Garda Siochana Ombudsman Commission [2012] 2 lR. 580; [2012] IESC 29 per Fennelly] at paras. 29 and 47 and O'Neill v. Applebe [2014] IESC 3 per O'Donnell J at para. 14). In addition, the right of access to the court is supplemented by the right to an effective remedy pursuant to Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union. "*

**22.** In his decision in *W.T v Minister for Justice and Equality*, Humphreys J. noted that a court may of its own volition take a number of points, including significant points that are new to the case/pleadings. Indeed, as clear from the decision *J.K. v. Minister for Justice and Equality* [2011] IEHC 473 the Court may do so at any stage. In *J.K. v. Minister for Justice and Equality,* Hogan J. resumed the hearing of a case to raise an issue which had not been raised by the parties during the course of the first hearing and which came to his attention only in the course of preparing his judgment. He concluded that O.84, r.23 of the Rules of the Superior Courts, 1986 enabled the High Court to formulate a new ground of its own motion where appropriate to exercise that jurisdiction.

**23.** In allowing the amendments sought in *W.T v Minister for Justice and Equality*, Humphreys J. re-iterated the factors of pertinence to the court in considering leave as being "*... arguability, explanation and lack of irremediable prejudice"*. Humphreys J. stated at para 23 of his judgment:

> *"I appreciate that there may come a point where an amendment is so major as to be such that the court would be reluctant to permit it: Copymoore Ltd. v. Commissioners of Public Works of Ireland, [2014] IESC 63, per Charleton J. However, for the reasons stated, we are some distance from that point in this case. Fundamentally, the court must keep the interests of justice firmly in mind as stated by O'Donnell J. in O'Neill. Fennelly J. in Keegan emphasised that a party should not*

*be deprived without good reason of the opportunity to argue a significant point. A similar approach was taken recently by Posner J. in Reed v. Illinois (Case 14-1749, US. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9: "What is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument.""*

**24.** Most recently, in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126, Collins J. considered an application to amend which followed upon the issue of an application to strike out as showing no reasonable cause of action stating that the test to be applied was less onerous in circumstances where it was not sought to substantially change a case by the addition of new respondents or new grounds. He observed (at para. 55) that O.84, r.23(2) does not require that every amendment application must be approached as if it involved a late application for leave. He posited that while this is the appropriate approach where a substantially new case is sought to made, the amendment in that case which involved pleading new reliefs on grounds already pleaded against parties already joined, did not involve the making of a substantially new case or, indeed, any new case at all. Collins J. observed (para. 67), however, that he would not have been willing to allow the amendment appeal without at least directing the Applicant to plead more clearly the grounds that it relied on to seek declaratory relief, having regard to the observations made by the Supreme Court in *A.P. v DPP* [2011] IESC 2, [2011] 1 IR 729. He noted that consideration would also have had to be given to directing that the claim against the State Respondents should proceed by plenary action, in accordance with Order 84, Rule 22 of the Rules of the Superior Courts.

**APPLICATION OF THE PRINCIPLES**

**25.** In circumstances where it is pleaded in opposition that this breach of rights complained of by the Applicant was actionable, but statute barred and where it is not accepted that his rights under Articles 3 and/or 8 of the Convention were infringed, the Applicant is on proof in these proceedings. While separate issues arise in respect of an asserted breach of Articles 3 and 8 of the Convention which the Applicant has contended is admitted (albeit I have seen no evidence of any such admission and such admission is denied), the Applicant must, insofar as a remedies claim is concerned, establish that there was no effective remedy available to the Applicant in Irish law in 2013-2014 in respect of an admitted breach of constitutional rights (if not

Convention rights). Through the application to amend in this case it is sought to enlarge the case in terms of the relief sought by introducing two new reliefs. Despite this the only amendment to the grounds sought to be made is to identify a claim that Article 6 of the Convention is breached by the decision to refuse the application on the basis that the claim is statute barred.

**26.** I propose to apply the three-stage test identified in the case law to determine if a threshold of arguability is reached, whether there is sufficient explanation for moving the application at this stage of the proceedings, whether there is any issue of irremediable prejudice and where the balance of justice lies having due regard to the paramount interest in permitting access to the Court and an effective remedy and the need for the court to determine the real issues in dispute between the parties.

*Arguability*

**27.** In submissions before me it is contended on behalf of the Applicant that there was no effective remedy under Irish law for breach of rights occasioned by the practice of slopping out prior to the decision of the Supreme Court in *Simpson* and accordingly it is in breach of the Applicant's right to access to the Court under Article 6 of the Convention to impose a limitation period in respect of historic claims in a manner which means that there is no opportunity to pursue proceedings. Reliance in this regard is placed on "*Prison Law in Ireland Enters Adulthood: Simpson v. Governor of Mountjoy Prison*" [2021] 3 Irish Supreme Court Review 121 where the learned author posits that the *pre-Simpson* case-law required something akin to intent or evil purpose to ground a finding a breach of a prisoner's rights, a view which was not accepted in *Simpson*.

**28.** The proposition that there was no effective remedy under Irish law for breach of rights occasioned by the practice of slopping out prior to the decision of the Supreme Court in *Simpson* is not expressly pleaded in the Statement of Grounds nor has it been proposed by the Applicant that such a plea be introduced on this application to amend. This has the potential to raise an issue with regard to the adequacy of pleadings having regard to authorities such as *A.P. v. DPP* [2011] IESC 2, [2011] 1 IR 729 where Denham J. affirmed the principle that when an applicant seeks leave to apply for judicial review, he does so on specific grounds stated in the statement required. She reiterated that the order of the High Court granting leave determines

the parameters of the grounds upon which the application proceeds and the process requires the applicant to set out precisely the grounds upon which the application is to be advanced.

**29.** Despite the paucity of pleading in this case, it seems to me that it is at least implicit from the factual history which is pleaded that the Applicant makes the case that prior to the decision in *Simpson*, Irish law did not provide an effective remedy for breach of rights occasioned by a practice of slopping out. For his case to be intelligible at all, this must be the starting position and it is clearly foundational for the other claims made in the bare case as pleaded, even though it has not been expressly set out as it properly ought to have been. In this context there is an obvious hurdle which the Applicant must cross to establish that neither an action for a constitutional tort nor an action for damages pursuant to s. 3 of the 2003 Act, then some ten years on the statute books, was open to him at that time recalling that just such an action was taken in *Mulligan*, albeit unsuccessfully. Insofar as I am aware, no appeal was brought against the decision in *Mulligan* for the purpose of exhausting domestic remedies and making complaint to the European Court of Human Rights at that time.

**30.** If the Applicant does not succeed in the argument he makes that there was no effective domestic remedy in Irish law prior to the decision in *Simpson* at hearing, the prospects of success for any part of the claim are likely to be in significant peril. Without further commenting on the difficulties with the claim articulated on behalf of the Applicant, I would merely observe that an analogy with the Scheme introduced consequent upon the decision of the European Court of Human Rights in the case of *O'Keeffe v. Ireland* [2014] ECHR 96 is far from perfect for obvious reasons, not least the question of the exhaustion of domestic remedies.

**31.** These important matters notwithstanding, I propose to proceed for the purpose of this application on the basis that it is part of the Applicant's case that there was no effective remedy under Irish law for breach of rights occasioned by the practice of slopping out prior to the decision of the Supreme Court in *Simpson.* It seems to me that it will be for the Applicant to establish this proposition at the hearing of this action as a preliminary issue before being in a position to make complaint in relation to the absence of an effective remedy for breach of rights but I do not propose to concern myself further with the extent to which this question is stateable on this application other than to again observe the omission to plead a breach of a constitutional right to a remedy before invoking Article 13 of the Convention.

**32.** The case which is pleaded, albeit in very bare terms, is that the application of a requirement that the claim not be statute barred included in the Scheme introduced following the Supreme Court decision in *Simpson* deprived the Scheme of its effectiveness as a remedy for historic claims affected by the pre-*Simpson* legal landscape. At least arguably the decision in *McGee* is not determinative of this issue as the Supreme Court did not consider whether, to the extent that the Scheme constituted a remedy for breach of rights, the inclusion of a requirement that the claim not be statute barred deprived it of its' effectiveness. This was not an issue in *McGee*. It seems to me, however, that leave has been granted on the pleadings as they currently stand to make this case, albeit with primary reference to the Convention and without adverting to the question of whether the Constitution also protects the right to an effective remedy. There has been no application to set aside the leave granted. Consistency and requirements of judicial comity persuade me that I should accept as being already determined that there is an arguable case on the facts disclosed in this case on this basis. It seems to me that this is the proper conclusion in the absence of an application to set aside even though I am in a better-informed position than the Judge at leave stage in that I have the benefit of the Respondents' Opposition papers.

**33.** It is common case that in introducing the Scheme for the purpose of providing a remedy for persons with claims arising from the unlawful practice of slopping out, it was open to the State to dispense with a requirement to demonstrate that the claim was not statute barred as a condition of eligibility, although a requirement to do so clearly does not flow from the decision in *Simpson* where the claim for constitutional damages was in time. Although the Supreme Court in *Simpson* endorsed the High Court finding that a claim under the 2003 Act was largely statute barred because of a failure to institute proceedings within the one-year limitation period specified in s. 3(5) of the 2003 Act, consideration was not given to the power to extend time under that section. It would not have been necessary to do so in the light of the Supreme Court's finding that a remedy in damages for breach of a constitutional right was available.

**34.** Were the Applicant to succeed in the claim as pleaded and secure declaratory relief in the terms already sought thereby establishing that his exclusion from the Scheme was unlawful given the absence of any other domestic remedy, it is at least arguable (having regard to authorities such as *G.E. v. Commissioner of An Garda Siochana* [2022] IESC 51 and the Supreme Court decision in *Simpson* itself) that such declaratory relief would not be a complete remedy as it would not necessarily result in the admission of the Applicant's claim under the

Scheme or the payment of compensation which would otherwise be available under the Scheme but for the excluding condition.

**35.** Despite some obvious difficulties for the Applicant in establishing that his exclusion from the Scheme constitutes a breach of his right to an effective remedy under Article 13 and/or 6 of the Convention already referred to above, it seems to me that if it is arguable that the Applicant is entitled to declaratory relief in the terms already pleaded (as Meenan J. has found in granting leave in November, 2021), then it is also arguable that a claim for damages would lie under s. 3 of the 2003 Act on the same basis, provided the claim is not statute barred under s. 3(5) of the 2003 Act. If his exclusion based on the retrospective application of a limitation period which he could never satisfy is in fact in breach of his right to a remedy, as contended, then that exclusion is unlawful and it follows that but for the unlawful exclusion he would have received compensation in the sums contemplated under the Scheme. While the court ultimately hearing this case will have to address evidence that the Scheme was established for the purpose of providing a remedy for extant rather than historic claims, it seems that this is already an issue in the case in terms of the grounds for which leave has been granted and is not a new issue introduced by the amendment proposed on behalf of the Applicant. Accordingly, the test governing the amendment application in this regard is not onerous if one adopts the reasoning signaled by Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126 in such circumstances.

**36.** As regards the introduction of a plea based on Article 6 of the Convention for the first time, it seems to me that the introduction of such a plea is consistent with the case already pleaded on behalf of the Applicant regarding the absence of an effective remedy. Article 6 arguably applies to the conditions with which a claimant must comply before compensation can be awarded as a remedy for a breach of rights protected under law. I am satisfied that were a court persuaded that the Applicant is correct in contending that there was no effective remedy at any time for breach of rights occasioned by the practice of slopping out prior to the decision in *Simpson*, then it is arguable that this could constitute a breach of Articles 6 and/or 13 of the Convention, although a Court will only get to this point if it has concluded no breach of a constitutional right to an effective remedy (whether pursuant to Article 34 and/or 40.3 of the Constitution or otherwise). Given the primacy afforded in this jurisdiction to the Constitution and the fact that remedies under the 2003 Act constitute remedies of last resort, it seems to me to be anomalous that the Applicant has not expressly asserted a root in the Constitution for a

claim to an entitlement to an effective remedy in conjunction with the plea in reliance on Articles 6 and/or 13 of the Convention.

**37.** Likewise, if a Court is persuaded that there was no effective remedy in the pre-Simpson era, it is further arguable that the Applicant's claim for breach Articles 6 and/or 13 of the Convention is triggered by the refusal of his application under the Scheme combined with the non-availability of any other remedy, again presuming the Court is also satisfied that a remedy in damages for breach of a constitutional right to an effective remedy is not available.

**38.** If it is the case that the Applicant may be entitled to seek a remedy in damages presuming he establishes an actionable breach of a right to an effective remedy, then conceivably the question of whether the Applicant is entitled to an extension of time under s. 3(5) of the 2003 Act to make a claim for damages for breach of Articles 6 and/or 13 of the Convention arises given that the time period in question is not the period from 2014 but rather the time between the refusal of the application under the Scheme impugned in these proceedings and the making of the application to amend against the background of a leave application in August, 2021. A basis for seeking such an extension has been set out on Affidavit in support of this application with reference to a changing legal landscape. Accordingly, I am satisfied that an arguable basis for seeking an extension of time has been demonstrated.

**39.** As for the factual or evidential basis for the damages claimed for a breach of rights under Articles 6 and/or 13 (or under Articles 34 and/or 40.3 of the Constitution if leave to introduce such a plea follows) and how these fall to be measured, it seems to me on the basis of what was argued in support of the application that the fact that these proceedings arise from the refusal of an application under the Scheme means that the damages sought for pecuniary loss are measurable by reference to the terms of the compensation which would have been payable under the Scheme had it been properly administered. I do not consider there to be any real ambiguity therefore in relation to the measure of damages for pecuniary loss sought, albeit it might be necessary to establish what sums would have been payable under the Scheme had the claim not been excluded on the basis that it was statute barred in evidence. Furthermore, were a Court ultimately to determine that a further claim for damages lay by reason of non-pecuniary loss, it would be open to the Court to convene a plenary hearing to determine the quantum of damages (whether pecuniary or non-pecuniary), if this were considered necessary

or appropriate.

**40.** While I am satisfied that a low threshold of arguability is demonstrated in relation to damages for claimed breach of a right to an effective remedy, I have very significant misgivings as to whether a threshold of arguability is reached in relation to a claimed breach of Articles 3 and 8 of the Convention not least given the obvious time issues arise in bringing such a claim at this remove in respect of events occurring in 2013-2014. The pleadings are advanced on the basis of an asserted "*admitted*" breach of Article 3 and 8 (which is clearly in dispute and will require to be established in evidence) and leave has already been granted on this basis. A claim for damages under s. 3 of the 2003 Act for breach of Articles 3 and/or 8 of the Convention would need to overcome the one-year limitation period prescribed under s. 3(5) of the 2003 Act and dicta in *Simpson* to the effect that a claim under the 2003 Act was out of time in that case.

**41.** While there is a power to extend time under s. 3(5) of the 2003 Act and a case for extension might be advanced on the basis identified on affidavit on behalf of the Applicant, little evidence has been adduced on affidavit to establish the existence of conditions in his case which were such as would constitute a breach of Articles 3 and/or 8 of the Convention and these are issues of fact which could only properly be determined on a plenary hearing, except in straightforward cases of uncontested evidence.

**42.** In view of the absence of evidence to ground a finding of breach and clear issues regarding time, it does not seem to me that it is arguable, even on a low threshold, that a claim for damages for breach of Articles 3 and/or 8 of the Convention properly lies in these proceedings at this remove from the events which occasioned the alleged breaches. In my view such a claim is bound to fail.

**43.** Turning then to the application to introduce a claim for a declaration that the s. 11 of the 1957 Act is incompatible with the Convention, it seems to me that were leave granted to seek this relief it would change the nature of the case advanced and that accordingly the application to introduce this plea warrants some scrutiny in line with the dicta of Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126. No grounds have been pleaded to substantiate an entitlement to such relief. Section 11 of 1957 Act was not challenged on the case as originally pleaded and no new grounds are proposed, other than

an omnibus reference to Article 6 of the Convention, upon which to base this extended plea. Furthermore, no authority was identified before me in argument to support a conclusion that a statutory limitation period of the type prescribed under the 1957 Act and at issue in these proceedings (six years) is incompatible with the Convention.

**44.** The decision to rely on the 1957 Act in determining eligibility under the Scheme or in defending proceedings is not mandated by law but arises at the election of the party against whom a claim is initiated. Accordingly, I am not satisfied based on the case as argued before me that an arguable basis has been shown for contending that s. 11 of the 1957 Act is incompatible with the Convention as the State is never obliged to invoke a statutory limitation period which does not go to jurisdiction. It seems to me that the real question which arises is whether the inclusion of a requirement that a claim not be statute barred under the Scheme renders that Scheme ineffective as a remedy for the purpose of the Convention given the asserted lack of a remedy at material times. I note, in any event, that the Applicant contends that this relief is not required to be pleaded specifically as the Court may grant such relief of its own motion. In all the circumstances, I am not satisfied that an arguable basis to give leave to seek a declaration of incompatibility in amended proceedings is demonstrated.

*Explanation*

**45.** Although a plea for s. 3 damages could have been included from the outset in the alternative to the relief sought, I am satisfied that an explanation for delay in including the plea has been advanced on affidavit as set out most particularly at paragraph 14 of the Replying Affidavit of Matthew Byrne sworn on the 20th of November, 2023. I am further satisfied that the relevance of a plea in reliance on Article 6 of the Convention was drawn into focus by the terms of the decision of the Supreme Court in *McGee* and the implications of that decision. Likewise, I accept as regards the challenge to s. 11 of the 1957 Act that the decision in *McGee*, which concluded that the six-year limitation period applied, served to bring into fresh focus the lawfulness of the provision providing for the limitation period and were the case arguable on this basis, then I would not refuse leave to amend because of a lack of explanation.

*Irremediable Prejudice*

**46.** There is no irremediable prejudice to the Respondents of permitting the amendments proposed. Insofar as it is contended that a s. 3 damages claim is statute barred or out of time or that the Applicant's *locus standi* is not established on the evidence, these are pleas which

may be advanced in opposing the relief sought at full hearing. Furthermore, it is also open to the Court to direct a plenary hearing in respect of the issue of damages or any issue pursuant to Order 84, rule 22 of the Rules of the Superior Courts, 1986 if considered necessary and appropriate. The grant of leave to proceed on the basis of an amended Statement of Grounds does not prejudice the Respondents reliance on any of the identified points of opposition but, in my view, serves to clarify the Applicant's case in a manner which seeks to ensure that the real issues in the case are properly identified before the Court on a full hearing.

**CONCLUSION**

**47.** Where the Scheme was established as a remedy for breach of rights arising from the practice of slopping out and it is established by the Applicant that there was no effective remedy contemporaneous with those breaches such that the inclusion of a retrospective limitation period and its application to the Applicant to exclude his claim renders the Scheme ineffective as a remedy, then I consider it is arguable (recalling again the low threshold which applies on an application for leave to amend) that the exclusion of the Applicant under the Scheme coupled with the unavailability of any other remedy, if this is established, is in breach of his right to an effective remedy (contrary to Articles 6 and/or 13 of the Convention), albeit it seems to me that to get to consideration of this argument the Applicant must first engage with the question of a constitutional right to an effective remedy as protected within the ambit of Articles 34 and/or 40.3 of the Constitution.

**48.** In my view the balance of justice favours an amendment as sought to allow:

I. a claim for an order for damages under s. 3 of the 2003 Act for breach of a right to an effective remedy in respect of rights infringed by the practice of slopping out contrary to Articles 6 and/or 13 of the Convention at paragraph D(iv) of the Statement of Grounds;
II. an application, if necessary, pursuant to s. 3(5) of the 2003 Act and/or Order 84, rule 21 of the Rules of the Superior Court, 1986 for an extension of time within which to bring proceedings; and
III. the amendment of the Statement of Grounds to include express reliance on Article 6 of the European Convention on Human Rights both in the relief claimed at D(iii) and the grounds advanced at E(6) of the proposed amended Statement of Grounds.

Consistent with this I will hear the parties as to whether I should also allow liberty to amend to include a claim for damages for breach of a constitutional right to a remedy on the grounds of a breach of a right to an effective remedy under the Constitution to ensure that the real issues arising are properly before the Court given the established position that consideration of a claim under the Convention should properly only arise where the Corut is satisfied that there is not other remedy and having due regard to the precedence afforded to constitutional remedies over Convention remedies in the domestic legal order or whether there are good reasons why this should not be done.

**49.** I refuse the relief sought at the proposed D(v) where a Declaration of Incompatibility is sought in respect of s. 11 of the 1957 Act. I also expressly do not permit a claim to be included in these proceedings for damages for breach of Articles 3 and/or 8 of the Convention arising from the practice of slopping out as it affected the Applicant historically.

**50.** In reliance on the decision of Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126 and mindful of the requirement to frame the scope of the proceedings in the Statement of Grounds in accordance with *A.P. v. DPP* [2011] IESC 2, [2011] 1 IR 729, I consider it appropriate that the Applicant further amend the Statement of Grounds beyond the pleas he has sought to include to make it clear that which was urged in argument and which I consider must be implicit in the case for which leave has been granted but which has not been properly pleaded in the Statement of Grounds by further expressly pleading:

I. there was no effective remedy under Irish law for breach of rights occasioned by the practice of slopping out prior to the decision of the Supreme Court in *Simpson* (at E(3A) of the Amended Statement of Grounds) [and subject to hearing the parties and further decision, Articles 34 and/or 40.3 of the Constitution].
II. the imposition of a retrospective limitation period in the Scheme introduced following the decision in *Simpson* coupled with the absence of any other effective remedy for breaches of constitutional rights established for the first time in that case is contrary to the Convention by reason of a failure to vindicate a right to an effective remedy contrary to Articles 6 and/or 13 of the Convention (at E(5A) of the Amended Statement of

Grounds) [and subject to hearing the parties and further decision, Articles 34 and/or 40.3 of the Constitution].

III. the Applicant has suffered loss and damage by reason of the refusal to assess his claim in accordance with the terms of the Scheme and/or consequent upon the breach of his rights to an effective remedy under Articles 6 and/or 13 of the Convention (at E(7) of the Amended Statement of Grounds) [and subject to hearing the parties and further decision, Articles 34 and/or 40.3 of the Constitution].

IV. the grounds relied upon for an extension of time should one be required as identified at paragraph 14 of the Replying Affidavit of Matthew Byrne, Solicitor, sworn on the 20th day of November, 2023 (at E(8) of the Amended Statement of Grounds).

**51.** In granting leave to seek an extension of time, I expressly make no determination as to whether the Applicant is entitled to an extension of time either under Order 84, rule 21(3) of the Rules of the Superior Courts, 1986 or s. 3(5)(b) of the 2003 Act. This will be a matter for the judge dealing with the full hearing of these proceedings. I require the Applicant to prepare and have available to me a further draft of the Amended Statement of Grounds for which leave is sought for the purpose of making final orders. I will hear the parties in relation to all matters arising before orders are finalized.