



THE SUPREME COURT

[Supreme Court Record No. 118/2020]

[Court of Appeal Record No. 207/2019]

[High Court Record No. 1675P/2015]

**Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Baker J.**

BETWEEN:

MICHAEL O'CALLAGHAN

APPLICANT

v.

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 30th day of September, 2021

Introduction

1. The right to have criminal proceedings conducted with due expedition has been long recognised in the constitutional jurisprudence of this State. That right derives from Article 38 of the Constitution, which provides that no person shall be tried on any criminal charge save in due course of law. This case raises that entitlement, albeit within a narrow scope, both as to time and circumstance. The case at hand concerns alleged systemic delay in a criminal appeal. The events in question occurred in the years 2011 to 2013. This will be referred to as the "relevant period". The alleged systemic delay under consideration arose in the functioning of the Court of Criminal Appeal, now superseded by the Court of Appeal, created by statute in 2014. Those events were described in a judgment delivered by the High Court, [2019] IEHC 782. There, Faherty J. dismissed the appellant's claim that his constitutional right under Article 38 had been infringed by delays which took place in his appeal to the Court of Criminal Appeal. That judgment was upheld by the Court of Appeal, [2020] IECA 180 (Donnelly, Ní Raifeartaigh and Power JJ.) on the 6th July, 2020. Like the High Court, the Court of Appeal also reiterated the principle that, in certain circumstances, there was an entitlement derived from Article 38 of the Constitution to recover damages for infringement of the right in question, and that the entitlement was not a novel one. (See, most recently, *Nash v. Director of Public*

Prosecutions [2017] 3 I.R. 320, and, earlier, *McFarlane v. Director of Public Prosecutions* [2008] 4 I.R. 117). Both the High Court and the Court of Appeal held that the appellant's lawyers had either made, or failed to make, certain procedural steps prior to the appeal which contributed to the delay. Thus, for somewhat different reasons, both courts held that the appellant was debarred from recovering damages.

2. The appellant applied for leave to appeal to this Court. He contended that the Court of Appeal had erred in its decision. The focus in this case, therefore, will, to a significant degree, be on the basis for the Court of Appeal's conclusions on the evidence regarding the existence of systemic delay at the time, and three factors of varying weight which, it considered, debarred the appellant from relief. These three factors were, first, a finding that there had been delay in amending the appellant's grounds of appeal to the Court of Criminal Appeal; second, a conclusion, though of lesser weight, that the appellant's lawyers should have applied to the Court of Criminal Appeal for bail or an early trial; and third, the absence of comparator evidence to provide a basis for a finding that there had been unreasonable delay. One of the many distinct features of this case is that the events in question occurred in the proceedings of a court which is no longer in operation, and where, as the appellant submits, he was in custody serving a sentence pending the outcome of an appeal to the Court of Criminal Appeal.
3. It must be emphasised, therefore, that this is a highly unusual case, which relates to a court structure which has since been altered with the intention of eliminating systemic delays. After his conviction in the Circuit Criminal Court on the 15th February, 2011, the appellant's appeal to the Court of Criminal Appeal had to be adjourned on no less than five occasions, due to the unavailability of judges due to other work, before, on the sixth occasion, a date could be fixed for the appeal. This is the gravamen of the appellant's case.

The Circumstances

4. In March 2009, two men robbed a post office in Cork City. The appellant was later arrested in relation to this offence on 14th April, 2009. He was charged the following day. On the 16th April, 2009, he was brought before the Circuit Criminal Court, and remanded in custody. On the 8th February, 2011, the appellant was arraigned before the Cork Circuit Criminal Court on the post office robbery charges. He pleaded not guilty. The trial took place between the 8th and 15th February, 2011. During the course of those proceedings, the judge excluded the evidence of two members of An Garda Síochána purporting to identify the appellant from CCTV recording taken during the robbery. However, the court admitted DNA evidence which potentially connected the appellant to a balaclava allegedly worn and discarded by one of the raiders. Before the jury, there were; ultimately, three principal strands of prosecution evidence against the appellant. These were, first, eye-witness evidence of a witness, BG, who had given a statement to the Gardaí of seeing one of the raiders take off his balaclava and throw it into a nearby canal. The witness did not, however, give identification evidence. Upon application by the prosecution to the trial judge, the witness' written statement was nonetheless admitted in evidence under s.16 of the Criminal Justice Act, 2006. Second, there was testimony that,

when interviewed, the appellant had failed to tell Gardaí that he had, in fact, visited the post office in question earlier on the same day as the robbery. Third, there was DNA evidence relating to a balaclava which was found at a nearby canal. This forensic evidence did connect the appellant to the balaclava, but it also connected two other persons to the garment. At the close of the prosecution in the trial, counsel for the appellant applied for a directed acquittal, on the basis that he had no case to answer on a number of grounds. The trial judge refused to accede to this application, and the matter was, therefore, left to the jury. On the 15th February, 2011, the appellant was convicted by the jury on the evidence adduced, and sentenced to 10 years' imprisonment. At this time, he was already serving a sentence of three years' imprisonment on an unrelated firearms offence. The sentence concluded on the 7th August, 2011. Consequently, there was an overlap of over 5 months between the period the appellant spent in custody in relation to the firearms matter, and the period spent in custody by reason of his conviction and sentence on the robbery charges following the trial in February 2011. By the time the Court of Criminal Appeal quashed his conviction, and ordered his release, on the 31st July, 2013, the appellant had spent 23 months, 3 weeks and 3 days in custody solely in respect of the quashed conviction.

The Appeal against Conviction and Sentence

5. On the 18th February, 2011, the appellant filed a formal notice to the Court of Criminal Appeal appealing against his conviction. He filed general grounds of appeal on the 24th February of that year. That court requisitioned the trial transcript on the 9th March, 2011. This was received on the 30th March of that year, approved by the trial judge on the 7th April, 2011, and furnished to the appellant's solicitors on the 26th April, 2011.

Amendment to the Notice of Appeal

6. On 4th July, 2011, four and a half months after the appeal was filed, the appellant's solicitors lodged a motion to amend the grounds of appeal. This motion came too late for the matter to appear in the July Court of Criminal Appeal case management list. As a result, the motion had to be adjourned to a further list on the 28th November, 2011. On 28th November, 2011, eight and a half months after the notice of appeal was filed, the Court of Criminal Appeal granted the appellant leave to amend his grounds of appeal on consent. Written legal submissions were filed on the same date. This allowed the matter to be listed in the Court of Criminal Appeal's list to fix dates on the 5th December, 2011. The appellant's criminal appeal first appeared in the list to fix dates for the next, Hilary term, which was presided over by a Supreme Court judge on the 5th December, 2011. On that occasion, it was fourteenth in the list of conviction appeals. Owing to the unavailability of judges due to their commitments to other work, only three appeals could be assigned hearing dates. In the next Court of Criminal Appeal list, on 12th March, 2012, the appeal was listed eleventh, but, for the same reason, no case in that list could receive a hearing date. At the next list to fix dates on the 14th May, 2012, the appeal was listed eleventh in the list of conviction appeals, but just one case could be assigned a hearing date. When the matter appeared in a list of the 16th July, 2012, it was tenth on the list, but, again, no case could be listed for a hearing date. By the next list to fix dates, on the 17th December, 2012, the appeal was sixth in the list of the conviction cases, of which

four received dates for hearing. On the 11th March, 2013, the appeal was fifth in the list, and it secured a hearing date on the 18th April, 2013. Each of these adjournments occurred because it was not possible to assemble panels of judges to hear this and other matters in the Court of Criminal Appeal owing to their time commitments to other lists. Altogether, therefore, this appeal was listed on five occasions between December 2011 and March 2013, during which no court dates were available, when the appellant's case was ready to proceed. The date for the appeal was fixed on the 6th occasion the matter appeared in the list to fix dates, during which time the appellant was in custody.

7. The appellant's case was ultimately heard by the Court of Criminal Appeal on the 18th April, 2013, which reserved judgment, delivered on the 31st July, 2013 ([2013] IECCA 46). There was no delay in delivering the reserved judgment. The Court of Criminal Appeal held that the prosecution case should not have been allowed to go to the jury based on the evidence, and that the conviction should be quashed. That court was satisfied that there was no evidence upon which a properly directed jury could rationally find, beyond reasonable doubt, that any one of the persons involved in the robbery, rather than another, was the person wearing the balaclava at the time (para. 41). The trial judge should not, therefore, have allowed the case to go to the jury, when, at the conclusion of the prosecution case, counsel for the defence had submitted that there was insufficient evidence to show that the person whose DNA cells were found on the balaclava was the same person who wore that garment during the commission of the offence. Whilst observing that this submission was one amongst many others made before the Circuit Criminal Court, the Court of Criminal Appeal nonetheless concluded that such other evidence as was available would be an insufficient basis upon which a jury at a retrial could link or identify the appellant as being a person who had committed the robbery offences, and insofar as any inferences could be drawn from the remaining evidence, these would be too tenuous a basis for concluding that the appellant was guilty (para. 44). The court held that the verdict of the jury should be considered unsafe, set it aside, and, did not direct a retrial.

Systemic Delay

8. The appellant's case is predicated on delay in the appeal, which, it is said, denied him a trial in due course of law. No point is taken as to any distinction between a trial and an appeal. Nor could there be. Historically, there is a well-developed jurisprudence in the State on the rights of defendants and accused persons when faced with delay (cf. observations of Gannon J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 at page 326, and O'Higgins C.J. at page 349). In an appropriate case, an accused person could apply to a trial court for an appropriate order, or to the High Court, for an order of judicial review by way of prohibition, preventing a trial proceeding on the grounds of delay. A number of authorities deal with prohibition of an intended trial on the grounds of "prosecutorial delay", linked with impropriety, that is, delay by the investigatory and prosecutorial arms of the State (cf. *Kelly: The Irish Constitution (2018)* Hogan Whyte Kenny & Walsh Eds., (6.5.276 et. seq.), *DPP v. Byrne* [1994] 2 I.R. 236). In the jurisprudence, an applicant charged on indictment would seek to show that the delay in a prosecution, or perhaps a lengthy elapse of time between the offence and criminal

charge, together with clear prejudice, would render an intended trial unfair and contrary to an accused person's rights to a fair trial under the Constitution. (*The State (O'Connell) v. Fawsitt* [1986] I.R. 362). Now, such applications are generally made to a court of trial rather than the High Court.

9. The appellant's case, however, is that he was deprived of his constitutional right, arising from what is termed "systemic delay". This occurs when, owing to the responsibility of the State, courts are unable to provide a timely remedy owing to failure by the State to provide a sufficient number of judges, sufficient resources, or adequate court organisation. This case does not concern any delay by a judge or judges in either hearing a case, or delivering a judgment. In fact, it was the judiciary who repeatedly identified the persisting problem, now outlined, and which was established in evidence in this case.

Precedent

10. In order to set out why delay sometimes occurs it will be helpful to provide a little background. As pointed out by the Court of Appeal, the Superior Courts, defined under the Constitution, are courts of record. They apply the common law system involving the doctrine of precedent. Absent distinguishing facts, a legal principle identifying a Constitutional right or the interpretation of a statute, or matter of law, when established by a higher court, will be followed in later cases, by courts of the same level or lower courts. A judgment of the Supreme Court on a legal question must be followed by other lower courts, just as now, a judgment by the Court of Appeal must be followed by the High Court and lower courts. Courts of co-ordinate jurisdiction will follow the *ratio decidendi* or fundamental principle established in earlier cases by that same court.
11. As a consequence, in an increasingly complex society, with a variety of sources of law, judges, on many occasions, are not simply deciding one case, but identifying an interpretation of the law which may be applied in many other subsequent cases. Judges in the Superior Courts therefore expend a far greater proportion of time preparing and drafting judgments than actually hearing cases. This out-of-court work must be done before or after court sittings, or during periods when the courts are not physically sitting. Pressure of work does not often allow time for "judgment writing" days. *Ex tempore* judgments are not possible in complex cases. Courts must always be alive to the future consequences of the definition of a legal principle, or the interpretation of a statute.

The Evidence on Systemic Delay: The Working Group Report

12. From 1924 onwards, the High Court consisted of four judges. But from the 1960's onwards, the number of judges in that court expanded exponentially in number, though the appeals framework remained unchanged. An ever greater number of appeals fell to be dealt with by the Supreme Court, which was the final and only court of appeal in civil matters from the High Court. This in itself, created serious delays, and a substantial backlog. The problem had reached a near-critical point even towards the end of the last century. The issue of systemic delay in the courts of this State had been considered in cases before the European Court of Human Rights ("ECtHR") as long ago as 2003. These cases are outlined later in the section of the judgment headed "Dialogue between Courts".

13. The extent of the problem, by then much magnified, was later clearly described in a Report of the Working Group on a Court of Appeal ("the Report"), prepared and published by a committee chaired by Denham J. in May, 2009. (See Report Summary, p.6.) This Report formed part of the appellant's case. A few simple statistics illustrate the scale of the difficulties as they stood even in that year. Between 1961 and 2007, the number of High Court judges had increased from 6 to 35 in number. But the appellate structure laid down by the Constitution remained unchanged. As the court of final appeal, the Supreme Court then had to deal with all appeals from the High Court, on civil matters including cases ranging from multi-million euro commercial matters, the constitutionality of statutes, appeals involving fundamental Constitutional and Convention rights, and EU law. Additionally, the Supreme Court also dealt, on occasion, with points of law arising from criminal proceedings in lower courts. By 2011, the Supreme Court was facing a very substantial backlog of appeals. All these factors made it difficult to release a judge of the Supreme Court to preside over a panel of the Court of Criminal Appeal.
14. Additionally, the Working Group set out that, in the last 40 years there had been a massive expansion in litigation in the State. It described a substantial "institutional bottleneck" at Supreme Court level, and described that the Supreme Court was then delivering between two and three times as many judgments as other comparable courts in other jurisdictions, but remained unable to make inroads into the backlog which had been created by the number of appeals from the High Court (see Report p. 42). The Report also noted that the number of appeals received by the Court of Criminal Appeal had risen from 114 in the year 1995 to 237 in the year 2000 and again to 302 in the year 2008.
15. By 2009, there were 8 Supreme Court judges sitting in panels of three or five. The Report stated in May, 2009: *"The best option for Ireland in the 21st Century is to have a Court of Appeal, amalgamating the Court of Criminal Appeal into a new court which would also hear civil appeals from the High Court"* (p.6). These reforms were proposed to *"remedy the systemic backlog that will otherwise continue to build in the Irish court system"* (p.7). The extent of the problem is shown by the fact that the High Court judgment in this case records that, by the time the Court of Appeal was set up in 2014, there were 3,000 civil, and some 660 criminal appeals pending. This was not the only evidence, however. In the High Court, Ms. Geraldine Manners, the then Registrar of the Court of Criminal Appeal, gave detailed evidence to the effect of this situation. This is described later. The State was on notice of these facts, as well as earlier decisions of the ECtHR on systemic delay in this State, set out later.

These Proceedings Claiming Damages

16. On 27th February 2015, one year and seven months after the judgment of the Court of Criminal Appeal, the appellant's proceedings alleging systemic delay were issued in the High Court. The appellant claimed damages on a threefold basis. First, he claimed for damages for a miscarriage of justice said to arise by reason of his wrongful conviction from the error of the trial judge in failing to direct his acquittal. Second, a claim based on s. 3 of the European Convention on Human Rights Act, 2003 ("ECHR Act 2003")

concerned damages for miscarriage of justice and delay. Third, he claimed for breach of constitutional rights, which he claimed arose because there had been a failure to provide him with a trial, or more accurately, an appeal, with reasonable expedition.

17. In its judgment, the High Court (Faherty J.) dismissed the claim under the miscarriage of justice heading. That part of the decision was not appealed by the appellant. The claim made under s.3(2) of the ECHR Act 2003 was also dismissed. This was by reason of the fact that the Convention-based claim was initiated outside the one year time limit provided for such claims (s.3(5) ECHR Act 2003). The appellant did not put forward any reason for an extension of time to bring the Convention-based claim, which Faherty J. held was, in any case, improperly constituted. There was no appeal on that issue either.
18. On the constitutional issue, however, Faherty J. promptly delivered a detailed judgment. This set out the full circumstances, reiterating that, in principle, the appellant had a right to claim damages for violation of his Article 38-derived constitutional right to a trial and appeal process conducted with due expedition. The judge held, however, the claim should be dismissed on the grounds, that while significant, the delay was not inordinate, and that, whilst pending, the appeal had continued to be under review and regulated by the Supreme Court judge presiding over the list to fix dates. Faherty J. accepted the respondents' argument that the maximum period in respect of which the appellant could complain was an 18 month period awaiting the appeal hearing (paras. 142 – 145). She held that there were mechanisms available to the appellant within the Court of Criminal Appeal to expedite cases, but the appellant had not availed of these. These included an application for bail, and an application for priority over the other pending appeals.
19. The High Court judge also observed that, in an Article 40 application brought in June 2012, the appellant had been able to ventilate, albeit unsuccessfully, at least one of his grounds of appeal, to the effect that as a result of the judgment of this Court in *DPP v. Damache* [2012] 2 I.R. 266, his conviction, and hence his detention, should be considered unlawful. While recognising the appellant's entitlement to make a claim for damages, Faherty J. held that, when considered in all the circumstances, the lapse of time from conviction to appeal was not sufficient to warrant an award of damages. I should add that the High Court judge was not in any way to blame for the elapse of time between the date these proceedings were issued on the 27th February, 2015 and the hearing which took place before her, nearly four years later. In fact, when the case was assigned to her, Faherty J. delivered her judgment in a remarkably short period of time.

Delay in the Court of Criminal Appeal: The High Court evidence and findings

20. The circumstances of this case cannot be fully understood without a further description of the causes and effects of delay as given in evidence in the High Court.
21. Giving evidence before Faherty J., Ms. Geraldine Manners, the then Registrar of the Court of Criminal Appeal, gave first-hand evidence of the extent of the delays, and how she sought to address the problem. In the course of her duties, Ms. Manners prepared a schedule of available dates for the member of the court then in charge of the list to fix dates. By and large, cases in that list had to be dealt with *seriatim*, based on the dates as

they became available, dependent upon availability of judges. Beginning in January 2012, there were twenty dates available, the majority of which were given over to clearing the very serious backlog of appeals against sentence as opposed to those against conviction. Any priority that was available was given to that category of appeals because of concern that an appellant's sentence might actually have been served by the time the appeal was heard and dealt with. For appeals against a conviction, "custody cases", i.e. cases where an appellant was serving a sentence, had to receive priority. Ms. Manners confirmed the manner in which the appellant's appeal had to be adjourned on five occasions because of shortage of judges available.

The Presiding Judge's Expressions of Concern

22. She also testified that, on a number of occasions during the list to fix date hearings, the presiding Supreme Court judge frequently expressed concern in open court in relation to the backlogs in the system. Ms. Manners told the High Court that, in March 2013, at which time the appellant had secured a hearing date for an appeal, the presiding judge had observed that there were a total of 209 matters on the Court of Criminal Appeal list seeking a hearing date, in circumstances where there were only 7 hearing dates available. When it comes to an assessment of the causes of the delay in this case, the cumulative weight of this evidence cannot easily be ignored.

The Conduct of the Appellant

Amendment of the Notice of Appeal

23. In other parts of her evidence, Ms. Manners addressed an issue, now relied on by the respondents in argument, that the appellant's advisors contributed to the delay. As already touched on, the appellant applied to amend the grounds of appeal. But Ms. Manners testified that, on the basis of her experience, the fact that the appellant's lawyers had taken this step in July 2011 did not add to the delay in his appeal obtaining a hearing date. On this Faherty J. held:-

"While [the appellant] 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." (para. 151).

Priority

24. Ms. Manners also told the High Court that making an application to the Court of Criminal Appeal for priority would have had "no reality" at the time (paras. 119 and 153). But the High Court judge felt that it nonetheless behoved the appellant to have applied for priority (para. 153).

Bail

25. The High Court judge, however, accepted the State's submission that, while it would have been difficult to obtain bail post-conviction, it was nonetheless an issue which told against the appellant obtaining relief. I mention here the question of whether the appellant should have applied for bail is, in part, a legal question (*DPP v. Corbally* [2001]) 1 I.R. 180). On the established jurisprudence, it would have been necessary to show that the appellant had a clear, discrete, point of appeal. Faherty J. held it was a fact that the appellant did not apply for bail after 2011, either generally, or by raising a point on the frailty of the

DNA evidence (para. 155), but that he should nonetheless have made an application for that purpose.

26. Ms. Manners testified that the presiding judge would hear any practitioner who applied for an expedited hearing, and would prioritise appeals based on length of sentence. However, she said, it was necessary to prioritise these appeals in accordance with the length of the sentence, and that, by and large, priority had to be given to accused appellants serving short sentences.
27. Later, the impact of these, and other factors, will be considered as against the evidence on systemic issues. Faherty J. held that the appellant could and should have made an application for bail, and for priority hearing. Taking these factors into account, she held that the delay in hearing the appeal was reasonable and did not violate the appellant's constitutional right.

The Court of Appeal Judgment

28. The judgment of the Court of Appeal, now before this Court, must be considered against this general background. Ní Raifeartaigh J.'s decision is, too, admirably thorough and comprehensive. The brief summary which follows can only be an outline of what is the product of careful, well thought-out reasoning and analysis. The judgment contains a detailed framework for determining whether there has been systemic delay which might give rise to a cause of action under the Constitution. I would have no hesitation in adopting this framework which both reflects aspects of ECtHR jurisprudence and sheer common sense. But it must be remembered that the issues in this judgment concern the application of a constitutional obligation in a common law system concerning a criminal trial and appeal carried out having reference to the duty of the State under Article 38.1 of the Constitution. In its judgment in the year 2020, the Court of Appeal held:-
 1. Under the Constitution, there exists a right of action derives from Article 38.1 for violation of a constitutional right to a trial with due expedition.
 2. This constitutional right falls to be considered, and can have regard to principles identified by the European Court of Human Rights ("ECtHR") in its jurisprudence.
 3. Separately, and independent of the foregoing, an action may lie under s.3(2) of the European Convention on Human Rights ("ECHR") Act, 2003, for a breach of Convention rights. Such action may be heard in the domestic courts.
 4. The broad framework within which such a constitutional action may be brought was outlined by this Court in *Nash*.
 5. In developing the jurisprudence, the court will pay due regard to observations made subsequent to *Nash* by the ECtHR, as assisting in the consideration of the nature of the constitutional right.

6. For the purposes of identifying whether or not there has been a denial of a constitutional right to a trial with due expedition, the Court of Appeal held a court should have regard to the following factors:
 - (a) An identification of the overall time period for the progress of the case from beginning to end, and then a breakdown of the overall period into sub-periods.
 - (b) An identification of the sub-periods within the overall timeframe, which, *prima facie*, raise the concern, and which exclude any periods in which there is no complaint, or which fall outside the reasonable range of time periods for consideration.
 - (c) The extent to which the State is responsible for any sub-periods of time which have been identified at (b) as being periods concerning which the court may have a *prima facie* concern.
 - (d) The extent to which an applicant has in any way contributed to the delay within any periods of concern, as identified at (b) above, by failing to employ available mechanisms to speed up the progress of the case, (applicant's conduct).
 - (e) Issues at stake for an applicant, and the impact upon the applicant of any delay.
 - (f) Whether there are any other relevant factors, including complexity of the case.
 - (g) Whether an applicant is entitled to a remedy of damages for the breach of his or her constitutional right with reasonable expedition.

Later, this judgment addresses how these factors- many of which are reflected in ECtHR case law- should be interpreted and applied in the circumstances of this case, on the evidence and findings made.

29. Ní Raifeartaigh J. made a number of salient preliminary observations. She held the evidence made clear that what occurred in this criminal appeal was not a problem created by judges, nor did the solution lie within the hands of judges. The crux was not one of a delay caused by a judge or judges in hearing a case or delivering judgment, but rather, by systemic delay. Thus, insofar as the ECtHR had discussed the issue of judicial immunity in *McFarlane v. Ireland* (Application No. 31333/06 (2010) E.H.R.R. 20), the question simply did not arise for consideration. It also followed that the question of such immunity also considered by the Court of Justice of the European Union ("CJEU") in *Köbler v Austria* (2003, Case C-224/01), and by the ECtHR in *McFarlane* did not arise (paras. 105 and 106 of the Court of Appeal judgment).
30. The judge observed that the court was dealing with the breach of a constitutional right in an adversarial criminal process, and not a claim for breach of a Convention right as such, where different considerations might arguably arise, and that comparisons with individual ECtHR cases might not always be helpful, as each such case was highly fact-specific. Ní Raifeartaigh J. nonetheless referred in detail to ECtHR case-law, noting that in cases such as *McFarlane* the total period in question, involving two sets of judicial review

proceedings, was 10 years and 6 months; and that, in later cases, such as *Healy v. Ireland* App. No. 27291/16, 10th January 2018 ("*Healy*") there was a period of 12 years civil litigation, including a "relevant period" of 4 years during which time the case had been involved in the appellate process. She noted that, in *Keaney v. Ireland* App. No. 72060/17, (2020) 71 E.H.R.R. 22 ("*Keaney*"), again a civil case, the overall period involved was 11 years, with delays of between 5 and 7 years during which time the parties took no steps to progress an appeal. But the judge observed that, whether as to remedy or otherwise, the circumstances and considerations in an *inter partes* civil case might not always be directly relevant in a criminal matter such as that now under consideration.

31. Article 6 ECHR, *inter alia*, protects the right to a fair and public hearing within a reasonable time of any criminal charge by an impartial tribunal. This is referred to as the "criminal limb" of the Article. Many of the discussions in the case law refer to delays in an appeal process. Turning to ECtHR jurisprudence on criminal appeals, therefore, Ní Raifeartaigh J. observed that the decision of the ECtHR in *Abdoella v. The Netherlands*, App. No. 12728/87, (1995) 20 E.H.R.R. 585 ("*Abdoella*"), was perhaps the high point of the appellant's case. There, the overall period concerned totalled 4 years and 4 months, in a murder conviction and appeal. The ECtHR found a violation of the criminal limb of Article 6 ECHR. There had been 21 months of inactivity (a figure calculated by adding two separate periods together), in the progress of that criminal appeal. This lapse of time had been caused by delays in transmitting papers relating to the case from one level of court to another in the Dutch courts.
32. But the Court of Appeal judgment makes the point that, under the common law, the conduct of litigation is adversarial, and the parties' conduct - i.e. that of their lawyers - was still relevant to some degree when considering whether or not a claimant might be entitled to damages for breach of the constitutionally derived right to trial with reasonable expedition (*Nash v. DPP* [2017] 3 I.R. 320). Ní Raifeartaigh J. held that, in the absence of evidence, it was necessary to use a subjective test as to the reasonableness of the periods in question where, in a different case there might potentially have been evidence anchored in a more objective analysis. The judge observed a decision entirely based on a subjective basis of assessment, and in something of an evidential vacuum as to the absence of national or international comparators, could not carry much, if any, precedential value.
33. The Court of Appeal concluded that, in this, a criminal matter, the proceedings overall took a little over 4 years across two levels of jurisdiction, rendering it in ECtHR terms a 'borderline case'. On the one hand, there was a period of time during which the case did fail to progress at a reasonable pace because of systemic delay. During that time, the appellant was in custody pending the outcome of his appeal. If the case had been one in which the criminal appeal had been ready for hearing within a short period of time, Ní Raifeartaigh J. was of the view that she would have probably been willing to find that there had been a breach of the constitutional right, warranting a remedy in damages

(para. 142). But she held that the three countervailing factors, which she identified, argued against such a conclusion.

The Appellant's Conduct: Three Factors Identified

34. It will be remembered that in the High Court, Faherty J. had considered, but rejected, the application for amendment to the grounds of appeal as a valid reason for the delay, but she did give weight to the absence of an application for priority, and the fact that no application had been made for bail. For its part, the Court of Appeal, identified three *contra* factors concerning the appellant's conduct. These were first, that the appeal was not in a state of readiness to obtain a date for trial until the grounds of appeal (which were the appellant's responsibility) had been amended. Here, it had to be borne in mind that there was a period of approximately 6 or 7 months from when the appellant obtained the transcript, to the ultimate amendment of the grounds of appeal. Second, but to a lesser extent, the Court of Appeal felt it was necessary to have regard to the appellant's failure to make a bail application pending the appeal, which might have released him from custody for some of the period pending the appeal hearing, or might have led to an earlier appeal date being fixed (para. 142). Third, the Court concluded there was an absence of any comparator evidence which would permit assessment of what was reasonable and what was not.
35. As to the amendment of the Notice of Appeal, Ní Raifeartaigh J. observed that, although a court had overall responsibility for ensuring that cases proceeded at a reasonable pace, a consequence of the adversarial system was that the failure of a party to have their case in a state of readiness was to be considered a matter of some importance when reckoning the periods of time alleged to constitute delay, and whether or not a litigant was entitled to damages. The judge also made a further important observation, to the effect that, when it came to giving weight to various factors, there might possibly be nuances of difference, between a case considered under the Constitution and one considered having regard to Convention principles. The judgment also placed some emphasis on the fact that, due to the appellant's own failure to bring his application for a remedy under the ECHR in time, or to provide an explanation as to why the time should be extended, the court was, of necessity, having to deal with a claim brought under the Constitution, and not the Convention (para. 143).

Application of the Framework by the Court of Appeal

36. The Court of Appeal concluded that, if one counted the periods of time between the issuing of the motion to amend the grounds of appeal, and then to final judgment, a period of 2 years had elapsed, at least part of which might be allocated to the writing of the judgment in respect of which a period of 3 months was not unreasonable. But, in the absence of any objective evidence as to what was a reasonable time between filing the appeal and ultimate disposal, the Court of Appeal was not prepared to find that the time which had elapsed in the case was unreasonable to the extent that it constituted the breach of the constitutionally-based right to trial with reasonable expedition, together with any consequent remedy in damages that might flow from such a finding. Ultimately, the Court held that while the case was borderline, the three factors identified earlier stood

against making a finding that damages should be awarded. The judgment of the High Court was affirmed and the appeal was dismissed.

The Appeal to This Court

Submissions

37. In this appeal, counsel for the appellant submits that the Court of Appeal erred in concluding that the three factors identified should have precluded the appellant from a finding that there had been a violation of his constitutional right, and thereafter recovering damages. It is said none of the three matters were such as to have contributed substantially to the delay. Rather, the fundamental issue in the case was the fact that there had been systemic delay owing to a shortage of judges, and that, even taken separately or cumulatively, the three factors paled into insignificance when seen against the background of the evidence regarding the accrual of the backlog, the Report, and Ms. Manners' evidence. The court was referred to *Nash v. DPP*, *McFarlane v. DPP* [2008] 4 I.R. 117, and counsel for the appellant cited ECtHR jurisprudence including *Dobbertin v. France*, App. No. 13089/87, (1993) 16 E.H.R.R. 558, *Abdoella v. The Netherlands* (cited earlier); *Frydlender v. France*, App. No. 30979/96, (2001) 31 E.H.R.R. 52; *McFarlane v. Ireland* (cited earlier) *Healy v. Ireland* (cited earlier) and *Keaney v. Ireland* (cited earlier).
38. Counsel for the State, on the other hand, submitted that the Court of Appeal had not erred. He submitted that the judgment in *Nash* made clear that very careful consideration and analysis is required in cases such as these. As was pointed out in *Nash*, the question of whether damages might be awarded for breach of a constitutional right to a timely trial was not a matter to be considered in a vacuum, but rather was highly dependent on all the circumstances of the case. Counsel submitted that the Court of Appeal conducted precisely the sort of careful consideration and analysis required, had reviewed the domestic law regarding the constitutional right at issue, and also considered the ECtHR jurisprudence regarding the corresponding Convention right. The Court of Appeal had proposed a framework for analysis, with which the appellant did not take any real issue, and applied it to the facts of the case. In particular, the State respondents submitted that the Court of Appeal judgment was correct in identifying the extent of the appellant's contribution to the delay in hand; it had correctly assessed the question of the State's inaction in the face of delay; and also appropriately assessed and weighed the period of time for which the appellant was in custody pending the outcome of the appeal. The circumstances of this one case must, however, be seen in a wider context, which will now be explored, bearing in mind the established jurisprudence that there may be circumstances in which ECtHR jurisprudence may not assist in interpreting provisions of the Constitution, but other occasions when the protections are similar, when the jurisprudence can be of considerable assistance. This issue is touched on later in this judgment.

The Evolution of ECHR Jurisprudence

Dialogue Between Courts

39. The issue of systemic delay has a considerable provenance in ECtHR case law. The question has also been the subject matter of a continuing dialogue between the Irish

courts and the ECtHR for more than two decades, but with greater intensity in the last 10 years. As in many such interactions, important points are sometimes missed, or 'lost in translation'. Misapprehensions can arise with predictable consequences. The judgment of the majority in the important ECtHR decision in *McFarlane* was the subject of dissenting judgments of some force in that court. That judgment must however be seen within a broader context of the ECtHR case law as it evolved. As the history of this case hopefully shows, such dialogue can also be fruitful, illuminating and constructive. The similarities between the criteria identified by the Court of Appeal, and those developed by the ECtHR, are very clear. In the discussions which follow there is some consideration of cases involving civil, inter parties, proceedings. It is important to bear in mind, however, that this appeal concerns Article 38 of the Constitution, and deals only with the question of criminal proceedings, in the context of a delay in a criminal appeal.

The Evolution of ECtHR Jurisprudence

40. As already set out, Article 6(1) ECHR guarantees a fair trial within a 'reasonable time'. But, prior to the 1990s, the question as to what constituted such a 'reasonable time' under Article 6 had yet to be determined by the ECtHR. But that did not mean the right did not exist. Its precise features had yet to be defined by case law. It is trite, but necessary, to emphasise that courts cannot decide issues, or outline principles, on an abstract or hypothetical basis. Such questions can only be decided on a concrete set of facts, where an issue has been raised by pleading, affording both sides and the deciding court the opportunity to consider the issue in a factual context.
41. Until the beginning of this century, no ECtHR proceedings concerning systemic delay were brought concerning this State. In fact, many complaints referred to one particular state, which was responsible for 25% of the total workload (*The Right to a Fair Trial; Effective Remedy for Excessively Lengthy Proceedings, Articles 6 and 13 ECHR*, Kuijer, 28 February 2013, EJTN Seminar, Kraków, Poland, HRLR 2013, 777-794). The question of systemic delay was addressed by the ECtHR first in the case of *Ferrari v. Italy* App. No. 33440/96, 28th July, 1999. The consequence of this decision was to shift the burden of proof onto the State. Thenceforth, if there was unreasonable delay, the ECtHR would proceed on the assumption that the Convention had been breached, unless, in a given case, the state in question challenged that presumption.

Convention Criteria

Commencement

42. Remembering that this is a case to be considered under the Constitution, the jurisprudence of the ECtHR, as it has since evolved, can nonetheless assist in an assessment. The Convention approach now involves a series of steps. There is, first, a commencement date (*dies a quo*). The time requirement begins by an identification of the moment a person was charged (*Eckle v. Germany*, App. No. 8130/78, (1983) 5 E.H.R.R. 1.) Occasionally, this may have occurred on a date prior to the case coming before the trial court, such as the date of arrest, or when the person was officially notified of an investigation.

Conclusion

43. There is then a consideration of the *dies ad quem*. The relevant time ceases to run when the proceedings have been concluded at the highest possible instance, that is, when the determination becomes final, and the judgment has been brought into effect. As it developed, the ECtHR jurisprudence took a series of factors into account. These included (i) the complexity of the case; (ii) the behaviour of an applicant; (iii) the behaviour of the national judicial authorities; and (iv) whether there was a reason for special diligence. There is no reason why these should not also be factors in a constitutional assessment.

Complexity

44. In turn, the issue of (i) complexity, comprises an assessment of (a) the nature of the facts that are to be established; (b) the number of accused persons and witnesses; (c) international elements; (d) the joinder of a case to other cases; (e) the intervention of other persons in the proceedings. A more complex case may justify longer proceedings (*Boddaert v. Belgium* App. No. 12919/87, (1993) 16 E.H.R.R. 242). However, even in complex cases, unreasonable delay can occur.

Conduct of the Appellant

45. The court will also have regard to the conduct of an applicant. These may well be particularly relevant factors in a constitutional assessment, especially in civil *inter partes* proceedings. However, the ECtHR case law holds that an applicant cannot be blamed for using all procedural avenues available to him. Nor is an applicant required to actively cooperate in expediting the proceedings which might lead to conviction. An applicant's duty is said to be only to "*show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics, and to avail himself of the scope afforded by domestic law for shortening the proceedings*" (*Alimentaria Sanders SA v. Spain*, App. No. 11681/85, (1990) 12 E.H.R.R. 24 para. 35).

Obligation of National Courts

46. National courts are under a particular duty to ensure that those playing a role in the proceedings do their utmost to avoid unnecessary delay. The ECtHR case law places emphasis on the role of the trial judge (*Cuscani v. United Kingdom*, App. No. 32771/96, (2003) 36 E.H.R.R. 2). Much of the ECtHR jurisprudence has developed in the context of the judicial processes and procedures not always to be found in common law states. In many common law jurisdictions, a judge will not acquire and control a case from the outset, or have a "docket". Rather, specially tasked judges may deal with different procedural steps prior to the case being assigned to a particular judge for the purposes of hearing. Similar procedures can arise in relation to the managing of an appeal.

Systemic Delay: Factors

47. In considering systemic delay, the ECtHR jurisprudence has considered procedural "complexity" issues such as time taken for transfer of cases between courts, the hearing of cases against two or more accused together, the communication of a judgment to the accused, and the elapse of time between trials and appeals. In one case, a period of inactivity of 9 to 10 months was held to be inexcusable, without further explanation (Kuijjer (2003); Mole & Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights*; Human Rights Handbooks, No. 3 (2006)). It must be emphasised that, historically, the ECtHR has "*rejected arguments by*

member states that the national courts could not deal with their workload because of inadequate staffing or insufficient number of courts. Rather, all states are obliged to organise their legal system so as to ensure compliance with the requirements of the Convention.” (Salesi v. Italy, App. No. 13023/87, (1998) 26 E.H.R.R. 187.)

Special Diligence/Custody

48. Finally, the ECtHR looks to issues such as whether there are reasons for special diligence, or whether a person is in custody, to provide an effective remedy under Article 13 of the Convention. Ireland has been the subject matter of a number of complaints to the ECtHR

Strasbourg case-law on systemic delay involving this State

49. A discussion of the ECtHR decisions involving the State must begin with the simple acknowledgement that, in the early parts of this century, Ireland, along with many other countries, was found to be in violation of Article 6 ECHR (trial within a reasonable time), and Article 13 ECHR (absence of effective remedy), in a number of cases (cf. *Barry v. Ireland* App. No. 18273/04, 15th December 2005; *Doran v. Ireland* App. No. 50389/99, (2006) 42 E.H.R.R. 13; *McMullen v. Ireland* App. No. 42297/98, 29th July 2004; *O’Reilly v. Ireland* App. No.54725/00, (2005) 40 E.H.R.R. 40. In *Barry*, a criminal case, and a precursor to others, the applicant succeeded in his case before the ECtHR on the grounds of a violation of Article 6 and Article 13 in a very protracted series of criminal proceedings and appeals.

The Supreme Court judgments in *McFarlane*

50. For the present purposes however, it more helpful to start the narrative with the judgment of this Court (Hardiman, Geoghegan, Fennelly, Kearns and Macken JJ.) in *McFarlane v. Director of Public Prosecutions* [2008] 4 I.R. 117, a case with a complex procedural history, which involved two applications for judicial review in the High Court, which were both then appealed to this Court. The ultimate appeal in this Court was unsuccessful, but it is necessary only to identify what this Court determined regarding the existence of the constitutional right under Article 38.1 to damages for systemic delay.

51. Fennelly, Kearns, and Geoghegan JJ. each delivered separate judgments. But Hardiman J. and Macken J. concurred with the observations of Kearns J. on the existence of a right of action under the Constitution for infringement of the right to a trial with due expedition due to systemic delay. It is true that Geoghegan J. was more guarded as to the existence of such a constitutional right. He took the view that the case law of the ECtHR, including *McMullen v. Ireland* and *Barry v. Ireland* was not sufficiently developed to conclude that it set out a clear principled approach to be applied. He expressed reservations as to the nature and scope of the constitutional right.

52. Fennelly J., for his part, pointed out that in *Barry v. Ireland*, the ECtHR appeared to have misapprehended what was at stake in that case, and, in particular, had erroneously concluded that those representing the government of Ireland before the ECtHR had accepted that there was no domestic legal provision for an award of damages following a delay in proceedings. Fennelly J. pointed out that no claim for damages had been made in *Barry*, a criminal case. Nor had any such claim ever been made in any other case, involving claims for prohibition based on delay. He observed that in every relevant case,

an accused person had in practice sought the remedy of prohibition of his trial. Thus he pointed out it was clearly not possible for the Supreme Court, which only had an appellate function, to pronounce in the abstract on whether damages would be available as a remedy if they were not claimed. Any such claim would have to be made in the High Court in the first instance. He observed that the ECHR Act 2003 might also be relevant.

53. Fennelly J. also went on to point out that the ECtHR appeared to have misapprehended remarks made by Keane C.J. in the course of his judgment in *Barry v. Director of Public Prosecutions*, Unreported (Supreme Court), 17th December, 2003. It is no longer fruitful or necessary to go into this matter in any greater detail.
54. However, the judgment of Kearns J., with whom Hardiman and Macken JJ. were in agreement, was entirely explicit that, in principle, there was no qualitative difference between prosecutorial and systemic delay. The same principles should govern both. Kearns J. observed that systemic delay, caused by failures of the criminal justice system might take various forms. He specifically identified a *failure by the State to provide an adequate number of judges, back-up staff, court room facilities or the other assistance* which is required to enable the criminal process to move forward with reasonable expedition. There might be failures by judges to give decisions or judgments within an appropriate time. He stated, in terms, that the decisions of the ECtHR made it clear that a State was obliged to organise its legal system so as to allow its courts to comply with the reasonable time requirement of Article 6; a requirement and obligation which did not cease to exist simply because domestic law required the parties themselves to take initiatives or steps to progress proceedings (paras. 137 and 138).
55. Kearns J.'s judgment went on to engage in an extensive consideration of ECtHR jurisprudence. He pointed out that, in *Barry*, it had held there had been a violation of Article 6(1) of the Convention, and also a violation of Article 13, guaranteeing an effective remedy before a national authority for an alleged breach of a requirement under Article 6 to hear a case within a reasonable time, and that the applicant had been awarded €8,000 in respect of non-pecuniary damage. Having referred to *Pelissier and Sassi v. France*, App. No. 25444/94, (2000) 30 E.H.R.R. 715, Kearns J. pointed out that one of the factors to be taken into account in the jurisprudence was what was at stake for the applicant in the litigation. He cited *Pailot v. France*, App. No. 32217/96, (2000) 30 E.H.R.R. 328. The judgment commented, explicitly, that the decision in *Barry* conveyed how the ECtHR approached the issue of delay in the context of criminal cases. It was similar to that in civil cases, though perhaps less helpful in determining how reasonableness in the context of delay was to be measured. In fact, an objective assessment of the judgment of the majority in *McFarlane* made the position as to the existence of a right of damages under the Constitution for systemic delay quite clear. Kearns J. stated, in terms: "[124] *It is well established in Irish law that the right [Under Article 38.1] thus guaranteed includes a right to a trial with reasonable expedition*". This was a very clear statement by the majority of the court.

Broader Context of the *McFarlane* Application to the ECtHR

56. The appellant in *McFarlane* then applied to the ECtHR, *inter alia* claiming breaches of his rights under Article 6 ECHR for delay. In order to place the judgment of that court in context, it is necessary to set out that the Court in Strasbourg had, by then, repeatedly held there existed a duty on state parties under the ECHR to ensure that there is a remedy for a person who has suffered unreasonable court delays. In *Kudla v. Poland*, App. No. 30210/96, 26th October, 2000, the ECtHR had provided guidance on the exact form which that remedy should take. Such remedy must be effective in law, as well as in practice. It must be capable of preventing any continuation of delays with the litigation, or, alternatively, it must be capable of providing adequate redress for any delays which have already occurred. It must be provided by a national authority; but such authority need not necessarily be a judicial body, nor necessarily does there need be one remedy to meet all of these requirements. The jurisprudence can be sub-divided into a criminal limb and a civil limb, but the criteria often overlap.

The Judgment of the ECtHR in *McFarlane*

57. The ECtHR judgment in *McFarlane v. Ireland* must also be seen against a backdrop where, in the period of 2009 to 2012, the court had found violations in 1,478 cases, in all Member States of the Council of Europe, as part of its “war on unreasonable delays” initiated in 1996 (Henzelin & Rordorf (2014) ‘When Does the Length of Criminal Proceedings Become Unreasonable According to the European Court of Human Rights?’ *New Journal of European Criminal Law*, Vol. 5, Issue 4 pp. 78-109.) In *McFarlane*, the majority of the ECtHR decided to consider the merits of the complaints under Article 13 (absence of effective remedy in national law) at the same time as the State’s objection as to the exhaustion of domestic remedies. Reservations about such an approach were expressed in the minority opinions, and subsequently in an important ECtHR opinion delivered in *Keaney*. In *McFarlane*, the effect of embarking on an Article 13 consideration was that, rather than assessing whether the applicant had exhausted domestic remedies, the majority of the ECtHR cast doubt on whether there existed a domestic remedy for systemic delay, an issue upon which there was actually evidence before the court in Strasbourg. The court held, by a majority, that the complaints concerning the excessive length of proceedings and lack of remedy were admissible, and the remainder of the application inadmissible, and by twelve votes to five, held there had been a violation of Article 13, and, by the same majority, that there had been a violation of Article 6(1) (trial within reasonable time). As a consequence, the court held that the State was to pay to the applicant a sum in respect of non-pecuniary damages, costs and expenses, dismissing any claim for just satisfaction.

58. Against the background of the views of Kearns J. and the majority of the Supreme Court in *McFarlane*, the majority of the ECtHR nonetheless came to the conclusion that the constitutional remedy in Ireland for damages arising from a breach of the right to reasonable expedition was not an effective remedy within the meaning of Article 13. In addressing the government’s submissions that there had been domestic developments since the *Barry* judgment which therefore required the applicant to exhaust the domestic remedy of damages, the majority held that this matter was closely linked to the merits of the application, and the complaint under Article 13 (effective remedy). The majority

concluded that an applicant was expected only to exhaust those remedies that were “available, sufficient and certain in theory and practice”, and held that the State had failed to establish there was an effective domestic remedy. The majority also expressed the view that effective form of remedy must also be available “to expedite the proceedings”, holding that a compensatory remedy must also be available for proceedings that have already been excessively long. The majority concluded that a state could choose between a remedy that could expedite proceedings or providing for a remedy in damages. The court held that the primary responsibility for implementing Convention rights and freedoms laid with the national authorities. The obligation of the court was simply to ensure that states observed their Convention obligations in accordance with the principle of subsidiarity.

59. However, the court went on to observe that it was its role to determine whether a domestic remedy was effective. Citing Article 13 ECHR, the court held that the principle of subsidiarity did not require the court to renounce what was referred to as its supervisory role of domestic remedies, and that Ireland had been unable to establish “with certainty” that an effective remedy of damages was available domestically. The judgment stated that this remedy must be clearly set out and complemented by case law, and that this was the case, even in common-law inspired systems with written constitutions which provided an implicit right to the remedy. The majority of the court stated that damages for delay in proceedings had never been sought in Ireland, but observed that “judicial dictum” was divided on the scope of such domestic remedy. Having also observed that it had also not been demonstrated that the remedy of damages was available with respect to a judge’s delay in delivering judgment, the court went on to hold that, even assuming that the remedy of damages for delay in criminal proceedings was an adequate one, the effectiveness of the remedy would be undermined by the length of time it would take to pursue the remedy; it would be necessary to first bring proceedings in the High Court which might be appealed to this Court. As there was no specific and streamlined procedure to obtain the remedy, any action would be both legally and procedurally complex, “raising questions of some legal novelty”. Thus, the court held that this was not reconcilable with the requirement that the remedy for delay be sufficiently swift, and that the costs and expenses of legal action to obtain the remedy should also be considered.

The Minority Opinions in *McFarlane*

60. Though the judgment is over ten years old, the minority opinions of the ECtHR in *McFarlane* deserve close and attentive reading. On the basis of the evidence adduced, the minority pointed out that, under Irish law as it stood at that time, the right to trial within a reasonable time was guaranteed by Article 38 of the Constitution; that it was well-established in Irish law that damages would be available for breach of constitutional rights; that the judgment of the majority offended against the well-established ECtHR-jurisprudence principle of subsidiarity, and that the majority had reached conclusions on the doubtful nature of the right based on the absence of jurisprudence, but in circumstances where there had actually been strong and clear expert testimony before the court as to the existence of an entitlement in damages for breach of such a right under the Constitution. The minority opinions pointed out that the opinion of the majority

addressed a claim for damages made by Mr. McFarlane, which had never been made before the national courts at all, and drew attention to the fact that the Court of Human Rights seemed not to have paid sufficient regard to what had been held by the Supreme Court of Ireland in *McFarlane* as to the existence of the constitutional right. The minority added there had been a misunderstanding of what had been said by this Court in *Barry*, and that the opinions of the majority also appeared to misunderstand and misapply other citations of national law which were not on point. The matter of judicial immunity was a case in point. No less significantly, in the long term, was the fact that the opinions of the minority also made the point that the majority in *McFarlane* appeared unclear as to precisely what form of remedy the State should appropriately adopt, and that the majority judgment was ambiguous as to whether or not there should be a mechanism for expediting trials, or whether the remedy should lie in damages. These questions are no less valid at the present time when legislation on this matter of remedy is being prepared. I make no comment on this issue therefore.

61. But, against what were undoubtedly a complex series of proceedings at first instance and appeal, the ECtHR nevertheless made what was, in fact, the uncontroversial finding that the totality of proceedings against the applicant which had lasted over 10 years and 6 months was overly-long, and that the sensitive and complex nature of the proceedings involving terrorist offences could not justify this excessive delay.
62. The majority of the ECtHR period of time after the impugned events, the state was under a "special obligation to ensure expedition". In an observation relevant here, the court held that obligation also applied to the *procedure of fixing dates*. Any right the applicant might have to take steps to expedite proceedings did not dispense the State from ensuring proceedings progressed reasonably quickly. The court specifically identified three periods of delay in the fixing of hearing dates. It held the onus was not on the applicant to ensure the expeditious approval of a court transcript which had delayed proceedings. It held that, bearing in mind interests at stake for the applicant and that the charges against him were serious, he had had to bear the weight of those charges for approximately 10 years and 6 months, during which time he had bail-reporting obligations.
63. However as was pointed out in the later ECtHR case of *Keaney*, the judgment in *McFarlane* may well have had a further, unforeseen, consequence. It may actually have had a chilling effect. In the light of the conclusions of the majority, it was perhaps hardly surprising that for some years afterwards, few, if any, proceedings were launched in Ireland claiming damages under the Constitution for systemic delay. This was despite the fact that at that time, there were possibly other instances of the problem. The judgment contained the observation that the subsequent silence may also have been due to the steps taken by the State to remedy the position, and the efforts made by the Court of Appeal, and by this Court, to eliminate the backlogs in both civil and criminal cases. But the judgment contains the observation that the fact that the majority of the ECtHR had pronounced its view on the ineffectiveness of a national remedy might actually have had a stifling and counter-productive effect on the evolution of the constitutional jurisprudence.

The Further Evolution of the Constitutional Jurisprudence on Right to a Trial with Due Expedition

G.C. v DPP [2012] IEHC 430

64. The narrative then returns to the Irish courts. In *G.C. v. DPP* [2012] IEHC 430, Hogan J. had no difficulty in stating that he could see no reason why the court should not be able to make an award of damages in appropriate cases, as a remedy for such a breach. He pointed out that the purpose of an action for damages for breach of constitutional rights would be to supply a remedy for such a breach, where none has otherwise been provided, either by common law, or by statute. (cf. the comments of Henchy J. in *Hanrahan v. Merck Sharpe & Dohme Ltd.* [1988] I.L.R.M. 629, at 636). Hogan J. went on to state that, in those circumstances, applying standard *Meskill* principles (*Meskill v. Córas 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.

Nash v. DPP [2017] 3 I.R. 320

65. Matters were still further clarified in the judgment by this Court in *Nash v. DPP* [2017] 3 I.R. 320. There, Clarke J. (as he then was) pointed out that the question arose in respect of the right to a timely trial conferred both under the Constitution and the Convention. The judgment in *Nash* pointed out that, since the coming into force of the ECHR Act, 2003, it was clear that, at least at the level of principle and at least in many cases, a claim in damages could be made against an organ of the State, in respect of a breach of the rights conferred by the ECHR. Clarke J. went on to point out that s.3(2) of the 2003 Act provided that a person who suffered 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 be awarded damages, "if no other remedy in damages is available", if a court of competent jurisdiction considered it appropriate.

66. Having reiterated the principle of a constitutional right to a timely trial, Clarke J. went on to point out that, absent any appropriate remedy provided by common law, or by statute, damages might lie for a breach of the constitutional right. He went on to state, in terms, that:-

"[16] It [was], 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." (Emphasis added)

67. The judgment also went on to point out that the courts system itself provided mechanisms to enable any party, dissatisfied with the pace of litigation, to seek an

appropriate intervention by the court to ensure that the litigation progresses at an appropriate pace.

68. The judgment identified a number of factors to be borne in mind in making a determination as to whether damages would lie for systemic delay. It would be necessary to identify the extent to which a party, or parties, may be responsible for the failure of the process to be conducted and concluded in a timely fashion. Equally, it would be necessary to assess the role of the accused in any possible delay. In a party-led litigation system, it would 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), designed to accelerate the process, or prevent excessive delay.

69. The judgment went on to point out, importantly:-

"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." (para. 51)

70. The judgment identified these matters for three purposes. First, to emphasise that, in principle, there was an entitlement to damages for breach of the constitutional right to a timely trial; second, to indicate that the precise parameters would require careful consideration in the light of a proper analysis of all material facts connected with the litigation; and third, that the determination of an entitlement to damages should also require a detailed consideration as to the reasons why there was a lapse of time between when it might be said *that the process had begun and been finalised*. Regarding the prosecution of criminal offences Clarke J. set out the broad framework in this way:-

"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 entities 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." (para. 54)

Balancing Consideration

71. The judgment identified what might be 'balancing considerations'. These might include whether or not the appellant had availed of a primary remedy for delay, that is, sought an

appropriate order requiring that the matter be expedited, or, in an appropriate case, sought an order for prohibition. It would also be necessary to have regard to the range of rights, including that of the community in respect of the prosecution of criminal offences, but also, importantly, the rights of victims of crime, or those who asserted that they are victims. Clarke J. explained that it might 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 other reasons, it was not to be assumed that every case of delay must necessarily convert into a claim in damages.

State Responsibility: An Observation

72. I add here that the essential test in systemic delay is whether a trial in due course of law is denied to an accused person, for reasons for which the State *itself* is responsible. (See Criteria 6(c) earlier). But, dependent on evidence in any future case, a court might have to have regard to whether extraordinary excusing circumstances or supervening events for which the State is not responsible would constitute a good answer to a claim of delay. In this, a court might have to consider measures taken by the State or its agents for the protection of the common good. There may be a balance, dependent on evidence. But it is now necessary to return to Strasbourg to consider the consequences of *McFarlane*, and the observations of two more recent judgments.

A Further Consequence of *McFarlane*

73. Despite any subsisting concerns as to the reasoning in the ECtHR judgment, *McFarlane* also had longer-term consequences for the State. The question of implementation of the judgment, in that and four other cases, fell to be considered under the enhanced supervision committee of the Committee of Ministers of the Council of Europe, who later considered that the *Nash* judgment alone did not demonstrate the existence of an effective remedy for the purposes of Article 13. The Committee remained unconvinced that Irish law provided an effective remedy. It regretted that Irish authorities had not established an effective remedy in law, and strongly encouraged the authorities to take all necessary measures to finalise the adoption of an effective remedy. (cf. Meetings of 6-7 June 2017; 18-20 September 2018; 3-5 October 2019.) At the meetings, the Committee noted the Irish Government proposed to adopt a non-court based remedy for excessive length in civil and criminal proceedings, but noted that there was not yet consensus on the issue. In an action plan submitted on 30th November, 2018, Ireland explained that a draft general scheme of the European Convention on Human Rights (Compensation for Delay in Court Proceedings) Bill, 2018 ("the General Scheme Bill"), introducing a non-court based remedy for excessively lengthy civil and criminal proceedings would be published in the Summer of 2019, and enacted by the end of that year. (See *Keaney v. Ireland*, and, in particular, the opinion judgment of Judge O'Leary, paras. 64-69.)

***Healy v. Ireland* (App. No. 27291/16) 10th January 2018**

74. A forensic examination of every ECtHR judgment concerning Ireland on systemic delay in court proceedings is not necessary. For present purposes however certain other

judgments concerning this State assist in providing context, though they concern civil litigation, not a criminal prosecution. In *Healy v. Ireland*, a civil case, (cited earlier) the applicant's claim was that the authorities had been slow to react to an obvious systemic problem of delay. They had chosen a course of action that took many years to complete. They could have appointed additional judges to the Supreme Court so as to alleviate congestion of that court's docket, pending the establishment of a new court. In response, the government of Ireland explained to the ECtHR that, at the time the case was pending on appeal, the State was in the middle of a process to address the backlog of the Supreme Court. The 2009 Working Group had proposed the creation of a Court of Appeal as the best option. The Group had also given consideration to increasing the number of judges in the Supreme Court, but concluded the idea was inherently problematic, as it could lead to judicial inconsistency and obscure the true role of a court of last resort. The government had accepted the report necessitating the organisation of a referendum to amend the Constitution, and subsequently the enactment of legislation establishing the new court. Substantial parts of the claim were dismissed by the ECtHR as being manifestly unreasonable. The applicant was not free from blame for the significant delay which had taken place. But, whatever issues arose in the High Court - there were many - the essence of the case was that, at the appellate stage, her case had simply been caught in the Supreme Court backlog, and remained pending there between the 1st July, 2010, until it was transferred to the Court of Appeal on the 29th October, 2014. The appeal was heard on the 30th July, 2015. It was dismissed in a judgment on the 17th November, 2015.

75. The ECtHR reviewed the general principles established in its case law, as identified earlier. It pointed out that the appeal stage was clearly protracted, having lasted, in total, over 5 years and 4 months. The court held that, even taking full cognisance of the series of substantial efforts made by the State, in order to overcome a clear structural deficiency, and of the positive impact for the applicant at a later stage, there had nonetheless been a violation of Article 6, in conjunction with Article 13 of the Convention at the appellate stage, as a result of which the appellant was awarded €5,000 just satisfaction under this heading. The judgment of the Court of Human Rights lays considerable emphasis on the fact that the responsibility lies with the legal system to keep control of its own proceedings.

Keaney v. Ireland App. No. 72060/17, (2020) 71 E.H.R.R. 22

76. More recently still, in *Keaney v. Ireland*, again a civil case, the ECtHR set out what this Court set out in *Nash*, making the point that this Court had observed that the precise parameters as to the circumstances in which it might be appropriate to award damages awaited consideration in the context of a suitably concrete case.
77. Like *Healy*, *Keaney* was also a civil case, in which the relevant period began with High Court proceedings on the 8th February, 2006, and ended on the 5th April, 2017, when this Court handed down judgment in an appeal against a High Court judgment delivered on the 19th December, 2008. The ECtHR observed that the applicant's litigation took on a scale which was incommensurate with the nature of the underlying legal claim. Much of

the initial work had been dedicated to deciding which of the many claims advanced by the appellants were sustainable. The failure of the applicant, represented by solicitor and counsel, to properly plead and advance his litigation had contributed decisively to the delay of the proceedings at the High Court level. On multiple occasions, he had failed to comply with court orders, resulting in further delays. However, the High Court proceedings concluded 2 years and 10 months from the date of issue. Once the applicant had pleaded his case in accordance with the domestic procedural requirements, those proceedings concluded within 5 months, a reasonable period of time.

78. But the ECtHR concluded that despite these considerations, the applicant's conduct alone could not justify the entire length of the proceedings from beginning to end. Certain stages of the appeal process were unreasonably protracted. The applicant's inaction in prosecuting his appeals before the Supreme Court appear to have persisted without repercussions until such time as the defendants took action seeking to dismiss them. The government had given no explanation for the significant periods of between 5 and 7 years during which appeals to this Court were allowed to lie dormant.
79. The court concluded that the fact remained that there existed no effective domestic remedy for excessively lengthy legal proceedings. The judgment observed that the common law development of a constitutional remedy was likely to remain legally and procedurally complex, at least for a period of time, making the further observation that problems regarding the existence of an effective remedy for unreasonable delay concerning this State, had been signalled since the year 2003, and reiterated in subsequent cases.
80. A further concern was the speediness of the remedial action itself. In *Nash*, the damages proceedings had lasted over six and a half years. A right of appeal was provided from the High Court to the Court of Appeal, or to the Supreme Court. In 2018, the waiting time for appeals in civil cases to the Court of Appeal was 20 months. The waiting time from the date of determination on leave to delivery of a judgment to the Supreme Court was shorter. Notwithstanding *Nash*, considerable legal effort, time, and even expense, by potential applicants and the respondent State, further steps were still required to establish how the right of expedition might apply in practice. Furthermore, the court was of the view that the State had remained silent regarding the availability of such a remedy for unreasonable delay, given what was said to be the exclusion of courts from the definition of "organs of the State" under the ECHR Act 2003. The court held that there had been a violation of Article 13, in conjunction with Article 6. It granted simply a declaration.
81. In a concurring opinion, Judge O'Leary, set out a history of the dialogue between our own courts and the ECtHR. She identified the "*scaffolding measures*" which the State had adopted, addressed what had been decided in *Nash*, and held that the *Keaney* judgment was not to be seen as a basis for considering remedies afforded by the Constitution as ineffective, and that it recognised the wide discretion enjoyed by courts under the Constitution to fashion remedies. Judge O'Leary went on to state that the judgment in

Keaney should not, either, be regarded as an abandonment of the crucial principles of exhaustion of domestic remedies and subsidiarity cited in *D v. Ireland* App. No. 26499/02, 27th June 2006, and indeed in *McFarlane*. But it reflected a proposition which, after twenty years of repetitive cases on excessive delay, was a reasonable one: “*where an applicant complains of excessive delay within the general court system, sending that applicant back into the general court system the subject of the delay complaint in order to craft and/or develop his or her own remedy is unlikely for the time being to meet the requirements of Articles 35(1) and 13 of the Convention.*” (para. 21 of concurring opinion). The reference to Article 35 ECHR concerns the duty of a claimant to exhaust domestic remedies. Article 13 concerns the right to an effective remedy

82. The concurring opinion made a number of other important observations on the history of the interaction. First, that the Nash proceedings themselves had taken 6 years to come to court. Second, that it was to be presumed that developments in relation to an effective remedy, whether judicial or legislative, would be speedier post-*Keaney* than they had been post-*McFarlane*. Third, that, since remedies under the Act of 2003 only came into play in cases where the Constitution did not supply litigants with a remedy, resort to court proceedings, whether under the Constitution or the 2003 Act, might not always be an effective remedy. Fourth, while observing that the conduct of the applicant in *Keaney* was in many ways reprehensible, and while in some senses the result of that case might appear unfair, nevertheless the system as it stood was characterised by what one Supreme Court judge had, a few years previously, described as “*permitting comfortable assumptions on the part of a minority of litigants of almost endless indulgence*”, and in that case, had allowed the passage of 6 to 7 years before the court acted on a motion to dismiss the proceedings. Even after that time, and despite the applicant’s prolonged inaction, he had been allowed to bring a motion to adduce additional evidence, and still did not comply with the requisite practice direction. The conduct of the case by the applicant, highlighted by judges at both the High and Supreme Court levels, had been set out in the judgments. Thus, Judge O’Leary observed, the ECtHR decision granting a declaration under the Convention was not to be seen as a victory for the applicant. It was not accompanied by any just satisfaction award, due to the manner in which the case had been conducted. It was, instead, a “*judgment of principle identifying a systemic problem of delay which in relation to some levels of the domestic court system may have since been remedied*”. But it was also “*a judgment which [required] the respondent State to act in relation to the provision of an effective domestic remedy in cases of delay. Not all sound legal principles find the appropriate champion.*” (para. 26, concurring opinion).

The issues in this case, considered under the Constitution

83. As outlined at the beginning of this judgment, Article 38 of the Constitution provides that no person shall be tried on any criminal charge, save in due course of law. The judgment is based on that constitutional provision, as what is in question here is a criminal process. That phrase “due course of law” was aptly described as one of very wide import, which included not only matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice, which are inherent in the proper course

of the exercise of the judicial function, as per Gannon J. in the High Court in *The State (Healy) v. Donoghue* [1976] I.R. 325. The judge himself spoke of the right to a trial with due expedition, as embodied in Article 38 of the Constitution. These basic principles of justice must necessarily include the right to a trial and appeal within a reasonable time. Providing a system and resources capable of carrying out this guarantee is a responsibility which ultimately devolves on the State, recognising the principle that, by its nature, delayed justice is justice denied.

84. This case has no direct precedent. It arises on very narrow facts concerning a criminal appeal heard in 2013, by a court now no longer functioning. It derives from events now to be seen through the prism of legal history. Here, the appellant's case is that there was a combination of accumulated factors in the appeal process, all of which were known to the State, and within its control to resolve. It is said that when a person is serving a sentence, repeated adjournments of his criminal appeal without good reason create injustice. It is submitted that the delay was undoubtedly 'systemic'; the appellant had proved this in evidence. It was not reasonable, or in "due course of law", that an appeal would have to be adjourned five times before, on the sixth occasion, it became possible to fix a date. This happened because the criminal appeal system had become outmoded and unfit to fit the needs of society, and because there was an insufficient number of judges available to deal with a criminal appeal because of other commitments. All this was well known to the State, and within its power to solve. The appellant's case is that, taken together, all this evidence points to the existence of systemic delay at the time, or that, even if in some cases the matter is marginal, he is entitled to a remedy under the Constitution.
85. To a large extent, the respondents' case hinged upon persuading the Court that the appellant's conduct, through his lawyers, caused or contributed to the delay such that the conduct affords a good defence. Thus, the weight to be given to the three factors becomes a fundamental consideration.
86. Against this background, the issue in this appeal must be whether or not there was systemic delay, for which the State was responsible, remediable in damages, for breach of the appellant's *constitutional* right to have his trial and appeal conducted in due course of law. It is true that the conduct of an applicant for constitutional relief in this type of case may indeed be an important consideration, bearing in mind the fact that, in this State, there is an adversarial system of litigation derived from the common law. But these considerations do not mean, either, that courts established under the Constitution cannot derive assistance in this area where, be it said unsurprisingly, the considerations and criteria are quite similar to decided Strasbourg case law.

Distinctions and Similarities in the Protections

87. As recently pointed out in the judgment of this Court in *Fox v The Minister for Justice and Equality and the Attorney General* [2021] IESC 61 (Clarke C.J.), just as there can be distinctions between the nature of Constitutional and Convention rights, so too there can be close similarities, where an analysis of Irish, ECtHR, and major common law jurisprudence leads to the conclusion that the nature and scope of a right can be very

close indeed. This case is an example of where the essence of the constitutional and Convention rights are very similar. Inevitably, in a constitutional assessment, what constitutes a 'reasonable time' in an appeal will be measured by when the process began, when it concluded and what might be the intervening features contributing to an apparent delay.

88. A constitutional right to a trial in *due course* of law must necessarily give rise to a derived entitlement of a right to a trial and appeal within a reasonable time. The words "due course of law" contained in Article 38 of the Constitution must necessarily have a temporal as well as 'procedural' connotation. The words, and their Irish equivalent, "cuí de réir dlí", convey a meaning as to what is due, appropriate, or correct, in the proper administration of law. The words give rise to the question in this case, whether what occurred here was in accordance with set legal parameters and procedures including reasonable time within which an accused person must be accorded his or her constitutional rights to a trial and appeal. Even in ordinary parlance, the words 'in due course' can mean something which should occur within a time-span which is reasonably predictable, based on the matter in question and on prior experience. If a legal process goes outside those reasonable and predictable parameters, a question may arise as to why this occurred. A legal system must be such that justice in criminal cases can be provided within a reasonable time. Unreasonable delay is not only a denial of justice to the victims and accused; it can also undermine public confidence in the rule of law itself. Delays are particularly likely to affect the rights of vulnerable and disadvantaged persons engaged in a trial or appeal process. In the field of criminal law, the precept that justice delayed is justice denied gives pithy expression to the simple fact that delay can be a denial of the rights of the State, victims of crime, or those accused of crime. The rights of an accused should include a trial and appeal process within a reasonable time. This does not, of course, preclude prosecution for cases when evidence allowing for a prosecution only becomes available after an elapse of time. Nor does it preclude the possibility that, in certain instances, what is "due", "appropriate", or "correct", might have to be seen in the light of extraordinary supervening events or circumstances, outside the control of the State. Absent more, mere delay will not be sufficient. It would be necessary to show that the delay arises from a failure by the State to provide resources, rather than some other cause or causes. The Constitution does not demand that the State should engage in procedures, conduct, or actions which lack practicality or reality.

Duties of the State

89. However, this appellant's case was a criminal prosecution and appeal where the state had particular responsibilities. Those obligations were both to ensure that criminal cases be processed in a timely way to show the guilt or innocence of an accused person *and* to ensure an adequate number of judges and courts be available so as to ensure trials could take place in due course of law. In this appeal, the State's response was confined to those factors identified in this judgment.
90. In the assessment of whether there has been a constitutional violation, it must be borne in mind that this appellant was detained in custody pending the appeal. This did not make

the detention unlawful, but the fact of detention was one which should have had a bearing on whether or not the appeal could have been dealt with in due or reasonable time. What distinguishes the case from others is not the total time scale involved. On that basis, the case is a marginal one, no less in terms of the Constitution than the Convention; but when one considers the appeal, there are unique cumulative features which stand out, namely, the repeated adjournments, and the length of time the appeal remained in the list to fix dates. These were disproportionate to the timescale of the entire criminal process.

Balancing Considerations

91. Under the law of this State, a number of remedies are available for delays. These could include judicial review by way of prohibition of a criminal trial; *mandamus* compelling the state or its agents to perform a legal duty; a claim under s. 3 of the ECHR Act 2003; and foreseeably, a claim under the legislation now in contemplation to provide for compensation for delays in court proceedings. In any future constitutional cases, if such there be, a claimant's conduct will be given close consideration. Questions may arise as to whether applications for bail or priority were made. In this case, concerning a criminal appeal, there was very strong evidence from the Registrar of the Court of Criminal Appeal. Whether there would be such evidence in any other cases must be an open question. There are some points in some of the earlier Strasbourg case law where it might be thought there was an incomplete understanding of the extent to which the Common law system is party-led, and reliant on legal advisors. Parties must trust and rely on their lawyers to conduct their cases so as to protect their interests, especially so in cases when a litigant or a potential litigant may be vulnerable, or persons suffering from an incapacity. Lawyers will be careful to ensure that there is no conflict of interest between their own conduct and the rights of their clients. The fact that this appeal is brought only under Article 38, is to be seen in light of the fact that it could not be brought under the ECHR Act 2003. It is necessary to consider the criteria identified earlier, against these considerations, and the evidence, including the State's defence.

6(a): Overall Time Period

92. The overall time period from beginning to conclusion of the proceedings was from the date of arrest on the 14th April 2009, to the date of the decision of the Court of Criminal Appeal which was 31st July, 2013. This was a period of four years and four months approximately (see 6(a) of the factors identified earlier).

6(b) Sub-Periods within Timeframe

93. The timeframe of the criminal trial itself was not a cause for concern and may be excluded. The relevant dates for the appeal are to be seen as the "dates" raising concern (see 6(b)). The notice of appeal was dated 18th February, 2011. The notice of motion to amend the grounds of appeal was brought on 4th July, 2011. This motion was not heard until the 28th November, 2011. The case was first placed on the list to fix dates on 5th December, 2011. No date could be fixed then. Further adjournments of the appeal, attributable to the unavailability of judges took place on 12th March 2012, 14th May, 2012, 16th July, 2012, 17th December 2012. Ultimately, in the list to fix dates on 11th March, 2013, the appeal date was fixed for the 18th April, 2013. The judgment of the

Court of Criminal Appeal was 31st July, 2013. Taken together, these must be seen as the dates raising concern under 6(b) excluding the reasonable time for preparation and delivery of the reserved judgment.

6(c) State Responsibility for Delay

94. The focus then must turn on matters set out under headings 6(c). The question is whether the State was responsible for any sub-headings of time concerning which this Court should have a prima facie concern. As the Court of Appeal observed, in making a constitutional assessment, regard should be had to any periods of inactivity by agents of the State or those acting on behalf of the State. (See also *Kalashnikov v. Russia*, App. No. 47095/99, (2003) 36 E.H.R.R. 34 and *Solovyev v. Russia*, App. No. 4878/04, 14th December 2006). A substantial period of inactivity in a list to fix dates caused by systemic delay, at minimum, calls for an explanation. Clearly this requirement is satisfied on the evidence. The systemic delay which arose in this case was the responsibility of the State. There was no other defence raised in this instance.
95. The Court of Appeal considered that three factors tilted the balance against a finding in favour of the appellant. It must be acknowledged that this was a decision based on fine margins and, to a degree, on considerations of what might have happened, rather than what actually occurred. But if this requires a closer consideration of the appellant's conduct.

Sub-heading 6(d): The Appellant's Conduct: The Three Factors

Amendment of Grounds of Appeal

96. The Court of Appeal considered that the appellant had contributed to the delay by the amendment to the notice of appeal. It is true that this was done some months after the notice of appeal was filed. However, in the High Court, Ms. Manners' evidence was that, on the basis of her experience, the fact that the appellant had applied to amend his grounds of appeal in July, 2011 did not add to the delay in obtaining a hearing date (para. 151 of the High Court judgment). This evidence can also be seen in the light of the overall situation in the Court of Criminal Appeal as matters stood in the relevant period. There were just more than 200 appeals pending at the relevant period.

Application for Bail or Priority

97. The Court of Appeal accepted that, if the appellant's lawyers had made an application for a priority hearing *simpliciter*, it was almost certain that it would have failed. However, the court drew a distinction between this factor and the absence of an application for bail. The court concluded that an application for bail *might* not have been so contingent upon the availability of judges for a full appeal hearing, and would have taken less time than a full appeal, although it might have required some amount of time in order to explain the overall case in order to persuade the court that the appellant satisfied the quite stringent criteria established in *DPP v. Corbally*. Accepting that an objective assessment was difficult in hindsight, the court made the correct observation that there was a danger in assuming that something which had later moved clearly into the foreground (the DNA point) had always been so obviously likely to be successful before the Court of Criminal Appeal. The issue did not appear to have loomed large in the appellant's legal team's

thinking prior to delivery of the appellate judgment. The DNA point was one of seven grounds, and had not been given particular prominence prior to the appeal. Having assessed the situation, the Court of Appeal held that, in hindsight, there appeared to have been a discrete, strong ground of appeal which might have satisfied the *Corbally* criteria.

98. On balance, therefore, the court held that the absence of a bail application did weigh against the appellant. The Court held it had not had the opportunity empirically to consider whether there had been sufficient reason to grant bail, simply because the appellant had not put that issue before the Court of Criminal Appeal by means of an application. The judgment therefore concluded that, objectively speaking, the appellant had failed to employ a mechanism which *might* have set him at liberty pending the appeal (para. 118). Even had a bail application failed, the court might nonetheless have granted the appellant priority (para. 119). The court held that the fact that the grounds of appeal had to be amended was also a factor which told against the appellant.
99. However, again, I think these conclusions must be seen in the light of Ms. Manners' evidence in the High Court. There, the then Registrar of the Court of Criminal Appeal, who had very close experience of the matter, stated that the amendment to the grounds of appeal, and the failure to apply for bail, had not made any significant difference to the delay. The High Court judge accepted that evidence. As the Court of Appeal correctly commented, the question of whether the appellant should have applied for bail is problematic, and not easily determined in retrospect. To what extent could this factor count against the appellant even if it is given less weight?

Corbally

100. The legal authority which gave rise to the Court of Appeal's inference was *Corbally*, cited earlier. In that case, the Supreme Court (Keane C.J., Denham, Murphy, Hardiman and Geoghegan JJ.) on appeal from the Court of Criminal Appeal held that post-conviction bail should be granted when, notwithstanding that the applicant came before the Court as a convicted person, when the interests of justice required it, either because of the apparent strength of the applicant's grounds of appeal, or the impending expiry of a sentence, or some other special circumstance. But this Court held that the discretion should be exercised "sparingly". Observing that the Court of Criminal Appeal had not made a definite determination as to whether the appeal was *likely* to be successful, but that there should be enough material before that court to enable it to hold there was *at least a strong chance* of success before it granted bail, this Court went on to hold that bail could only be granted where, *without having to consider the entire transcript*, some definite or discrete ground of appeal could be identified and isolated, and was of such a nature that there was a strong chance of success on appeal.
101. Speaking for this Court, Geoghegan J. observed that, if the ground of appeal involved a detailed analysis of the evidence before the trial court, it could not, by its nature, enable the court to arrive at any preliminary view as to the strength of the appeal. In refusing bail, Geoghegan J. commented that the grounds of appeal (in *Corbally*) were "quite numerous", and included various matters arising from the trial itself, and that it would

have required the Court of Criminal Appeal "to consider the whole transcript in order to assess the strength of the appeal."

102. In the instant case, there had been a criminal trial of some days. A myriad of different points had been raised at the trial. Seven issues were raised in the appeal. There is no evidence that the appellants considered the DNA issue as being a strong or decisive point at any stage prior to the appeal hearing. The trial transcript would have all the evidence giving rise to the many issues raised. This case must be seen as one where there were around 200 cases in the list to fix dates at the relevant time. The Court of Criminal Appeal would not have been in a position to consider a bail application without considering the whole transcript. Inferentially, the DNA point emerged actually in the course of the appeal hearing. There is no evidence that it acquired any earlier prominence such as might have allowed it to be raised as a clear point in a bail application. While it is difficult to put hindsight to one side, I am not persuaded that, as a matter of probability, a failure to apply for bail can be seen as a telling factor against the appellant. It is factually true to say that the appellant did not *make an application for bail*. But I think the question is, rather, whether there was evidence that it was *probable* that the appellant would *actually* have been granted bail in this case, compared to the very many others pending in the Court of Criminal Appeal list? I do not think it is probable. I think both the bail and priority issues, while significant, must be seen in light of the evidence in the High Court and the judge's acceptance of much of Ms. Manners evidence on these two relevant points. I might add that, even had the appellant been granted bail, it is not clear this would have entirely addressed the constitutional infringement, though it might have affected the question of remedy. If anything, his appeal would have been further delayed, as he would have lost the priority due to his being a custody case. Similarly, I also find difficulty in accepting the argument that the appellant would have been given priority in this particular appeal, unless it could be shown that the appeal had some particular feature that was so distinctive as to render it apart from the vast number of appeals then pending

The Absence of Comparator Evidence.

103. As to comparisons, there is also ECtHR jurisprudence which sets out standards that would place this criminal case in a marginal category (Henzelin and Rordorf (2014) *op. cit.*) This was a priority case where the appellant was in custody. In ECtHR jurisprudence on Article 6 (civil limb), a delay of up to two years can be acceptable in at each level of jurisdiction. But a court may depart from that approach, and find a violation even if the case lasted less than two years (Henzelin & Rordorf (2014) p.493). This was not a civil case; it was a criminal appeal where the appellant was in custody.

104. Admittedly, I should now also add, in fairness, that were a further comparator needed, it could be by reference to the speed with which criminal appeals are now dealt with by the Court of Appeal. That court conducts a weekly call-over of appeals. Appeals are dealt with in a fraction of the time that this appeal took to get on, by contrast with the five occasions, the appellant's appeal to the Court of Criminal Appeal was listed and ready for hearing but simply could not get a date because of the unavailability of judges. The Court

of Appeal was entitled to place lesser weight on the absence of a bail application, but it must be said any assessment of the potential outcome runs the risk of being clouded by the wisdom of hindsight. Ironically, had the appellant been actually granted bail, one could surmise this appeal would have received an even lower priority, and the delay in finally dispensing of the case would have been greater. In the event that an international comparator was needed, I think the ECtHR case law referred to above must be of assistance. Cases under the criminal limb of Article 6 defined as priority cases where an appellant is in custody can be a useful comparison. In *Jusuf v Greece*, App. No. 4767/09, 10th January, 2012, an elapse of four years and seven months for two levels of jurisdiction in a criminal case was deemed to be a violation of Articles 6 and 13, where the delays were attributable to the authorities.

Sub-heading 6(e) Impact on the Appellant

105. Under 6(e), the Court of Appeal judgment emphasised that the right to liberty was a fundamental constitutional right. The impact upon a person's life caused by delay in the administration of justice was significantly greater when that person was in custody, than it would be in a case where the person is at liberty awaiting trial or appeal (*Abdoella and Salmanov v. Russia*, App. No. 3522/04, 31st July, 2008 at para. 89). In *Salmanov*, the European Court of Human Rights took into account that, "throughout the proceedings the applicant [had] remained in custody, so that particular diligence on the part of the authorities was required" (para. 8). The Court of Appeal pointed out that this did not mean that, if there was a finding of unreasonable delay, any award of damages was somehow on the basis that the person should not have been in custody, or that his or her custody was somehow wrong or unlawful. I agree with this observation.

Sub-heading 6(f) Complexity

106. Under 6(f)- complexity- the judgment pointed out that the case had a degree of complexity, but the respondents did not seek to rely upon it, because the reality was that the cause of delay during which the appellant was waiting for an appeal date was systemic.

Sub-heading 6(a) Overall period, and 6(b) Specific periods of *prima facie* concern

107. The Court of Appeal then turned to the "ultimate issue", that is, whether the appellant was entitled to a remedy in damages for breach of his right to trial with reasonable expedition. Referring to 6(a), the judgment identified the overall period as being that of 4 years and 4 months, or 52 months, from arrest to final outcome, which was the judgment quashing conviction; the period of 29 months constituting the entirety of the appellate process; and then, under 6(b), a period of 17 months between the first appearance in the appeal list to fix dates, and the appeal hearing; and a period of 20 months between first appearing in the appeal list to fix dates and the final outcome.

108. The court held that the fact that the proceedings overall took a little over four years across two levels of jurisdiction, rendered it a borderline case (para. 142). While accepting there was a responsibility on the State, Ní Raifeartaigh J. pointed out that the adversarial system was led by parties. Thus, it was possible that there might be a nuance of difference (in terms of the weight to be attributed to the appellant's inaction) between

the Constitution and the European Convention on Human Rights. Through the appellant's own failure to bring his application for a remedy under the ECHR in time, or provide an explanation as to why time should be extended, the court was, of necessity, dealing with a claim under the Constitution and not the Convention (para. 143). Thus, if one counted the period of time between the issuing of the motion to amend the grounds of appeal (July 2011), to the final judgment (31st July, 2013), that was a period of two years, part of which must be allocated to the writing of the judgment, in respect of which a period of three months was not unreasonable.

109. As it was pleaded, this case, with its original threefold legal basis, was more complex than it now appears. In the High Court, it involved consideration as to whether or not there had been a miscarriage of justice. In itself that was an issue of some legal complexity. But, even seen in isolation, the simple elapse of time that occurs here can only be a cause of real concern. That these substantial elapses of time did occur in the appeal was as a result of defects in the system. Under the Constitution, the responsibility lies with the State to provide adequate resources to allow a judiciary to conduct its work in a timely way as a service to the public and the State itself. Did these factors tilt the balance?

The Balance

110. To seek to set some numerical standard in a constitutional assessment would be a fallacy. The test is whether the delay in this criminal appeal was reasonable. In themselves, repeated adjournments of an appeal of this type can be seen as having a particularly "pernicious" aspect, when a person has been sentenced, and is serving a lengthy period of detention. All three of these factors must, therefore, be seen against the cumulative effect of the clear evidence that there was systemic delay known to the State at the relevant time described as early as 2005 in the decisions of the ECtHR, and outlined and forecast in the Report of 2009. It is also to be seen against the observations made by the presiding judge in the Court of Criminal Appeal in the relevant period, and against the evidence of Ms. Manners in relation to the backlog and the reasons for that backlog. It is to be measured against the unavoidable and unfortunate fact that this criminal appeal, where the appellant had been given a serious sentence, had to be adjourned five times over a 17 month period by reason of the fact that for systemic reasons it proved impossible to empanel judges to deal with this and indeed many hundreds of other appeals then pending before the Court of Criminal Appeal. This case, without a precedent, is to be also seen against the total effect of all these facts which made it clear that there was, then, an acute systemic delay problem in the Court of Criminal Appeal which caused this appeal not to be heard within a reasonable timeframe, thereby infringing the appellant's constitutional right to a fair trial with due expedition protected by Article 38 of the Constitution.
111. It is difficult to overstate the thought and consideration that went into the judgment of the Court of Appeal. It is admirable in its clarity and its expression. I have no hesitation in adopting the framework set out in that court as being the correct approach in assessing whether or not there has been an infringement of the constitutional right. When I say that I respectfully differ from the inferences leading to the conclusion that there was no denial

of a constitutional right to a timely appeal this is not said out of mere courtesy or diplomacy.

112. When put in the context of this other clear, incontrovertible and objective evidence, I think the significance of the three factors identified diminishes in significance. There are no other countervailing or balancing factors in this case. One could envisage that, in other cases under the Constitution, were there such, many other factors might arise for consideration. Because the delay in this case was systemic, so that it was highly unlikely that any procedural mechanisms could actually have expedited the hearing, it is unnecessary to consider the appropriate analysis which would require to be conducted in a case where there was a clear failure on the part of an accused person to involve such procedures which would actually have been likely to have expedited a hearing. I would leave a detailed consideration of the proper approach to be adopted in such circumstances to an appropriate case. It must follow therefore that, while marginal, the evidence in this case does cross the threshold for a finding that there was a violation of the appellant's constitutional right to a trial and appeal process conducted in accordance with Article 38.1 of the Constitution.

Remedy

113. The question then is as to remedy under the Constitution. Even though this is a marginal case, I am not persuaded that a simple declaration would be sufficient to reflect the justice of the case, particularly bearing in mind the feature of the appellant's period in custody. Damages which may be awarded by way of compensation must be commensurate with the constitutional wrong as found. They must be limited to that which arises directly as a result of the denial of the Article 38 constitutionally derived right, which had particular consequences in this case, accepting that the appellant was entitled to a timely order ultimately granted by the Court of Criminal Appeal.
114. But, it is also necessary to bear in mind what this case does *not* concern. Here, there was no question of malicious prosecution, nor misfeasance in public office, or police or judicial misconduct. The appellant in this case was convicted on evidence before a jury of people drawn from the community, based on evidence adduced in the case. He was tried in due course of law. His conviction was quashed in due course of law. This judgment is intended to deal with the justice of this one case, and not other hypothetical cases, brought in whatever forum may be appropriate in law, where, in the future, quite different considerations might arise, and different evidence adduced, for example, on the issue as to whether the State itself, as opposed to another cause, was actually responsible for systemic delay. Any case will depend on its own facts, and the strength of the evidence. The issue of remedy is not resolvable under the law of torts, and must be in the Constitution.
115. While the weight to be given in an assessment factors in any individual case may vary, in general, the constitutional protections, requirements, or standards should move in pace with the Convention. This was a criminal appeal, where the State was, itself a party to the proceedings, and was, itself, responsible for providing resources for an effective courts system, as well as the prosecution. This case is decided on these narrow facts.

116. This was, too, an appeal where the appellant was in custody. It required to be dealt with in a way which acknowledged that fact. A constitutional assessment does not lend itself to measuring an award against a precise timeframe in months or years. What happened in this appeal, and why it happened, are almost facts which speak for themselves. Had the appeal been completed within a reasonable and proportionate period to the total time involved, there would have been no violation of the appellant's Article 38 constitutional right. The appeal simply could not be listed for hearing within a reasonable time. The appellant was denied a right guaranteed under the Constitution. The issue of damages can only be measured on the basis of a period when he sustained a denial of that right. However, as noted, the appellant's detention was lawful, and there was no breach of his constitutional right to liberty. The measurement of damages does not fall to be considered on that basis. What is in issue here is the measurement, or remedy, for a constitutional tort, and whilst the constitutional and Convention approaches are not identical, as explained earlier, assistance can nonetheless be had from the jurisprudence of the ECtHR in arriving at a proper measure of damages. This is not to say that the remedy is for an identical breach, but, rather, that the principle giving rise to the right, breach of which, in some instances, justifies an award of damages, are sufficiently similar.
117. In *Simpson v. Mountjoy Prison* [2019] IESC 81, this Court awarded €7,500 for a prisoner detained for a period of 7½ months in inhuman and degrading conditions that violated his constitutional right to privacy and the value of dignity. Here, the period of detention in question was significantly greater. But there is no criticism levelled as to the condition of the appellant's detention. The dominant issue here is not the conditions of the detention, it is, rather, systemic delay. The damages in *Simpson* had a particular regard to the nature of the constitutional right to privacy and denial of dignity, inhuman and degrading conditions. The measure of damages here should have some regard to the circumstances. The award is for damages which, albeit compensatory, should be seen in the context that what is in issue here is the vindication of a constitutional right, rather than a tort proper, without any evidence of misconduct or *mala fides* on the part of the State. This is a marginal case where the threshold of unconstitutionality has been narrowly crossed. What is of fundamental importance is the declaration of unconstitutionality. It is appropriate that the level of remedy should fall within the range of "just satisfaction" which might be awarded under Article 41, ECHR. For the purposes of compensation in this one case, I would propose the appellant should be awarded €5000 by way of compensatory damages for violation of his constitutional right to be tried in due course of law with reasonable expedition. It arose from an unprecedented series of events. It derived from a delay in a criminal appeal, in itself a particularly serious matter, which requires appropriate acknowledgement.

Conclusion

118. It is now many years since one of our most eminent judges spoke of the need to end the "old, comfortable" assumptions about delay. The precept that "justice delayed is justice denied" can be traced from ancient history up to modern times. Delay can deny even a just judgment of its value. There is a societal interest involved. If people believe that courts cannot vindicate their rights, then they will come to distrust the law itself, and the

system within which the rule of law operates. Even the progress of this particular case, initiated in the year 2015, itself illustrates the fact that it will be necessary in the future to adopt new practices. What is in issue is not simply an aspirational precept: it is a fundamental principle necessary for the upholding of the letter and the spirit of the Constitution. Not only does the Constitution guarantee a trial in due course of law, but also it must be interpreted as guaranteeing a criminal process, trial and appeal, conducted with due expedition.

119. Some of the material set out in this judgment may make for uncomfortable reading. It is important to emphasise that substantial work has already been done in improving court procedures, both in criminal and civil proceedings. That process is continuing. The State itself, ultimately, initiated the process for a constitutional change which brought about the Court of Appeal. Those who brought this outcome about deserve praise. But, the ECtHR opinion in *Keaney* makes the observation that the circumstances of that case reflected a daily reality which faced courts in all jurisdictions, where the ratio of judges to population was low, where the level and complexity of litigation was substantially greater than the number of judges made available to deal with such litigation, where commensurate resources were lacking, and where procedural rules needed an overhaul to protect the courts and other litigants from those who waste time. However uncomfortable some of the observations, there are occasions when an external critique can be useful in creating an insight into the way in which our own legal system can sometimes be perceived. Public perception and trust can sometimes be influenced by a partial or partisan narrative. An over-defensive system, which cannot criticise itself and provide remedies when necessary, will not long retain public trust. In an era when the rule of law is sometimes under challenge, the maintenance of such trust is fundamental. Here, there is a duty to identify a situation where there was systemic delay.
120. To summarise, it is necessary to emphasise the very unusual, unprecedented, nature of this matter, which concerns an appeal in a criminal case. There are many distinguishing factors. The words of the Constitution guarantee a trial in a criminal charge in due course of law. Those words must include an appeal, as well as a trial. There is a derived right to an appeal within a reasonable time. The evidence clearly shows that, in the relevant period of 2011 to 2013, it was systemic deficiencies which had the effect of delaying this appeal. These deficiencies were known to the State, and were within its power to solve. During that time, the appellant served a considerable time in custody. The elapse of time before the appeal was heard fell outside what could be considered reasonable. The evidence in this case, when analysed and considered, shows that the dominant cause of the delay was the deficiencies in the system at that time, rather than any conduct by the appellant's lawyers, as urged by the respondents. The delay was caused as a result of inaction by the State in remedying a clear and evident systemic problem which had been long signalled by judges in this State, and referred to in judgments of the ECtHR. The State, itself, was responsible for what occurred in this instance. It was not a situation where there was some supervening circumstance. By contrast to other categories of case, the position of the appellant in this criminal appeal cannot be remedied by mechanisms, such as an award of interest on a judgment, or adjustments to the measure of damages.

What was in question here was a criminal prosecution, resulting in a conviction and sentence, not an *inter partes* civil proceeding where, clearly, many other constitutional considerations might arise. Claims of this type under the Constitution will be rare. Setting aside the earlier sentence for a different offence, the appellant was in jail solely on these charges from 7th August, 2011 onwards. The appeal was listed five times without a date being fixed, between December, 2011 and March, 2013, when, on each occasion, no dates were available to hear the appeal because judges could not be assigned to deal with the matter. During this time, he was in custody until his conviction was quashed on 31st July, 2013. This was not a trial or appeal conducted with due expedition. For this reason, I conclude the appellant is entitled to a declaration that the delay which occurred in his criminal appeal infringed his constitutional right under Article 38.1 of the Constitution, and to an award of €5,000 in damages. I would, therefore, reverse the judgment of the Court of Appeal, grant a declaration, and make an award of damages. I propose counsel be heard on the form of the declaration and order.