AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2024:000151
[2026] IESC 7

O'Donnell C.J.

Dunne J.

O'Malley J.

Woulfe J.

Hogan J.

Murray J.

Collins J.

Between/

STUART BROPHY

Appellant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, AND THE ATTORNEY GENERAL

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 10th February 2026

Introduction and background

1. The issues in this appeal concern s.75 of the Children Act 2001 (referred to in this judgment as "the Act of 2001") as amended. That provision gives to a judge of the Children Court a power to deal summarily with any child charged with an indictable offence (apart from manslaughter and offences that must be tried in the Central Criminal Court such as rape and murder), whether or not the Director of Public Prosecutions consents to such disposal. Summary disposal means that any sentence imposed must be within the powers of the District Court, with a maximum custodial sentence of 12 months. In constitutional terms, the District Court has jurisdiction only in respect of minor offences. The decision of a judge of the District Court to accept jurisdiction in any given case depends, in essence, on a preliminary assessment of the facts and a decision as to whether the appropriate penalty would be within the powers of the District Court.

2. A "child" is a person under the age of 18. Where an accused person is over that age when charged, the provisions of the Children Act are inapplicable and the consent of the Director will normally be required for summary disposal of an indictable offence. Where consent is not given, the case must be sent forward to the Circuit Court, which can impose heavier sentences than the District Court. The key difference between cases involving children and cases involving adults, therefore, is that the Director can veto summary disposal in the case of an adult and cannot in the case of a child.

3. The appellant is alleged to have committed an indictable offence when he was a child, but he was not charged until after he had reached adulthood. The Director did

not consent to summary trial, and he has been sent forward for trial on indictment. He claims that his exclusion from the ambit of s.75 is unconstitutional, and/or that it is incompatible with the European Convention on Human Rights. He was unsuccessful in the High Court (Phelan J. – see [2024] IEHC 392) and appeals directly to this Court.

4. The charge against the appellant is robbery contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was aged just over 17 years at the time of the alleged offence. The prosecution case is that on 15th April, 2019, a co-accused, who was armed with a knife, entered a shop premises and ordered the shop worker to open the till. €300 in cash was stolen. It is alleged that the appellant entered the shop when the co-accused had difficulty opening the till, and that he acted as a "*lookout*" on the shop floor. The co-accused was aged in his mid-30s.

5. Robbery is an indictable offence which may be tried either summarily in the District Court (in which case the maximum penalty will be 12 months imprisonment) or on indictment in the Circuit Court (in which case the maximum penalty available under the Act is life imprisonment). The choice of jurisdiction is governed by s.53 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This provides that the District Court may try the person if a) the Court is of the opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily, b) the accused, on being informed of their right to trial by jury, does not object to summary trial and c) the Director of Public Prosecutions does not object.

6. The appellant was arrested and detained by the Garda Síochána on 19th February, 2020. According to the affidavit evidence, the delay between April 2019 and February 2020 can be attributed to the investigating member's absence from duty

for eight weeks due to an injury, as well as the difficulties encountered in making contact with the appellant in this period. The garda attended at the appellant's home on three occasions before the arrest in February 2020 in order to arrest him on suspicion of the alleged offence, but in each instance, the appellant was not present.

7. Following the arrest and interview in February 2020, the investigating gardaí sent a file to the National Juvenile Office in August 2020. Meanwhile, the appellant had reached the age of 18 in March 2020. In August 2021 he was deemed unsuitable for inclusion in the Diversion Programme in circumstances where he had failed to meet with his assigned Juvenile Liaison Officer. The garda file was referred to the Director of Public Prosecutions in December, 2021. Directions to initiate a prosecution were received on the 16th February, 2022. The matter first came before the District Court in March, 2022, by which time the appellant was almost 20 years old.

8. Given the age of the appellant, the discretion vested in the Children Court by s.75 of the 2001 Act was no longer applicable. The Director did not consent to summary trial. On 20th April, 2022, the applicant was sent forward for trial before the Dublin Circuit Criminal Court. The Appellant appeared before the Circuit Criminal Court on 18th May, 2022, and was remanded to the 27th July, 2022 for arraignment.

9. Judicial review proceedings were initiated on the 19th July 2022.

10. The appellant does not allege that any delay involved in the process was such as to amount to a breach of duty on the part of the investigatory or prosecutorial authorities, and does not claim that there has been any violation of his right to a trial with due expedition. His central claim is that, as he is a person alleged to have

committed an offence while a child, his exclusion from the benefit of s.75 because of his age when he was charged is an unjustified and unlawful discrimination contrary to the equality guarantee of Article 40.1 of the Constitution. He also argues that it breaches Articles 6, 8 and 14 of the European Convention on Human Rights ("the Convention"). He seeks an order of *certiorari* quashing the return for trial and an order restraining his continued prosecution or, in the alternative, an order limiting the sentencing jurisdiction of the Circuit Court in his case to that of the District Court. He also seeks a declaration that s.75 of the 2001 Act is contrary to Articles 40.1, 40.3, and 42A of the Constitution or contrary to Articles 6, 8, and 14 of the Convention, by reason of its exclusion of a person, alleged to have committed a crime as a child, who has turned 18 by the time the question of jurisdiction arises.

Relevant aspects of the Constitution and the Convention

11. Article 40.1 of the Constitution guarantees the right of all citizens to be held equal before the law. The Article goes on to provide that this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

12. By Article 40.3, the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

13. Under Article 42A, the State recognises and affirms the natural and imprescriptible rights of all children and it is obliged to, as far as practicable, by its laws protect

and vindicate those rights. The Article does not make any specific reference to children in the criminal justice process.

14. Article 38.1 provides that no person shall be tried on any criminal law save in due course of law. Article 38.2 provides that "minor offences" may be tried by courts of summary jurisdiction. (The District Court, first established by the Courts Act 1924 (under the terms of the Constitution of Saorstát Éireann), is the only court of summary criminal jurisdiction in the State.) The Article goes on to state that, save in the case of the trial of the "minor offences" referred to in Article 38.2 (or trials prosecuted in the exceptional jurisdiction of the Special Criminal courts, not relevant here), "*no person shall be tried on any criminal charge without a jury*".

15. Article 6 of the Convention is concerned with the right to a fair trial before an independent and impartial tribunal. Article 8 protects the individual's private and family life. Article 14 obliges States to secure the rights and freedoms set out in the Convention without discrimination "*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status*".

The Jurisdiction of the District Court

16. As a court of summary jurisdiction, the District Court can exercise only such powers as are conferred by statute. Originally, its jurisdiction in criminal matters was set out in the Courts of Justice Act 1924. Section 77 of that Act set out a list of offences, and provided that persons charged with those offences could be tried summarily if the District Justice was "*of opinion that the facts proved against the*

accused constitute a minor offence fit to be tried summarily" and the accused, having been asked, did not object to being so tried. Any cases not disposed of summarily were to be sent forward for trial to either the Circuit Court or the Central Criminal Court. Under the Act, the maximum penalty that the District Court could impose was six months imprisonment.

17. Section 80 of the Act of 1924 provided for special sittings of the District Court to hear charges against children. When sitting in that court (called the Children Court when so engaged) the District Justice had the power to deal "*in such manner as shall seem just*" with all cases except charges which "*by reason of their gravity or other special circumstances he shall not consider fit to be so dealt with*." Children, in this context, were those under the age of 16. The District Court could also exercise the powers conferred by the Summary Jurisdiction Over Children Act 1884 in dealing with accused children (under the age of 12, later 15 by virtue of s.28 of the Children Act 1941). In such cases, it could deal summarily with a range of indictable offences if the court thought it "*expedient*" to do so. These provisions are no longer in force, the powers and procedures of the District Court when dealing with children being now governed by the provisions of the Children Act 2001.

18. As far as adults were concerned, the Criminal Justice Act 1951 set out, in the First Schedule, a list of indictable offences that could (under s.2 of the Act) be tried summarily in the District Court if the Court was of opinion that the facts proved or alleged constituted "*a minor offence fit to be so tried"* and the accused, on being informed of the right to be tried by jury, did not object to summary trial. The consent of the Attorney General was required for the summary trial of three of the scheduled offences – public mischief, obstruction of the administration of justice and perjury.

(The Attorney General was the prosecutorial authority before the institution in 1974 of the office of Director of Public Prosecutions.) This provision did not prevent the Court from sending forward a person for trial on a scheduled offence.

19. Section 3 of the Act of 1951 provided for the possibility of summary disposal in respect of *all* indictable offences except treason, murder, attempted murder, conspiracy to murder and piracy. Where the Court, in the course of the procedures preliminary to an order sending a person forward for trial, ascertained that the person wished to plead guilty, and that the Attorney General did not object to summary disposal, the Court had the option of dealing with the offence summarily. In such cases, a sentence of up to 12 months imprisonment could be imposed.

20. The District Court was re-established by s.5 of the Courts (Establishment and Constitution) Act 1961, with the same jurisdiction as before (s.33 of the Courts (Supplemental Provisions) Act 1961).

21. The Criminal Procedure Act 1967 established the procedure known as the preliminary examination, necessary (until the later abolition of the procedure) before a person could be sent forward for trial on an indictable offence. Like the Act of 1951, it provided for summary disposal of such cases if the person wished to plead guilty and the Attorney General consented. This Act also amended the First Schedule to the Act of 1951, adding some offences and removing others.

22. Section 2 of the Criminal Justice Act of 1951 was substituted by s.8 of the Criminal Justice (Miscellaneous Provisions) Act 1997. It now provides in a more straightforward manner that the District Court may try summarily a person charged with a scheduled offence if the Court is of the opinion that the facts proved or

alleged constitute a minor offence fir to be tried summarily; the accused, on being informed of his right to be tried with a jury, does not object to summary trial; and the Director consents to summary trial.

The Children Act 2001

23. Section 75 of the Children Act 2001 provides in relevant part:

(1) Subject to subsection (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.

(2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—

(a) the age and level of maturity of the child concerned, and

(b) any other facts that it considers relevant.

(3) The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.

24. Subsection (4) provides that the child, in deciding whether or not to consent, may obtain assistance from a parent, guardian or adult spouse, or, in the absence of these persons, from any adult who has accompanied them to court.

25. The reference to "the Court" in this provision means the Children Court.

26. The comparable procedural provision in respect of adults, so far as the offence of robbery is concerned, is set out in s.53 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This provides that such an offence can be dealt with in the District Court, but only if the judge considers that the facts proved or alleged constitute a minor offence fit to be tried summarily, the accused does not object *and* the Director consents.

27. The essential difference, therefore, is that in the case of an adult the Director can veto a summary trial and insist on the matter being sent forward for trial on indictment, while if the accused is a child the decision is entirely for the judge, so long as the child consents to summary disposal. It must be emphasised, however, that in either situation the judge can accept jurisdiction only if of the opinion that the offence is "*minor*".

28. It is also relevant to consider the range of sentencing options available in respect of children. Section 96(2) sets out the general principle in the following terms:

> *Because it is desirable wherever possible—*
> *(a) to allow the education, training or employment of children to proceed without interruption,*

(b) to preserve and strengthen the relationship between children and their parents and other family members,

(c) to foster the ability of families to develop their own means of dealing with offending by their children, and

(d) to allow children reside in their own homes,

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

29. Section 96(3) provides that a sentencing court may take into account as mitigating factors the age and maturity of a child, unless the offence is one for which the penalty is fixed by law.

30. Under s.98, the Children Court may reprimand the child or deal with the case by making one or more than one of the following orders:

(a) a conditional discharge order,

(b) an order that the child pay a fine or costs,

(c) an order that the parent or guardian be bound over,

(d) a compensation order,

(e) a parental supervision order,

(f) an order that the parent or guardian pay compensation,

(g) an order imposing a community sanction,

(h) an order (the making of which may be deferred pursuant to section 144) that the child be detained in a children detention school or children detention centre, including an order under section 155(1),

(i) a detention and supervision order.

31. Section 143 of the Act implements the "last resort" principle by providing that the court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and, in the case of a child under the age of 16, that a place in a children detention school is available for him or her. Where a detention order is made, the court making the order must state its reasons for so doing in open court.

The High Court judgment

32. The issues considered in the judgment of Phelan J. were:

(i) Whether the proceedings were time-barred under the relevant provisions of the Rules of the Superior Courts;

(ii) Whether summary disposal under the terms of s.75 would have been open on the facts of the case;

(iii) Whether the exclusion from the scope of s.75 of persons who were alleged to have committed a crime when aged under 18 but who had turned 18 by the time that the question of jurisdiction arose impermissibly discriminated against such persons contrary to Articles 40.1 and/or 40.3 and/or 42A of the Constitution; and

(iv) Whether s.75 was compatible with Articles 6 and/or 8 and/or 14 of the Convention by its exclusion of persons in the appellant's circumstances.

33. The trial judge held, firstly, that the proceedings were brought within the time prescribed by the relevant Rules of the Superior Courts. Secondly, she held that the appellant had discharged the burden of showing that there would have been a reasonable prospect that the Children Court would have accepted jurisdiction if he had been under 18. Reports put before the Court constituted, in her view, cogent evidence in relation to his age and maturity. The appellant was accordingly entitled to make the case that his exclusion from the special procedure available to child offenders under s.75 constituted the loss of a procedural benefit in breach of his constitutional rights, and/or of rights safeguarded under the Convention.

34. Neither of these findings are disputed in the appeal. It is, therefore, accepted that the case is one that a District Judge might have dealt with in the Children Court under s.75 and that the appellant has, accordingly, lost the benefit of that possibility.

35. Phelan J. held against the appellant, however, on the issues relating to the constitutionality of the section and to its compatibility with the Convention.

36. The judgment explains the principal relevant features of the Act of 2001 in the light of the authorities up to that time. Phelan J. saw the Act of 2001 as reflecting a recognition on the part of the legislature that special duties were owed to children participating in the criminal justice system. The legislative intention in making special provision for children in relation to procedural matters was, in her view, to shield them during the criminal process. Adjustments were made by the Act to the normal criminal justice process to provide for effective participation by a child in

that process; to allow, where possible, the education, training or employment of the child to continue without interruption; and to preserve and strengthen family relationships so that children could remain in their own homes. In Phelan J.'s view, legislation of this nature was contemplated by and consistent with Article 42A of the Constitution.

37. It appears from the judgment that the appellant advanced, but did not seriously contend for, a proposition that a child offender had a right to be treated as a child throughout the criminal process, even after having aged out. It was noted by the trial judge that if Article 42A were to be interpreted as establishing that proposition, it would bolster the appellant's equality argument. Any difference in treatment resulting from the failure to extend s.75 to aged out persons would, in such circumstances, involve an interference with a constitutionally protected right.

38. The judgment records that the only support advanced by the appellant for such a construction of Article 42A, however, was the United Nations Convention on the Rights of the Child and, more specifically, a 2019 General Comment from the Committee on the Rights of the Child. Phelan J. pointed out that the Convention itself did not have the force of law in this jurisdiction and that, in any event, such General Comments were intended as guidance and were not binding on signatory States. She referred in this context to the observations of O'Donnell C.J. on the use of international instruments in the interpretation of the Constitution in *Odum v. Minister for Justice and Equality (No.2)* [2023] IESC 26, where it was said that any interpretation of the Constitution must respect its express terms. Phelan J. found nothing in Article 42A to support an argument that the rights of a child subsisted

after ageing out. The exclusion of adults from the benefits provided by the Act of 2001 was, in her view, entirely consistent with the Article.

39. Next, the judgment considered the submissions based on Article 40.1. This is the constitutional guarantee that all citizens shall, as human persons, be held equal before the law. On this issue, the respondents maintained that a person's age was not a "protected ground" under Article 40.1. They relied on the comments of O'Donnell J. in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21 in support of their contention that age-related differences in treatment fell outside the scope of Article 40.1 because they were not "*referable to immutable human characteristics such as race, gender or sexual orientation*", and nor were they "*matters of intimate personal choice intrinsic to a person's sense of themselves as a human person such as religion or marital status*" (*O'Connor,* para. 20).

40. The trial judge referred to the manner in which O'Donnell J. looked beyond a determinative list of personal characteristics in his judgment in *Murphy v. Ireland* [2014] 1 I.R. 198. He had described the "*essence*" of an equality claim as being the sense of injustice experienced when a person similarly situated was treated differently, if the circumstances were suggestive of a discriminatory ground related to a person's human personality.

41. Phelan J. then considered a number of authorities, including the decisions of this Court in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, *J.D. v. Residential Institutions Redress Committee* [2010] 2 ILRM 181, *M.D. (A Minor) v. Ireland* [2012] 1 I.R. 697, [2012] IESC 10 and *B. v. Director of Oberstown Children Detention Centre* [2023] 2 I.R. 191, [2020] IESC 18. She saw these as demonstrating that measures providing for different treatment on grounds

of age were precluded as contrary to Article 40.1 if they were shown to be invidious, unfair or discriminatory (while noting that the courts would be deferential to the legislature on matters of policy). The more recent judgments in *Donnelly v. Minister for Social Protection* [2023] 2 I.R. 415, [2022] IESC 31 and *O'Meara v. Minister for Social Protection* [2024] 1 ILRM 43, [2024] IESC 1 were also seen as acknowledging that, while age was not an *automatically* suspect ground, differences in treatment based on age could be suspect.

42. Phelan J. concluded that Article 40.1 gave protection against invidious age discrimination. She acknowledged that age was not immutable in the same way as characteristics such as race, and was not an intimate personal choice. Nonetheless, it was immutable in the sense that it could not be changed by choice. It was integral to personhood and life, and was a human characteristic that was known to result in stereotypes and give rise to prejudice. While the authorities established that exclusion from a benefit on age grounds did not necessarily, or even usually, imply that excluded persons were being treated as inferior for no good reason and because of some constitutionally illegitimate consideration, a difference in treatment based on age warranted scrutiny. The level of scrutiny would be informed by the context and the apparent justification, or lack of justification, for the measure.

43. The trial judge held, in paragraph 128 of the judgment, that the appellant was therefore required to demonstrate that

> "*(i) by reason of a legislative classification he is treated differently because of his age than another similarly situated person would be; and*

(ii) the legislative classification, which benefits from a presumption of constitutionality and proper deference to the role of the Legislature in making policy choices, is not for a legitimate purpose as it is arbitrary, capricious or irrational (including in the sense that it is improperly rooted in stereotype or prejudice), or

(iii) that the statutory classification is not relevant to the legislative purpose because it is incapable of supporting that purpose and is therefore unfair."

44. Applying this test to the present case, Phelan J. proceeded to examine the exclusion of the appellant from the s.75 procedure on the basis that his age and status as a child were protected characteristics under Article 40.1. She was satisfied from the context that this was not a case that required a high level of close scrutiny, since the legislature was clearly entitled to legislate with due regard in a general way to differences of capacity and social function and the classification of a child as a person under the age of 18 was an "*objective categorisation*" which did not contain an obvious or apparent element of discrimination.

45. The appropriate comparator was held to be another child offender who came before the court while still a child, rather than another adult before the court. The appellant was comparable to a child, because the reduced legal responsibility due to age and maturity were matters that related to the situation when the offence was committed rather than to the time when it came to court. The two categories of juvenile offender were the same in a material way.

46. The appellant was therefore required to demonstrate that his exclusion from the s.75 procedural benefit was incapable of being rationally justified by reference to the manner in which the comparators were *unalike*, namely, that one person was legally a child and the other an adult, albeit both were children when the offending behaviour occurred. The appellant's case was that the purpose for which the benefit of s.75 was provided was to reflect the possible lesser responsibility of a child offender and to vindicate the rights of the child. The respondents argued that the purpose was not related to questions of responsibility or capacity, but rather was directed to the appropriate mode of trial and punishment for a child.

47. To properly assess the different treatment the trial judge examined the statutory purpose of s.75 in the light of the general scheme of the 2001 Act. She found that the overriding purpose of the Act generally, and s.75 specifically, was to create a special system of juvenile justice for juvenile offenders. *Forde v. DPP* [2017] IEHC 799, *Doe v. DPP* [2024] IEHC 11, and *DPP v. J.H.* [2017] IECA 206 were cited in support of her conclusion that the primary intention of the legislature in introducing s.75 of the 2001 Act was to shield a child from an adult court environment, by making provision for cases to be dealt with in a child-sensitive manner by a judge with access to specialist services and training, rather than to reflect any broader principle that criminal wrongdoing by a juvenile offender should be treated differently. She illustrated this proposition by reference to the analysis in *Doe v. Director of Public Prosecutions* [2024] IEHC 112 regarding the reporting restrictions in s.93 of the Act. (That judgment must now be read in the light of *inter alia* the decision of this Court in *People (Director of Public Prosecutions) v. P.B.* [2024] IECA 60.) It was also clear that the considerations underlying s.143 of the

Act (which provides that a sentence of detention is to be imposed on a child only as a last resort) had no application to an aged out juvenile offender.

48. The statutory age classification was, in Phelan J.'s view, manifestly relevant to this purpose and there was a rational basis linked to the age of the offender at the time of trial which justified his difference in treatment. Further, this was a distinction the Oireachtas was entitled to make. She found that the exclusion of adults who had offended as children was a deliberate legislative policy which was rationally open to the legislature. Adults did not require the same procedural protections, since they were at a different stage of emotional and educational development. As in *B. v. Director of Oberstown*, the presumption of the legislature that the differences between children and adults called for different regimes had not been shown to be factually incorrect or unfair in principle. The "rights" lost by an aged out juvenile offender were never intended for adults. The exclusion of a particular class of child from the s.75 procedure was not arbitrary, capricious or irrational.

49. It was emphasised that the appellant would still have the opportunity to address the trial court and sentencing court on his age and level of maturity at the time of the offence, or on any other factors relevant to his degree of culpability, and to the sentence to be imposed on him, respectively.

50. Accordingly, the trial judge was satisfied that no constitutional frailty inhered in s.75 of the 2001 Act by reason of the Appellant's exclusion from the procedural benefits of that provision.

51. Turning to consider the appellant's Convention argument, the trial judge found that the European Court of Human Rights authorities established that Article 6 required

appropriate safeguards to ensure a fair hearing for a child participant. They did not, however, extend to a requirement to guarantee those same procedural safeguards to an adult in respect of alleged juvenile offending. Decisions such as *V. v. United Kingdom* (2000) 30 EHRR 121, [1999] ECHR 171 and *T. v. United Kingdom* (App. No. 24724/94) tended to confirm that the requirement for special treatment related to the experience of a child in the criminal justice process.

52. It was accepted that the term "other status" in Article 14 could include age. However, the appellant's claim failed to satisfy the test set out in *Re McLaughlin* [2018] UKSC 48 for a purported breach of Article 14 of the Convention. It had not been demonstrated that there had been difference in treatment between two persons in an analogous situation, and in any event, the different treatment complained of by the applicant was objectively justified.

53. The reliefs sought by the appellant were accordingly refused and the proceedings were dismissed.

Grant of leave to appeal

54. Having initially adjourned its decision on the application for leave to appeal pending delivery of the judgment in the case of *Doe and ors v. DPP* [2025] IESC 17, the Court granted leave to the Appellant to bring a leapfrog appeal from the decision of the High Court ([2025] IESCDET 68). The panel stated that while some of the issues in the case were similar to those dealt with in *Doe*, the compatibility of s.75 with Article 40.1 of the Constitution had not been decided in that case.

Submissions in the Appeal

55. The issues in the appeal are:

(i) Whether the exclusion of the appellant from the s.75 jurisdictional hearing, as a person who is alleged to have committed a crime when a child but who had turned 18 before jurisdiction was determined, amounts to impermissible discrimination against him contrary to Articles 40.1, 40.3 and 42A of Bunreacht na hÉireann.

(ii) If the exclusion is not constitutionally impermissible, whether s.75 is incompatible with Articles 6, 8 and 14 of the ECHR by reason of its exclusion of persons who are alleged to have committed a crime when children but have attained the age of majority by the time the Children Court determines jurisdiction.

The appellant

56. The appellant submits that the protection afforded by s.75 is recognised as "*one of the most important procedural benefits under the Children Act 2001*" (*DPP v. L.E.* [2020] IECA 101). Similar sentiments were expressed at para. 81 of *Furlong v. DPP* [2021] IEHC 326 as well as in the Court of Appeal judgment in that case ([2022] IECA 85).

57. Reference is made to this Court's recent judgment in *Doe* where s.75 was considered in some detail. The appellant relies in particular on para. 130, which noted the value

of the procedural protection of s.75 and its benefits to the child defendant. The appellant submits that these benefits are also of valued to aged-out juvenile offenders, especially those with maturity issues.

58. It is submitted that the trial judge erred in two respects – firstly, in holding that the primary objective of the Act of 2001 was to shield a child from the adult courts and, secondly, in holding that there was a legitimate justification for the detriment, or difference in treatment, incurred by the appellant.

59. On this aspect, reliance is placed in part on the analysis in the judgments in *P.B.* and *Doe* of the reasons why childhood is a status that is afforded particular legal protection. While accepting that any legislation may have more than one objective, and that the vulnerability of children is a consideration, the appellant submits that the Act has as its principal objectives the recognition of the reduced culpability of children and of their greater capacity for rehabilitation. It is observed that in *P.B.* the Court rejected an argument to the effect that the purpose of the anonymity provision in s.93 of the Act was only to shield children during the actual trial process, having regard to its relevance to the objective of rehabilitation. The objectives of recognition of reduced culpability and the promotion of rehabilitation are also found in international human rights norms that require special treatment of children in the criminal justice process. Here, the appellant cites the UN Convention on the Rights of the Child and General Comment No. 24 of the UN Committee.

60. Addressing the Article 40.1 issue, the appellant quotes paragraphs 188 and 189 of *Donnelly v. Minister for Social Protection*:

> "*188. The authorities do demonstrate support for the following propositions:*

(i) Article 40.1° provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.

(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1°.

(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.

(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.

(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.

(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case.

189. It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in Brennan and approved a number of times in this Court is consistent with the analysis in Dillane. The

statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose."

61. Reference is also made to a passage from the judgment of O'Donnell C.J. in *O'Meara v. Minister for Social Protection* [2024] 1 ILRM 437, [2024] IESC 1:

"The concept of equality involves not only treating like cases alike, and unalike cases unalike, but also that where a differentiation is made, that it is made and justified by reference to the manner in which the comparators are unalike."

62. In application of these principles, the appellant submits that it is appropriate to compare him to a child alleged to have committed an offence who is prosecuted while under 18. The difference in treatment is due, it is contended, to a purely "accidental" factor in the sense in which that phrase was used by Hogan J. in *McCabe v. Ireland* [2014] IEHC 435. It is asserted that the exclusionary ambit of s.75 relates, not to the treatment of children and adults, but to the difference in treatment between two classes of children, determined by when the prosecution commences. That, the appellant says, is a matter "wholly" controlled by the State.

63. On this basis, the appellant contends that the section excludes a particular class of alleged child offenders and says that this discrimination is arbitrary, capricious and irrational. He says that the purpose of the Act is to put in place a different system for child offenders, and that it is irrational for that system not to apply to a child offender simply because the investigative process has taken a length of time that

renders the child an adult before his case comes to court. The appellant further submits that there is no difference in social function between children alleged to have committed offences while under the age of 18.

64. It is argued by the appellant that he has suffered detriment, including not having his case dealt with in the Children Court and, also, the loss of the benefit of the statutory provision for anonymity. He asserts that he now faces a maximum sentence of life imprisonment and will not have a right to a *de novo* appeal. (An adult convicted in the District Court or a child convicted in the Children Court has a right to a full rehearing of the evidence on appeal to the Circuit Court, while a person convicted in the Circuit Court is in general confined, in an appeal to the Court of Appeal, to arguments on points of law.) In that latter context the appellant again relies upon the judgment in *McCabe v. Ireland*, where Hogan J. emphasised the role of the principle of equality in the criminal law and held that there had been impermissible discrimination concerning rights of appeal in certain circumstances. The appellant says that there is no justification for depriving him of a procedure that would have given him an opportunity to limit his sentence and to have access to a *de novo* appeal.

65. On the question of the potential sentence that might be faced in the Circuit Court, the appellant argues that the relevant authorities concerning sentencing principles would require the judge to take into consideration the fact that the maximum available sentence would be life imprisonment. He therefore believes that the judge would have to set a headline sentence that would be "markedly" higher than that in the Children Court. Citing the judgment of Hogan J. in *Byrne v. Director of*

Oberstown [2020] 2 I.R. 338, [2013] IEHC 562, he emphasises the importance of equality in sentencing.

66. Although an order of prohibition has not been sought, the appellant contends that if he is granted a declaration, his trial should not be permitted to continue as his constitutional right to equality before the law has been breached.

67. In relation to the Convention aspect, the appellant relies upon the same factors as in relation to the Constitution. He has cited one additional judgment of the ECtHR, *Martin v. Estonia* (App. No. 35985/09, 30 May 2013). That case concerned a defendant who had reached the age of 18 just three weeks before he was arrested and confessed to a murder. The case largely turned on the unsatisfactory nature of the evidence as to the legal advice and representation that he had been provided with, but the Court also stated that the reasons for which the special treatment of minors was required did not cease immediately on reaching the age of adulthood. Considerations based on factors such as maturity and intellectual and emotional capacity could maintain some of their relevance although their importance would diminish.

The Attorney General

68. The Attorney General refers to the judgments in *C.C., P.B.,* and *Doe* and submits that despite the appellant's reliance on aspects of those authorities, they ultimately favour the dismissal of this appeal. He submits that an individual does not lose the opportunity to be dealt with summarily simply by "ageing out". The offence of robbery is capable of summary disposal in appropriate cases, even where the accused is an adult. In those circumstances, the Attorney General argues that the

appellant is incorrect in implying that an opportunity to have a sentence capped at one year depends on the application of s.75.

69. It is submitted that the High Court was correct in its analysis of the objective of the section and that the appellant has not demonstrated that it was wrong. It is contended that s.75 is rationally connected to the legitimate objective of protecting a child who is engaged in the criminal justice process, rather than being focussed on culpability at the time of the offence.

70. It is further submitted that the regulation of criminal procedure is a legislative policy matter and therefore falls within the preserve of the Oireachtas. Reference is made here to para. 101 of *Doe*, where it was said that "…*the legislature must, of necessity, have a very broad margin of appreciation in creating procedures to deal with criminal conduct by children*." In s.75, the legislature chose to confer a benefit on children, but only on certain terms. The benefit in question is not one that is required by the Constitution and it is squarely within the realm of permissible policy choices. Legislative "cut-offs" are regularly and legitimately made on the basis of age. Additionally, the Attorney General notes that the Oireachtas must balance competing interests between the rights of an accused and those of victims and society generally, and asserts that this has been achieved by the terms in which s.75 is cast. It is submitted that the approach contended for by the Applicant would be a narrower one which only focused on offenders' interests. As the Attorney General sees it, the allegation of arbitrariness is akin to a complaint that a different policy could have been adopted, which is not a permissible ground of challenge.

71. It is submitted by the Attorney General that the appellant's complaints are fully met by the analysis of the section in *Doe*. If a matter relating to an aged-out child offender proceeds to sentence, the age of the accused at the time of the offence will be a central feature in the assessment of culpability. If the s.75 procedure is unavailable because of a breach of the duty of the Gardaí and prosecution authorities to act with due expedition in cases involving children, the Director should give serious consideration to the question of consent to summary disposal, while the trial court must bear in mind that the Act would have applied if the accused had been charged at an earlier time. *Doe* emphasises that it cannot be assumed that the Circuit Court will not impose an appropriate sentence.

72. It is observed that the appellant has not focussed on the core difference between s.75 and s.53 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The possibility of summary disposal is still available in respect of an adult.

73. The decision in *P.B.* is cited for the proposition that the Act focusses on processes involving children, where there are particular considerations that justify treating children differently to adults. The Attorney General takes issue with the appellant insofar as the latter sees *P.B.* as supporting his contention that it is the age of the accused at the time of the offence that matters. It is pointed out that the Court rejected a possible interpretation of s.93 as covering persons alleged to have committed an offence in childhood but not brought before the courts until adulthood.

74. The Attorney General disagrees with the appellant on the question of the appropriate comparator, submitting that the appropriate comparator is another adult who is subject to prosecution. In this respect the judgment of O'Donnell J. in *MR*

and DR v. An tArd Chláraitheoir [2014] 3 I.R. 533 is cited. The appellant's approach, it is submitted, assigns to him characteristics of childhood which he no longer possesses and is grounded upon a misidentification of the purpose of the section.

75. Since the Attorney General sees the objective of the section as being the reduction of the stress that may be suffered by a child in the criminal justice process, it is submitted that the difference in the treatment of adults is justified by the fact that an adult will be better able to withstand that process. It is submitted that this position is in line with international authority and in particular with the decisions of the ECtHR in *T. v. UK* and *V. v. UK*. A child charged with a criminal offence must be dealt with in a manner that takes full account of their age, level of maturity and intellectual and emotional capacities, and promotes their ability to understand and participate in the proceedings. In a case attracting high levels of public and media interest, the hearing should be conducted in a way that reduces the child's feelings of intimidation and inhibition. The focus, it is submitted, is on the child's experiences in the courtroom.

76. The Attorney General says that the appellant's submission does not engage with the judgment of the High Court on the Convention issue, and that the arguments advanced by him are undermined by *T. and V. v. United Kingdom*. It is asserted that the appellant does not meet the *McLoughlin* test. He has not explained why the prosecution of an adult for robbery engages Article 6, why the appropriate comparator is not another adult, or why a person's age should be included in the "other status" category of Article 14. It is again asserted that the section has an objective justification.

The Director of Public Prosecutions

77. The Director leaves the constitutional and Convention issues to the Attorney General and her submissions are mainly concerned with whether or not the trial should be permitted to proceed. Since the parties are agreed that the question of remedy should be left over pending determination of the substantive argument the submissions will not be described here in any detail. She argues that the starting point for seeking to halt a case on the grounds of delay is to establish blameworthy prosecutorial delay as set out by Birmingham P. in *DPP v. Furlong* [2022] IECA 85. It is emphasised that no finding of culpable prosecutorial delay was made by the High Court and the appellant has not taken issue with this in the appeal. Further, there has been no suggestion that, had there been culpable prosecutorial delay, the balancing exercise would favour an order of prohibition notwithstanding the seriousness of the offence. The Director relies here on the analysis of the Court in *Doe* and the finding of the Court that the unavailability of s.75 would not be a matter of much weight in considering an order of prohibition.

Discussion

78. I propose to commence with some further consideration of the jurisdiction of the District Court.

79. There are a number of authorities dealing with the difference between minor and non-minor offences. In a range of cases argued before this Court, plaintiffs sought to argue that the offences with which they had been charged were too serious to be considered "minor" and that, accordingly, they had a right to a jury trial. An

important example is *Conroy v. Attorney General* [1965] I.R. 411, where the plaintiff sought a declaration that the provision for summary trial of a charge of drunk driving was repugnant to the Constitution. At that time the offence carried a maximum sentence of six months imprisonment. A further 6 months might be added if the accused failed to pay any fine also imposed. The driver could also be disqualified.

80. Although he was successful in the High Court, this Court held against the plaintiff. The judgment was given by Walsh J., who noted the constitutional distinction between minor and non-minor offences. In that context, he said:

> "*The Constitution does not give an accused person a right to trial by jury for a minor offence or a right to trial in a Court of summary jurisdiction for a minor offence. The provisions of [Art 38(2)] in relation to minor offences are permissive. The Oireachtas may determine that minor offences may be tried with a jury or without a jury*."

81. For present purposes, the key point here is that there is no constitutional right to summary disposal in the District Court, even in the case of minor offences. Instead, the Oireachtas may designate offences as being triable summarily only, triable on indictment only or triable either way. Where an offence may be dealt with either summarily or on indictment a choice of jurisdiction must be made. When the accused is an adult, the legislation applicable to the offence usually confers the power of choice on the prosecution authority, subject to the possibility that the District Judge might refuse jurisdiction on the basis that the offence in the particular case is not minor. Where child defendants are concerned, s.75 of the Act of 2001

has the effect that the choice is that of the judge alone, subject to the right of the child to object.

82. The judgment in *Doe* refers to *People (DPP) v. Corcoran* [2024] 2 ILRM 421, [2024] IESC 52, where the process by which jurisdiction is accepted or refused was comprehensively considered. The judge's decision to accept or refuse jurisdiction must be based on the gravity of the individual case and the consequent potential penalty. Essentially, that means an assessment by the judge of the seriousness of the offence, (normally, having heard only an outline of the facts as presented orally by the prosecution) and a determination as to whether the appropriate sentence on conviction would be within the District Court jurisdiction.

83. The appellant has not challenged s.53 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and does not on any basis impugn the decision made by the Director to opt for trial on indictment in this case. He argues, nonetheless, that the fact that an offence was committed by a child who has reached adulthood by the time of charge ought to have the consequence that the power of choice would remain with the judge alone, notwithstanding the age of the accused at the time that the decision falls to be made. In summary, the appellant's case is that the age of the accused at the time of the offence is, the crucial point. He says that the s.75 procedure is an acknowledgement of the reduced culpability and greater prospects for rehabilitation of the child offender.

84. It is necessary here to repeat to some extent the analysis agreed on by the Court in *C.C.*, *P.B.* and *Doe.* In each of those cases it was said that the guarantees set out in

Articles 38.1 and 40.1 (no trial on a criminal charge save in due course of law, and the guarantee of equality before the law) apply to children as well as adults. It was also noted that Article 42A, while primarily concerned with matters such as child care proceedings and adoptions, could be seen as expressly recognising the status of children.

85. In each case, the judgment continued:

> "*Within these broad principles, the legislature must, of necessity, have a very broad margin of appreciation in creating procedures to deal with criminal conduct by children. To mention the most obvious point, the Constitution does not define childhood. It leaves it to the legislature to determine as a matter of policy (subject, perhaps, to considerations such as the duty to protect young children and also, perhaps, the need to respect choices made by young adults as to their own lives) when the status, and any specific protections associated with that status, should be deemed to come to an end in various different contexts.*
>
> *The Constitution does not, by the same token, prescribe any particular process or outcome for criminal prosecutions against children. Children are not immune to the criminal justice process and can be subjected to punishment. The point is that the guarantees of fair procedures and equality may, in the cases involving child defendants, justifiably be implemented by way of trial procedures that are adapted to accommodate at least to some extent (without compromising the fundamental principles according to which a criminal trial is conducted) certain relevant features of childhood*."

86. The relevant features of childhood were seen as including the weakness and vulnerability of children. Additionally, it was accepted in the judgments that, since children in general cannot think ahead, understand consequences, make choices about their behaviour or control their own impulses in the way that would be expected of adults, they have a lesser degree of culpability for criminal behaviour than adults. It was also accepted that since their personalities are still in the process of development, children have a greater capacity for rehabilitation. It has to be stressed, however, that *each* of these features was seen as relevant. It cannot be expected that, in a statute as complex and comprehensive as the Children Act 2001, the legislature will cater for each feature in each provision of the statute. Different sections and different Parts of the Act can be seen to have different functions and purposes.

87. The effect of age-based classifications was addressed in *P.B.*, where it was observed that any such differentiations can result in distinctions that seem arbitrary and even unfair. This often cannot be avoided where the legislature confers protections or benefits on a specified age-group, and excluded persons are in a position to assert that they are similar to the included persons in at least some relevant respect. In the recent case of *G. v. Ireland* [2025] IESC 49 (delivered after the hearing in the instant appeal), O'Donnell C.J. observed that statutory distinctions between adults and minors were commonplace, and that the Constitution itself drew the same distinction. It was held, having regard to *Donnelly*, that the test for unconstitutional inequality in a law, in respect of a distinction between adults and children, was whether the classification bore a rational relationship to a justifiable objective of the legislation.

88. In *Byrne v. Oberstown*, differentiation in relation to remission of custodial sentences as between child detainees in same institution was held by Hogan J. to be unjustified, because it was based purely on where they had been detained when they were first sentenced. By contrast, in the (different) case of *B. v. Oberstown*, this Court held that differentiation between adults and children in relation to the availability of *enhanced* remission was justifiable, because the system of incentives applicable to child detainees was geared to take account of their lesser ability to plan for and work towards long-term goals.

89. The distinctive nature of the s.75 procedure was noted at para. 113 of *Doe*:

> "*It applies to nearly all indictable offences (other than manslaughter and those offences such as rape and murder that must be sent to the Central Criminal Court) and does not require the consent of the Director.* ***It remains constitutionally necessary for the District Judge to determine whether or not the facts of the case disclose a minor offence, but in that assessment the judge will have in mind the sentence that would be appropriate for a child, and the range of sentencing options available under the Children Act****. It is true that the harm done by an offence will not be altered by the age of the perpetrator but, for the reasons outlined above, the culpability will be reduced where the offence is committed by a child. The appropriate sentence is therefore likely to be less than that which might be imposed in the case of an adult offender*." (Emphasis added.)

90. The following passage is at para. 115 of the judgment:

> "*It is essential to stress that where the decision is to send the matter forward to the Circuit Court, the assessment of gravity and appropriate sentence carried out in the District Court in no way dictates the outcome of the very different assessment to be carried out in the Circuit Court. If the person is convicted or pleads guilty, the Circuit Court judge is obliged to pass sentence in accordance with the fundamental principle applicable to sentencing – the sentence must be proportionate to the offence and to the circumstances of the offender. At that stage, the court will have considerably more information than was outlined to the District Court, in relation to the gravity of the offence and also the culpability and personal circumstances of the accused*."

91. This analysis applies whether the accused is an adult or a child, and whether the decision to send the matter forward is made by the District Judge on their own view of the case or because of the exercise by the Director of her veto on summary disposal. The Circuit Court judge is in no way obliged to accept anyone else's view as to the seriousness of the case, but forms their own view based on the evidence and submissions put before them and imposes sentence in accordance with the fundamental principle just referred to.

92. The significance of s.75 to a child was considered in para. 130, where it was said:

> "*Section 75 is of value to an accused child for a number of reasons. The Director cannot veto a decision to deal summarily with a case. If such a decision is made the child can be immediately assured that no sentence greater than 12 months detention will be imposed. The whole process, if dealt with in the*

Children Court, will be swifter than trial on indictment in the Circuit Court. It is very important that a case involving a child should be handled expeditiously, not least because it enables the rehabilitation process to commence earlier with consequent benefits to society. A further consideration is that a lapse of time between an offence and punishment can make it difficult for the child to understand the connection between the two."

93. Importantly, the fact that an aged-out accused loses the opportunity for a s.75 decision was not, however, seen by the Court as a matter to be given any great weight in an application for an order of prohibition. The first reason identified for this view was that the High Court would not, in general, be well-placed to speculate about what the decision would have been. The appellant says that this concern is met in this case, because the trial judge considered that she had "ample" evidential material about his age, maturity and role in the offence. Since the finding of the trial judge is not challenged in the appeal, I will accept that she was entitled to make it.

94. The second reason given in the judgment, with which the appellant has not really engaged, is that it was a particularly difficult matter to assess what the outcome of a s.75 hearing would have been without knowing whether the judicial review applicant intended to plead guilty or not. The view taken was that, if the applicant was definitely going receive a sentence in one court or the other, the inevitable result must be that the judicial review application would fail. Again, the reason for this is important in the instant appeal:

"*This is because the High Court can never assume that the Circuit Court would not impose the appropriate sentence, whatever that might be. In principle, if it*

becomes apparent to a sentencing court that the case should be dealt with by way of a non-custodial sentence, or a sentence of less than 12 months, then that is the sentence that should be imposed."

95. It was emphasised that the age of the person at the time of the offence would be, not simply a relevant factor but, where the offence was committed by a child, a *central* feature in the assessment of culpability.

96. The judgment goes on to say that the unavailability of s.75 for an aged-out defendant is nonetheless a loss to some extent. For that reason, it was said that if the situation came about because of a breach of duty on the part of the Gardaí or prosecution authorities, it would be incumbent on the Director to acknowledge that she would not, if charges had been brought at an appropriate time, have had a right to veto summary disposal. In those circumstances she should give serious consideration to consenting to such disposal in order to minimise any further delay and the concomitant stress for all concerned in the case. This would not, of course, be relevant where it is clear that the facts of the case are such as to make summary disposal inappropriate.

97. A similar view was taken in relation to the inapplicability of s.96 and s.98 to an adult before the court:

"*136. Similarly, I do not find the inapplicability of s.96 (the sentencing principles) and s.98 (the sentencing options) to be of great significance. The obvious feature of these provisions is that they are focussed on the continuing development of the child, ideally at home with their families. It is for that reason that orders can be made for parental supervision, and parents can be fined or*

bound over for offences committed by their children. The fact that such orders are not available in the case of a defendant who has aged out is not, in my view, to be seen as a "loss" – it simply reflects the fact that one range of possible options is suited to one age group and not to another.

137. Very little of the content of these two provisions would actually be applicable to a person over the age of 18. The applicants do, however, rely heavily on the fact that the Act requires the sentencing court to see a custodial sentence as a last resort. On this aspect, I agree with the Director that this is in any event a general principle of sentencing law. In a case where the objectives of the sentencing process can be achieved by an alternative disposal, it is arguably an error in principle to instead deprive a person of their liberty, with all of the associated damage to family relationships and employment possibilities.

138. Furthermore, in a case where there has been unjustified delay that has resulted in a child "ageing out", a court dealing with an offence committed by a child must bear in mind that the Act would have applied if the defendant had been charged at an earlier time. A person cannot be punished for growing older. If detention would not have been the right sentence for the child, then imprisonment may well not be the right sentence for the adult (although much, obviously, would depend on their record in the intervening period)."

98. The question is whether any of this analysis falls to be altered by reference to the constitutional equality guarantee.

99. The appellant does not suggest that any of the large range of criminal justice measures that give the choice of jurisdiction to the Director are unconstitutional. His case is focussed on his exclusion from the operation of s.75 of the Children Act 2001. He says that he is accused of having committed an offence while a child but is, because of the Director's choice, being subjected to a different sentencing regime to that which applies to accused persons who are still children when brought before the court. Since the District Court might have accepted jurisdiction if the choice had been that of the judge alone, he argues that the distinction between him and a child is irrational, arbitrary, contrary to the legislative purpose and results in his exposure to a higher sentence.

100. The core point being made is not an argument that there is a constitutional right to summary disposal in any case concerning an offence committed by a child – such an argument clearly could not succeed, having regard to the constitutional limitations on the jurisdiction of the District Court. The appellant accepts that the decision to accept or refuse jurisdiction will relate to the facts of the individual case. But he does claim an entitlement to a procedure whereby the decision on jurisdiction will rest solely with the judge rather than with the Director. The only basis on which such an entitlement is claimed is that the offence was committed when he was a child and it must therefore be dealt with, procedurally, in the same way as it would be in the case of a child defendant.

101. In this context, a question arises that was not disposed of in *Doe*, as to the significance of the reference in subs.(2) of s.75 to "the age and maturity of the child". In order to address this submission in the context of the equality debate, it is necessary to examine the meaning and purpose of s.75 more closely and, in

particular, to determine the significance of the reference to the age and maturity of the child. Subsection (2) provides that:

> *(1) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—*
>
> *(a) the age and level of maturity of the child concerned, and*
>
> *(b) any other facts that it considers relevant.*

102. For the purpose of interpreting this provision, its context in the statute is relevant.

103. The provisions of the Children Act 2001 relevant to the criminal justice system are mostly in Parts 2 – 9. Parts 2, 3 and 4 of the Act make provision for what might be termed alternatives to the criminal trial process – family welfare conferences, special care orders and the diversion programme. Part 5 deals with the age of criminal responsibility. Part 6 is concerned with the treatment of child suspects. Part 8 provides for a variety of orders that can be made in the Children Court ranging from referrals to child care authorities, procedures in respect of family conferences, action plans, remands in custody and bail. Part 9 governs the sentencing of children.

104. Section 75 is in Part 7, where provision is made for such matters as the title of the Children Court, the arrangements of its sittings, the power of the Children Court to continue with a case if it becomes apparent that the accused is in fact over the age of 18, and the obligation of a District judge to participate in training or education before sitting in the Children Court (if directed to do so by the President of the Court). Section 74 deals with the procedure to be adopted where children are jointly charged with adults in summary matters – in such cases, the Children Court may

deal with both unless the judge considers that the charges should be heard by the District Court sitting otherwise than as the Children Court. Section 76 provides that where a child is jointly charged with an adult in an indictable matter, the child is to be dealt with in accordance with s.75 while the adult is to be dealt with in accordance with enactments governing proceedings in the District Court against a person charged with an indictable offence. It seems clear that ss.74, 75 and 76 are concerned with the determination of the appropriate venue and mode of trial.

105. Reference has already been made to the fact that a District Judge making a decision whether or not to accept jurisdiction will be considering whether the sentencing powers available to the Court will be sufficient in the light of a preliminary assessment of the alleged facts. Where the accused is a child, a judge making a s.75 decision will have in mind the range of options available in and the principles applicable to sentencing a child. The decision must, therefore, take into account the fact that offences committed by children will in general involve a lower degree of culpability, the fact that it is likely that the child offender will be dealt with more leniently than an adult offender, and the fact that disposal by way of one of the orders set out in s.98 may be appropriate.

106. In that context, I am of the view that the *additional* factor set out in the express reference in subs.(2) of s.75 to the age and maturity of the child as something that can be taken into account is a reference to their age and maturity when they appear before the court. The point here, as I see it, is that when considering jurisdiction in the case of an adult, the judge will focus on the facts and gravity of the alleged offence. In the case of a child, the section permits the judge to take account of an additional factor – the child's capacity at that time to deal with the process of trial

on indictment as opposed to summary disposal. In his dissenting judgment, Hogan J. says that it would be unrealistic to suggest that this latter factor would be the only consideration in a decision on jurisdiction, and that the question of sentence must loom large. I agree, and repeat here that the lesser culpability of an accused who committed an offence when a child must be a central consideration for a sentencing judge. I also repeat that the potential sentences for child defendants are not the same as the potential sentences for adults.

107. It seems to me that the equality argument raised in this appeal cannot succeed. For the purposes of this case, I do not feel that it matters greatly whether one takes the appropriate comparator for the appellant as being another child offender brought before the court while still a child, or another adult. Assuming that the appellant is correct and that he can legitimately compare himself to a child charged before reaching the age of 18, it must still be acknowledged that his position differs in a number of significant, relevant ways by virtue of the fact that he has become an adult. Primarily, as far as s.75 is concerned, the differences are that an adult is assumed to be less vulnerable to the court process and that the range of sentencing options has changed irrevocably.

108. Hogan J. cites the judgment of Simons J. in *Musueni and anor. v. Ireland* [2024] IEHC 523 as supporting his analysis of the equality issue. In my view, it can be seen as giving rather greater support to a contrary outcome.

109. The offence involved in *Musueni* was murder. Any adult convicted of murder must, by virtue of s.2 of the Criminal Justice Act 1990, be sentenced to life imprisonment. (This Court upheld the constitutionality of s.2 in *Lynch v. Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1, [2010] IESC 34.) Because of its

seriousness, murder is an exception to the general constitutional principle that a sentencing judge must consider matters such as the level of culpability of the offender and must take account of any mitigating factors arising from their personal circumstances. Section 2 of the Act of 1990 does not, however, apply to children and a sentencing judge dealing with a child convicted of murder must therefore consider their lesser culpability, their personal circumstances and the potential for rehabilitation. The issues in *Musueni* arose because the accused were alleged to have committed a murder while under the age of 18 but were now over that age. In those circumstances they would, if convicted, be sentenced as adults and would have to receive the mandatory sentence without consideration of their culpability as child offenders.

110. The judgment of Simons J. emphasises the fact that child offenders have a lesser culpability than adults and that a judge sentencing in respect of an offence committed by a child is required to have that in mind. It was in that context that the statutory differentiation between the treatment of child defendants sentenced for murder and the treatment of aged-out defendants sentenced for murder committed while they were children was held to amount to unconstitutional discrimination contrary to the Article 40.1 guarantee.

111. The position in the instant case is wholly different. A judge sentencing an adult for the offence of robbery, committed while the defendant was a child, is not only entitled but obliged to sentence on the basis that the offence was committed by a child.

112. The processes envisaged in the Children Act ultimately have the same purposes as the processes prescribed in respect of adult accused – the determination of the guilt

or innocence of the accused and, in the event of a finding of guilt, the imposition of an appropriate sentence. The prescribed processes and the range of possible outcomes differ as between adults and children, but those differences are in my view manifestly geared towards the differences between adults and children appearing before the courts. These arise because of the normal development and maturing of human beings. Changes in personality and understanding as a person develops from childhood have a significant effect both on the way that the person experiences, understands and participates in the criminal court process and on the appropriateness of different sentencing options.

113. Looking at the end of the court process, the Children Act provides the trial judge with a range of disposal options that are clearly designed for children. Their unavailability in respect of adults does not constitute discrimination against adults – they would be manifestly inappropriate for adults. As a matter of principle, it would be wrong to order the detention of an adult in a detention institution for child offenders, or to make orders against the parents of an adult. It is clear that these and other measures provided for in the Act reflect the legislature's understanding of the lesser culpability of children, their greater capacity for rehabilitation and the straightforward fact that persons aged 18 and over are in general to be considered as having independent responsibility for their own lives. The appellant does not, in fact, suggest that he should be entitled to a sentence from the s.98 range – his focus is solely on the 12-month limit on any potential custodial sentence imposed in the District Court.

114. Before reaching that end point of sentence, the Act also prescribes a range of procedures to be applied when children are dealt with in the criminal courts. The

differences in treatment are at their most obvious in the Children Court, although a child sent forward for trial to the Circuit Court or, where required, the Central Criminal Court will still be treated differently to an adult. The procedures are, in my view, designed to fulfil a number of varying purposes. The clearest example of different treatment is perhaps in relation to anonymity. Adult defendants can in general be named publicly (unless the case is of a kind where, by law, anonymity is required for the protection of either the accused or other persons). Children appearing in any criminal court cannot be named (s.93 of the Act) and the protection subsists after the conclusion of the proceedings. This differentiation was discussed in detail in *P.B.*, and found to be based on both the greater vulnerability of children when subjected to the stresses of a criminal court process and the objective of encouraging the process of rehabilitation after the conclusion.

115. As was said in *Doe*, the s.75 procedure assists children through the court process because it enables immediate reassurance and a swifter outcome. It was also pointed out that a lapse of time between an offence and punishment can make it difficult for a child to understand the connection between the two. Further, expedition of the process assists in getting full benefit out of the range of sentencing orders that the Children Court can make. Childhood, for the purposes of the criminal law, is a relatively short period of time between the ages of 12 (in most cases) and 18. In addition to these considerations, I would agree with Phelan J. that the provision enables the trial judge to have faster access to specialist services for assistance in devising an appropriate disposal.

116. The appellant says that all of these factors can be relevant to young adults also, particularly if they have any developmental issues or learning difficulties. The point

to be made here, however, is that the procedural differences are based on those features of childhood that *in general* make children different to adults. There are, no doubt, some very mature 17-year-olds, and very immature 19-year-olds, but the criminal law has never sought to measure personal maturity for the purposes of determining what *procedures* are to be followed in the criminal justice process. The legislature is entitled to have regard to the distinctive features of childhood and adulthood that make it reasonable and desirable to treat children differently to adults. It could, if it saw fit, provide for some form of intermediate category of young offender but is not obliged to do so. An adult cannot complain of not being treated as a child.

117. In the case of an adult, features of personal maturity, *both as they were at the time of the offence and as they are at the time of sentence*, come to the fore in the making of the substantive sentencing decision, if that stage is reached. Here, it seems necessary to repeat and to emphasise that when a judge is imposing a sentence for an offence committed by a child, that fact will be central to the outcome. Both the gravity of the offence and the culpability of the accused are fixed by reference to the date of the offence, and do not increase as the accused gets older. Hence, it is absurd to suggest that the appellant is now exposed to the possibility of a life sentence. Current best practice involves the nomination by a trial judge of a "headline" sentence based on an assessment of the gravity of the offence and the culpability of the accused, before the adjustment of the nominated figure to take account of personal mitigatory factors. It is wrong to suggest that a Circuit Court judge must start by referring to the maximum sentence applicable, such that the headline sentence must be higher than it would be in the District Court. If it is, it

will be because the sentencing judge assesses the gravity and/or culpability as being higher.

118. Should the appellant be convicted or plead guilty to the offence outlined above, the fact of his age at the time it was committed will be central to the sentencing decision. In this case the fact of his age is coupled with the possibility that he will be found to have played by far the lesser role in the offence.

119. A sentencing court must take account both of the facts of the offence and the personal circumstances of the offender. Those personal circumstances will, of necessity, have changed due to the simple fact that the appellant has grown older. That will be true in any case where there is any appreciable lapse of time between the offence and sentence, and can certainly be true where the offender has reached adulthood in the intervening period. It may be the case that an individual offender will have become more or less vulnerable, or may have shown themselves to be more or less apt for rehabilitation. But the unavoidable fact that people change as they grow up does not mean that the offender can or should be sentenced as if still a child. The sentence is imposed for an offence committed by a child, but it has to take account of the person as they are at the time of sentence. That would still be the case if, hypothetically, the appellant had an accomplice who was a few months younger and was dealt with as a child in the Children Court. The different treatment of the two would not be arbitrary, irrational or unfair, because both processes are intended to culminate in an appropriate sentencing outcome that is focussed on the individual.

120. It is not, I think, necessary to say much about the argument that because he has been sent forward to the Circuit Court the appellant has lost the right to a *de novo* appeal. The differences between the forms of appeal from summary trials and trials on indictment simply reflect the differing nature of those processes. The distinction has not been shown to be in any way invidious or constitutionally illegitimate.

121. To recap, the appellant's challenge is to his exclusion from a procedure that would reserve the decision on jurisdiction to the judge alone, without the possibility of a veto by the Director. The procedure is available only to children appearing before the Children Court. The case made is that the legislative exclusion of adults who offended as children fails to meet the criteria set out in *Donnelly*, where it was said that a statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose.

122. In my view, s.75 creates a special procedure for children for legitimate purposes. Those purposes include the reduction of the stress experienced by children in the criminal justice process. They also include the expediting of the process in order to make the purpose of the process more comprehensible to children. Perhaps most importantly, the section enables access to the range of sentencing measures available in respect of children. It is true that, in turn, that range of measures is in part affected by the fact that children are generally less culpable for criminal behaviour than adults. This latter factor, however, cannot be said to be the dominant reason for the provision, such that the exclusion of an adult who was a child when the offence was committed is unfair. The distinction drawn in this respect by the

legislature between adults and children is, in my opinion, for an entirely legitimate purpose and is neither arbitrary, capricious or irrational.

123. Finally, there remains the argument concerning the ECHR. My view is that the trial judge was entirely correct on this issue. The chief concern of the ECtHR to date, reflected in its judgments, is with the particular requirements of the obligation to ensure the fairness of trial procedures where child defendants are concerned. It has never held that where an offence was committed by a child the same procedures applicable to child defendants must be followed no matter what the age of the accused person when appearing before the court. *Martin v. Estonia* does not go beyond saying that some factors can continue to be of some relevance, which is undoubtedly correct. That position does not lead to a finding that s.75 of the Children Act 2001 is incompatible with the Convention because it does not apply to adults.

124. In the circumstances I would dismiss the appeal.