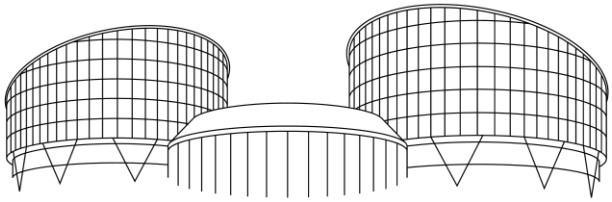

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

**CASE OF MC FARLANE v. IRELAND**

*(Application no. 31333/06)*

JUDGMENT

STRASBOURG

10 September 2010

*This judgment is final but may be subject to editorial revision.*

**In the case of McFarlane v. Ireland,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Christos Rozakis, *President*,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Elisabet Fura,
Alvina Gyulumyan,
Ljiljana Mijović,
Dean Spielmann,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Ledi Bianku,
Ann Power, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 3 March 2010 and on 23 June 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 31333/06) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Brendan McFarlane ("the applicant"), on 21 July 2006.

2. The applicant was represented by Mr J. MacGuill, a lawyer practising in Dublin. The Irish Government ("the Government") were represented by their Agents, Ms P. O'Brien and, subsequently, Mr J. Kingston, of the Department of Foreign Affairs.

3. The applicant mainly complained, invoking Articles 6 and 13, that the criminal proceedings against him were unreasonably long and that he did not have an effective domestic remedy in that respect.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 6 September 2007 a Chamber of that Section decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

5. On 20 October 2009 the Chamber, composed of Judges Josep Casadevall, Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Alvina Gyulumyan, Egbert Myjer and Ann Power and also of Santiago Quesada, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed a memorial on the admissibility and merits of the application.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 2010 (Rule 59 § 3). There appeared before the Court:

(a) *for the Government*
Mr J. KINGSTON, *Agent*,
Mr M. COLLINS,
Mr B. MURRAY,
Ms U. NI RAIFEARTAIGH, *Senior Counsel*,
Ms M. COOKE,
Ms O. MCPHILLIPS, *Advisers*;

(b) *for the applicant*
Mr J. MACGUILL, *Solicitor*,
Ms A. MCCUMISKEY, *Adviser*.

The Court heard addresses by Messrs Murray, Collins and MacGuill.

# THE FACTS

## I THE CIRCUMSTANCES OF THE CASE

### A. Background to the case

9. The applicant was imprisoned in Northern Ireland in 1975 for his involvement in a bombing for which the Irish Republican Army ("IRA") was held responsible. On 25 September 1983 he escaped from prison.

10. In December 1983 a high profile kidnapping in Ireland ended in a gunfight with the security forces. The kidnapped man was released but a soldier and policeman were killed. A forensic report identified fingerprints found on items at the crime scene as those of the applicant. On

7 January 1984 an internal police circular was issued stating that the applicant was wanted on serious charges connected to the kidnapping.

11. In January 1986 the applicant was arrested in the Netherlands. In December 1986 he was extradited to Northern Ireland where he resumed serving his sentence. The Irish police did not interview the applicant about the kidnapping while in prison in Northern Ireland for the reasons later outlined by the Supreme Court (see paragraph 30 below).

12. From 1993 the applicant was granted periods of temporary release during which he visited Ireland. In January 1998 he was released on parole from prison in Northern Ireland.

### B. The applicant's arrest and the criminal proceedings

13. On 5 January 1998 the applicant was arrested in Ireland by the Irish police under section 30 of the Offences Against the State Act 1939, as amended ("OASA"). He was questioned and charged before the Special Criminal Court ("SCC") with offences relating to the kidnapping: false imprisonment, unlawful possession of firearms and kidnapping (a life sentence was the maximum prison term for the first and third charge). The SCC later noted (prior to dismissing the charges in 2008) that the evidence against the applicant was an admission he had made during his police interviews that he had been at the kidnap location (which admission he had denied in evidence before the SCC) as well as the fingerprint evidence.

14. On 5 January 1998 an official of the Department of Justice, Equality and Law Reform received a printed notice of the report of the applicant's arrest and he made handwritten notes thereon ("memorandum of 5January 1998"). The applicant submitted that those notes proved that the Irish police had been aware of his presence in Ireland prior to his arrest.

15. He applied for bail and on 13 January 1998 he was released on bail, subject to certain reporting conditions. The Supreme Court later noted that he had to sign on once a month at a police station in Ireland (a 160 km round trip from his home in Belfast) and that he had also to attend on approximately 40 occasions since 1998 at the SCC in Dublin (a round trip of 320 km) during the criminal proceedings against him.

16. On 14 July 1998 the Book of Evidence (statement of the evidence on which the prosecution proposed to rely) was served on the applicant. The Government maintained that the applicant informed the SCC on that date that he might bring judicial review proceedings to prohibit his trial on grounds of delay prior to his arrest.

17. Correspondence took place between the prosecution and the applicant from July 1998 to March 1999 on disclosure by the prosecution of any other relevant evidence not in the Book of Evidence: it concerned correspondence between the Irish and other authorities as regards his whereabouts prior to his arrest in 1998 and matters relating to the fingerprint issue. The case was put in for mention on the SCC list four times between

October 1998 and 18 March 1999. On the latter date the disclosure issues were resolved with further disclosure by the prosecution.

18. It was through this disclosure process that the applicant was made aware of the loss (on a date between 1993 and 1998) of the items on which the original fingerprints had allegedly been found ("the original fingerprint evidence"). The forensic report (including photographs of the original fingerprints) was retained and available. The Government submitted that the applicant was informed of this loss on 15 January 1999.

19. A trial date was fixed for 23 November 1999.

*1. The first prohibition action*

**(a) High Court ([2004] IEHC 246)**

20. The applicant then took expert advice as to the implications for his trial of the loss of the original fingerprint evidence. In October 1999 the expert advised that the fingerprint evidence could not be comprehensively evaluated from the forensic report retained.

21. On 1 November 1999 the applicant was granted leave to apply for judicial review and, further, a stay on the criminal proceedings against him pending the outcome of the judicial review proceedings. The relief sought by the applicant included a declaration that the delay until 1 November 1999 (mainly concerning the pre-arrest delay) was irreparably prejudicial to a fair trial, a declaration that the loss of the original fingerprint evidence limited his ability to contest the evidence against him as well as an order prohibiting his further prosecution on these bases. The return date for this application was 29 November 1999 and the trial date was vacated. The application was re-listed once a month (from December 1999 to March 2000) and on 5 April 2000 the prosecution filed its Statement of Opposition.

22. On 15 May 2000 the applicant requested voluntary discovery from the prosecution. No substantive response having been received, on 18 July 2000 he filed a notice of motion for such discovery. While the return date for the motion was in October 2000, the parties agreed to adjourn it to the first hearing date (12 January 2001). Neither party attended on that date, due to a misunderstanding, and the motion was struck out. The applicant submitted that he then sent several letters to the prosecution to obtain its consent to re-enter the motion: the Government accepted that one such letter from the applicant (of 29 May 2001) was on the file.

23. The applicant filed a fresh motion for discovery on 2 October 2001 and a return date was accorded (16 November 2001). On the latter date the prosecution agreed to make voluntary discovery and, on 8 February 2002, the prosecution filed an affidavit of discovery listing 93 documents in its schedule. This list included the memorandum of 5 January 1998 but the applicant did not request sight of that document at that point. On 1 March 2002 the applicant's motion for discovery was therefore struck out on a consent basis.

24. On 11 March 2002 the prosecution applied to re-enter the applicant's judicial review action and a hearing date was set for 14 March 2003.

25. The applicant then filed a motion for further and better discovery returnable before the Master of the High Court on 14 May 2002. The Master refused the order sought (11 June 2002) as did the High Court on appeal (on 22 July 2002).

26. When the prohibition action came on for hearing on 14 March 2003, a judge was not available to hear the case. It was adjourned to 11 July 2003, when it was heard.

27. On 18 July 2003 the High Court delivered an *ex tempore* judgment. The High Court made an order prohibiting the trial of the applicant on the basis that the loss of the original fingerprint evidence meant that there was a real or serious risk of an unfair trial. The High Court rejected the applicant's claim based on the delay: the decision to prosecute was a decision of the prosecuting authorities and depended on the sufficiency of evidence; there were no grounds to suggest that any delay was deliberate; and the decision to prosecute was prompted by new evidence (the applicant's alleged admission during questioning following his arrest in 1998).

**(b) Supreme Court ([2006] IESC 11)**

28. On 19 August 2003 the prosecution appealed and the applicant lodged a cross-appeal. On 15 November 2004 the prosecution lodged the Books of Appeal. Since the High Court judge did not formally approve his judgment until 17 January 2005, the prosecution could not file a Certificate of Readiness (that the appeal was ready to be heard) until 27 January 2005.

29. On 2 February 2006 the applicant was granted leave to have his cross-appeal heard with the prosecution's appeal. On 16 February 2006 the appeal hearing took place before the Supreme Court.

30. On 7 March 2006 the Supreme Court delivered its judgment allowing the prosecution's appeal and refusing the applicant's cross-appeal. As to the lost original fingerprint evidence, there had been a forensic examination of the fingerprints before they were lost and the results of that examination were preserved so that the applicant had not been deprived of the reasonable possibility of rebutting the evidence proffered against him and he had therefore not demonstrated that there was a real risk of an unfair trial. As to the impugned pre-arrest delay, all five judges of the Supreme Court considered that that lapse of time was not such as should give rise to a prohibition order. The court considered it legitimate for the Irish police to have waited for his release from prison to arrest him under section 30 of the OASA. There was insufficient evidence to initiate a prosecution prior to his being questioned. The parameters of any questioning while he was in prison in Northern Ireland would have been entirely different from those applicable to a person arrested under section 30 of the OASA. In this latter respect, he was obliged to at least listen to the questions; the structure and duration of the questioning (subject to the proper treatment of persons in custody)

would have been under their control and not under that of other (Northern Irish) authorities or that of the applicant himself; and, in the end, he made some statements during questioning which provided additional evidence and, consequently, a basis to initiate a prosecution. Kearns J partly dissented as regards the loss of the original fingerprint evidence only: in doing so he referred to the advice on the issue of the applicant's expert.

*2. The second prohibition action*

**(a) High Court ([2006] IEHC 389)**

31. Following this judgment, the stay on the criminal proceedings pending the first prohibition action was lifted. On 4 April 2006 the SCC fixed the applicant's trial for 3 October 2006.

32. On 15 May 2006 the applicant was granted leave by the High Court to seek judicial review and, further, a stay on the criminal proceedings against him pending the outcome of the judicial review proceedings. He sought a declaration and a prohibition order on the basis that the delay since 1 November 1999 (namely, during his first prohibition action) had delayed the criminal proceedings which had, *inter alia*, violated his constitutional right to a trial with reasonable expedition and exposed him to a real and serious risk of an unfair trial.

33. On 8 November 2006 the High Court refused the prohibition application. It considered that, at best, the evidence demonstrated at most three periods of unnecessary delay by the prosecution during the first judicial review action. However, any increased stress or culpable delay and impact on his right to an expeditious trial did not outweigh the community's considerable interest in having offences of such gravity prosecuted.

**(b) Supreme Court ([2008] IESC 7)**

34. The applicant appealed by notice dated 22 February 2007. The Supreme Court heard the appeal on 24 January 2008. On 5 March 2008 judgment was delivered dismissing the appeal unanimously. Fennelly J., Kearns J. and Geoghegan J. delivered separate judgments, with Hardiman J. and Macken J. concurring.

35. Fennelly J. noted that, while the applicant had included in his motion a request for "any further and/or other relief as this Honourable Court deems meet and just", the only substantive relief specifically and explicitly sought by him was the prohibition of his trial on grounds of delay. Such a prohibition could only be granted if there were a real risk that his trial would be unfair, and this had been rejected in the first judicial review proceedings as regards the delay prior to the preferment of charges and was undemonstrated as regards the length of the first judicial review proceedings.

36. However, Fennelly J. noted that the courts had also recognised the possibility of making a prohibition order for the quite distinct reason that there had been a breach of an accused's right to trial with "reasonable expedition". Noting that the judgment of Powell J. in *Barker v. Wingo* ((1972) 407 U.S. 514) of the Supreme Court of the United States had been influential in the development of the case-law of the Irish courts on the right to reasonable expedition and the consequences of its breach, Fennelly J. stated that "we have now established a consistent approach, particularly in some recent cases".

37. Referring to the approach of Keane CJ in *P.M. v Malone* ([2002] 2 I.R. 560) and to the reiteration of that approach by Kearns J. in *P.M. v DPP* ([2006] 3 I.R. 172), Fennelly J. considered that it was necessary to consider, firstly, whether the period that it took to dispose of the first judicial review proceedings constituted a violation of the applicant's right to a trial with due expedition and, secondly, assuming an affirmative answer to that question, whether, having regard to all the circumstances, the Court should make an order prohibiting the Director of Public Prosecutions ("DPP") from continuing with his prosecution.

As to the first question, Fennelly J. considered that the applicant might have had a legitimate complaint in respect of the delay in approving the High Court judgment (July 2003-January 2005). However, the applicant had taken no steps to expedite the appeal, probably because of the High Court prohibition order. While this delay was significant, in the entire context of the case it did not amount to a breach of his constitutional right to an expeditious hearing of the criminal charges against him.

As to the second question, and even assuming there had been a breach of his constitutional right to an expeditious hearing, the circumstances did not warrant a prohibition order: any delay of 1-2 years was not significant in the trial for offences alleged to have been committed in 1983. As to his anxiety caused by delay, he was, during that period of delay, the holder of an order of the High Court prohibiting his trial and he had carriage of those judicial review proceedings and could have taken steps to accelerate them. In addition, the public interest in pursuing serious crime was crucial and the seriousness of the relevant charges outweighed the added anxiety and length of bail conditions caused by unnecessary delay on judicial review.

38. Finally, Fennelly J. noted that the right to a trial within "a reasonable time" and to a trial "with reasonable expedition" were "indistinguishable". However, he differentiated between this Court's finding of unreasonable delay under Article 6 (with an award of just satisfaction), on the one hand, and the balancing exercise a domestic court had to carry out between delay and the public interest in pursuing crime in a prohibition action on grounds of delay (the domestic proceedings), on the other. This Court's role (and therefore the criteria used by it) was more analogous to the decision as to whether delay violated the constitutional right to expeditious proceedings. He noted the Government's submission to this Court in *Barry v. Ireland* (no. 18273/04, § 35, 15 December 2005) to the effect that judicial review was an

effective domestic remedy and that "damages might have been available" on judicial review. Having noted this Court's response to that argument (paragraph 53 of the *Barry* judgment), he continued:

> "74. I made a similar observation in my own judgment in [*T.H. v DPP]*.
>
> These observations are relevant to the interpretation of the judgments of the Court of Human Rights. That court does not engage in the balancing exercise described in the Opinion of Powell J in *Barker v Wingo* and in the decisions of this Court (such as *P.M. v Malone* and [*P.M. v DPP]*. That exercise is neither necessary nor relevant to the decision as to whether to award just satisfaction. Consequently, the decisions of the Court of Human Rights provide useful guidance on the question of whether there has been a breach of the right of an accused person to a trial within a reasonable time or with reasonable expedition. For example, in its judgment in the case of *Barry v Ireland* ..., the Court restated its consistent approach to the assessment of a reasonable time as follows (paragraph 36 of the judgment; citations omitted):
>
> > 'The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities..... On the latter point, what is at stake for the applicant in the litigation has to be taken into account.'
>
> 75. A further passage from the judgment of the Court also calls for observation. It appears that the representatives of Ireland had submitted to the Court that judicial review, which was available to the applicant in that case, provided an effective remedy in domestic law and that "damages might have been available as a remedy in the judicial review proceedings, if the applicant had sought them." The Court's response to that argument (at paragraph [53]) was:
>
> > 'There is no evidence that such proceedings would have been capable of providing damages and the Government accepted that there was no domestic legal provision for an award of damages in following proceedings. Although the Government argued that the common law might be flexible enough to provide such a remedy, they did not refer to one precedent even tending to support this argument. Moreover, the judgment of the Supreme Court made it clear that Convention case-law would not cause the domestic courts to fashion any remedies that would not otherwise have been available ... .'
>
> 76. ... in [the *Barry*] case, as in the present case, no claim for damages had been made. Nor, so far as I am aware, has any such claim ever been made in such a case. In every such case, the accused person, in practice, seeks the remedy of prohibition of his trial. It is clearly not possible for this Court, having an appellate function only, to pronounce in the abstract on whether damages would be available as a remedy, [if they were claimed]. Any such claim would have to be made in the High Court in the first instance. The [European Convention of Human Rights Act 2003] might be relevant.
>
> 77. I would also add that the Court may have somewhat misapprehended the remarks of Keane C.J. in the passage of his judgment in [Barry v DPP], which ... [the Court] also quoted. Keane C.J. was merely saying that a particular judgment of the Court of Human Rights did not have effect in domestic law. Whether these courts would "fashion remedies" in the light of the case-law of that Court is a quite different

matter and would have to await an appropriate case. Again the [European Convention of Human Rights Act 2003] may or may not be relevant."

39. Kearns J. agreed in the main with Fennelly J.'s judgment. He explained, in addition, the various forms of delay in criminal proceedings:

"This appeal raises serious issues about the effects of delay on the entitlement of the State to prosecute criminal offences. It is an issue which has given rise to much anxious consideration by this Court in recent years, particularly in the context of offences relating to the sexual abuse of children. Evaluating reasons for delay and attributing blame for delay in reporting abuse (complainant delay or pre-charge delay) came to be seen as a far from simple exercise in those cases. ...

That was one form of delay. Delay can also arise from the tardiness of the police, either in investigating an alleged crime after it has been reported, or on the part of the prosecuting authorities in bringing an alleged perpetrator before the courts and in taking the necessary steps to prepare a case for trial. The jurisprudence makes clear that this form of delay, called 'prosecutorial delay', may also entitle an applicant to relief in the form of prohibition in certain circumstances. This will arise because an applicant is also entitled to a trial with reasonable expedition as part of his constitutional rights under Article 38.1.

Delay may also arise when the State, by its failure to provide adequate resources or facilities for the disposal of litigation, has itself contributed to delay. 'Systemic delay' of this nature may overlap to some degree with prosecutorial delay and run hand in hand with it. There may be prosecutorial delay within systemic delay. Equally there may be no blameworthy delay by the prosecution but there may yet be delays within the system to which an applicant has in no way contributed. There may also be judicial delay where the court fails to deliver its judgment or decision within an appropriate time frame. Where systemic delay is established it may amount to an infringement of a citizen's constitutional right to a trial with reasonable expedition. Such forms of delay may also amount to an omission or failure on the part of the State to comply with its obligations under the European Convention on Human Rights, in particular Article 6 thereof ...

In the present case it is claimed that there was both prosecutorial delay and delays within the system which prevented an earlier set of judicial review proceedings being disposed of within a reasonable time. There is no suggestion that there was any form of judicial delay contributing to that alleged delay....."

40. Kearns J. assessed the criteria by which prosecutorial delay would be measured (a test which he considered reflected that of this Court) and found those principles equally applicable to systemic delay (described as "failures of the criminal justice system"). Prior to applying the test, he made a number of preliminary comments, notably to the effect that degrees of dilatoriness which may have been acceptable in the past could no longer be tolerated since the European Convention of Human Rights Act 2003 ("the 2003 Act") gave effect in Ireland to the provisions of the Convention: both the constitutional and Convention rights to trial with reasonable expedition had to be "vindicated by being given real effect".

41. However, that did not mean that the prohibition of a criminal trial had to be resorted to more readily and Kearns J. pointed to the difference between the role of this Court under the reasonable time requirement of

Article 6 § 1 and its award of just satisfaction and that of the domestic courts in prohibition proceedings where unreasonable expedition had to be balanced against the public interest in continuing with a prosecution. Given this added element in the domestic prohibition proceedings, prohibition should only be granted exceptionally and where there was an assessed serious breach of the rights under Article 38(1) of the Constitution and of Article 6 § 1 of the Convention. In so noting, Kearns J. referred to other domestic remedies as follows:

> "I would accept that a distinction may require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages. However, any entitlement to a remedy in damages for breach of a constitutional right to an expeditious trial is a matter that will require very full and careful consideration in an appropriate case."

42. As to whether there was blameworthy delay, Kearns J. hesitated on the same period of delay (noted by Fennelly J.) in approving the High Court judgment but he did not consider that "blameworthy" given the absence of evidence that it deviated from the norm. Accordingly, even given the passage of time since the original alleged offence and a consequent "heightened degree of urgency in advancing this prosecution", it was not considered that the applicant had established blameworthy prosecutorial or systemic delay. Even assuming he had, Kearns J. was satisfied that there was no demonstrated prejudice to the applicant or impairment of his other rights including the constitutional right to a trial in due course of law. As regards the motion struck out on 12 January 2001, Kearns J noted that the applicant had not done anything about re-entering it for four months and that it had taken eight months to re-enter the motion. As regards discovery by the prosecution in February 2002, Kearns J noted that this affidavit listed 93 documents and was clearly the result of "considerable effort".

43. Geoghegan J. broadly agreed with those judgments. He considered that no important issue of "systemic delay" arose in the present case and he reserved his view on its nature and relevance for a future case, though noting that the rather new concept of systemic delay was not the same thing as prosecutorial delay. He suggested that an inadequate number of judges would, if anything, be a reason to assess a longer delay as reasonable in the circumstances, although he acknowledged that that view might not accord with the Convention. The Convention's jurisprudence in Irish cases was not sufficiently clear as to the correct approach to systemic delay and, notably, as to the blameworthiness of a State for systemic delay: could, for example, a State be blamed for diverting limited economic resources to a hospital as opposed to judicial institutions? In any event, the present case was not the appropriate one to examine systemic delay as none of the impugned periods of delay warranted a prohibition order. As to the lapse of time in approving the High Court judgment, he found it unnecessary to consider whether this delay should be taken into account in considering whether a trial should be

prohibited because he was "quite satisfied that prohibition would not be appropriate in this case at any rate".

### C. Dismissal of the criminal charges

44. Following this judgment, the stay on the criminal proceedings pending the second prohibition action was lifted. On 14 March 2008 the criminal proceedings were reinstated before the SCC when the trial date was fixed for 11 June 2008. The memorandum of 5 January 1998 (paragraph 14 above) was again disclosed as additional evidence on 16 June 2008.

45. On 26 June 2008, and following a ruling by the SCC that the principal evidence in the case (the alleged admission of the applicant during police questioning) was inadmissible, the prosecution indicated that they did not propose to adduce further evidence and the charges were dismissed.

### D. Second application to this Court (No. 25100/08)

46. The applicant introduced a second application to this Court in April 2008 in which he complained under, *inter alia*, Articles 6 and 13 about the length of the criminal proceedings against him and about the lack of an effective domestic remedy in this regard. Referring to the general time-line of events since 1983, he mainly complained about delay during the first prohibition action. That application has not been joined to the present one.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Irish Constitution

47. Article 35(2) of the Constitution reads as follows:

> "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law".

48. Article 38(1) of the Constitution provides that:

> "No person shall be tried on any criminal charge save in due course of law".

49. Article 40(3)(1) of the Constitution also provides that:

> "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."

### B. Courts and Court Officers Act 2002 ("the 2002 Act")

50. Section 46 of the 2002 Act provides that the Courts Service shall establish and maintain a register of judgments reserved by, *inter alia*, the High and Supreme Courts in civil proceedings and supervise the delivery of those judgments within prescribed periods. This Act entered into force on 31 March 2005.

### C. Working Group on a Court of Appeal, May 2009

51. The background and terms of reference of this Working Group were outlined in its Report as follows:

> "In recent years there have been significant changes in Irish society. Ireland's population has grown from 3.5 million in 1991 to over 4.2 million in 2006. There has been an increase in economic activity and demographic diversity. Changes in social and public policy have occurred. International developments now have a greater impact on Irish affairs and the courts.
>
> These changes have had important implications for the Irish legal system. In particular, the High Court and Supreme Court have experienced a significant expansion in litigation.
>
> Despite the relative success of the courts in introducing procedures to deal with these developments, the current Superior Court structure was not designed to cope with developments of such a profound nature. There has been a need for some time to conduct a strategic review of the current Superior Court structure.
>
> In December 2006 the Government decided to set up a Working Group to consider the question of establishing a Court of Appeal, with the following terms of reference:
>
> '(a) to review and consider the necessity for a general Court of Appeal for the purpose of processing certain categories of appeals from the High Court.
>
> (b) to address and consider such legal changes as are necessary for the purposes of establishing a Court of Appeal, and
>
> (c) to make such other recommendations as are appropriate for the purposes of ensuring greater efficiencies in the practices and procedures of the Superior Courts.'

52. The Report recommended the establishment of a Court of Appeal in order to, *inter alia*, eliminate undue delay in processing appeals before the Supreme Court. The Report described the increase in High and Supreme Court litigation and the backlog this had created particularly at the Supreme Court level:

> "The Supreme Court has seen a significant increase in the volume and complexity of its appellate caseload. Unsurprisingly, this greater volume of cases has created a backlog of appeals in the Supreme Court. This has led to longer delays in the Supreme Court, with some cases now taking as much as 30 months to get a hearing .... A delay in determining these appeals can cause uncertainty for individuals, for businesses and

for government. It can put unnecessary emotional and financial pressure on litigants. It leaves others unsure about the law, which inhibits their ability to organise and plan their affairs. In short, delays create confusion and costs and are bad for business. This situation poses serious problems for the Irish legal system and for Irish society as a whole."

53. The Report recorded the average delays in obtaining a hearing before the Supreme Court as follows: 2003 (4 months), 2004 (10 months), 2005 (14 months), 2006 (22 months), 2007 (26 months) and 2008 (30 months).

54. Chapter 4 of the Report is entitled "Time-limits and International Obligations" and noted that Ireland had been found in breach of Article 6 of the Convention (*McMullen v. Ireland*, no. 42297/98, 29 July 2004; *Doran v. Ireland*, no. 50389/99, ECHR 2003-X (extracts); *O'Reilly and Others v. Ireland*, no. 54725/00, 29 July 2004; and *Barry v. Ireland*, cited above). It noted that a common feature of those cases was that they involved litigation in which the violations of Article 6 were, in large part, attributed to delays occurring as a result of a shortage of judges, relative to the caseload of the courts. This underlined the fact that any logistical difficulties encountered by the courts might result in a breach of Ireland's obligations under the ECHR.

55. As to Ireland's efforts to comply with its Convention obligations, the Report continued:

"The increase in judicial appointments to the High Court has alleviated these difficulties at that level. As this chapter has already noted, however, the fact that the two-division Supreme Court is obliged to deal with all Superior Court civil appeals means that there is a significant risk of delays of the sort impugned in *McMullen*, *Doran*, *O'Reilly* and *Barry* occurring at appellate level.

...

The European Court of Human Rights has identified delays caused by the courts themselves (as a result of logistical pressures) as the key factors offending the requirements of Article 6 in each case. Violations have been found, as in [*Price and Lowe v. the United Kingdom*, nos. 43185/98 and 43186/98, 29 July 2003], where the courts themselves were held to have acted reasonably in respect of the relevant proceedings. The State is obliged to organise its system to avoid the risk of parties unduly delaying their proceedings. It must also therefore be required to ensure that the structure of the legal system itself does not generate undue delays. The institutional bottleneck at Supreme Court level has just such an effect on our system."

## D. Prohibition orders on grounds of delay

56. In the case of *Ivor Sweetman v. the DPP, the Minister for Justice, Equality and Law Reform and the Attorney General* ([2005] IEHC 435), the High Court granted a prohibition order to stop a prosecution concerning events which took place in 1966. In so finding, the High Court commented:

"Despite the absence of any explanation for the delays already enumerated it is clear that some part at least of this delay was caused by the overwhelming pressure on the, then, inadequate facilities of the legal system. The government had an obligation to

> "organise [its] legal system so as to enable the courts to comply [with the requirements of Article 6 § 1] ...
>
> ... significant improvements have been made in court waiting times through better management and facilities and the systemic delays of that period are now, thankfully, a thing of the past."

57. On an application for leave to apply for judicial review, the High Court (and on appeal, the Supreme Court) can prohibit a prosecution on the basis of delay considered to constitute a real and serious risk of an unfair trial. This does not exclude the inherent and constitutional duty of the trial court to ensure that there was a fair trial and to stop a trial if matters arose which rendered it unfair (*DPP v. O'C* [2006] IESC 54).

58. A trial can also be prohibited on the basis of a breach of the right of an accused to trial with "reasonable expedition" (*State (Healy) v Donoghue* [1976] I.R, Gannon J.).

59. In *P.M. v. Malone* (cited above) Keane C.J. reviewed recent Irish cases on the subject. He found that "in determining whether the concern and anxiety caused to an accused person is such as to justify the prohibition of his trial on the ground that his constitutional right to a reasonably expeditious trial has been violated, the court, depending entirely on the circumstances of the particular case, may be entitled to take into account, not merely delay subsequent to his being charged and brought to trial, but also delay prior to the formal charge." He went on to identify as the essential issue being whether, assuming a breach of the constitutional right to a reasonably expeditious trial, the prohibition of the trial was justified. He answered that question as follows:

> "Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay."

60. The Supreme Court reiterated that approach in *P.M. v DPP* (cited above). Kearns J, speaking for a unanimous court, cited the above judgment of Keane C.J. Having done so, he continued:

> "I believe that the balancing exercise referred to by Keane C.J in *P.M. v. Malone* is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial."

61. In *T.H. v. DPP* ([2006] 3 IR 520) the applicant had been charged in 1996 with sexual assault alleged to have occurred in 1995. He was granted leave to seek judicial review as regards a number of issues arising from the prosecution of the case. The High Court dismissed his judicial review proceedings but nevertheless granted a prohibition order on the grounds that the blameworthy delay by the prosecution in conducting the judicial review proceedings had denied the applicant his right to a criminal trial with reasonable expedition. The DPP appealed to the Supreme Court which allowed the appeal finding that, where inordinate delay did not jeopardise the applicant's right to a fair trial but had caused unnecessary stress and anxiety, the court had to engage in a balancing process between the applicant's right to be protected from such stress and anxiety and the public interest in the prosecution and conviction of those guilty of criminal offences. Fennelly J., with whom the other judges of the Supreme Court concurred, stated:

> "It is important to clear up any misunderstanding concerning the import of such decisions of the Court of Human Rights. The Court does not and did not, in that case, hold that the prosecution had to be stopped. It would be most surprising if a judgment of that Court holding that the prosecuting authorities were "partially or completely responsible" for certain periods of delay had the automatic consequence that a prosecution had to be halted. Such a conclusion would, in any legal system, call for some consideration of the public interest in the prosecution of crime. We know, of course, from other parts of the case-law of the Court that it does recognise the public interest in prosecuting crime (see *Kostovski v Netherlands* [1989] 12 EHRR; [*Doorson*] *v Netherlands* 22 EHRR 330). Thus, the decision of the Court leads to a monetary award. It has no consequence for the pending prosecution.
>
> In brief, the decision in *Barry v Ireland* adds nothing to the applicant's claim to have his trial stopped. The applicant has not, at any stage, advanced a claim for damages as part of the relief sought in these proceedings. As in almost all such cases, the principal objective has been to seek to prevent his trial from proceeding."

62. The later case of *J.B. v. DPP* ([2006] IESC 66) concerned the accused's application for an order prohibiting his criminal trial (on numerous charges of sexual assaults on his nieces between 1971 and 1987) on the basis of delay in the institution and prosecution of the charges. He was only partially successful before the High Court and he unsuccessfully appealed to the Supreme Court. Having reviewed the pre-conditions for an order of prohibition and noted that there "may be other remedies", Judge Denham noted the above-quoted reference of Fennelly J. (in *T.H. v. DPP*) to *Barry v. Ireland* and, notably, the sum of money awarded in just satisfaction. Hardiman J. also stated that:

> "I do not consider that the arguments advanced on behalf of the defendant and based on the jurisprudence of the European Court of Human Rights, has any relevance in the circumstances of this case. I wish, therefore, to reserve my opinion on the effect of that jurisprudence in a case of this sort until a case arises where this material is of direct relevance."

63. In *Devoy v. DPP* ([2008] IESC 13) the accused alleged prosecutorial delay in pursuing firearms and criminal damage charges against him. The High Court (in 2006) granted the prohibition order and the Supreme Court (delivering its judgment in the month following the judgment of the Supreme Court in the present case) allowed the DPP's appeal.

Kearns J. recalled and summarised the principles governing prosecutorial delay in Irish law (laid down in the above-cited cases of *P.M. v. Malone* and *P.M. v. DPP*) as follows:

> "(a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.
>
> (b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.
>
> (c) Where there is a period of significant blameworthy prosecutorial delay less than that envisaged at (b), and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in [the above cited case of *P.M. v. Malone* and *P.M. v. DPP*] are demonstrated.
>
> (d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.
>
> ...
>
> When applying the test, the court must, however, keep certain considerations in mind. On the one hand, the court must remember that degrees of dilatoriness which may have been acceptable in the past may no longer be tolerated since the European Convention on Human Rights Act 2003 gave effect in this jurisdiction to the provisions of the Convention, including the right under Article 6 to a trial with reasonable expedition. This right must be given real effect.
>
> In the context of prohibition this is not to say that an Irish court must readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, ..., prohibition is a remedy to be granted only in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction. It must analyse the causes for delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. In this context not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an enquiry by the court under *P.M. v. DPP* or *Barker v. Wingo*. In my view an applicant should ordinarily adduce and place before the court some evidence of what is the norm in terms of time taken for the particular proceedings or the identified process or processes within it which are the subject matter of complaint. This is information which is readily available from the Courts Service with regard to various forms of proceedings."

Denham J began her judgment noting that the case, raising issues of delay in prosecuting criminal offences, was one of a number of cases which

had been decided in the High Court (2006) at a time when the jurisprudence was being clarified by the Supreme Court. Finding that the High Court had not applied the correct test as regards prosecutorial delay, Denham J referred to the restatement of the law in *P.M. v. DPP* (cited above):

> "This test requires that in circumstances where there was blameworthy prosecutorial delay, a further step is required to be taken by the Court, this step was not taken by the High Court. To prohibit a trial, in addition to the finding of blameworthy prosecutorial delay one or more of the interests protected by the right to an expeditious trial must be shown to have been so interfered with as to entitle the applicant to relief. The bar of the test is high because this is a very significant relief - an order prohibiting the public prosecutor from prosecuting an accused.
>
> In this case the second step required by the test was not taken. Indeed the learned trial judge stated that the applicant did not complain of any specific prejudice, and that he did not complain that his right to a fair trial had been impaired by the delay."

## E. Judicial Immunity

64. In *Kemmy v. Ireland and the Attorney General* ([2009] IEHC 178) the Court of Criminal Appeal set aside the applicant's conviction for rape and sexual assault on the grounds that the manner in which his trial had been conducted rendered his trial unfair. A retrial was not ordered. However, by that date the accused had served his sentence and had been released. Not being entitled to damages under section 9 of the Criminal Procedure Act 1993 (his conviction was not quashed on the grounds of a miscarriage of justice), he took proceedings against the State claiming essentially damages for a breach of his constitutional right to a fair trial. In dismissing the application, the High Court found that the State could not be vicariously liable for errors which a judge may commit in the administration of justice nor could a plaintiff sue the State on other grounds as regards the failure by the trial judge to ensure a fair trial. In addition, the High Court opined that, in any event, the immunity conferred by law on the judiciary also applied for the benefit of the State when an attempt was made to render the State liable for the wrongs of a judge. The High Court stated:

> "I am of the view that many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for State immunity in cases such as those before this Court. Indeed it is my view that not to extend the immunity to the State in the present circumstances would represent an indirect and collateral assault on judicial immunity itself.
>
> To make the State liable in such a situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine his independence as guaranteed by the Constitution. It would introduce an unrelated and collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might, for example, encourage the other organs of

government to monitor the conduct of the judges in this regard, thereby resulting in "a chilling effect".

The fundamental reason for supporting this conclusion, however, is that when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the State in these circumstances, he is not even acting on behalf of the State. He is not doing the State's business. He is acting at the behest of the people and his mission is to administer justice. ...

... The plaintiff's case might be advanced to another stage by arguing that the above line of reasoning, which recognises personal immunity for judges and State immunity for the majority of wrongs committed by judges in the administration of justice, does not apply when the constitutional rights of the individual are at stake. I cannot agree. If one were to accept that line of argument one would have to acknowledge that the immunity given to judges personally would also have to yield in such situations. ...

In my view, the acceptance of personal immunity for the Judiciary must logically extend to the State when sued directly for judicial error even when a fundamental right is asserted. That this immunity is not specially recognised in the Constitution, is no impediment, since the State immunity in these circumstances is a corollary of the personal immunity conferred on the judges and the State immunity can be inferred from the personal immunity long since recognised by our courts, though not explicitly acknowledged in the Constitution."

## F. Legal Aid

### *1. The Attorney General's Scheme*

65. This Scheme provides payment for legal representation in cases not covered by the civil or criminal legal aid schemes. It is an *ex gratia* scheme set up with funds made available by Parliament. Special rules apply which are contained in the Scheme itself including, the following.

66. The Scheme applies to the following forms of litigation: (a) *habeas corpus* applications; (b) bail motions; (c) such judicial review application as consist of or include certiorari, mandamus or prohibition and are concerned with criminal matters or matters where the liberty of the applicant is at issue; and (d) applications under section 50 of the Extradition Act 1965, extradition applications and European Arrest Warrant applications.

67. The purpose of the Scheme is to provide legal representation for persons who need it but cannot afford it. It is not an alternative to costs. Accordingly, a person wishing to obtain from the court a non-binding recommendation to the Attorney General that the Scheme be applied must make his or her application, personally or through his or her lawyer, at the commencement of the proceedings and must obtain the recommendation at the commencement of the proceedings.

68. The applicant must satisfy the court that he or she does not have the means to pay for legal representation and that the case warrants the assignment of legal representation.

*2. Civil Legal Aid*

69. The Legal Aid Board provides legal advice and legal aid for non-criminal matters to those who satisfy the requirements of the Civil Legal Aid Act 1995. In order to obtain legal aid, a person must have limited means and merit to their case and their case must not be one of the categories excluded by section 28(9) of the 1995 Act. None of the categories listed excludes an action for damages for breach of the constitutional right to reasonable expedition.

## III THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW ("THE VENICE COMMISSION")

70. During the preparation of its "Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings"[1], the Venice Commission provided a questionnaire to Contracting States. The questions as well as the responses of the Irish Government, in so far as relevant, are set out below[2]:

> **"4. Is any statistical data available about the extent of this problem in your country? If so, please provide it in English or French.**
>
> The Courts Service is responsible for the management of courts. Average waiting times in each court for 2005 are as set out below. Provision is made to accord early hearing dates to urgent and emergency matters. The average times are as follows:
>
> | | |
> |---|---|
> | Supreme Court | 14 months from lodgement of a certificate of readiness to hearing date (earlier hearing dates are allocated by the court for urgent cases). |
> | **...** | |
> | Judicial Review (excluding asylum) | 15 months (cases taking less than 2 hours will be dealt with sooner). ..." |
>
> **"5. Does a remedy in respect of excessive delays in the proceedings exist in your country? If so, please describe it (who can lodge the complaint, before which authority, according to what - ordinary/special – procedure, within what deadline etc.). Please provide the texts of the relevant legal bases in English or French.**

[1] CDL-AD(2006)036(rev).

[2] CDL(2006)026 entitled "*Replies to the Questionnaire on the Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings*".

**Criminal**

In the criminal context an accused can take Judicial Review proceedings seeking an order for prohibition against the prosecution on the ground of delay. This application is to be made before the High Court by an accused and must be made 'promptly' [*Connolly v DPP* 15th March 2003, HC, Finlay Geoghegan J.]. The Court has an inherent jurisdiction to prohibit a prosecution where there is unreasonable delay.

**Civil**

In the civil context defendants may seek an order for dismissal for want of prosecution in circumstances where there has been delay on the part of the Plaintiff. This application is made to the courts.

In *O'Donoghue v Legal Aid Board* [21st December 2004, High Court, Kelly J.] the High Court held that the applicant in family proceedings could obtain a declaration of breach of rights under Article 40.1.3 and be awarded damages for delay in the State providing her with legal aid. This case was not appealed to the Supreme Court.

Under the [2003 Act] an applicant may apply to the High Court for damages if an organ of State has not fulfilled its obligations under the Convention. Under that legislation the courts are excluded from the definition of organ of State but delay by the DPP or other State agents or agencies might give rise to this remedy.

Under the [2002 Act] section 46, if judgment has not been delivered within a prescribed period the Courts Service will list the matter before the relevant judge and at that time the Judge must fix a date by which time judgment will be delivered.

According to a procedure initiated in 1996 any litigant who has a complaint in relation to delay must address it formally to the President of the High Court. However, the [ECHR] in [*O'Reilly and Others v. Ireland*, no. 54725/00, 29 July 2004] found that this did not constitute an adequate remedy.

The Courts themselves employ a system of case management and judges seized of a case will set deadlines by which time the parties are required to have submitted or served documents. Legislation, including the Statute of Limitations 1957, stipulates the period in which applicants must take proceedings, before they become 'statute barred'."

**"7. Is there a cost (ex. fixed fee ) for the use of this remedy?**

Generally, costs follow the event of the trial i.e. they are awarded to the winning party. However, awards may be made to a particular party in relation to specific interlocutory proceedings."

**"10. What are the available forms of redress:**

- acknowledgement of the violation YES

- pecuniary compensation

  - o material damage YES

  - o non-material damage YES

- measures to speed up the proceedings, if they are

still pending YES

- possible reduction of sentence in criminal cases NO

- other (specify what)

In criminal proceedings if Article 38.1 is held to have been breached because of delay, an order of prohibition will be granted directing that the prosecution be restrained. Similarly, in a civil action if a Defendant successfully argues that Article 40.1.3 has been violated by reason of delay the claim will be dismissed for want of prosecution. In a judgment in the High Court a Plaintiff in a civil matter complain successfully about delay and declaration of breach of rights and damages were awarded. In the case of *PP v DPP* [2000] 1 IR 403] it was held that, although a breach of constitutional rights in the context of criminal proceedings had not been made out, any further delay would not be tolerated and the courts should not permit it to occur.

In criminal proceedings if an accused has been in custody pending trial, the period spent in custody will be set off against a sentence imposed.

**11. Are these forms of redress cumulative or alternative?**

Generally, proceedings will be restrained where unacceptable delay has been shown to exist. A declaration of breach of rights has been accompanied by an award of damages in a civil case.

**12. If pecuniary compensation is available, according to what criteria? Are these criteria the same as, or linked with, those applied by the European Court of Human Rights? Is there a maximum amount of compensation to be awarded?**

In *O'Donoghue v Legal Aid Board* damages were calculated with regard to the loss suffered by the applicant ...and stress and upset caused.

**13. If measures can be taken to speed up the proceedings in question, is there a link between these measures and the general case-management of the relevant courts? Is the taking of these measures co-ordinated at a central or higher level? On the basis of what criteria and what factual information concerning the court in question (workload, number of judges, nature of cases pending, specific problems etc.) does the competent authority order such measures?**

No"

**"18. Is there any statistical data available on the use of this remedy? If so, please provide them in English/French.**

Not applicable.

**19. What is the general assessment of this remedy?**

Not applicable

**20. Has this remedy had an impact on the number of cases possibly pending before the European Court of Human Rights? Please provide any available statistics in this connection.**

Not applicable

**21. Has this remedy been assessed by the European Court of Human Rights in respect of Articles 13 or 35 ECHR? If so, please provide reference to the relevant case-law.**

The remedy available before this development was considered by the European Court of Human Rights in the cases of [*Barry v Ireland*, cited above, *Doran v. Ireland*, no. 50389/99, ECHR 2003-X (extracts); *O'Reilly v. Ireland*, cited above; and *McMullen v. Ireland*, no. 42297/98, 29 July 2004]. In each of these decisions Ireland was found to be in breach of the Convention for failure to provide an adequate remedy for delay."

# THE LAW

## I. ADMISSIBILITY OF THE COMPLAINTS

71. The applicant complained under Article 6 § 1 that the criminal proceedings against him exceeded the reasonable time requirement of Article 6 § 1 and under Article 13 about the lack of an effective domestic remedy in that respect. He also made separate complaints under Article 6 § 3(d) and Article 8 of the Convention.

### A. Article 6 § 1 (reasonable time) alone and in conjunction with Article 13 of the Convention

72. Articles 6 and 13, in so far as relevant, read as follows:

6(1). "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

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

73. The parties disputed whether there was an effective remedy to be exhausted and thus the admissibility of the complaints under Articles 6 and 13 of the Convention. The Government's principal submission was that an action for damages for breach of the constitutional right to reasonable expedition should have been attempted by the applicant and that the finding in the *Barry* judgment, that this remedy was not effective, was incorrect. The applicant argued that that remedy was not effective, relying on the Court's finding to that effect in the *Barry* judgment. The Court notes, at this

point, that the Supreme Court considered that the rather formulaic request by the applicant in the second prohibition action, for "such further and/or other relief" as the court deemed just, did not amount to a request for damages in addition to the other relief sought. Finally, the parties agreed that a six-year limitation period ran from the last period of relevant delay so that this remedy was not statute barred.

74. The Court recalls that this Court found, in December 2005 in its *Barry* judgment, that the proposed constitutional action for damages for breach of the right to reasonable expedition was not an effective remedy within the meaning of Article 13 of the Convention. The Government did not request the referral of that case to the Grand Chamber (Rule 73 of the Rules of Court). While the Government now dispute the correctness of that conclusion in the *Barry* judgment, it has nevertheless been this Court's position, from before the applicant's introduction of the present case to date, that the constitutional remedy it is proposed the applicant should have exhausted was not an effective one.

75. In so far as the Government suggested that there had been substantial domestic developments since the *Barry* judgment which meant that the applicant should have, despite that judgment, attempted the constitutional action for damages, the Court considers this question is closely linked with and should be joined to the merits of the related complaint under Article 13 of the Convention. The Court would similarly join to the merits of the Article 13 complaint the effectiveness of the other remedies relied on by the Government. Furthermore, these issues raise questions of law which are sufficiently serious that their determination should depend on an examination of their merits.

76. No other ground for declaring these complaints inadmissible having been established, the Court therefore declares these complaints admissible.

### B. Article 6 § 3(d) of the Convention

77. The applicant also complained under Article 6 § 3(d) about certain matters which he maintained rendered the proceedings unfair. He raised, in particular, the loss of the original fingerprint evidence and the lack of evidence against him other than the police interviews, about which interviews he had various complaints and allegations.

78. The Court notes that the criminal charges against the applicant have been dismissed so that he could no longer claim to be a victim of a violation of the right to fair proceedings. These complaints are, as such, inadmissible pursuant to Articles 34 and 35 of the Convention.

### C. Article 8 of the Convention

79. Finally, the applicant complained that his arrest and subsequent pre-trial detention amounted to a deliberate and disproportionate interference with his private and family life as protected by Article 8 of the Convention.

80. The Court notes that the applicant was released on bail in or around January 1998 and he does not submit that he was otherwise in pre-trial detention as a result of the proceedings the subject of this application.

81. His complaints about that arrest and pre-trial detention are, even assuming he had no effective remedy to exhaust, inadmissible as out of time within the meaning of Article 35 § 1 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

82. The applicant complained under Article 13 that he had no adequate compensatory remedy for the breach of his right to a trial within a reasonable period of time.

### A. The Government's submissions

83. The Government argued that there were four effective domestic remedies available to the applicant.

84. In the first place, they mainly submitted that he could have taken an action for damages for a breach of his constitutional right to reasonable expedition (separate from, or as an alternative claim within, his prohibition actions) and that the conclusion in the *Barry* judgment, which found this remedy to be ineffective, was erroneous. Recalling that it was not necessary to demonstrate a certainty of success for a remedy to be considered effective, they mainly relied on a detailed Opinion from an experienced Irish constitutional lawyer and practitioner dated May 2008 to demonstrate the effectiveness of the remedy.

85. The Opinion stated that the constitutional right to trial with reasonable expedition was a recognised part of the right to trial in due course of law guaranteed by Article 38(1) of the Irish Constitution[3]. While certain criminal prosecutions had been stayed on the basis of this constitutional right, damages did not appear to have been previously sought or granted for a breach of that right. Indeed, "reasonable expedition" was the most litigated area of constitutional law in the late 1990s, the cases often concerning late allegations of sexual assault. Virtually every such case concerned an application for a prohibition of prosecution and apparently no claim for damages for a breach of the right to reasonable expedition was referred to in any judgment. However, this was probably explained by the fact that the threshold for granting leave to seek a prohibition order on judicial review was low (an arguable case) and generally a stay on the

[3] *The State (O'Connel) v. Fawsitt* [1986] IR 263.

criminal proceedings would be accorded pending a final decision on prohibition. An accused was clearly more interested in stopping a prosecution than in damages[4] and/or did not wish to jeopardise a request for a prohibition order with an alternative claim for damages.

However, it was "highly probable" (the Opinion also assessed this as "almost certain") that an accused could sue successfully for damages for such a breach and this was despite the comment of Kearns J., in the Supreme Court in the second prohibition action, that any such entitlement would require careful consideration by the Supreme Court. To support this view, the Opinion relied on "relatively developed jurisprudence" (notably the generally applicable *Meskill* doctrine) which established the principle of compensation for a breach of a constitutional right and the right to seek damages for such a breach when no other effective or sufficient remedy existed[5]. The Opinion went on to refer in detail to cases where damages had been awarded for a breach of different constitutional rights[6]. This principle was borne out by the case of *O'Donoghue v. Legal Aid Board*[7], the closest parallel found to the present case: a delay in granting a legal aid certificate for 25 months when the plaintiff manifestly qualified for it was found to amount to a breach of the plaintiff's constitutional right of access to court and to fair procedures so that she had a right to recover damages for demonstrated loss.

The Opinion underlined the substantive difference, noted by the High and Supreme Courts in the present case[8], between the prohibition of a trial, which required the balancing of the right to reasonable expedition and fairness against a public interest in prosecuting crime, and the less complex issues before this Court under the "reasonable time" aspect of Article 6 § 1 which involved an award of damages for culpable delay. The Opinion stated that the courts would apply the principles governing awards of pecuniary and non-pecuniary damages in tort to an award of damages. In *McDonnell v.*

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[4] As noted by Fennelly J. in *TH v. DPP, cited above,* and by Fennelly J. in the Supreme Court (in the second prohibition action) in the present case.

[5] *The State (Quinn) v. Ryan* [1965] IR 70 (O'Dalaigh C.J., "the court's powers were as ample as the defence of the Constitution requires"); *Byrne v. Ireland* [1972] IR 241 **(**Walsh J., "Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce those must be deemed to be also available …"); and *Meskill v. CIE* [1973] IR 121 (Walsh J., "the constitutional right carried within, its own right to a remedy or for the enforcement of it").

[6] *Inter alia, Kearney v. Ireland* [1986] IR 116 (prisoner's right to communicate); *Kennedy v. Ireland* [1987] IR 587 (journalist's right to privacy); *Conway v. Irish National Teacher's Association* [1991] 2IR 305 (a right to free primary education); *Healy v. Minister for Defence*, High Court, 7 July 1994, unreported (right to fair (promotions) procedures); *Walsh v. Ireland*, Supreme Court 30 November 1994, unreported (right to liberty and good name); *Sinnott v. Minister for Education* [2001] 2IR 545 (right to adequate primary education); *Gulyas v. Minister for Justice, Equality and Law Reform* [2001] 3IR 216 (right to fair (immigration) procedures); and *Redmond v Minister for the Environment* (No. 2) [2006] 3IR 1 (electoral rights).

[7] *O'Donoghue v. Legal Aid Board*, cited above.

[8] see also *T.H. v. DPP*, cited above.

*Ireland*[9] the Supreme Court treated, for the purposes of the Statute of Limitations, an action for a breach of constitutional rights in the same way as an action in tort. Accordingly, much of the adjectival law governing tort actions applied to constitutional actions for damages. While there was some authority to the effect that a breach of a constitutional right could be actionable *per se*, without proof of loss[10], in the majority of cases the courts would compensate as in a tort action on the basis of demonstrated pecuniary and non-pecuniary loss. Exceptionally, awards of punitive or exemplary damages might be made[11].

86. Accordingly, the Government argued that, while no one had ever requested damages for a breach of a right to reasonable expedition, the Opinion demonstrated that there was no doubt that such a remedy existed. While hitherto accused persons sought to prevent their trials through prohibition actions, they could have, but did not, seek damages either in separate proceedings or as alternative relief in the prohibition actions. The applicant did not explain why he did not make an alternative claim for damages in his prohibition actions and it was absurd in an adversarial system to suggest that the State (*via* its courts or the prosecution) should have taken the initiative to offer damages for delay which was excessive but did not warrant prohibition. The fact that no accused had ever sought such a remedy was not dispositive of the matter and did not mean that it did not exist or that there was any legal bar to it.

87. On the contrary, the Opinion demonstrated, in a more detailed manner than in the *Barry* case, that the Constitution and its remedies were flexible and adaptable, that where there was a constitutional right there was a remedy and that the domestic courts had no hesitation in granting, and no difficulty in calculating, damages for a breach of a constitutional right notwithstanding that damages had never been calculated or awarded for a similar breach. As well as the Opinion outlined above, the Supreme Court indicated in the applicant's second prohibition action that the question of an action for damages for breach of the right to trial with reasonable expedition was an open one to be examined when raised (Fennelly J. and Kearns J., paragraphs 38 and 41 above). There was therefore sufficient evidence of a remedy in the present case to allow the Court to adopt its approach in *D v. Ireland* ((dec.), no. 26499/02, 27 June 2006) where, despite there being no statutory or case-law precedent, the Court acknowledged that it was important that the domestic courts (especially in a common law constitutional system) should be afforded the opportunity to test the extent of domestic protection, thereby allowing domestic courts to develop legal and constitutional remedies.

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[9] [1998] 1IR 134.

[10] *Redmond v Minister for the Environment (No. 2)*, cited above, (a nominal sum of EUR 130 since there was no actual proof of loss).

[11] *Conway v. Irish National Teacher's Association*, cited above, (a range of exemplary damages were awarded to children who missed school from IR£1500-IR£15.000).

88. In failing to exhaust this remedy and then coming to this Court to suggest that no effective remedy existed, the applicant sought to subvert the principle of subsidiarity and to invert the relationship between national courts and this Court. Three unacceptable risks flowed therefrom. In the first place, it was not for the Court to act as an appellate court in resolving unsettled matters of national law including questions of whether an applicant could seek either or both remedies (prohibition and damages). Secondly, it was not for the Court to resolve disputed issues of fact, including allegations of *mala fides* as to the date of the applicant's arrest. Thirdly, this confused the issue of where the primary function lay for the protection of fundamental rights: the Government questioned whether the Court had the competence to review the substance of the domestic courts' careful assessments of the delays in the present case. In their oral submissions, the Government argued that the Supreme Court had considered and rejected the applicant's claims that his trial breached his constitutional right to reasonable expedition and, further, the Supreme Court considered that that constitutional right and reasonable time requirement of Article 6 were co-extensive. The Irish courts had already considered the delay complaint and rejected it and, in the absence of any manifest inadequacy in that assessment, this Court should not interfere with it.

89. The Government noted that, while the applicant accepted that there was a right to damages for a breach of this constitutional right, he had asserted, without more, that the Opinion was erroneous and simply suggested that it was unreal to expect a litigant in his situation to make an alternative plea in damages. However, that alternative plea would have entailed no separate proceedings, no extra cost and no additional factual considerations. The applicant was simply asking the Court to speculate.

90. They also underlined that the reference in the *Barry* judgment (paragraph 55 of that judgment) to a statement of the Supreme Court in that case was misconstrued. That statement was made in the context of a prohibition application, which was substantively different from the "reasonable length" issue before this Court under Article 6 § 1, so that the Supreme Court statement should not be relied upon as evidence against the availability of an effective domestic remedy for damages.

91. The Government accepted in their written and oral submissions to the Grand Chamber that it was "likely" that the proposed action in damages could not be invoked as regards delay "caused by an individual judge in failing to deliver judgment within a reasonable time", given the important principle of judicial immunity which protected the independence of the judiciary. The principle of judicial immunity was recognised by the common law (*inter alia*, *Sirros v. Moore* [1975] QB 118; *Deighan v. Ireland* [1995] 2 IR 56; *Devoy v. DPP* and *Kemmy v. Ireland and Another*, both cited above). Judicial independence was protected by the Constitution, the Convention and the Court's jurisprudence (*Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003). The Court should not therefore base a violation of Article 13 on the observance by the State of this recognised

principle of judicial immunity. The damages remedy proposed could still be effective with this limited exception. However, in their oral submissions the Government suggested that the applicant should have tested, in the proposed action for damages, the nature, extent and application of the principle of judicial immunity, without which it was not apparent what immunities (of the police, prosecutors or judges) would stand against a claim for damages for delay. The Government rejected the applicant's reliance on the case of *L.L.M. (Plaintiff) and the Commissioner of An Garda Siochana, the Minister for Justice, Equality and Law Reform, the DPP, Ireland and the Attorney General*: that case was ongoing and did not concern immunities but rather the question of whether a State owed to a victim of crime a legal obligation in connection with the prosecution of a criminal trial, an issue which raised profound issues as to the relationship between the presumption of innocence of a person acquitted and the right of a victim to a trial.

92. The Government added that States had a margin of appreciation to choose an effective remedy for vindication of the right to trial with reasonable expedition and a remedy could be effective if it provided for *ex post facto* damages. A successful litigant could claim costs on the basis of the normal rule of "costs following the event".

93. As to the average length of time for such a constitutional remedy, the Government referred to 6-12 months for the High Court proceedings (assuming there was no delay by the parties and that judges met deadlines). Before the Supreme Court on appeal, a party could apply for priority to the Chief Justice, priority was routinely granted in cases concerning pending criminal trials and, if granted, the appeal could be finalised within weeks/months. If priority was not granted, 34 months was the average time for completion of an appeal before the Supreme Court.

94. Secondly, if the constitutional action were unsuccessful, the applicant would have had an entitlement to claim damages under the 2003 Act and he could have done so, as an alternative argument, during his second prohibition action. The Convention had been incorporated into domestic law by that Act and section 3 of the 2003 Act allowed an individual to take an action for damages as from 31 December 2003, the 2003 Act not being retroactive, as regards a violation of Convention rights by organs of the State.

95. Thirdly the Government maintained that an application for an early hearing date also constituted an effective remedy.

96. Fourthly, they pointed to an application for prohibition as a further effective remedy for an accused in criminal proceedings in circumstances where the delay had caused such prejudice as to create a real risk of an unfair trial. The courts would reserve this remedy for cases of significant delay and with a genuine risk of such prejudice.

### B. The applicant's submissions

97. The applicant maintained that there was no effective compensatory domestic remedy for unreasonable length of criminal proceedings, relying on the conclusion to that effect in the *Barry* judgment.

98. An accused would be motivated to pursue prohibition orders since, even if a conviction were overturned on appeal outside the narrow confines of a finding of a miscarriage of justice, he would not be compensated for intervening bail conditions or detention. The primary concern of the applicant was to have the prosecution stopped and it was unreal to suggest that he would abandon the prohibition option in favour of an expedited trial based on tainted or insufficient evidence. Even if he could have made a claim for damages as an alternative claim in the prohibition proceedings, it was unreal to suggest that he would have been legally advised to pursue a theoretical damages action.

99. In any event, this did not change the fact that the State had not discharged the onus on them to demonstrate that the constitutional action for damages was an effective one sufficiently certain and normally available both in theory and in practice and with reasonable prospects of success, despite the flexibility of the Irish common law constitutional system.

100. There was no precedent at all for such action. He accepted that there was a constitutional right to reasonable expedition and damages were awarded for a breach of certain constitutional rights but in the years since the *Byrne v. Ireland* and *Meskill v. CIE* cases (cited above), no one had ever been awarded damages in his situation. In the many recent domestic prohibition actions, damages had never been suggested as an alternative remedy. To the applicant's knowledge, the State had never pleaded, in the alternative in prohibition proceedings, that damages were available for prejudicial delay not warranting a prohibition order or that damages would be a lesser alternative to prohibition in cases where there was prejudice or special hardship. Moreover, he had made an alternative claim before the Supreme Court in his second prohibition action ("for any further or other relief as to this Honourable Court deems ... just"). However, the first declaration was not responded to by the Supreme Court and his claims of delay in violation of the constitutional and Convention right were rejected. Accordingly, despite the fact that delay was a major issue before the Irish courts and despite the "no right without remedy" concept espoused in the Opinion, no initiatives were taken and no official response was offered, by the DPP or the courts, of the nature now canvassed by the State. Indeed, the Senior Counsel who drafted the Opinion had never canvassed the idea of a damages remedy on behalf of a client even in one of his most recent relevant cases (*Sparrow v Minister for Agriculture, Fisheries and Food & Another* ([2010] IESC 6). The Opinion was not supported by the practitioners involved in the relevant field.

101. Moreover, on the facts of his case, such a constitutional action for damages would not have succeeded since the domestic courts, in his

prohibition actions, had twice refused to find a breach of his right to trial with reasonable expedition (Article 38(1) of the Constitution) or within a reasonable period of time (Article 6 of the Convention) quite apart from the question of any potential unfairness.

102. Furthermore, there were many relevant legal principles which remained unsettled, notably the extent to which various elements of the State apparatus (police, prosecutors and judges) enjoyed legal immunity from suit for damages arising from the discharge of their official functions. The Opinion did not cover this issue. The recent case of *Kemmy v. Ireland* (cited above) confirmed that the principle of judicial immunity would exclude an action for damages as regards judicial delay: any action for damages could neither take into account the above-noted delay by a judge for 17 months in finalising his judgment nor other forms of judicial delay. Moreover, in the *L.L.M.* case (cited above), the plaintiff was an alleged victim of an accused who obtained a prohibition order given the delay in prosecuting the matter and she sought damages against the defendants. Immunity from suit was invoked by respondents. This issue would be tried as a preliminary issue but it might be that the immunity from suit would be held to extend to the DPP and the police.

103. As to the average length of any such constitutional action, without priority being accorded, the applicant argued that proceedings involving the State took longer due to a culture of non-proactivity. He also maintained that the average time for judicial review proceedings before the High Court was 2 years and in the region of 32 months before the Supreme Court (referring to the Report of the *Working Group on a Court of Appeal*). Moreover, the pressure (particularly on the criminal courts) was such that it was not feasible to suggest that priority could be accorded to a case such as his. Indeed, the Government did not suggest that the duration of his prohibition actions was comparatively excessive: while the Government relied on the above-cited *Sweetman* case, the courts acknowledged therein unacceptable delays which led to prohibition orders.

104. The applicant underlined that he had limited means (he obtained legal aid for his criminal proceedings). He would not have been eligible for any legal aid or financial assistance for the proposed constitutional action. The Attorney General's scheme was applicable to judicial review for prohibition but it excluded actions for damages. Moreover, he would risk a substantial costs' order against him in the event of losing any such action. Even if one could make the damages claim in the prohibition proceedings, any such test claim would be resisted by the State so his costs exposure would remain high. No lawyer would advise his client to take such risks.

105. Accordingly, the applicant considered that the State relied too heavily on the flexibility of the Irish common law constitutional system: equating the flexibility of the system with the obligation to exhaust effective remedies would mean that a violation of Article 13 could never be established as the State could simply invoke a hitherto undiscovered remedy. The applicant therefore argued that the weight of the above-

described legal opinion and practice, as well as settled judicial precedent, constituted practical and real evidence of the absence of a remedy in damages and outweighed the theoretical and untested remedy outlined in the Opinion. Accordingly, the applicant argued that there was no effective constitutional remedy in damages available in Ireland for unreasonably long criminal proceedings.

106. As to the 2003 Act, that legislation incorporated the Convention at a lower level than the Constitution. Any remedy under the Act would concern only delay after the coming into force of the Act on 31 December 2003 as the Act was not retroactive. Any proceedings under the Act could not concern delay attributable to the courts since the courts were excluded from the Act's definition of organs of the State. As to applications to strike out for delay/delay causing prejudice/want of prosecution, he maintained that these had no application to the criminal proceedings against him.

## C. The Court's assessment

### *1. Relevant principles as regards Articles 13 and 35 § 1*

107. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among many other authorities, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII; and, more recently, *Leandro Da Silva v. Luxembourg*, no. 30273/07, §§ 40 and 42, 11 February 2010).

108. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (*Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

The scope of a Contracting Party's obligations under Article 13 varies depending on the nature of the complaint. However, the remedy required by

Article 13 must be "effective" in practice as well as in law (for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" means that the remedy must be adequate and accessible (*Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-VII).

An effective remedy for delay in criminal proceedings must, *inter alia*, operate without excessive delay and provide an adequate level of compensation (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 195 and 204-207, ECHR 2006-V; and *Martins Castro and Alves Correia de Castro v. Portugal*, no. 33729/06, 10 June 2008). Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy *post factum* in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist (*Kudła v. Poland* [GC], cited above, § 158; *Mifsud v. France*, cited above, and *Scordino v. Italy (no. 1)*, [GC], cited above, § 187).

*2. Application to the present case*

109. In the present case, the Government submitted that there were four effective domestic remedies for delay in criminal proceedings. They mainly argued that this Court's judgment in *Barry v. Ireland* was incorrect in concluding that an action for damages for a breach of the constitutional right to reasonable expedition did not constitute an effective domestic remedy for delay in criminal proceedings.

**(a) Preliminary remarks**

110. In the first place, the Court accepts that the extract of the judgment of the Supreme Court in the *Barry* case (referred to in this Court's judgment in that case at §§ 53 and 55) is not directly relevant to the assessment of the effectiveness of any constitutional action for damages for delay in criminal proceedings: the Supreme Court was ruling in the context of a prohibition action (where any unfairness/unreasonable expedition must be balanced against the public interest in pursuing a prosecution) which would be substantively different from any action for damages only for culpable delay, a difference underlined by the Government (paragraphs 85 and 90), in previous domestic case law (paragraphs 59-61 and 63) and by the Supreme Court in the second prohibition action (paragraphs 38 and 41 above).

111. Secondly, the Government argued in some detail that, by assessing a remedy which remained untested in a common law constitutional system, the Court would be assessing matters of fact and law and going beyond its subsidiary role in the Convention system.

112. The Court agrees that, by virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing Convention rights and freedoms is on the national authorities so that the machinery of

complaint to the Court is indeed subsidiary to the human rights safeguards of the national systems.

However, Articles 13 and 35 § 1, which have a close affinity with each other, give direct expression to the subsidiary character of the Court's work (see *Kudła v. Poland* [GC], cited above, § 152; *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, § 63, ECHR 2009-... (extracts)). It follows that less than full application of the guarantees of Article 13 would undermine the operation of the subsidiary character of the Court in the Convention system and, more generally, weaken the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention (*Kudła v. Poland* [GC], cited above, § 155). Accordingly, less than full supervision of the existence and operation of domestic remedies would undermine and render illusory these guarantees of Article 13 and the Convention is intended to guarantee rights that are practical and effective and not theoretical or illusory (*Scordino v. Italy (no. 1)* [GC], cited above, § 192). Consequently, and contrary to the Government's submission, the principle of subsidiarity does not mean renouncing supervision of domestic remedies (*Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII; and *Riccardi Pizzati v. Italy* [GC], no. 62361/00, § 82, 29 March 2006).

113. It is also true that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law and to decide on issues of constitutionality (*Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 82, ECHR 2000-XII; *Wittek v. Germany*, no. 37290/97, § 49, ECHR 2002-X; *Forrer-Niedenthal v. Germany*, no. 47316/99, § 39, 20 February 2003; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005-VI). However, in accordance with the Court's case-law on the interpretation and application of domestic law, the Court's duty under Article 19 of the Convention is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention so that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Scordino v. Italy (no. 1)*, cited above, at § 190).

114. Accordingly, the question to be determined by the Court in the present case is whether the way in which domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention as interpreted in the light of the Court's case-law (see *Scordino v. Italy (no.1)*, cited above, § 191; *Riccardi Pizzati v. Italy* [GC], cited above; and *Burdov v. Russia (no. 2)*, no. 33509/04, § 99, ECHR 2009-...). In the context of Article 13, the Court's role is to determine whether, in the light of the parties' submissions, the proposed remedies constituted effective remedies which were available to the applicant in theory and in practice, that is to say, that they were accessible, capable of providing redress and offered reasonable prospects of success (see, among other authorities, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Sejdovic v.*

*Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; and *Apostol v. Georgia*, no. 40765/02, § 35, ECHR 2006-XIV).

**(b) Damages for a breach of the constitutional right to trial with reasonable expedition.**

115. The principal remedy proposed by the Government was an action for damages for a breach of a constitutional right to reasonable expedition. In particular, they argued, relying on the Opinion in support, that there was an unenumerated right to reasonable expedition in criminal proceedings (Article 38(1) of the Irish Constitution), that there was a right to sue for damages for a breach of that constitutional right and that the law of tort would apply to, *inter alia*, the calculation of any damages awarded. The Opinion (summarised at paragraph 85 above) constitutes a substantial document of some complexity drafted by an experienced practitioner and constitutional lawyer.

116. However, the Court has identified a number of matters which would cast some doubt on the effectiveness of this proposed remedy.

117. In the first place, there is, in the Court's view, significant uncertainty as to the availability of the proposed constitutional remedy.

According to the Opinion, the constitutional right to a trial with reasonable expedition was recognised as early as 1986 (*State (O'Connell) v. Fawsitt*, cited above) and the right to damages for breach of a constitutional right was founded on the cases of *State (Quinn) v. Ryan* and *Meskill v. CIE*, the latter being decided in 1973. It is undisputed that no accused has ever requested damages for a breach of the constitutional right to reasonable expedition in criminal proceedings, either in a separate action or as alternative relief to a prohibition order. The proposed remedy has therefore been available in theory for almost 25 years but has never been invoked and recent judicial dicta (paragraphs 38, 41 and 62 above) would indicate that the availability of this remedy remains an open question.

The above-described situation is to be distinguished from the time which is accorded by this Court's jurisprudence to allow a new and specifically adopted remedy for delay to be tested (see the evolution of domestic remedies reflected in *Gama da Costa v. Portugal*, no. 12659/87, decision of 5 March 1990, Decisions and Reports (DR) 65, p. 136, *Paulino Tomás v. Portugal*, cited above, and *Martins Castro and Alves Correia de Castro v. Portugal*, cited above; in *Vernillo v. France* and *Mifsud v. France*, both cited above; in *Lutz v. France* (no. 1), no. 48215/99, 26 March 2002 and *Broca and Texier-Micault v. France*, nos. 27928/02 and 31694/02, 21 October 2003; and in *Berlin v. Luxembourg* (dec.), no. 44978/98, 7 May 2002 and *Leandro Da Silva v. Luxembourg*, cited above. See, more recently, *Grzinčič v. Slovenia*, no. 26867/02, § 108, ECHR 2007-V (extracts); and *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII). Moreover, in the recent case of *Vinčić and Others v. Serbia* (nos. 44698/06, et seq. § 51, 1 December 2009), the constitutional remedy (including a specific constitutional law provision allowing direct access to the Serbian

Constitutional Court for human rights complaints) was not considered effective until after the latter court had heard applications and delivered and published judgments on their merits.

118. This uncertainty is also illustrated by the Government's relatively brief submissions about this constitutional remedy for damages in the above-cited *Barry* case. It is also demonstrated by the relative complexity of the Opinion required to describe this remedy. The Government's response to the Venice Commission outlined at paragraph 70 above did not dispel this uncertainty: the Government relied on a prohibition action only as a remedy for delay in criminal proceedings (question No. 5); the remaining other case law, legal provisions and remedies cited in response No. 5 follow the heading "civil" (notably, the case of *O'Donoghue v. the Legal Aid Board*, the 2002 Act and the 2003 Act); and, while the Government answered positively Question no. 10 as to whether damages were available, their explanations immediately thereafter indicate that such damages concerned delay in civil proceedings only, which conclusion is confirmed by the responses to questions no. 11 and 12.

119. Moreover, two of the judges of the Supreme Court (Fennelly J. and Kearns J.) in the second prohibition action in the present case opined that the right to trial with reasonable expedition (Article 38(1) of the Constitution) and to trial within a reasonable period of time (Article 6 § 1 of the Convention) were indistinguishable. However, they went on to identify only one relevant period of delay (the 17-month delay of the High Court judge in approving the transcript of his judgment) and, further, found that that delay did not breach the right to reasonable expedition, a finding which was made *prior* to carrying out the balancing exercise inherent in the prohibition action. Geoghegan J. (paragraph 43 above) queried whether the State could be held liable for delay caused by a dearth of judges/budgetary restrictions even if that view might not accord with Convention principles. Having regard to the reasoning of this Court as regards the breach of the reasonable time requirement of Article 6 (notably, paragraphs 151-154 below), it considers that there remains substantial uncertainty as to whether the constitutional and Convention notions of blameworthy delay are indeed coextensive as the Government suggested.

120. The Court recognises the importance, underlined by the Government, of allowing remedies to develop in a constitutional system and, more importantly, in the particular situation of Ireland namely, a common law system with a written Constitution (*D. v. Ireland*, cited above). However, having regard to the principles outlined at paragraphs 111-114 above and in the absence of a specifically introduced remedy for delay, it remains the case that the development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case law (*Šoć v. Croatia*, no. 47863/99, 9 May 2003; and *Apostol v. Georgia*, cited above, § 38), even in the context of a common law inspired system with a written constitution

providing an implicit right to trial within a reasonable period of time (*Paroutis v. Cyprus*, no. 20435/02, § 27, 19 January 2006).

121. Secondly, the Court considers that it has not been demonstrated that this action could constitute a remedy as regards a judge's delay in delivering a judgment. While the Government suggested that the applicant should have tested this issue in a constitutional action for damages, they accepted in both their written and oral submissions to the Grand Chamber that there was likely to be an exception to the right to damages for a breach of a constitutional right when the delay was caused by the failure of an individual judge to deliver judgment within a reasonable time, given the important and established principle of judicial immunity. While this period of delay was considered relevant - although not blameworthy - in the second prohibition action, the High Court opined in a later judgment (*Joseph Kemmy v. Ireland and the Attorney General*) that the immunity of suit conferred by law on the judiciary applied for the benefit of the State in the context of an action against the State in damages for the wrongs of a judge. The 17-month period required to approve the High Court judgment and found blameworthy under Article 6 § 1, would not therefore appear to be addressed by this proposed constitutional remedy.

Since this Court holds a State responsible under the "reasonable time" aspect of Article 6 § 1 for delay by judges in delivering their judgments (see, for example, *Eckle v. Germany*, 15 July 1982, § 84, Series A no. 51; *O'Reilly v Ireland*, no. 21624/93, Commission's report of 22 February 1995, §§ 65-66; *Somjee v. the United Kingdom*, no. 42116/98, § 72, 15 October 2002; *Obasa v. the United Kingdom*, no. 50034/99, § 34, 16 January 2003; *O'Reilly and Others v. Ireland*, no. 54725/00, § 33, 29 July 2004; and *McMullen v. Ireland*, no. 42297/98, § 39, 29 July 2004), a remedy which does not apply to this form of delay cannot be considered an effective one within the meaning of Article 13 of the Convention. The Court is not therefore required to examine whether the benefit of that domestic judicial immunity would extend to other forms of judicial delay or, as the applicant argued, to delay caused by other officers of the court including the prosecution.

In this respect, the Court considers, contrary to the High Court in the *Kemmy* case, that there is a relevant distinction to be drawn between the personal immunity from suit of judges (also at issue in the *Ernst and Others v. Belgium* case relied on by the Government) and the liability of the State to compensate an individual for blameworthy delay in criminal proceedings attributable in whole or in part to judges.

122. Thirdly, the proposed constitutional remedy would form part of the High and Supreme Court body of civil litigation for which no specific and streamlined procedures have been developed. The proposed action would therefore amount to a legally and procedurally complex constitutional action for damages in the High Court, with a likely appeal to the Supreme Court which, at least at the outset, would present some legal novelty. The Court

has identified two relevant consequences of this, which would also appear to undermine the effectiveness of this remedy.

123. The first consequence concerns the speed of the remedial action. As noted above**,** particular attention should be paid to the speediness of the remedial action itself, it not being excluded that an otherwise adequate remedy could be undermined by its excessive duration (*Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222; *Paulino Tomás v. Portugal* (dec.), cited above; *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX; *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001; and *Scordino v. Italy (no. 1)* [GC], cited above, § 195).

In this respect, the Court notes that the Opinion considered the *O'Donoghue v. the Legal Aid Board* case to be the closest parallel to the present. It concerned a complaint about a 25-month delay in according a legal aid certificate: the case contesting this delay began in 1999 (based on the case number assigned by the Central Office of the High Court) and ended with a judgment of the High Court in 2004. The Court has also had regard to the information supplied by the Government to the Venice Commission in the above-described study on average relevant waiting times before Irish courts as of 2005: the delays were noted as 15 months before the High Court on (non-asylum) judicial review (although it is not clear from when this period began to run) and 14 months before the Supreme Court from the date of filing of the Certificate of Readiness, to which periods of time would have to be added the period of execution of any damages awarded. Moreover, the parties agreed before the Grand Chamber that the average waiting time before the Supreme Court on appeal is, at present, in the region of 32-34 months. The *Report of the Working Group on a Court of Appeal (*May 2009) outlined the average "waiting times" for a hearing before the Supreme Court as 22 months in 2006, 26 months in 2007 and 30 months in 2008. As to requesting damages as alternative relief in the prohibition actions, the second action may have taken less than 2 years but the first lasted approximately 6 years and six months. Given existing delays, notably before the Supreme Court, the Court could not base an assessment of effectiveness of the proposed remedy on an assumption that all actions for damages for delay could be accorded priority.

Accordingly, there is no evidence that the proposed remedy would have been speedier than ordinary civil suits and it thus could have lasted for several years through two jurisdictions (*Ilić v. Serbia*, no. 30132/04, 9 October 2007). Such a lapse of time would not be reconcilable with the requirement that the remedy for delay (even before a constitutional court) be sufficiently swift (see *Belinger v. Slovenia*, cited above; *Lukenda v. Slovenia*, no. 23032/02, § 65, ECHR 2005-X; and, later, *Vidas v. Croatia*, no. 40383/04, 3 July 2008).

124. The second consequence concerns the legal costs and expenses burden the remedial action could impose. The Court recalls that, where the organisation of a judicial system leads to delay, it may be reasonable to

require litigants to have recourse to a compensatory remedy but the rules on legal costs should avoid placing an excessive burden on litigants where the action is justified. Excessive costs could constitute an unreasonable restriction on access to such a remedy and thus a breach of the right of access to court (*Scordino v. Italy (no. 1)* [GC], cited above, § 201). The applicant maintained that he was of limited means, that he would not have been eligible for legal aid for a constitutional action for damages and that he would face a substantial costs risk should he be unsuccessful. The Government underlined, as they did to the Venice Commission, that an accused would likely be awarded his or her costs if successful.

The Court notes that the proposed action would be subject to the normal rules of litigation concerning legal representation, court fees and legal costs. While legal representation is not obligatory, as noted above, the remedy would be legally and procedurally complex. A judicial review action would not be covered by criminal legal aid, an action in damages would not appear to be covered by the Attorney General's *ex gratia* scheme and the applicant would have to obtain the agreement of the Civil Legal Aid Board that the remedy had merit before legal aid would be granted. The action would, at least initially, be novel and uncertain (paragraphs 117-121): should an applicant be unsuccessful, there was a risk of a costs order against him or her; and, even if damages were pursued as an alternative claim in the prohibition action, there would be separate costs attributable to the damages claim (notably, those of the Attorney General who would be a respondent) and thus any costs' exposure could be high. The Court considers that the Government have not demonstrated that, in such circumstances, an applicant would not be unduly hampered in taking an action for damages for a breach of the constitutional right to reasonable expedition (*Cocchiarella v. Italy* [GC], no. 64886/01, § 102, ECHR 2006-V).

**(c) The three remaining remedies relied on by the Government**

125. As to an application for damages under the 2003 Act, the Government accepted that this could be invoked only if the constitutional action for damages were unsuccessful. It would therefore appear that the most efficient manner of so applying under the 2003 Act would be as an alternative claim in any constitutional action: however, the latter action risks being lengthy (paragraph 123 above). In addition, the courts are excluded from the definition of "organs of the State" by Article 1 of the 2003 Act: any delay attributable to "the courts" would not therefore be actionable under that Act. Moreover, the 2003 Act did not enter into force until 31 December 2003 by which time the applicant's proceedings had been in being for almost 6 years and the 2003 Act is not retroactive (*Dublin City Council v Fennell* [2005] IESC 33).

126. An application for an early hearing date falls to be examined under the substance of Article 6 § 1 rather than under Article 13 of the Convention, for the reasons outlined at paragraph 152 below.

127. As to an application for a prohibition order by reason of prejudice and real risk of unfair trial due to delay, the Court recalls that the applicant did reasonably pursue, although unsuccessfully in the end, two prohibition actions based on delay. A prohibition action could, in principle, be an effective remedy for a complaint about delay causing potential unfairness at trial but, having regard to the additional balancing exercise inherent in prohibition proceedings (paragraph 110 above), it could not constitute an effective remedy to be exhausted as regards a complaint about unreasonable delay within the meaning of Article 6 § 1 of the Convention.

**(d) Conclusion**

128. In such circumstances, the Court considers that the Government have not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time.

129. Accordingly, the Court finds that there has been a violation of Article 13, in conjunction with Article 6 § 1 of the Convention, and consequently, dismisses the Government's objection as to the applicant's failure to exhaust domestic remedies.

## III ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

130. The applicant also complained that his criminal proceedings had not concluded within a reasonable period of time.

### A. The applicant's observations

131. He accepted that he was not aware of the charges until his arrest in January 1998. However, he made detailed submissions to the effect that he was, nonetheless, "substantially affected" by the plan for his prosecution as early as January 1984 from which date he was sought by the police. In his opinion, the Court should look behind *Eckle v. Germany* (15 July 1982, Series A no. 51), develop the approach begun in *Deweer v. Belgium* (27 February 1980, Series A no. 35) and accept that there were special circumstances why the length of the criminal proceedings began at the end of 1983/beginning of 1984 namely, the *mala fides* and conduct of the prosecution prior to his arrest. He argued, making detailed submissions in this respect, that he was deliberately not arrested until he had served his sentence in Northern Ireland and this was not to obtain admission evidence additional to the fingerprint evidence. During that time the original fingerprint evidence was lost. In such circumstances, it would not be acceptable for him to lose the protection of Article 6 § 1 prior to his arrest.

132. Even if the relevant period were to be calculated from January 1998, the length of those proceedings was unreasonable.

133. The applicant argued that the Government's suggestion, that the delay was due to his prohibition actions, was both legally and factually incorrect. Given the delay prior to his arrest (during which the original fingerprint evidence was lost) and thereafter, it was reasonable for him to have sought prohibition orders and he was not responsible for delays within those proceedings. Indeed, the failure to accommodate such legitimate litigation in a timely fashion was a fault attributable to the State.

In the first place, it was reasonable to await full disclosure and expert advice before issuing the first prohibition action. In particular, he needed to establish the state of the evidence against him before contemplating the first prohibition action. The Book of Evidence was delivered in July 1998 but, due to the lack of statutory regulation of disclosure in criminal proceedings, he had to pursue further disclosure. During that process he was informed that the original fingerprint evidence had been lost and additional disclosure was made in March 1999. It was only after this disclosure process that he could brief an expert to obtain advice as regards the loss of the original fingerprint evidence. He obtained that advice in October 1999 following which he applied for a prohibition order (1 November 1999).

Secondly, he could not be held responsible for delay during the first prohibition action. Following the Statement of Opposition (5 April 2000), he was entitled to seek discovery to usefully pursue those proceedings and he made his discovery request within 6 weeks. Since the State did not make voluntary discovery, he had to issue a motion. He did so within 2 months. Having obtained a return date (13 October 2000) both parties agreed to adjourn it to the first date thereafter (12 January 2001). Neither party appeared on that date due to a misunderstanding. The applicant then pursued the normal procedure and invited the prosecution, by several letters in 2001, to consent to re-entering the motion and, apart from one, his letters were unanswered. He was then obliged to issue a further motion to re-enter the proceedings in October 2001. It was only on the first return date (16 November 2001) that the prosecution agreed to make discovery, which was completed by affidavit on 8 February 2002.

134. The applicant also referred to the following additional delays during the first prohibition action which were attributable to the authorities: the delay (March 2002-July 2003) in fixing a High Court hearing date, there being nothing he could have done to expedite matters as the solution lay in the grant of additional judicial resources; the State was entirely responsible for the High Court judge's delay in approving the transcript of his judgment (July 2003-January 2005) and he could not have advanced this matter; and the delay in fixing a hearing date before the Supreme Court (January 2005-March 2006) which was relatively quick by that court's standards of the time and therefore offered no real chance of obtaining an earlier date.

135. Finally, and as regards what was at stake for the applicant, he was on conditional release with reporting restrictions for the duration of the criminal proceedings. Miscarriages of justice apart, there was no means whereby an acquitted accused could obtain compensation for this.

### B. The Government's submissions

136. The Government argued that Convention case-law indicated that the criminal proceedings began, for the purposes of Article 6 § 1, from the date the applicant was first "substantially affected" by the administration of justice namely, the date of his arrest in January 1998. For him to have been so affected prior to that date, he would, at the very least, have to show that he was aware that he was wanted by the police. The Government denied, in any event, the *mala fides* alleged by the applicant as regards the decision to delay his arrest: he was not arrested until January 1998 as he was unlawfully at large until 1986 and, when he was extradited back to Northern Ireland, the police awaited the end of his sentence in order to avail themselves of the powers of arrest and detention for which the OASA provided. They also denied his related suggestion that his admission during police questioning in January 1998 was an invention.

137. The Government mainly argued that the bulk of the delay in the criminal proceedings was caused by the prohibition actions and, notably, by the first one. Domestic law allowed an individual to institute such actions and they inevitably took time. It would be unfair and wrong in principle to hold the State responsible for delays caused by those actions as they were misconceived and unsuccessful and because the applicant did not pursue those actions diligently.

The applicant could have initiated the first prohibition action earlier. He had two grounds for that action. The first ground was the lapse of time between the relevant offences and his arrest but he could have initiated his action on this issue after the service of the Book of Evidence in July 1998: apart from responding to his disclosure requests, no additional evidence was served thereafter. His second ground was the loss of the original fingerprint evidence but that loss was disclosed on 15 January 1999. Even if he had to wait until March 1999 (when further disclosure was made) to issue the action, there was no reason to wait until November 1999 which was the eve of his trial. The expert opinion he had obtained was not relied upon by him.

The applicant was also responsible for delays during those actions and, in particular, he did not apply sufficient diligence to his discovery application in the first action. Indeed, discovery appears to have been no more than a device to delay because the material discovered was never considered. The applicant issued a letter seeking discovery six months after leave to apply for judicial review was obtained (on 15 May 2000). While neither party appeared on the hearing date (12 January 2001) due to a misunderstanding on both sides, the applicant then delayed 9 months before re-issuing the application for discovery (in October 2001). In the meantime, he wrote one letter seeking the prosecution's consent to re-entering the matter (May 2001). Discovery was completed by the prosecution in February 2002 and the prosecution, not the applicant, then re-entered the prohibition action. The applicant brought his cross-appeal in the first prohibition action at the last moment (2 February 2006). The Supreme Court commented that the

applicant could have, but did not, expedite the first prohibition action. The delay of the High Court judge in approving his judgment did not, of itself, constitute a violation of the reasonable time requirement and otherwise there was no delay in the first prohibition action attributable to the authorities.

138. There was no unreasonable delay in the second prohibition action, the matter being concluded in less than 2 years.

139. Finally, taking account of the complexity of the underlying criminal proceedings and of the associated prohibition actions, the criminal proceedings were disposed of within a reasonable period of time.

### C. The Court's assessment

140. The Court recalls its constant case law to the effect that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant (for example, *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006-VII).

141. The Court would clarify one preliminary point. In introducing his complaint under Article 6 § 1, the applicant mainly referred to the period preceding his arrest in January 1998. The application was introduced in 2006, approximately 8 years and six months after the arrest as regards events which had taken place over 22 years and six months previously. In such circumstances, the Court communicated, and the parties responded to, a question under Articles 6 § 1 concerning the reasonableness of the overall length of the criminal proceedings which subsequently terminated in 2008. This is the issue which now falls to be examined by the Grand Chamber.

142. The parties disputed when the criminal proceedings could be considered to have begun for the purposes of the "reasonable time" requirement of Article 6 § 1. The applicant maintained that it was, at the earliest, January 1984 (when he was sought by the police) or 1986, when the Irish police first became aware of his whereabouts following his re-arrest in the Netherlands. The Government argued that the length of the criminal proceedings was to be calculated from the date of his arrest when he became aware of the charges against him (January 1998).

143. The Court reiterates that in criminal matters, the "reasonable time" referred to in Article 6 § 1 begins to run as soon as a person is "charged". "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (*Deweer v. Belgium*, cited above, § 46; and *Eckle v. Germany*, cited above, § 73).

144. The Court considers the applicant to have been "substantially affected" on his arrest on 5 January 1998 when he accepts he was first

notified by the police of the charges against him concerning the kidnapping (for example, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, §§ 91-93, *Reports of Judgments and Decisions* 1998-II; *Etcheveste and Bidart v. France*, nos. 44797/98 and 44798/98, 21 March 2002, § 80; and *Malkov v. Estonia*, no. 31407/07, § 57, 4 February 2010). While police and prosecution activity prior to that date could, in principle, have some relevance to the fairness aspect of Article 6 § 1, the dismissal of the charges means that he can no longer claim to be a victim of any violation of his right to a fair trial (paragraph 78 above).

145. The proceedings ended on 28 June 2008, with the applicant's acquittal, and thus lasted over 10 years and 6 months.

146. While the criminal investigation would have been sensitive and somewhat complex, the Court does not consider that this explains the overall length of the criminal proceedings against the applicant.

147. As to the applicant's conduct, the Government mainly argued that his prohibition actions caused the delay and, notably, that those actions were ill-conceived and were neither issued nor pursued with diligence by him.

148. The Court recalls that applicants are entitled to make use of all relevant domestic procedural steps including applying to bring to an end prosecutions on grounds of delay but they should do so with diligence and must bear the consequences when such procedural applications result in delay (*Jordan v. the United Kingdom (no. 2)*, no. 49771/99, § 44, 10 December 2002; and *Boczoń v. Poland*, no. 66079/01, § 51, 30 January 2007).

The Court considers that it was reasonable for the applicant to have pursued the first prohibition action on the basis that the delay since the impugned events and the loss of the original fingerprint evidence rendered his trial unfair. Indeed, he was successful in obtaining a prohibition order from the High Court on the latter basis. It was also not unreasonable to issue those proceedings once satisfied as to the fullness of disclosure in the criminal proceedings (March 1999), during which process he was informed of the loss of the original fingerprint evidence, and once he had obtained advice as regards the feasibility of defending the charges with only the forensic report on that original evidence (contrary to the Government's submission, that advice was referred to in the domestic proceedings, see paragraph 30 above). However, the applicant has not convincingly explained why obtaining that expert advice took until October 1999.

It was also reasonable that the applicant would request a prohibition order as regards the delay after his arrest (namely, after 1 November 1999 and during his first prohibition action). When he initiated the second prohibition action in 2006, it was almost 8 years and six months after his arrest and almost 22 years and six months following the impugned events. The second prohibition action was based on the claim that the impugned delay also breached his right to a trial with reasonable expedition. The case law of the Supreme Court on the right to reasonable expedition and on the consequences of its breach as regards obtaining a prohibition order was at

that point developing (see, for example, the judgments of the Supreme Court in the second prohibition action referred to at paragraphs 36, 39 and 43 above and that of Denham J. in the *Devoy* case at paragraph 63 above). Furthermore, he had a prohibition order in his favour from the High Court until March 2006 (when the Supreme Court ruled against him) and it was not therefore unreasonable for him to begin his second prohibition action once he was apprised of the rejection of the first one.

The Court does not therefore agree with the Government that the prohibition actions were so ill-conceived, and their initiation so unreasonably delayed, that the duration of those actions, should be attributed to the applicant.

149. As to the applicant's diligence in the pursuit of the first prohibition action and, notably, his request for voluntary discovery with which the Government mainly took issue, he made this request weeks after the service of the Statement of Opposition. Both parties were responsible for the striking out of the motion on 12 January 2001. However, even if the applicant had written the letters he claimed to the prosecution, the Court, in common with Kearns J. (paragraph 42 above), does not consider justified his failure to re-enter the motion for eight months in the absence of the prosecution's consent. While the Government argued that the documents later discovered were not considered thereafter, the Court cannot conclude, without more, that discovery served no purpose when 93 documents were disclosed by the prosecution in February 2002 including the memorandum of 5 January 1998. While that discovery process was onerous for the prosecution (Kearns J. at paragraph 42 above), the Government have not detailed why it required 1 year and six months to complete. While the applicant had carriage of the prohibition action, the Government rightly noted that it was the prosecution which re-entered the action following the end of the discovery phase: however, this concerned a two-week period of delay only. There is no evidence of any delay attributable to the applicant in the second prohibition action.

150. While the Court therefore considers that the conduct of the applicant contributed somewhat to the delay, that does not explain the overall length of the proceedings against him.

151. As regards the conduct of the relevant authorities, the Court has noted the particular obligation of expedition on the State when criminal proceedings begin a significant period of time after the impugned events (see, for example, *Massey v. the United Kingdom*, no. 14399/02, § 27, 16 November 2004) and the following periods of delay have been assessed in light of that obligation:

(i) While the prosecution requested (on 11 March 2002) the re-entry of the first prohibition action, the first hearing date proposed was March 2003 and, following an adjournment due to the unavailability of a judge, it was not heard by the High Court until 11 July 2003 (16 months)

(ii) An *ex tempore* judgment was delivered by the High Court on 18 July 2003. While the prosecution quickly appealed (August 2003), it could not certify the appeal as ready until the transcript of the judgment was approved by the High Court judge which was done on 17 January 2005 (17 months).

(iii) The appeal was quickly certified as ready (January 2005) but the Supreme Court hearing was not held until 16 February 2006 (13 months). There is no evidence that the applicant's cross-appeal delayed in any way that Supreme Court hearing.

(iv) The High Court refused the second prohibition action in November 2006. The applicant appealed in February 2007 but the Supreme Court did not hear the appeal until January 2008 (11 months).

152. Three of these periods of delay concerned the fixing of hearing dates. While the Government argued that a request by the applicant for an early hearing date could have constituted an effective remedy within the meaning of Articles 13 and 35 § 1 of the Convention, the Court considers that any failure to apply for an expedited hearing date falls to be examined under the merits of Article 6 of the Convention (*Mitchell and Holloway v. the United Kingdom*, no. 44808/98, §§ 55-56, 17 December 2002).

As to this submission of the Government as well as their similar suggestions (not raised as separate remedies) that the applicant should have attempted to expedite the approval of the High Court transcript and the proceedings generally, the Court recalls that, in the *Mitchell and Holloway* case, the Court found that, even if a system allowed a party to apply to expedite proceedings, this did not exempt the courts from ensuring that the reasonable time requirement of Article 6 was complied with, "as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities". In *Bullen and Soneji v. the United Kingdom* (no. 3383/06, §§ 65-66, 8 January 2009) the Court found that even the applicant's agreement to a later hearing date did not remove the State's obligation to ensure expedition. Indeed, the Court has found that, even a principle of domestic law, that the parties to civil proceedings were required to take the initiative to progress the proceedings, did not dispense the State from the requirement to organise its system to deal with cases within a reasonable period of time. If a State allows proceedings to continue beyond a "reasonable time" without doing anything to advance them, it will be responsible for the resultant delay (*Foley v. the United Kingdom*, no. 39197/98, § 40, 22 October 2002; and *Price and Lowe v. the United Kingdom*, nos. 43185/98 and 43186/98, § 23, 29 July 2003). These principles apply *a fortiori* where the State is itself a party to the proceedings and responsible for their prosecution (*Crowther v. the United Kingdom*, no. 53741/00, § 29, 1 February 2005).

Accordingly, the Court considers that the existence of any possibility or right on the part of the applicant to take steps to expedite did not dispense the State from ensuring that the proceedings progressed reasonably quickly. Indeed, the Government themselves recalled that domestic courts have an

inherent jurisdiction to ensure that justice is done and have a constitutional duty to protect constitutional rights, including the right to reasonable expedition.

153. In any event, it is not demonstrated that an earlier hearing date before the Supreme Court could have been accorded to a case such as the applicant's, not least given that the above-impugned delays pending a Supreme Court hearing were equal to or less than the average waiting times for such hearings at the time ("Report of the Working Group on a Court of Appeal" May 2009, paragraphs 51-55 above). As to the delay in approving the transcript by the High Court judge, the Court does not consider it reasonable to suggest that the onus was on the applicant in this instance. While he had carriage of the overall prohibition action, it was the prosecution's appeal which was delayed pending the transcript's approval (*Richard Anderson v. the United Kingdom*, no. 19859/04, § 28, 9 February 2010) and, furthermore, during the relevant 17-month period he had a High Court order of prohibition in his favour on the basis of a real and serious risk of an unfair trial and it was unrealistic to suggest that he should apply to speed up a prosecution appeal against that order. In this respect, the Court would note that the 2002 Act, which entered into force in March 2005 and which placed the onus on the Court's Service to supervise the delivery of judgments, does not concern criminal proceedings.

154. In such circumstances, the Court finds that the Government have not provided any or any convincing explanations (*Barfuss v. the Czech Republic*, no. 35848/97, § 83, 31 July 2000) for the above-described delays attributable to the authorities in the prohibition actions, which added to the overall length of the criminal proceedings.

155. As to what was at stake for the applicant, it is noted that the charges against him were serious and that he bore the weight of such charges and of the potential sentences, for approximately 10 years and six months, during which time he had reporting obligations and was frequently required to attend in Dublin before the SCC (paragraph 15 above).

156. Having examined all the material and arguments submitted and having regard to its case-law on the subject, the Court considers that in the instant case the overall length of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

158. The applicant claimed 15,000 euros (EUR) (or such other sum as this Court would consider appropriate) in respect of non-pecuniary damage given the stress, inconvenience and restrictions experienced by him as well as his inability to plan for his future during the relevant period.

159. The Government contested this claim, arguing that the applicant had not detailed the extent of any distress or upset suffered by him. They submitted, in any event, that damages could only be awarded for delay which was attributable to the State and having regard to the delay for which the applicant was responsible. They considered the applicant' claim to be excessive and requested that the Court exercise its discretion as it deemed fit, in accordance with its case law and practice.

160. The Court considers that the applicant must have suffered some distress and frustration resulting from delays attributable to the authorities, which cannot sufficiently be compensated by the finding of a violation (see, for example, *Mitchell and Holloway v. the United Kingdom*, cited above, § 69). It has had regard to all the circumstances of the case, including those factors which must have exacerbated the impact on the applicant of the breaches of the Convention (including the serious nature of the outstanding charges) and those which served to ease that effect (the prohibition order of the High Court which was in place from July 2003 to March 2006 as well as the final dismissal of the charges against him in June 2008).

161. Ruling on an equitable basis, the Court awards him EUR 5,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant.

### B. Costs and expenses

162. The applicant detailed and claimed EUR 119,775.48 and EUR 12,463 (both inclusive of value added tax) as regards the costs and expenses of the domestic prohibition and Convention proceedings, respectively.

163. As to the domestic proceedings, the applicant submitted that he could have but did not apply for legal costs under the Attorney General's scheme for his prohibition actions. This was because that scheme is limited, *ad hoc* in nature and does not, in his opinion, provide equality of arms since the fee rate for representatives acting under the scheme is 20-25% of the normal fee rate of the Taxing Master of the High Court. While he was of limited means, the State applied for their costs to be paid by him in the event that the prohibition actions were unsuccessful, although no bill of those costs has been served on him. As to the Convention proceedings, he submitted that he was prepared to facilitate an examination of his files by an expert or to accept such figure as the Court would consider appropriate.

164. The Government contested the claims. The purpose of the prohibition actions was different from that of the present application. Since he did not apply for costs under the Attorney General's scheme, he could not

claim that all of the costs of those proceedings were necessarily incurred. They maintained that the costs claimed for the present application were unreasonable and they suggested that this Court apply the principles flowing from its case law.

165. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred (in the case of domestic proceedings, in seeking redress for the violations of the Convention found or preventing a violation occurring) and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, for example, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II; S*mith and Grady v. the United Kingdom (just satisfaction)*, nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 182, ECHR 2005-X).

166. As to the costs of the prohibition actions and whether or not those actions "sought redress" for the violations established, the Court notes that the applicant failed to apply for costs for legal representation for those actions under the Attorney General's scheme. He accepts that prohibition actions were covered by that scheme and it is noted that costs are payable in accordance with the Criminal Justice (Legal Aid) Regulations 1965-2000. However, since he did not apply, he has not substantiated that costs would have been refused or that the costs payable would have been so low as to require a supplementary award from this Court. The applicant did not suggest that any costs order in those actions in favour of the State has been pursued against him so that it is unnecessary to make any provision under Article 41 in that respect (*Steel and Morris v. the United Kingdom*, no. 68416/01, § 105, ECHR 2005-II). The Court does not therefore find it demonstrated that the domestic costs and expenses claimed were necessarily incurred and it makes no award in this respect.

167. As to the costs of the present application, the Court notes that**,** even if the substantive issues (duration of criminal proceedings and the availability of an effective domestic remedy) were not particularly novel Convention questions, there was an added round of observations (concerning the submission of the Opinion) before the Chamber as well as further written and oral submissions before the Grand Chamber. While the above-claimed Convention costs related to the proceedings before the Chamber only and while the applicant did not make any specific claim for, or vouch additional work before, the Grand Chamber, the Court's own files attest to the legal work conducted on the applicant's behalf through the written and oral phases of the Grand Chamber proceedings. The Court considers it reasonable to award the sum of EUR 10,000 plus any tax that may be chargeable to the applicant in respect of the costs of the Convention proceedings.

### C. Default interest

168. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Decides* by a majority to join to the merits of the complaints under Article 13 the Government's objection as to the exhaustion of domestic remedies;

2. *Declares* by a majority the complaints concerning the excessive length of the proceedings and the lack of a remedy in that respect admissible and the remainder of the application inadmissible;

3. *Holds* by twelve votes to five that there has been a violation of Article 13 of the Convention and, consequently, *dismisses* the Government's objection as to the exhaustion of domestic remedies;

4. *Holds* by twelve votes to five that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* by twelve votes to five,
   (a) that the respondent State is to pay the applicant, within three months, EUR 5,500 (five thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable;
   (b) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant; and
   (c) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 September 2010.

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|---|---|
| Vincent Berger<br>Jurisconsult | Christos Rozakis<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of judges Gyulumyan, Ziemele, Bianku and Power;

(b) dissenting opinion of Judge Lopez-Guerra.

C.L.R.
V.B.

# JOINT DISSENTING OPINION OF JUDGES GYULUMYAN, ZIEMELE, BIANKU AND POWER

1. We do not share the majority's view in this case. We make no observation on the merits of this claim. In our view, this case is inadmissible for non-exhaustion of domestic remedies and it brings into sharp focus the fundamental importance of the principle of subsidiarity enshrined in Article 35 § 1 of the Convention.

2. It is not contested by the parties that there is, in Ireland, a long established Constitutional right to trial within a reasonable time.[1] Equally, it is not contested that there is a considerable body of domestic case law that demonstrates that damages for a breach of a Constitutional right are readily available (see § 85 of the Judgment).[2] In such circumstances, we find the majority's approach to be inconsistent with what the Court has previously and repeatedly held, namely, that "as regards legal systems which provide constitutional protection for fundamental human rights, it is incumbent on the aggrieved individual to test the extent of that protection" (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006; *Vinčić and Others v. Serbia*, nos. 44698/06, et seq., § 51, 1 December 2009; and *D. v. Ireland* (dec.), no. 26499/02, § 85, 28 June 2006).

3. The applicant does not deny that he has never asked the Irish courts to compensate him by awarding damages for the alleged breach of his Constitutional and Convention right to trial within a reasonable time. The only 'remedy' he claimed, domestically, was 'a right to no trial'. When he failed on two occasions to obtain a prohibition order, he then came before the Strasbourg Court with an altogether different and far less radical claim – a claim for damages – even though, in Ireland, damages are a readily available and widely recognised means of redress for an established breach of Constitutional rights. In effect, the applicant has brought one claim before the national courts (prohibition of trial) and a different claim before Strasbourg (damages). The consistent approach of this Court as articulated and reiterated by the Grand Chamber in *Selmouni v. France* ([GC], no. 25803/94, § 74, ECHR 1999-V), has been that the complaint which an applicant intends to make subsequently to this Court must first have been made to the appropriate domestic body.

4. In *Kudła v. Poland* ([GC], no. 30210/96, § 152, ECHR 2000-XI) the Court confirmed that the purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, "is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court". Relying on *Kudła* the majority begins its analysis by concluding that "it follows" that less than a full application of the guarantees of Article 13 would undermine the operation of the subsidiary character of the Court (see § 112 of the

[1] See Article 38.1 of the Constitution.
[2] See, in particular, the list of cases cited at footnote 6 of the Judgment.

Judgment). The starting point of its analysis appears to be, with respect, a conclusion concerning the less than full application of the guarantees of Article 13. How can this Court assess whether there has been 'a less than full application' of such guarantees if the national courts have not been asked by the applicant to apply them? What the majority regards as "the question to be determined" in this case is "whether the way in which domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention" (see §114); but no opportunity for the interpretation and application of the domestic law of remedies for 'length of proceedings' has arisen because the applicant sought only one outcome – prohibition of trial. Domestic courts are not obliged to order prohibition of trial each time a complaint concerning 'unreasonable time' is established. Far less radical remedies, such as, damages are acceptable. Had the majority started its analysis with the relevant test, namely, whether the applicant had done everything that could reasonably be expected of him to exhaust domestic remedies (see *Aksoy v. Turkey*, 18 December 1996, § 54, *Reports of Judgments and Decisions* 1996-VI*; Isayeva v. Russia*, no. 57950/00, § 153, 24 February 2005; and *D. v Ireland* (cited above, § 84)) it would, inevitably, have concluded that the domestic courts were never given an opportunity of ensuring "a full application of the guarantees of Article 13".

5. Our fundamental disagreement with the approach of the majority is based on its failure to respect and give meaningful effect to the core Convention principle of subsidiarity. Subsidiarity requires that before this Court proceeds to award damages for any violation of the Convention, the national authorities "*must be given an opportunity to put matters right through their own legal system"* (see *T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999). For this Court to deprive the Irish courts of the opportunity to determine the applicant's claim for damages is not just failing to respect subsidiarity; it is assuming the functions of a first instance court. Allowing the national courts to be the first to hear and determine a claim is a fundamental aspect of the principle that the Convention's 'machinery of protection' is subsidiary to theirs in the safeguarding of human rights (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV). Not allowing them so to do, is what is liable to weaken the workings of the "machinery' of human rights protection (see *Kudła* § 155) not least because a claim for damages brought before this Court is likely to take much longer.

6. Where non-exhaustion is raised, the onus is upon a respondent State to show that a remedy is available, domestically. The State's submission on the 'damages' remedy is, admittedly, more detailed in this case than in *Barry v Ireland* (no. 18273/04, 15 December 2005). Nevertheless, having raised non-exhaustion, the only standard to be met is that of a "reasonable prospect of success"– not certainty of a favourable outcome (see *Pellegriti v. Italy* (dec.), no. 77363/01, 26 May 2005). There is before this Court independent expert opinion from a senior practitioner and academic to the effect that a

Constitutional remedy is not just probably but "almost certainly" available in Ireland. The applicant has produced no evidence at all to contradict or cast doubt upon this opinion. In a case against the United Kingdom, it was held that even an *unfavourable* counsel's opinion on the prospect of success was insufficient to justify a failure to exhaust domestic remedies (see *K., F. and P. v. the United Kingdom* (dec.), no. 10789/84, 11 October 1984). Why that same obligation to exhaust was not required in this case, where the expert opinion is highly favourable, is difficult to fathom.

7. Having regard to the expert opinion evidence adduced and to the domestic courts' readiness to award damages for an established breach of Constitutional rights we are satisfied that the test of 'a reasonable prospect of success' has been met. The mere fact that damages for an alleged breach of one specific aspect (reasonable time) of one Constitutional right (fair trial) have not been claimed by any litigant is not sufficient to displace the fact that damages are available, domestically, for breaches of Constitutional rights, including, in circumstances where they have not previously been awarded for want of being sought.[3]

8. The rationale upon which the majority considers that an action in damages for breach of Constitutional rights is not effective is based, essentially, upon three grounds:- (i) uncertainty; (ii) 'judicial immunity'; and (iii) 'duration' and 'costs'.

*The 'Uncertainty' Argument*

9. The majority finds that an action in damages for the alleged breach of the applicant's Constitutional/Convention right is 'uncertain' (see § 117 of the Judgment). Its approach, in this case, stands not only in contrast to the weight of the domestic courts' jurisprudence but also in contradiction of this Court's own case law. The potential and importance of the Constitutional remedy in a common law system has already been accepted by this Court. In *D. v Ireland* (cited above) the unanimous Court was unable to dismiss as ineffective the Constitutional remedy which it considered was available "in principle" to the applicant. It took the view that, having regard to the potential and importance of that remedy in a common law system, it was reasonable to expect the applicant in *D.* (who had been pregnant and was, allegedly, obliged to travel abroad for an abortion) to have taken certain preliminary steps before the domestic courts towards resolving the disputed uncertainties. By contrast, the Court in this case relieves the applicant of the obligation to have taken any such preliminary steps even though the minimum that might have been required of him was the inclusion into his prohibition pleadings of an alternative claim in damages. This, the majority finds, he could not reasonably have been expected to do. If, in reality, there is any doubt about the availability of damages for the alleged breach of the

[3] *Kennedy v. Ireland* [1987] IR 587; *Sinnott v. Minister for Education* [2001] 2IR 545; *Gulyas v. Minister for Justice, Equality and Law Reform* [2001] 3IR 216; *O'Donoghue v. Legal Aid Board* [2004] IEHC 413; *Gray v. Minister for Justice* [2007] IEHC 52; and *Herrity v. Associated Newspapers [Ireland] Ltd* [2008] IEHC 249

applicant's right to an expeditious trial then, in our view and in line with this Court's own case law, any such doubt should have been resolved by him, domestically, before asking this Court to rule upon the issue.

10. In support of its stance on the "uncertainty" of the Constitutional remedy, the majority refers to answers recorded in a questionnaire compiled by the Venice Commission in preparation of its Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings (see § 70 of the Judgment). It strikes us as rather odd that the Judgment fails, entirely, to have any regard to the findings in the actual Report itself. In the light of its own investigations, the Venice Commission concluded that both preventative and compensatory damages *are* available in Ireland. Further, it found that, in respect of the administrative proceedings, both acceleratory and compensatory remedies are available.[4] The Commission's findings would indicate strongly that the test for "effectiveness" as set out in the settled case law of this Court has been met. *"Remedies available to a litigant at domestic level for raising a complaint about length of proceedings are "effective" ... if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred* (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V; *Sürmeli v. Germany* [GC], no. 75529/01, § 65, ECHR 2006-VII; and *Kudła v. Poland*, cited above, §§ 157 to 159).

11. Perhaps the majority's principal ground for 'uncertainty' of the remedy is the fact that no domestic case law has been opened to show that the Constitutional remedy is available in respect of a specific complaint concerning 'length of proceedings'. It cites a number of cases in which this Court has found a Constitutional remedy not to be effective until after 'delay applications' had been heard and judgments on their merits delivered (see § 117). All of the cases cited are distinguishable on their facts and none of them involved a legal system operating within the common law. Thus, their authoritative force for this case is weak. For example, unlike the applicants in *Šoć v. Croatia* (no. 47863/99, 9 May 2003 cited at § 120 of the judgment[5]) or in *Vinčić and Others v. Serbia* (cited above) the applicant in this case was not obliged to wait until a "new" Constitutional remedy had been introduced and its effectiveness 'tested' by reference to decided cases after a certain period of time. In contrast to the newly introduced remedies in the judgments cited by the majority, there is nothing 'new' about the Constitutional remedy in Ireland and there was nothing to prevent the

[4] See paragraph 62 of the Venice Commission's Report where Ireland is listed as one the countries where both general and specific remedies are available. Its finding in this regard is not limited to civil proceedings. See also paragraph 72 of the Report where Ireland is identified as one of the countries where acceleratory remedies co-exist with compensatory ones for administrative proceedings. The 'proceedings' in respect of which the majority found delays that breached the 'reasonable time' requirement were, in fact, administrative proceedings (judicial review) which the applicant instituted in an attempt to prohibit his trial.

[5] *Paroutis v Cyprus*, no. 20435/02, 19 January 2006 is also cited in § 120 as authority for the majority's position "*even in the context of a common law inspired system with a written constitution'*. This case is readily distinguishable in many respects not least by the absence of settled jurisprudence therein showing an established entitlement to damages against the State for breach of Constitutional rights. By contrast, such an entitlement has been amply demonstrated in the instant case and is supported by independent expert opinion which is unchallenged by alternative expert evidence.

applicant from testing its effectiveness in respect of his complaint at any time.

12. The majority purports to recognise the importance of allowing remedies to develop within a common law system with a written Constitution yet it censures the respondent State for not having "*a specifically introduced remedy for delay*" (see § 120 of the Judgment), presumably, such as, one that might be required of a State operating within a civil law system. If there is nothing to prevent applicants from seeking damages from the domestic courts now, we fail to see why a specifically introduced remedy permitting them so to do should be required. Such a move towards the 'micro management' of a domestic legal system operating within the common law is a worrying erosion of the fundamental principle of subsidiarity and represents a development that diminishes rather than enhances the protection of human rights.

13. The reality is that case law cannot be adduced to show that a remedy is effective if cases testing its effectiveness have never been taken.[6] The domestic courts went to some length to point out that they could not deal with a claim that was not before them. Fennelly J. specifically referred to the fact that the applicant was not seeking damages and that, as with other applicants in a similar position, he had sought only the remedy of prohibition of trial. Given the important public policy considerations arising in an application for the prohibition of a trial on serious criminal charges, it goes without saying that the relevant principles and the appropriate legal test are not the same as those in issue when considering a claim for damages. An entirely different case would have been presented to the domestic courts had the applicant sought damages either instead of or as an alternative to prohibition. Fennelly J. stressed that it was not possible for the Supreme Court, having an appellate function only, to pronounce in the abstract on whether damages would be available if they were claimed. He explained, expressly, that *"any such claim would have to be made in the High Court in the first instance*". Such a claim would be determined, *per* Kearns J. (as he then was) following *"full and careful consideration in an appropriate case*". It is difficult to envisage what more can be expected of domestic courts other than to give careful consideration to a claim for damages for breach of the right to an expeditious trial *if and when such a claim is made*. Short of inducing claimants to sue for 'reasonable time' violations, it is difficult to see how cases can be adduced in respect of claims that have not been made.

14. The majority now acknowledges, implicitly, that this Court's interpretation of comments made by the Supreme Court in *Barry v. Ireland*

[6] To the extent that any domestic case law is available, it is entirely against the majority's finding that an action in damages would not be 'effective'. The High Court in *Kelly v Legal Aid Board* referred specifically to this Court's jurisprudence on 'reasonable time' when awarding the plaintiff damages for a two year delay in obtaining legal aid in order to institute proceedings. To the extent that *Kelly* is the only case where damages for delay were claimed and awarded, there is no reason to believe that such a remedy would not be effective if sought by other litigants.

was not correct (see §§ 23, 53 in *Barry* and § 110 of this Judgment). It accepts that the comments were not relevant to the assessment of the effectiveness of the constitutional remedy in damages in that they were made in the context of a prohibition action, the legal test and relevant principles of which, it now accepts, are "substantively different" from an action for damages for culpable delay. That acceptance is welcome but the Court's misinterpretation of the comments in question would appear to have been rather central to its findings in that case (see § 53 of *Barry*).

*The 'Judicial Immunity' Argument*

15. The majority's second ground for rejecting the 'damages' remedy is the State's failure to demonstrate that damages could be obtained in respect of delay in the handing down of a judgment. It relies, exclusively, upon selected extracts from a High Court decision[7] in which that Court found against the plaintiff who had sued the State for an alleged a violation of his right to a fair trial. Having found that there had been no breach of the right to a fair trial because the 'unfairness' had been remedied on appeal, the Judge observed that the immunity which the law confers on the judiciary *in such situations* applies also to the State when an attempt is made to make it directly liable for the wrong of the judge *in such circumstances*. Not to extend the immunity to the State "*in the present circumstances*" would represent an indirect and collateral assault on judicial immunity.

16. The majority found that "contrary" to the High Court in the *Kemmy* case there is a relevant distinction to be drawn between personal immunity from suit of judges and the liability of the State to compensate for delay attributable in whole or in part to judges (see § 121 of the Judgment). Firstly, it should be clarified that the case in question had nothing to do with the issue of State liability for judicial delay. McMahon J. expressly stated that there had been no allegation of delay and that "*absent this*" the State could not have been faulted. Furthermore, a careful reading of the Judgment illustrates that the 'distinction' emphasised by the majority was not, in fact, lost on the High Court Judge. The case before him concerned the question of State immunity for alleged unfairness of trial caused by a judicial error. It was not about State liability for delays in the legal system. In general, such delays tend to occur where a State fails to erect the proper "scaffolding" to support the efficient administration of justice. Such scaffolding may be vulnerable if a State fails, for example, to provide a sufficient number of judges or to have in place an efficient case management system. In *Kemmy* the High Court Judge specifically distinguished between liability for judicial error (as in the case before him) and liability for what one might call the system's failure. The extracts cited by the majority (at § 64 of the Judgment) indicate the omission of certain paragraphs. In the paragraphs omitted, the trial judge had expressly stated that "*the State may be liable for failing to*

[7] *Kemmy v. Ireland and the Attorney General* [2009] IEHC 178.

*erect the appropriate scaffolding*" thus leaving open the question for determination in an appropriate case.

17. Since the Irish courts have never been asked to determine a claim for damages for unreasonable length of proceedings, they have never had an occasion to develop domestic law on State liability for delays, including, delays in the delivery of judgments. Nevertheless, from a case which had nothing to do with this issue, the majority has extrapolated that respect for the principle of judicial immunity – a fundamental aspect of judicial independence – would stand as an obstacle in a claim for damages against the State for unreasonable delay within the legal system. In so doing, it is interfering with the natural evolution of domestic law in that it is one step ahead of the domestic judges who cannot determine such an issue until it arises in proceedings before them. The underlying philosophy of the doctrine of exhaustion is to ensure that domestic courts undertake the primary obligation of protecting Convention rights. This Court's function is limited to supervising the domestic law's compliance with the Convention's requirements. That allocation of responsibilities must be respected if the machinery of human rights protection is to function effectively. The proper balance between the national and international legal orders is disturbed when this Court anticipates and assumes what the domestic courts might do in cases that have not yet come before them and when it fails to direct applicants back to the domestic courts to test any remedy that offers 'a reasonable prospect of success'.

*The 'Duration' and 'Costs' Argument*

18. Speculation as to the 'duration' and 'costs' of a claim in damages has led the majority to conclude that the applicant was not obliged to exhaust such a remedy. These are rather novel grounds for waiving the obligation to exhaust. As regards duration, it is only where the remedial procedure itself has been found to take too long (10 years in *Vaney v. France*, no. 53946/00, 30 November 2004) that the Court has exempted the individual from the obligation to exhaust. There has been no such finding in this case because there has been no attempt to exhaust. Where an applicant has never tested a remedy for which there is, clearly, 'a reasonable prospect of success', it is inappropriate for this Court to relieve him of the obligation so to do on no more than a speculative assumption that it might take too long.

19. Reliance upon the 'costs' argument is also rather new. An appeal within any legal system almost always costs money but that has never led the Court to waive the obligation to exhaust for applicants who fail to appeal nor to regard an appeal as ineffective for the purposes of Article 13. The Court has already held that lack of financial means does not absolve an applicant from making some attempt to take legal proceedings (*Cyprus v. Turkey* [GC], no. 25781/94, §§ 352 and 353, ECHR 2001-IV). In *D. v Ireland* (cited above, § 100) the Court expressly rejected such an argument which had been raised by the applicant and it found that "*the 'costs' risk*

*does not, as a matter of principle, constitute a reason to classify a constitutional remedy as generally ineffective".*

20. In our view, this Judgment is both inconsistent with settled case law on exhaustion and unconvincing in its reasoning on the ineffectiveness of the 'damages' remedy in Irish law. Furthermore, it stands as an invitation to all who fail to have their criminal trials prohibited in Ireland to simply by-pass the domestic courts and to come directly to Strasbourg for damages even though such applicants could readily include, within their domestic pleadings, an additional and/or an alternative claim for compensation in the event that prohibition is refused. It appears impervious to the express statements of the Supreme Court that careful consideration would be given to a claim for damages for breach of the right to an expeditious trial if and when such a claim is made.

# DISSENTING OPINION OF JUDGE LÓPEZ GUERRA

I disagree with the majority's opinion. In my view, it does not reflect the meaning and importance of the principle of subsidiarity in the procedures before this Court.

General respect for human rights can be guaranteed only if they are effectively protected at the internal State level. In that regard, the role of the national authorities, and especially that of the domestic courts, is decisive and justifies the provision in Article 35 § 1 of the Convention to the effect that the Court "will only deal with the matter after all domestic remedies have been exhausted". Any tendency of this Court to substitute itself for the national courts in this role will have undesirable effects, negatively affecting the national courts' position as the common and natural defenders of human rights.

Certainly, one of the rights enshrined in Article 6 § 1 of the Convention is the right to trial without undue delay, and the Court has often stressed that effective remedies must be provided against excessively lengthy proceedings. These remedies can either be preventive (to avoid the undue prolongation of proceedings) or compensatory (to seek redress, if possible, for the consequences of undue delay).

In this case I have strong doubts as to whether the applicant exhausted all available compensatory remedies. He did indeed avail himself of the preventive remedies at his disposal (asking twice for a prohibition of the trial, based on the excessive length of the proceedings). However, he did not apply to an Irish court for any compensatory remedy by which he might have been awarded damages for the undue length of the criminal proceedings. In that regard, the Irish courts did not have (or were not given) the opportunity to render a judgment in this matter concerning possible financial compensation for the undue delay.

The present judgment deals with the question whether a reasonably available remedy existed in Irish law allowing for the possible award of compensation, and it reached the conclusion that such a remedy was not available. I am not convinced that such a remedy did not (or does not) exist. The applicant relies on the Court's *Barry* judgment to conclude that there was no effective domestic compensatory remedy for the alleged unreasonable length of the criminal proceedings. Whilst I believe that upholding the Court's own precedents is a guarantee of legal certainty, as well as a measure to ensure consistency in the Court's task of protecting the human rights set forth in the Convention, in my view the present case has certain peculiarities that distinguish it from *Barry*.

I do not doubt that the principle *iura novit curia* is also applicable, in general terms, to the proceedings before this Court. But, given the peculiar nature of such proceedings, which concern matters affecting all areas of law in a wide array of legal orders, the parties play an important role in providing information on the law in force in the internal legal order which may be relevant in their cases. Such collaboration aids the Court in its

decisions by providing it with better knowledge and understanding of the particularities of each system.

In the present case, I believe that the relevance of the information provided should have been taken into account. In *Barry*, as the Court recognises in the present judgment (paragraph 120), the Irish Government's submissions concerning the existence of a constitutional remedy for damages were "relatively brief". By contrast, in the present case, the Government representation has extensively discharged its onus to justify its affirmation of the existence of such a remedy, accordingly providing a full-fledged Opinion by a renowned specialist on Irish constitutional law. In my view, the reasoning and arguments contained in that Opinion provide sufficient evidence of the existence of a constitutional action for damages in the Irish legal order, a remedy which should have been used by the applicant before turning to this Court.

The information presented by the Government, backed by extensive citations of Irish case-law, demonstrates that: (1) Article 38, paragraph 1, of the Irish Constitution, which establishes that "[n]o person shall be tried on any criminal charge save in due course of law", likewise protects the right to an early trial; (2) it is a general principle of Irish law that the rights recognised in the Irish Constitution are protected against violation by legal actions; (3) according to the Opinion, in the Irish constitutional order there is now relatively well-developed case-law dealing with awards of damages for breaches of constitutional rights; (4) as a consequence, "it is plain therefore, that such an accused can sue the State (or its agents) for damages where his constitutional right to an early trial has been violated" (see paragraph 29 of the Opinion of Senior Counsel).

In my opinion, the argument that to date there has been no previous case in which damages were awarded for a violation of the right to an early trial does not mean that there is no remedy available for damages in this case. The Irish Government explained that the redress usually sought for this type of violation was the prohibition of trial, not damages. In fact no judgment denying damages for the violation of that right was provided as evidence of the impossibility of seeking damages by way of redress for undue delay.

In sum, it is my view that, on this occasion, the Irish Government have provided enough legal and case-law information for it to be reasonably concluded that a remedy for this situation exists in the Irish legal order – a remedy which the applicant should have used before bringing his claim to this Court. As a result, I would have preferred the Court to apply Article 35 § 1 of the Convention and declare the application inadmissible for non-exhaustion of domestic remedies. In addition, from the allegations of the parties (paragraph 73) it appears that the six-year limitation period in which to file a claim for damages for an alleged breach of constitutional rights had not yet expired, so this possibility still remained open to the applicant.