THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 180
[2019/207]

Donnelly J
Ní Raifeartaigh J.
Power J.

BETWEEN/

MICHAEL O'CALLAGHAN

APPELLANT

- AND-

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 6th day of July, 2020

The nature of the case

1. This is an appeal against a decision of the High Court (Faherty J.) declining to award damages to the plaintiff in respect of an alleged breach of the right to trial with reasonable expedition and also declining to award damages in respect of a claim of miscarriage of justice. The High Court judgment ([2019] IEHC 782) was delivered on 14th March, 2019, and the order was perfected on 11th April, 2019. The plaintiff brought these proceedings after his criminal conviction was quashed on appeal on the ground that there was insufficient evidence for the case to go to the jury. No retrial was directed. The plaintiff had been in custody while awaiting the outcome of his case. There was undoubtedly some delay in the progressing of his appeal as a result of a backlog of cases in the appellate system at that time; that problem was subsequently addressed by the establishment of this Court and the appointment of additional judges. The plaintiff claims that he is entitled to damages by

reason of the particular combination of circumstances said by him to arise in his case; namely (a) that he was wrongfully convicted; (b) that no retrial was ordered; (c) that he was in custody pending trial and appeal; and (d) that there was unreasonable delay in progressing his case. He advances the case on a twin-track basis, involving a claim of "miscarriage of justice" and a claim of breach of the right to trial with reasonable expedition.

Part 1: Background to the plaintiff's claim; the High Court judgment; and the submissions of the parties

Background facts

2. The plaintiff was prosecuted in Cork Circuit Court in respect of offences arising out of the armed robbery of a post office in Cork city in March 2009. He was arrested on the 14th April, 2009, and detained, charged and remanded in custody within that month. A further charge was brought against him in June 2009. The book of evidence was served in June 2009 and his trial took place in February 2011. This was a period of approximately one year, nine months, three weeks and four days from arrest to trial.

3. There were three principal strands of evidence against the plaintiff:

(a) The statement of a Mr. B.G. who had told the Gardaí that he saw one of the raiders take off his balaclava and throw it in the canal. Upon application to the trial judge, his statement was admitted under s.16 of the Criminal Justice Act, 2006.

(b) The plaintiff's response to Garda interviewing, in particular his failure to tell Gardaí that he had visited the post office earlier on the date of the robbery.

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

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

5. As the plaintiff's claim in respect of delay by the State is primarily based on events after his conviction, the following dates are of significance. On 18th February, 2011, the plaintiff filed a notice of appeal against his conviction. He filed his grounds of appeal on 24th February, 2011. The Court of Criminal Appeal requisitioned the trial transcript on 9th March, 2011, it was received on 30th March, 2011, approved by the trial judge on 7th April, 2011, and furnished to the plaintiff's solicitors on 26th April, 2011. On 4th July, 2011, the plaintiff's solicitors lodged a motion to amend the grounds of appeal but, because this came on too late to appear in the Court's management list, it was adjourned to the case management list of 28th November, 2011. On 28th November, 2011, the plaintiff amended his grounds of appeal by consent, with the leave of the Court of Criminal Appeal. The plaintiff's written submissions for the appeal were filed on the same date. I pause to note that the plaintiff's appeal was therefore not ready for hearing until those grounds of appeal had been amended on 28th November, 2011.

6. The appeal then appeared in the list to fix dates on 5th December, 2011. It is not in dispute that there was, at that time, a backlog of cases in Supreme Court which had a knock-on effect on the Court of Criminal Appeal, and that there were fewer trial dates available than there should have been. This is discussed further below. The progress of the plaintiff's case in the various lists to fix dates was as follows:

- On 5th December, 2011, his case was 14th in the list of conviction appeals, of which three appeals got hearing dates.

- On 12th March, 2012, it was 11th in the list but no case received a hearing date on that occasion.
- On 14th May, 2012, it was still 11th in the list of conviction appeals, of which one was given a hearing date.
- On 16th July, 2012, it was 10th in the list, but no case on the list got a hearing date.
- On 17th December, 2012, it was 6th in the list of conviction appeals, of which four received dates for hearing.
- On 11th March, 2013, it was 5th in the list and it secured a hearing date for 18th April, 2013.

7. The appeal was duly heard on 18th April, 2013, and judgment was reserved and then delivered on 31st July, 2013. It was determined by the Court of Criminal Appeal that the conviction should be quashed on the ground that the case should not have been allowed to go to the jury. The judgement of the Court was delivered by Murray J. who said that the Court was satisfied that there was no evidence on which a jury properly directed could rationally find beyond reasonable doubt that it was not one of the other two persons whose DNA had been found on the balaclava, rather than the plaintiff, who was wearing the balaclava at the time of the robbery ("the DNA evidence point"). The remaining evidence was not a basis upon which a jury could link or identify the plaintiff as a person who committed the offence and insofar as any inferences could be drawn from any of that evidence, it was too tenuous a basis for concluding that the applicant was one of the persons who committed the offence. A jury properly directed could not conclude beyond reasonable doubt that the plaintiff, rather than any of the other unnamed persons who had been in contact with the balaclava material, had committed the offence. The Court was of the view that the case should not have been allowed to go to the jury on the basis of the evidence and the verdict should be considered unsafe and set aside. No retrial was directed.

8. At the time of his arrest, other proceedings were pending against the plaintiff in an unrelated matter in respect of which he ultimately served a sentence. He was sentenced to three years on this other matter on 19th June, 2009, which was affirmed on appeal but backdated to 7th May, 2009. This other sentence expired on 7th August, 2011. Thus, there was an overlap of five months between the period he spent in custody in relation to the unrelated matter and the period spent in custody by reason of the conviction and sentence which these proceedings concern. By the time of his release by the Court of Criminal Appeal on 31st July, 2013, the plaintiff had spent twenty-three months, three weeks and three days in custody in respect of the conviction, including the five-month overlap referred to; or approximately eighteen months if one subtracts the overlap period.

9. The plaintiff issued proceedings on 27th February, 2015, seeking damages under four categories:

1) Damages for miscarriage of justice;
2) Damages for breach of constitutional rights;
3) Damages pursuant to s.3(2) of the European Convention on Human Rights Act, 2003 (hereinafter "ECHR Act, 2003"); and
4) Punitive and/or aggravated and/or exemplary damages.

10. In effect, there were two limbs to the case as pleaded: (i) that the plaintiff was entitled to damages for breach of his right to trial with reasonable expedition ("the delay claim"), such right arising both under the Constitution and the European Convention on Human Rights; and (ii) that the plaintiff was entitled to damages for miscarriage of justice.

11. In addition to denying all aspects of the substantive claims, the defendants raised a number of preliminary objections as follows:

1) That the matters alleged did not give rise to a cause of action stateable in law, and in particular that the quashing of a conviction on the basis that the Court of

Criminal Appeal came to a conclusion different to that of the trial judge (that the case should not have been allowed to go the jury) could not have of itself amounted to a cause of action.

2) That any claim pursuant to s.3(2) of the ECHR Act, 2003 was statute-barred insofar as proceedings had been commenced more than one year before the date when the cause of action accrued.

3) That the plaintiff did not come within the definition of a person to which s.9(1) of the Criminal Procedure Act, 1993 applied and had no statutory right of action to compensation, and that there was no cause of action of miscarriage of justice known to the common law.

The High Court judgment of Faherty J.

12. In a careful and comprehensive judgment, the High Court (Faherty J.) examined all of the submissions of the plaintiff. She began by examining the claim for damages for miscarriage of justice. First, she examined the provisions of the Criminal Procedure Act, 1993, noting that this was limited to a category of persons who could point to a new fact or newly discovered fact but also pointing out that this wording had been taken from Article 3 of Protocol 7 to the European Convention on Human Rights and that it was also to be found in Article 14(6) of the International Covenant for Civil and Political Rights. Thus, in enacting the Act of 1993 and identifying that class of persons, the State was fulfilling its international obligations. She rejected the plaintiff's submission that a cause of action for a miscarriage of justice existed outside of, and independently from, the Act of 1993. She also rejected the plaintiff's suggestion that there was support in the comments of O'Donovan J. in *Pringle v. Ireland* [1999] 4 IR 10 or in *DPP v. Pringle (No.2)* [1997] 2 IR 225 for the proposition that a claim for miscarriage of justice exists independently of the Act of 1993.

13. With regard to the submission that the decision of the Court of Criminal Appeal not to order a re-trial of the plaintiff's case was a "rare occurrence" suggestive of the gravity with which the Court had viewed the trial judge's error, Faherty J. referred to the testimony of Ms. Geraldine Manners, Registrar, *inter alia*, that the annual court report for 2011 showed that there were no retrials in six of the eleven cases in which convictions were quashed; that in 2012, one out of the five quashed convictions resulted in no retrial being directed; and that no retrials were directed in three out of the six quashed convictions in 2013. She observed that it was not possible for the Court to reach any definite conclusion as regards the number of cases where the Court of Appeal did not order a retrial but, on the basis of the information before the Court, she was not persuaded that the fact that no retrial was ordered in the plaintiff's case was as rare and exceptional an event as had been suggested. She said that she was in any event of the view that the absence of a retrial being directed was not of itself an indicator of the existence of a cause of action for miscarriage of justice outside the Act of 1993.

14. Faherty J. went on to consider the decision in *Kemmy v. Ireland* [2009] 4 IR 74 in some detail and took the view that McMahon J.'s conclusions were as compelling now as they were in 2009 and that any wrong done to the plaintiff had now been righted given that the Court of Criminal Appeal had acquitted him, saying "[h]e has had the benefit of the totality of the criminal process". She addressed the submission that the *Kemmy* case had been overtaken by the jurisprudence of the European Court of Justice ("ECJ") and then the European Court of Human Rights. In the first instance she turned to the decision in *Kobler v. Austria* (Case C-224/01, judgment of 30th September, 2003) and said that there was no comparison between what was obtained in *Kobler* and the plaintiff's circumstances. As regards *McFarlane v. Ireland* (2011) 52 EHRR 20, the plaintiff had relied in particular on paragraph 121 of the judgment but Faherty J. pointed out that this was in the context of a

delay claim, his complaint with regard to the loss of fingerprint evidence and related matters having been ruled inadmissible by the European Court of Human Rights.

15. Faherty J. also referred to s.3A of the ECHR Act, 2003, as inserted by s.54 of the Irish Human Rights and Equality Commission Act, 2014, which allows a person to sue for damages where it has been found that they have unlawfully been deprived of their liberty by virtue of a "judicial act", defined as "an act of a court done in good faith but in excess of jurisdiction". This was introduced to comply with Article 5 of the Convention. She said that there was no suggestion in the present case that the trial judge had acted in excess of jurisdiction in depriving the plaintiff of liberty and therefore this did not apply.

16. Faherty J. concluded that absent a miscarriage of justice certificate under the Act of 1993, or *mala fides* on the part of the trial judge such as might give rise to an action for misfeasance against the judge personally, or the plaintiff being able to invoke the provisions of s.3A of the ECHR Act, 2003, the remedy available to the plaintiff in respect of his convictions was the appellate structure as provided for in law and which he had successfully availed of. She therefore rejected his claim that he was entitled to damages for a "miscarriage of justice".

17. Faherty J. then turned to the plaintiff's claim for damages pursuant to s.3(2) of the ECHR Act, 2003 which has a time limit of one year for the commencement of proceedings. No notice of motion or affidavit had ever been placed before the Court to lay the factual basis for an extension of time pursuant to s.3(5)(b) of the Act. She said that it was clear that the claims were statute-barred, and the question was whether the Court should extend the requisite period in the interests of justice. She accepted that the plaintiff had not put forward any basis for why the claim was not made within the time limit and had sought an extension for the first time in submissions without putting forward any explanation for the delay. However, she considered that because a substantial part of the plaintiff's claim alleged delay

on the part of the State, she was prepared to accede to the application for an extension of time.

18. Nonetheless, Faherty J. accepted the defendants' contention that the plaintiff had sued the State and not "an organ of State", as required by s.3 of the Act. She said that to find that the proceedings constituted against Ireland came within the ECHR Act, 2003 would be to give direct effect to the provisions of the Convention which was not the purpose or effect of the ECHR Act, 2003, citing *Gorry v. Minister for Justice* [2017] IECA 282. She also held, in the alternative, that since the State had given effect to the Convention obligation in Article 3, Protocol 7 by enacting the ECHR Act, 2003, she failed to see what other breach of the Convention might be said to arise.

19. The judgment of Faherty J. went on to consider the next limb of the plaintiff's case, being a claim for damages for breach of the right to trial with reasonable expedition or "the delay claim". The plaintiff had anchored his in case in what he described as a "systemic backlog" in the Irish court system at the time the plaintiff's appeal was seeking a date for hearing of the appeal. This had been described in the May 2009 report of the Working Group on the Court of Appeal. The report had said there was an institutional bottle-neck at Supreme Court level which had generated undue delays which impacted upon the Court of Criminal Appeal at a time when the number of appeals was increasing; the number of appeals had risen from 114 in 1995 to 237 in 2000 and then to 302 in 2008.

20. Faherty J. summarised the evidence before the Court of Ms. Geraldine Manners, the Registrar of the Court of Criminal Appeal, as to the manner in which the plaintiff's appeal was processed. Ms. Manners had testified, *inter alia,* that in Hilary term 2012, there were twenty dates available and the majority of those dates were given over to clearing a serious backlog of sentence appeals. Priority was given to those appeals because of a fear that the sentence would already be served by the time the appeal was heard, particularly where a

person was appealing a very short sentence. In essence, priority was given to custody cases. Ms. Manners testified that Hardiman J. had routinely expressed the concern of the judiciary in relation to the backlog in the system and that the delays in the Supreme Court list had impacted on the availability of Supreme Court judges to sit in the Court of Criminal Appeal. She said that by the time the Court of Appeal was set up in 2014, there was a significant backlog of appeals to be heard, namely some 3,000 civil cases and some 660 criminal appeals. She testified that in March 2013 (when the plaintiff had secured his hearing date for his appeal), Hardiman J. (who was presiding over the list) observed that there were a total of 209 matters in the list seeking a hearing date in circumstances where there were only seven hearing dates to be given out at that time. Ms. Manners also testified that the fact that the plaintiff had sought in July 2011 to amend his grounds of appeal did not contribute to the delay in his appeal getting a hearing date. Hardiman J. would hear any practitioner who applied for an expedited hearing and appeals would be prioritised on length of sentence; however, the longer the sentence the less likely one would get an expedited appeal. There was no record of the plaintiff having applied for an expedited hearing. Ms. Manners also gave testimony that there would have been no reality in his legal advisors applying for priority given the length of his sentence but there was nothing to stop him for applying for priority.

21. Faherty J. referred to the undoubted obligation to protect a right to an expeditious trial as a constitutional right, commenting on *dicta* of members of the Supreme Court in relation to the issue of compensation for delay in *McFarlane v. DPP* [2008] 4 IR 117, *G.C. v. DPP* [2012] IEHC 430 and the more recent decision in *Nash v. DPP* [2016] IESC 60. Having quoted extensively from these judgments, Faherty J. turned to the present case and noted the submission of the defendants that the plaintiff's circumstances did not meet the necessary threshold either under the Constitution or the Convention; that in *Nash*, the emphasis was on

"significant" delay which was not the position in the present case; and that the facts of the case when looked at as a whole did not amount to "significant, culpable or egregious delay such as would merit a finding that the plaintiff's right to a trial within a reasonable time frame was breached". I note that this phrase was taken from the defendants' submissions.

22. Regarding the relevant period of delay, Faherty J. focused on events during the appellate process and decided that the relevant time-frame for the purpose of the plaintiff's complaint of delay was from when the appeal first appeared in the Court of Criminal Appeal's list to fix dates (5th December, 2011) to the plaintiff's eventual release (31st July, 2013), which totalled a period of 18 months.

23. Commenting on the fact that the case regularly appeared in a list to fix dates, Faherty J. said (at paragraph 142):

> "I am satisfied that this is a factor of which the Court must take account. It is of some significance that the plaintiff's appeal was *under regular review* between November, 2011 and March, 2013 when he obtained a hearing date." (emphasis added)

24. In the course of her judgment, she referred to periods of delay which had been considered in other cases, including *G.C v. DPP* [2012] IEHC 430, where Hogan J. was considering a delay of sixteen years from the time of an alleged sexual assault, and *Devoy v. DPP* [2008] IESC 13, where there was a delay of sixteen months in rectifying a return for trial for which no adequate explanation was given. Faherty J. regarded the general situation with regard to appeals in the Court of Criminal Appeal at the relevant time as "far from ideal" but said that notwithstanding the "undoubted systemic delays", there were mechanisms available within the Court of Criminal Appeal whereby a person could seek to speed up the process by applying for priority and/or bail. She noted that in *Nash v. DPP* [2016] IESC 60, Clarke J. (as he then was) had said that it was relevant to consider the extent to which a person might be regarded as having contributed to the delay and that, in a system

of litigation which is party-led, it would be necessary to assess the extent to which a party had made use of available mechanisms. Noting that the plaintiff had failed to make an application for priority, Faherty J. commented (at paragraph 152):

> "This is a factor to be considered, to my mind. While the plaintiff has adduced evidence through Ms. Manners that any such application might not have stood a good chance of success, it remains the case that the plaintiff did not make an application for priority. To my mind, it was a matter for the Court of Criminal Appeal to determine the merits of any particular application and thus I cannot find as a fact that any such application would have been to no avail."

She also said, at paragraph 151 of the judgment, that:

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

25. At paragraph 153 of her judgment, she said that "…based on the dictum of Clarke J. (as he then was) in *Nash* and despite Ms. Manners testimony that there would have been no reality in the plaintiff applying for priority", it nonetheless "behoved the plaintiff to make an application for priority for his appeal, whatever the outcome might have been, particularly in circumstances where much emphasis has been put by the plaintiff upon the basis on which his conviction was ultimately quashed."

26. Faherty J. also laid emphasis on the fact that the plaintiff did not apply for bail. She accepted that it was difficult to get bail post-conviction and that bail would ordinarily be granted only if an appellant could point to a discrete point of appeal, but it remained the case

that the plaintiff did not apply for bail either in general or on the issue of DNA evidence which was ultimately the ground upon which the appeal succeeded.

27. Faherty J. referred to the fact that the plaintiff had, prior to his appeal, brought an Article 40 application but did not consider that the fact, or content of, this application was particularly relevant for present purposes.

28. Faherty J. moved on to consider the jurisprudence from the European Court of Human Rights cited by the plaintiff, stating that she accepted that when considering delay in the context of a breach of constitutional right claim, the Court could be guided by this jurisprudence save where there was a conflict between those principles and domestic law (which she did not think existed in the present case). She noted it had been repeatedly held that States were obliged to organise their legal systems in such a way as to ensure the reasonably timely determination of legal proceedings, referring to *Price and Lowe v. UK* [2003] ECHR 409, *McFarlane v. Ireland* (2011) 52 EHRR 20 and *Healy v. Ireland* [2018] ECHR 85. She also referred to the principle that where persons are in detention, special diligence is expected on the part of the courts dealing with the case to administer justice expeditiously, citing *Abdoella v. The Netherlands* (1995) 20 EHRR 585 and *Kalashnikov v. Russia* (2003) 36 EHRR 34.

29. Applying the tests identified by the European Court of Human Rights, Faherty J. said at paragraph 170 that: the criminal case against the plaintiff was not particularly complex; the trial was concluded within one week; and the plaintiff did not substantially contribute to the length of the proceedings.

30. Faherty J. noted that the period of time in the *McFarlane v. Ireland* (2011) 52 EHRR 20 case was ten and a half years between the date of his arrest to the date of his acquittal, and said that there was no valid basis for a comparison between the two cases in those circumstances. She referred to *Barry v. Ireland* [2005] ECHR 865 where the proceedings

lasted for ten years and four months and *Healy v. Ireland* [2018] ECHR 85 where the period was eleven years and nine months and in which the Court in particular commented on a lengthy period of inactivity which lasted for more than four years. In this regard she commented (at paragraph 178):

> "In the instant case, there was no discernible period of inactivity; the plaintiff's appeal was regularly listed before the Court of Criminal Appeal to see if a hearing date could be assigned. It is also the case that on those dates the plaintiff could have applied for priority but did not."

31. Faherty J. said that the plaintiff's reliance on *Abdoella v. The Netherlands* (1995) 20 EHRR 585 was misconceived because the applicant in that case had been under arrest for four years and four months before the procedure came to an end; had appealed on a number of occasions; and there had been a failure in the lower court to transmit documents to the Supreme Court which "exercised" the European Court of Human Rights. On both occasions, the transmissions of documents totalled more than twenty-one months of the fifty-two which it took to deal with the case. In *Kalashnikov v. Russia* (2003) 36 EHRR 34, the applicant was on remand for almost four years in what were described as inhumane and degrading prison conditions.

32. At paragraph 182, Faherty J. set out her conclusion on this limb of the plaintiff's claim:

> "However, albeit that the plaintiff's appeal process took some two years before he got an appeal hearing, I do not find, having regard to the matters which I have already alluded to earlier in this judgment, that the delay which undoubtedly occurred in the hearing of the plaintiff appeal was so egregious, unreasonable or culpable on the part of the defendants so as to constitute a breach of the right to an expeditious trial as guaranteed by the Constitution. Having regard to the guidelines set out in G.C and Nash, and having taken account of the ECtHR's jurisprudence to which the Court was

> referred, and having taken account of what the Court considered were the relevant factors in the plaintiff's case, including the fact that there were mechanisms available to the plaintiff to seek to either speed up his appeal or apply for bail, notwithstanding the overall two-year delay from the filing of the appeal to the plaintiff's eventual release, I am not satisfied that it has been established that there has been "*a sufficient level of culpability on the part of the State*" such as deprived the plaintiff of his constitutional right to an expeditious trial, and which would warrant an award of damages."

33. It may be noted that she included in this passage a reference to "egregious, unreasonable or culpable" delay, a phrase which, as I noted earlier, originated in the defendants' submissions.

The submissions of the parties

34. For the remainder of this judgment, I will refer to the parties as the appellant and the respondents.

The appellant's submissions

35. In relation to the "delay claim", the appellant submits that this Court should overturn the High Court finding that the delay was not sufficient to render the respondents liable in damages. Counsel argues that the systemic delays which had decelerated the processing of his appeal must be laid at the doors of the State and that there had been a systems failure which was widely acknowledged and yet went unrectified for several years. It is submitted that the appellant "languished in prison for almost two years, waiting for his appeal to be heard" and the State should be answerable.

36. It is submitted that the Court should overturn the High Court's implicit finding that the appellant contributed to the delay by failing to make an application for bail post-conviction or an application for priority, in circumstances where the evidence of the Registrar of the

Court of Criminal Appeal, Ms. Manners, was that neither application had any hope of success and that this was well known to practitioners. If practitioners were required to make each and every possible application knowing as a matter of experience that they were doomed to fail, the administration of justice would "grind to a halt".

37. Counsel for the appellant also take issue with the suggestion by the High Court that the case was not "in limbo" because it featured in a regular list to fix dates and was under the supervision of the Court of Criminal Appeal. It is submitted that in circumstances where there was no realistic prospect of a date, this was, in essence, a period of inactivity in the appeal.

38. Counsel take issue with the particular timeframe identified as the "delay period" by the High Court judge (at paragraph 143 of her judgment), being the time from when his appeal went into the list to fix dates to the finalisation of the appeal, and maintains that some delay prior to that should be included in the reckonable period because the State failed to consent at an early stage to the application to amend the grounds of appeal.

39. The case of *Devoy v. DPP* [2008] IESC 13 is sought to be distinguished on the basis that it did not concern a custodial situation and it is submitted that the European Court of Human Rights had determined that custody was relevant to whether or not a trial was expeditious. In this regard, reliance is placed upon *Abdoella v. The Netherlands* (1995) 20 EHRR 585 and *Kalashnikov v. Russia* (2003) 36 EHRR 34. Insofar as the High Court judge had distinguished *McFarlane v. Ireland* [2011] 52 EHRR 20 on the basis that there was no period of inactivity, the appellant submits that there was, in reality, a significant period of inactivity in the present case because Hardiman J., who was presiding over the various lists to fix dates, was not engaging in a review which was capable of moving the case on by reason of the systemic backlog. His repeated comments about the delays in the list indicated that this was his own view.

40. Regarding the second major part of the case, the "miscarriage of justice" claim, the appellant contends that there does exist a cause of action outside the Criminal Procedure Act, 1993 and that to hold otherwise would represent a failure to vindicate the appellant's constitutional rights including his right to liberty, his presumption of innocence, his right to a good name, and his right to a trial in due course of law. The view of the High Court that the acquittal of the appellant on appeal had righted the wrongs done to him does not take account of the fact that he was "deprived of his liberty for almost two years before being acquitted". The mere existence of an appellate structure and the fact that he ultimately attained a positive result on appeal fell significantly short of righting all wrongs done to him.

41. Counsel rely on the dicta of Blayney J. in *DPP v. Pringle (No. 2)* [1997] 2 IR 225 to suggest that the Criminal Procedure, 1993 merely gives partial recognition to what is a more general constitutional right. It is also submitted that the two aspects of the claim (the "delay" part and the "miscarriage of justice" part) are not mutually independent from each other and that they interact to create a miscarriage of justice in the present case.

42. Reliance is placed on the decision of the ECJ in *Kobler v. Austria* (Case C-224/01), and in particular on certain comments made about judicial immunity and judicial independence (to which I return below).

The respondents' submissions

43. In supporting the trial judge's analysis of the "miscarriage of justice" part of the claim, the respondents submit that the claim being advanced in respect of this part of the case is a far-reaching argument unsupported by any authority, and that it is, in essence, a cause of action for judicial error at trial which has never before been intimated by the courts, let alone recognised.

44. It is argued that the ground upon which the appellant's conviction had been quashed was one of seven grounds set out in his notice of appeal and was not put forward as any sort

of miscarriage of justice at the time. It had been seen as a normal appeal from a normal trial and neither an urgent priority hearing nor post-conviction bail had been applied for. Where the appellant himself had dealt with the appeal as a run of the mill appeal in the ordinary list, he could not now complain that it should have been treated with some particular urgency by the courts.

45. The respondents also submit that the trial judge erred in extending the time limit in respect of the ECHR Act, 2003 claim and put in a cross-appeal in this regard. No evidence or explanation had been put forward on behalf of the appellant as to why proceedings had not been initiated within the time limit and there was no factual basis upon which such an extension could have properly been granted. The fact that the claim was one for delay on the part of the State did not mean that a litigant was entitled to an extension of time as to do so would be to create an exception to the statutory time limit that the Oireachtas did not in fact legislate for.

46. Standing over the trial judge's analysis of the substantive claim for delay, the respondents submit that Faherty J. was correct in identifying an eighteen month period as the relevant one. The existence of a claim for damages did, in principle, exist, as the Supreme Court decision in *Nash v. DPP* [2016] IESC 60 had made clear but the Supreme Court had also been very cautious about the parameters of this right. Among other things, the Supreme Court had laid emphasis on the "party-led" aspect of litigation in Ireland which made the failure of the applicant to apply for post-conviction bail or priority in the appeal list in the present case particularly relevant. The respondents submit that it is also relevant that the total time in the case had been four years and three months, which is (they say) not an unreasonable period of time for the trial and appeal in respect of the offences in question.

47. The respondents submit that *Kobler v. Austria* (Case C – 224/01) was entirely different and concerned the obligation of a court of final instance to make a preliminary reference on

a matter of European law because said law was not clear; this was, in effect, a specific "Euro-tort" which applied only to a court of final instance. This is entirely different from the present situation where the appellants are effectively seeking to create a tort of judicial error at first instance and locate it within domestic law.

48. With reference to the second or "miscarriage" limb of the case, the respondents submit that the *dicta* in the *Pringle v. Ireland* [1999] 4 IR 10 and *DPP v. Pringle* (No.2) [1997] 2 IR 225 cases, read in their appropriate contexts, do not advance the appellant's case, and that there is simply no law to support the view that there is a cause of action in respect of miscarriage of justice as asserted.

49. I will turn now to the Court's analysis of each of the issues raised.

Part 2: The application for an extension of time to pursue a claim for damages under s.3(2) of the European Convention on Human Rights Act, 2003

50. As noted above, the High Court judge was prepared to accede to the application for an extension of time in respect of the claim for damages under s.3(2) of the ECHR Act, 2003, notwithstanding that no motion grounded on affidavit had been brought which set out the reasons for the delay. The reason she gave for this was that a substantial part of the appellant's claim alleged delay on the part of the State. I respectfully disagree with this approach as it would effectively remove the time-limit in the ECHR Act, 2003 for cases involving claims of delay. There are many reasons why a plaintiff might satisfy a court that an extension of time should be granted, and the fact that the case involves a claim for delay might be one of the relevant factors, but the appellant in the present case made no attempt at all to address the simple fact that his claim under s.3(2) of the Act was manifestly statute-barred. I therefore disagree with this aspect of the High Court judgment and would allow the respondents' cross-appeal on this point.

51. However, the fact that there is no valid claim before the Court concerning s.3(2) of the ECHR Act, 2003 does not mean that the jurisprudence of the European Court of Human Rights is irrelevant in this case. On the contrary, even before the ECHR Act, 2003 was introduced, this jurisprudence always played an important role in the assessment of certain types of case, and "delay" cases would certainly fall into this category. In any event, s.3(2) itself provides for a remedy only where there is no remedy in damages otherwise available, and the decision in *Nash v. DPP* [2016] IESC 60 makes it clear that such a remedy in damages for delay *is* available under Irish law.

52. Accordingly, I will consider the jurisprudence of the European Court of Human Rights below when discussing the claim for damages for delay under the Constitution, but I am of the view that in this case there is no separate or independent claim under s.3(2) of the ECHR Act, 2003. Therefore, it is not necessary to consider issues related to whether the respondents may properly be sued as "organs of State" within the meaning of Article 3(2) in respect of each of the distinct claims of the appellant.

Part 3: The claim for damages for "miscarriage of justice"

53. I am of the view that the trial judge was correct in her analysis of this issue and that there is no cause of action entitling a person to damages for a "miscarriage of justice" which exists outside and independently of the Criminal Procedure Act, 1993 and which stems from the common law or the Constitution.

54. In the first instance, there is nothing in the Criminal Procedure Act, 1993, either by virtue of its content or the circumstances of its enactment, which suggests that the Act was giving partial recognition to a right which was of more general origin and scope. On the contrary, it is clear that the legislation was specifically introduced so that the State would comply with its specific international obligation under Protocol 7, Article 3 to the European Convention on Human Rights, which is limited to cases of "miscarriage of justice" where

there has been a "new or newly discovered fact", and the legislation uses the precise language of that Protocol.

55. The terms of s.54 of the Irish Human Rights and Equality Commission Act, 2014 are also noteworthy. It inserted a new s.3A into the ECHR Act, 2003 and provides for a right to compensation "only to the extent required by Article 5(5) of the Convention" and provides that a person, in respect of whom a finding has been made by the court that he or she has been unlawfully deprived of his or her liberty as a result of a judicial act, may institute proceedings in the Circuit Court to recover compensation for any loss, injury or damage suffered by him or her as a result of that judicial act and the Circuit Court may award to the person such damages (if any) as it considers appropriate. The proceedings are to issue against Ireland and the Minister for Public Expenditure and Reform and "no court or member of the judiciary may be enjoined in such action". Subsection (3) provides that the court "shall not compensate an affected person, other than to the extent required by Article 5(5) of the Convention and then only to the extent that he or she suffered actual injury, loss or damage" and shall, in determining what compensation (if any) to award to the affected person, have regard to the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention. Subsection (6) provides that nothing in the section shall operate to affect the independence of a judge in the performance of his or her judicial functions or any enactment or rule of law relating to immunity from suit of judges. A "judicial act" is defined as "an act of a court done in good faith but in excess of jurisdiction and includes an act done on the instructions of or on behalf of a judge." This is an important provision, manifestly designed to comply with the requirements of Article 5(5) of the Convention, and carefully circumscribed to confer a cause of action no more than is strictly required by Article 5(5).

56. The appellant seeks to suggest there is a common law right to compensation for "miscarriage of justice". In this regard, he relies upon passages in the judgment of O'Flaherty J. (writing for the Court of Criminal Appeal) in *The People (Director of Public Prosecutions) v. Pringle (No. 2)* [1997] 2 IR 225 at 230, and of Blayney J. in the Supreme Court. (at p. 235), for the proposition that the statutory right to compensation merely gave partial recognition to a broader common law right to compensation for "miscarriage of justice".

57. However, these dicta must be read in their appropriate context, which was as follows. Mr. Pringle was convicted in 1980 of the murder of two members of An Garda Síochána as well as robbery. In 1995, the Court of Criminal Appeal quashed his conviction and ordered a retrial on the basis that material evidence had not been disclosed prior to the trial. The DPP subsequently entered a *nolle prosequi.* Mr. Pringle applied for but was refused a certificate pursuant to s.9 of the Criminal Procedure Act, 1993, but the Court of Criminal Appeal certified a question for the Supreme Court on a point of law of exceptional public importance concerning the circumstances in which a certificate should be granted. The Supreme Court (reported at *DPP v. Pringle (No.2)* [1997] 2 IR 225) agreed that the certificate should have been refused on the basis of the facts found in the Court's judgment, but referred the matter back to the Court of Criminal Appeal to allow the applicant to renew his application in light of the Supreme Court's clarification of the applicable principles. These principles were:

- that the fact that the applicant's conviction had been quashed as being unsafe and unsatisfactory could not, on its own, entitle the applicant to a certificate that there had been a miscarriage of justice;
- that an inquiry as to whether a s. 9 certificate should be given was a civil claim and the presumption of innocence had no place in such an inquiry;
- that the burden of proof rested on the applicant to prove on the balance of probabilities that there had been a miscarriage of justice and that a newly-discovered

fact, either on its own or to a significant degree in combination with other matters, showed that there had been such a miscarriage of justice; and

- that the primary meaning of "miscarriage of justice" in s.9 (1)(a)(ii) of the Criminal Procedure Act, 1993 was that the applicant was, on the balance of probabilities as established by relevant and admissible evidence, innocent of the offence of which he was convicted.

58. I would make the following observations about the comments of Blayney J. in the course of his judgment: :

1) everything that is being said there is being said in the context of an application for a certificate pursuant to the Criminal Procedure Act, 1993;
2) even in that context, the quashing of a conviction *simpliciter* is not being equated with a miscarriage of justice; and
3) in referring to the potential of unfair discrimination if a person whose conviction was quashed under a Criminal Procedure Act, 1993 application and a person whose conviction was quashed in an 'ordinary' appeal (if the former would automatically thereby receive compensation and the latter could not), Blayney J. was implicitly acknowledging that there is no compensation for a person whose conviction is quashed in the 'ordinary' way (i.e., outside the Criminal Procedure Act, 1993).

59. I note that Blayney J. rejected the submission that a miscarriage of justice under the Criminal Procedure Act, 1993 was made out on the ground that there had been an "unconstitutional trial", which appears to leave open the possibility that, on other facts, an "unconstitutional trial" might be a ground for establishing a miscarriage of justice, but I think this is again limited by the context, namely that he is talking about claims for compensation under the Criminal Procedure Act, 1993. Accordingly, I do not consider this judgment to advance the appellant's case on the proposition that there is a general right to damages for a

"miscarriage of justice". It is also, of course, relevant to note that Mr. Pringle had spent many years in prison on foot a conviction which was ultimately quashed because of a failure by the prosecution to disclose evidence in advance of the trial, but that of itself was not considered sufficient to warrant compensation.

60. The appellant next relies upon a comment made by O'Donovan J. in another of the *Pringle* decisions. Mr. Pringle commenced an action seeking damages for negligence, breach of duty and breach of constitutional rights grounded upon the prosecution's failure to disclose material (relating to a tissue) in advance of his trial. The defendants pleaded, *inter alia*, that he could not succeed in such a claim because he had exercised his option to apply for a certificate under the Criminal Procedure Act, 1993. Mr. Pringle had not, in the meantime, renewed his application to the Court of Criminal appeal. O'Donovan J. delivered a written judgment (reported at [1999] 4 IR 10) in which he held that the plaintiff was not barred from pursuing his negligence claim on the ground that he had exercised his option under the Criminal Procedure Act, 1993 since the Court of Criminal Appeal had refused his certificate. At the conclusion of his judgment, he said:

> "By way of completeness, while I think that counsel for the plaintiff is probably correct in his submission that, irrespective of any rights which he might have by virtue of the provisions of s. 9(2) of the Criminal Procedure Act, 1993, the plaintiff still has a constitutional right to litigate the matters which are the subject matter of these proceedings, in the light of my conclusions aforesaid, it is not necessary for me to decide that question and I do not propose to do so."

61. Again this passage is relied upon by the appellant in this case, but I do not think that this sentence could possibly be read to support the proposition that there is a constitutional right to damages for miscarriage of justice. It merely states that the plaintiff has a constitutional right to litigate whatever he chooses to litigate, and it may be noted that what

he had chosen to litigate (as O'Donovan J. already knew) was a claim for negligence, breach of duty and breach of constitutional rights. Accordingly, I do not think any of the *dicta* extracted by the appellant from the *Pringle* cases support their claim in the present case.

62. Further, the decision in *Kemmy v. Ireland* [2009] 4 IR 74 represents a formidable obstacle to the appellant's contention that there exists a cause of action for "miscarriage of justice" under Irish law in the circumstances arising in his case. The plaintiff in *Kemmy* was convicted of rape and sexual assault and sentenced to three years' imprisonment (with two suspended). After he had been released, having served the sentence in question, the Court of Criminal Appeal set aside his conviction on the ground, *inter alia*, that his trial had been unfair and did not order a re-trial. Mr. Kemmy claimed that because he had served a term of imprisonment, he had suffered a deprivation of liberty, loss and damage which were not remedied by his conviction being quashed, and he sought damages against the State for infringement of his constitutional rights by its judicial organ and failing to ensure that he received a fair trial. While the similarity to the present case may be noted, the appellant submits that there is a distinction to be drawn between the two cases in that the reason no retrial was ordered in *Kemmy* was that he had already served a sentence for the offence, whereas the appellant in the present case did not get a retrial because there was insufficient evidence against him. Mr. Kemmy also and alternatively sought damages for negligence and breach of duty by a servant or agent of the State in respect of the manner in which the trial judge had conducted his original trial and a declaration that any common law rule granting judicial immunity from suit was unconstitutional. I pause to note that Mr. Kemmy's claim was firmly rooted in a claim of breach of constitutional right, described thus by McMahon J. in the following way:

> "**[5]** The plaintiff's primary claim in these proceedings is for damages against the State for infringement by the State, through its judicial organ, of the plaintiff's constitutional

right to a fair criminal trial. It is important to emphasise that the plaintiff's complaint is that he did not receive a "fair trial" from the trial judge and that this was a breach of his constitutional rights. Had the Court of Criminal Appeal found that the trial judge had merely committed an error of law, counsel for the plaintiff conceded at the hearing that he would not have brought the action. The right to a fair trial is one of the unenumerated personal rights guaranteed in the Constitution at Article 40.3. In addition, and in the alternative, the plaintiff also claims damages against the State for the negligence and/or breach of duty of servants or agents of the State and if necessary, a declaration that any common law rule of law which purports to grant judges of the High Court of Ireland personal immunity from suit in respect of acts done in the performance of their judicial duty is subject to and in accordance with the plaintiff's rights under the Constitution and is unconstitutional insofar as it purports to deny the plaintiff his right to seek damages against the State. The plaintiff seeks such further or ancillary declaratory or other relief as the court deems appropriate."

63. Dismissing the action, the High Court (McMahon J.) rejected arguments based on vicarious liability and primary liability. For present purposes, it is interesting to note that while he engaged in an extensive examination of the principle of judicial immunity and its connection to the fundamental value of the independence of the judiciary, he also said that the State's duty to guarantee the plaintiff the right to a fair trial was not an absolute one but a duty to respect, defend and vindicate the right as far as practicable. He said that the State had acted reasonably to guarantee this right by enacting legislation establishing the Court of Criminal Appeal to which convicted persons could appeal, and the Criminal Procedure Act, 1993 which enabled a trial to be reviewed if new evidence subsequently came to the light. In arguing that the State was directly or primarily liable in the situation of an unfair trial caused by judicial error, the plaintiff could not limit the phrase "unfair trial" artificially to

the trial stage of the process. Consideration had to be given to the totality of the legal process from start to finish, and the Court of Criminal Appeal had, in effect, made fair that which had been unfair. In this sense, the obligation to provide a fair trial should more properly be referred to as an obligation to provide a fair legal system, and by providing an appeal system, the State had carried out its duty in this respect. The time to assess the fairness of the process was after the appeal and not after the trial. McMahon J. said:

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

64. He also said:

> "**[72]** The real problem in the plaintiff's case was that there was an inevitable *delay* between the original trial and the hearing of the appeal in the Court of Criminal Appeal. Before the corrective mechanism took effect the plaintiff had served his sentence. But by definition the appeal can only come on after the original trial and such a delay cannot be avoided. Even if the appeal had been organised on the day after the trial, the plaintiff's complaint, if his appeal was successful, would in principle be the same, albeit his damages for detention would be for a much shorter period. But there has been no allegation of inordinate delay in the hearing of the appeal by the plaintiff in this case and absent this, the State cannot be faulted on this account."

65. In his discussion of the issue of judicial immunity, McMahon J. provided a vivid "scaffolding" metaphor for the relationship between the State (which is responsible for

establishing the courts and appointing judges), and the judges (who engage in the activity of judging):

> "**[77]** In a constitutional sense, the State merely provides the scaffolding for judicial activity. The State is no longer involved once the judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the State's liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that I have already rejected."

66. In my view, it is significant that McMahon J. did not rest his conclusion entirely upon the principle of judicial immunity; as is clear from the above, he also rested it (effectively in the alternative) on the proposition that the right to a fair trial does not provide a guarantee of a perfect trial at first instance but rather a guarantee that the State will put in place a process which in its totality is fair, i.e. when one considers the totality of the process *including the appellate stage*. Therefore, insofar as the appellant in the present case seeks to suggest that the reasoning in *Kemmy* has been overtaken and undermined by certain European decisions concerning judicial immunity, it is important to bear in mind that judicial immunity was not the sole basis on which the conclusion in *Kemmy* was reached.

67. I do not find anything in the jurisprudence of the European Court of Human Rights which is of assistance to the appellant in undermining the rationale in *Kemmy* that the obligation of the State is to provide an appropriate scaffolding, which falls to be assessed in its entirety (i.e. including the appellate process). The Convention does not confer a cause of action simply on the basis of a judicial error at first instance, even if it was an error of a kind which means that he should never have been imprisoned at all. Indeed, it would be surprising if it did, when one considers that the Convention has a specific (and limited) Protocol on the issue, i.e. Protocol 7 Article 3, which limits the right to compensation to situations where

there are "new" or "newly discovered facts" which lead to the quashing of convictions. Such a restricted cause of action would not be necessary if a more general cause of action (as contended for by the appellant) already existed.

68. Quite apart from the above, I do not find persuasive the submission of the appellant that the European decisions cited to the Court have undermined the judgment in *Kemmy* insofar as it deals with judicial immunity in the context of a claim for damages after the quashing of a conviction. Insofar as comments were made by the European Court of Human Rights in *McFarlane v .Ireland* (2011) 52 EHRR 20 about the principle of judicial immunity, this was in the context of actions for damages for delayed trials, and not causes of actions arising out of judicial error (as discussed further below in Part 4 of this judgment). The action for damages based upon "delay" is a well-established cause of action under Convention law, grounded upon a clear and unequivocal right to trial with reasonable expedition under Article 6 of the Convention; and the question of judicial immunity arises in that context. The comments of the European Court of Human Rights indicating that judicial immunity cannot be availed of by a state as a defence to *a claim of delay based upon Article 6 of the Convention* cannot somehow be transplanted into the Constitution and grown into an entirely different concept, namely that the constitutional right to a fair trial requires damages for judicial error in a criminal trial at first instance.

69. The appellant seeks to rely on the comments of the ECJ in *Kobler v. Austria* (Case C – 224/01), but I do not think that these advance his case if one reads the Court's comments on judicial immunity in that case in their proper context. What arose there was a question relating to the failure of a court of final instance to make a reference to the ECJ on an issue of interpretation of EU law (the issue related to the compatibility of freedom of movement with a provision of Austrian law which did not equate a university professor's service in EU

countries other than Austria with service in Austria for the purpose of salary increments). The Court said:

> "32. In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 34)."

70. The Court went on to say:

> "33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.
>
> 34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.
>
> 35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC

a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur and Factortame,* cited above, paragraph 35)."

71. Addressing an argument in favour of an immunity grounded upon the value of independence of the judiciary, it said:

"42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary."

72. The *Kobler* case is therefore authority for the proposition that the principle of judicial immunity will not provide an immunity or defence to a claim against the State for a breach of EU law. This has nothing to do with whether or not there exists, as a matter of Irish law (whether in the common law of tort or under the Constitution), a claim for damages for a

miscarriage of justice. In *Kobler*, the concept of judicial immunity and State liability was being discussed in the context of a well-established cause of action, being a claim in respect of a breach of EU law. It is a large and unwarranted leap in the appellant's argument to suggest that this somehow grounds the proposition that there is a cause of action for judicial error at first instance under domestic law (in the present case, the error being that of the trial judge in not withdrawing the criminal case from the jury). On the contrary, the emphasis in *Kobler* that the impugned decision was one of last instance would suggest that any analogy to be drawn should be with the decision of the Court of Criminal Appeal (which quashed the appellant's conviction); but in any event, *Kobler* concerns the application of EU law by the court of final instance, and not the application of domestic law. To succeed with a claim that there is a cause of action for a miscarriage of justice, the appellant would have to point with particularity to a constitutional right that has been violated and, as *Kemmy v. Ireland* [2009] 4 IR 74 explains, there is no guarantee under the Constitution of perfection at first instance but rather a guarantee that the criminal court structure as a whole and in its totality should be a fair one and one which provides opportunity to correct errors at first instance.

73. The reality is that the appellant was unable to point to any authority supporting the proposition that there exists at common law a cause of action consisting of a claim for "miscarriage of justice" or that such a cause of action is necessitated by the Constitution. Nor was the argument cogently advanced from first principles. Indeed, in argument, counsel on behalf of the appellant was unclear as to whether the claim was said to arise at common law as an independent tort or was subsumed under another tort (referring at times to "false imprisonment", and was also unwilling to outline, even in general terms, the potential parameters for such a cause of action under the Constitution, or to identify which kinds of judicial error and different potential outcomes on appeal might fall within or without this asserted cause of action.

74. In the absence of any supporting authority, and without any clear common law or constitutional path leading to the cause of action asserted, I reject the appellant's submissions on this part of the case and agree with the High Court judge that, as matters stand, the only remedies for damages in Irish law for judicial error leading to a wrongful conviction are: (a) a miscarriage of justice certificate under the Criminal Procedure Act, 1993; (b) a showing of *mala fides* on the part of the trial judge such as might give rise to an action for misfeasance against the judge personally; or (c) a claim for damages under s.3A of the ECHR Act, 2003. None of these apply in the appellant's case.

Part 4: The constitutional claim for damages for breach of the constitutional right to a trial with reasonable expedition

75. In Part 2 of this judgment, I took the view that the Court should reverse the High Court finding that an extension of time should be granted with respect to the claim under the ECHR Act, 2003. Accordingly, this part of the judgment will deal with the appellant's claim solely on the basis that it is a claim for damages for breach of the right to trial with reasonable expedition under the Constitution.

76. That is not to say that the jurisprudence of the European Court of Human Rights is irrelevant. On the contrary, there is much overlap between the constitutional principles and those of the European Court in this area; the Strasbourg jurisprudence was always persuasive before the enactment of the European Convention on Human Rights Act, 2003 and continues to be so even where the remedy is sought under the Constitution rather than the Convention. Indeed, the Irish constitutional remedy of damages for breach of the right to trial with reasonable expedition has itself been the subject of considerable attention by the European Court of Human Rights, as will be discussed below.

77. However, the constitutional remedy of damages for breach of the right to trial with reasonable expedition is nonetheless distinct from its Convention counterpart, and the Chief

Justice in *Nash v. DPP* [2016] IESC 60 was careful to point this out and to note certain potential differences between the two remedies (discussed below). The constitutional claim for damages and the Convention claim for damages might therefore be described as siblings rather than identical twins.

78. Accordingly, I will approach the constitutional claim with a close eye on the European Convention jurisprudence but also with appropriate caution lest there be differences of importance or even slight nuance between them.

The existence of a remedy in damages for breach of the constitutional right to trial with reasonable expedition

79. As regards a breach of the right to trial with reasonable expedition, Irish law provides not only for the remedy of prohibition but also for damages. This was put beyond doubt, if doubt there was, by the Supreme Court in *Nash v. DPP* [2017] 3 IR 320. I propose to set out the Chief Justice's observations in that important case at some length throughout this judgment. I will start with a passage in which the Chief Justice traced the recognition of this right and remedy through the Irish authorities and concluded with a firm statement confirming its existence:

> "**[14]** However, it is clear that, in an appropriate case, damages for breach of constitutional rights by the State can be awarded (see for example, *Kearney v. Minister for Justice* [1986] I.R. 116 and *Kennedy v. Ireland* [1987] I.R. 587). That position has, therefore, long since been clarified by this court. It is again clear that the Constitution recognises the right to a timely trial and that this also has long since been recognised by the courts. Indeed, in my own judgment in respect of the prohibition aspect of this case, I noted, at para. 2.18, that there was an obligation on the State "to afford all litigants, criminal or civil, a timely trial".

[15] In *G.C. v. Director of Public Prosecutions* [2012] IEHC 430, (Unreported, High Court, Hogan J., 17 October 2012), Hogan J. in the High Court reviewed the relevant case law in this area. Reference was made to the judgment of Kearns J. in *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172, which noted that an order of prohibition may not be the only remedy available in circumstances of prosecutorial delay. Reference was also made to the earlier comments of Henchy J. in *Hanrahan v. Merck Sharp & Dohme* [1988] I.L.R.M. 629 at p. 636 where the right to maintain an action for damages for breach of constitutional rights was reaffirmed and where it was also stated that the right to claim damages was required to supply a remedy for such breach where no remedy had otherwise been provided either by the common law or by statute. It is true, of course, as Hogan J. pointed out, that, in the vast majority of cases, the focus of the claimant has been to seek to prohibit a criminal trial and, for that reason, it may well have been the case that few were anxious to focus on a claim for damages. But as pointed out in a number of the judgments of this court in respect of the prohibition aspect of this appeal, the fact that there has been delay sufficient to breach the right to a timely trial does not, necessarily and in and of itself, give rise to a finding that a fair trial cannot be conducted. Thus there will inevitably be cases where there will be a breach of the right to a timely trial but nonetheless no remedy in prohibition will properly be available. It follows that, at least in some such cases, the requirement identified by Henchy J. in *Hanrahan v. Merck Sharp & Dohme* [1988] I.L.R.M. 629, to the effect that there must be some appropriate remedy, will come into play.

[16] It is, therefore, clear that the constitutional right to a timely trial has been well established for many years. Given that it has also been clear that, in an appropriate case, damages can be awarded for the breach of a constitutional right, it has been

> clearly established for some time in our jurisprudence that there is, at least at the level of principle and in some circumstances, an entitlement to damages for breach of the constitutional right to a timely trial. However, just as in the case of a claim for damages for breach of the similar right guaranteed by the ECHR, there may well be questions as to the precise circumstances in which such an entitlement to damages may arise."

80. I pause to note that this confirmation of the availability of the remedy is particularly interesting in light of the unusual history of the issue in Strasbourg. Whether such a remedy existed in Irish law for breach of the right to a timely trial has been the focus of considerable attention from the European Court of Human Rights on a number of occasions in the last twenty years; see in particular *Barry v. Ireland* [2005] ECHR 865, *McFarlane v. Ireland* (2011) 52 EHRR 20 (paragraphs 85-88), *Healy v. Ireland* [2018] ECHR 85 and *Keaney v. Ireland* [2020] ECHR 292. The matter arose in Strasbourg in the context of complaints under Article 13 of the Convention which were allied to substantive complaints of delay under Article 6(1). Ireland repeatedly submitted that there *did* exist such a cause of action under the Constitution and that applicants had failed to exhaust their domestic remedies before bringing their cases to Strasbourg, but to date the European Court of Human Rights has not accepted there is a remedy in Irish law which can be deemed "effective" within the meaning of Convention jurisprudence. A majority of the European Court of Human Rights so held in *McFarlane*, although a number of judges dissented on this point.

81. One might have thought that the State's arguments on this point would prevail after the clarification provided by the Supreme Court in *Nash.* However, in *Healy v. Ireland* [2018] ECHR 85, which post-dates the Supreme Court decision in *Nash*, the European Court of Human Rights said there had been a violation of Article 13 because, where change in domestic law comes about through caselaw, the Court's approach had been to allow a certain

time for applicants to familiarise themselves with the new jurisprudence. As recently as April 2020, in *Keaney v. Ireland* [2020] ECHR 292 the European Court of Human Rights again found that there was a breach of Article 13 of the Convention, in addition to a breach of Article 6(1). It discussed the domestic jurisprudence relevant to the constitutional claim including the judgment of the Supreme Court in *Nash*, and examined in some detail the developments which had occurred after the *McFarlane v. Ireland* (2011) 52 EHRR 20 decision. These included the activities of the Expert Group established to respond to the decision, which had led to a proposed Bill entitled "European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill". The Court noted the unfavourable comments of the Committee of Ministers of the Council of Europe on the Irish position which have been delivered annually since 2017. The Court referred to the reluctance of the Supreme Court in *Nash* to indicate the precise parameters of the claim for damages (paragraph 121) and said that while "[t]his reticence by a common law court to develop the necessary parameters in the abstract and not in the context of a suitable, concrete case" was "understandable", the judgment had highlighted the fact that development of the constitutional remedy was "likely to remain legally and procedurally complex at least for a period of time". It also reiterated a concern expressed in *McFarlane* as to the speediness of the remedial action itself; noted that the application for damages under the ECHR Act, 2003 was possible only when no other remedy in damages was available; and noted the exclusion of the courts from the definition of "organs of the State" under the ECHR Act, 2003. It concluded that the remedy in Irish law was not yet sufficiently clear to meet the Convention requirement that it be practical and effective.

82. In *Keaney v Ireland,* Judge O'Leary pointed out that the Court's decision in *McFarlane* may have created the risk of a "vicious cycle", having regard to the dependence of common law systems on the development of the law through litigation. As she pointed out: "By

declaring the untested remedy ineffective the majority of the Grand Chamber thus risk ensuring that it would remain so". However, the lack of sufficient development of the law since the decision compelled her, she said, to join the unanimous decision in *Keaney.* She did not consider this approach to constitute an interference with the domestic courts' discretion to develop the constitutional remedy, saying the following by way of clarification:

> "**21.** The *Keaney* judgment is not a basis for considering as ineffective remedies afforded by the Constitution in the respondent State nor does it fail to recognize the wide discretion enjoyed by the domestic courts to fashion remedies where constitutional rights are concerned. It should not either be regarded as abandonment of the crucial principles of exhaustion and subsidiarity cited in *D. v. Ireland* and indeed in *McFarlane.* It reflects the following proposition which, after twenty years of repetitive cases on excessive delay, is a reasonable one: where an applicant complains of excessive delay within the general court system, sending that applicant back into the general court system the subject of the delay complaint in order to craft and/or develop his or her own remedy is unlikely for the time being to meet the requirements of Articles 35 § 1 and 13 of the Convention." (footnotes omitted)

83. In summary, it is now beyond doubt, at the latest since the Supreme Court decision in *Nash*, that Irish law provides for a remedy of damages for breach of the right to trial with reasonable expedition. However, the Supreme Court did not (and could not) delineate the precise parameters of the remedy in a vacuum and the task of identifying those parameters must be addressed on a case-by-case basis. This Court is faced in the present case with precisely that task.

The parameters of the right to damages for breach of the right to trial with reasonable expedition under the Constitution

84. Now that any doubt as to the existence of the remedy has been clarified by the Supreme Court in *Nash v. DPP* [2017] 3 IR 320, the thorny question arises as to the precise circumstances in which the remedy should be granted. The Chief Justice in *Nash* considered it inappropriate to be overly prescriptive about these circumstances since the Supreme Court had decided that the facts in that case did not warrant the remedy, and did not wish to describe the precise circumstances in a vacuum. Nonetheless, there are a number of points of guidance in the judgment, albeit at a relatively high level of generality, which may be summarised as follows.

85. *Prohibition and damages remedies distinguished:* First, it may be observed that the circumstances in which the remedy of prohibition might be appropriate and those in which the remedy of damages might be appropriate are not identical. This was noted by Clarke C.J. in *Nash* where he said that there would inevitably be cases where there would be a breach of the right to a timely trial even though no remedy in prohibition would lie. This flows from the fact that in applications for prohibition, other interests, such as the community rights and those of victims, must also be put into the balance, and the overarching consideration is whether or not there can be a fair trial notwithstanding any unreasonable delay which has taken place. Therefore, while the constitutional source of the remedy is the same (namely the right to trial with reasonable expedition), the circumstances in which the remedies of prohibition and damages respectively may be granted are not identical.

86. *Relationship between constitutional and Convention claim:* Secondly, while the relationship between the remedy of damages under the Constitution and the remedy in respect of the equivalent right under the Convention is a close one, it does not necessarily mean that the two are exactly co-extensive, and the Irish courts need to exercise caution in that regard. The Chief Justice identified some potential differences. He said, for example,

that it was possible that the approach to the calculation of damages might not necessarily be the same with regard to a claim under the Convention and the Constitution respectively:

> "**[17]** It is also important to note at least the possibility that the appropriate approach to the calculation of the quantum of damages in such cases might not necessarily be the same as and between a claim for damages arising out of a breach of rights guaranteed by the ECHR and a claim for damages arising out of a breach of similar rights guaranteed by the Constitution. This is a matter which may require a definitive determination in the future. It certainly appears to be the case that the level of damages typically awarded by the European Court of Human Rights ('ECtHR') falls somewhat below the level of damages which might be awarded by an Irish court in respect of a claim for damages in similar circumstances arising in respect of a breach of rights under Irish law whether that law be the Constitution, an Irish statute or derived from the common law as it is understood in Ireland. It remains for determination whether, in a claim which was based solely on the breach of rights conferred by the ECHR, an Irish court should award damages broadly equivalent to those which it might be expected would be awarded by the ECtHR or should approach the question of damages by considering the quantum which would be awarded in a similar case involving a breach of rights under Irish law."

87. The Chief Justice also discussed (at paragraphs 34-49) the interaction between common law systems (particularly on the criminal side) and the European Court of Human Rights jurisprudence as to when the litigation under review may be said to have "commenced", thus leaving open the possibility that arguments about possible divergence of approach under the two systems might arise in the future.

88. To these two potential points of divergence or difference identified in outline by the Chief Justice, I might add another. This is the question which arises when the cause of a

delay is neither prosecutorial nor systemic, but judicial; such as, for example, a delay caused by a judge in failing to deliver judgment within a reasonable time (discussed in *McFarlane v. Ireland* (2011) 52 EHRR 20 at paragraph 121). This type of delay would bring into the analysis the principle of judicial immunity which was discussed at length in *Kemmy v. Ireland* [2009] IEHC 178. This was in fact later mentioned by the Chief Justice when he said (at paragraph 51): "The immunity traditionally attaching to the courts or judges would require careful consideration". I will return to this point later.

89. *Failure of litigant to use available mechanisms:* Thirdly, the Chief Justice made the following observations concerning a litigant's potential responsibility for delay by failing to use available mechanisms which are designed to accelerate the process or prevent excessive delay:

> "**[50]** … There may, of course, be questions as to whether there has been a breach of that right in the circumstances of a particular case and also as to what person or body may be regarded as having contributed to the breach of the right concerned. In the party led courts system which applies in common law countries, the principal obligation for progressing proceedings lies on the parties themselves. However, the courts system provides mechanisms to enable any party who is dissatisfied with the pace of litigation to seek an appropriate intervention by the court to ensure that the litigation progresses at an appropriate pace.
>
> **[51]** In that context it may, of course, be necessary to identify the extent to which a party or the parties may be responsible for the failure of the process to be conducted and concluded in a timely fashion. It will, of course, be necessary to assess the role of the accused in any possible delay. In a party led litigation system it will always be necessary to assess the extent to which any party has made use of available

> mechanisms (such as appropriate procedural motions or applications for priority) which are designed to accelerate the process or prevent excessive delay."

An interesting question concerns the weight to be placed on any failure on the part of a litigant to employ mechanisms to expedite proceedings; in a common law system such as that of Ireland, it may be that greater weight would be placed on such failure, given the emphasis on the litigation being party-led, whereas the emphasis in Strasbourg might arguably be somewhat greater upon the responsibility of the courts themselves to take action even if the parties are failing to do so. Indeed, the latter point is of relevance in the present case and is discussed further below, in particular at paragraph 139 of the judgment.

90. *The impact of any delay upon the litigant:* Fourthly, the Chief Justice referred to the level of delay and the impact of the delay on the litigant in question, saying:

> "**[55]** … It may well also be necessary to consider in detail the precise level of delay which might legitimately give rise to a claim in damages and the *extent to which it might be necessary to establish significant consequences of the delay* for the accused in question in order that damages would be considered to be a necessary remedy for the purpose of meeting in an appropriate fashion any breach of constitutional rights established." (emphasis added)

I understand the italicised words to mean that the Chief Justice was suggesting that an appropriate case for damages might arise not only where there is a particular level of delay in chronological terms but also where the consequences for the particular litigant were "significant". A court must therefore be sensitive to factors which are other than the merely chronological. In the present case, for example, the fact that the appellant was in custody pending appeal is relevant, as is considered further below.

91. *Judicial and systemic delay:* Fifthly, the Chief Justice alluded to some different types of delay which may arise and included "systemic delay" within them:

"**[51]** … In addition it may be necessary to consider the extent to which it may be possible to award damages in respect of delay caused by a failure within the courts system itself. The immunity traditionally attaching to the courts or judges would require careful consideration. However, in addition to that it may be that there could be cases where, on a proper analysis, any delay within the courts system might properly be attributed to a failure on the part of the State itself to provide adequate resources to enable the courts system to deliver trials which met the constitutional requirement of timeliness."

92. *State culpability for delay:* Sixthly, the Chief Justice talked about the necessity to show State culpability for any delay:

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

93. *Other matters:* Finally, the Chief Justice touched upon a range of other considerations that might need to be taken into account in a particular case:

> "**[55]** … Furthermore, it is necessary to have regard to a range of rights including the right of the community in respect of the prosecution of criminal offences but also, importantly, the rights of victims of crime or those who assert that they are victims. It may well also be necessary to consider in detail the precise level of delay which might legitimately give rise to a claim in damages and the extent to which it might be necessary to establish significant consequences of the delay for the accused in question in order that damages would be considered to be a necessary remedy for the purposes of meeting in an appropriate fashion any breach of constitutional rights established. For these, and doubtless other, reasons, it should not be assumed that every case of delay must necessarily convert into a claim in damages. While the parameters will require to be worked out on a case-by-case basis it may well be that the circumstances in which damages can actually be recovered may turn out to be relatively rare although it is impossible at this stage to give any true assessment on that question."

I note in the above passage the reference again to the "significant consequences of the delay for the accused".

The parameters of the right and remedy arising under the European Convention on Human Rights

94. Subject to what I have said above about the distinction between the constitutional remedy and the remedy under the Convention, as well as possible differences between constitutional and Convention principles in this area, the Convention jurisprudence is nonetheless of considerable relevance. A useful and up-to-date summary of those principles is set out at paragraphs 85-91 of the European Court of Human Rights' judgment in *Keaney v. Ireland* [2020] ECHR 292 as follows:

"85. According to the case-law of the Court on Article 6 § 1 of the Convention, the "reasonableness" of the length of proceedings must be assessed in 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, and what is at stake for the applicant in the dispute (see, among other authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 143, 29 November 2016, *Frydlender v. France* [GC], no.30979/96, § 43, ECHR 2000-VII, *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV and *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006-VII).

86. In requiring cases to be heard within a "reasonable time", Article 6 § 1 underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 224, ECHR 2006-V).

87. As the Court has often stated, it is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time (see, among many other authorities, *Frydlender v. France* [GC], cited above, § 43; *McFarlane v. Ireland*, cited above, § 152; *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, § 38, 8 September 2011, and *Healy v. Ireland*, no. 27291/16, § 49, 18 January 2018).

88. A temporary backlog of court business does not entail a Contracting State's international liability if it takes appropriate remedial action with the requisite promptness. However, a chronic overload of cases within the domestic system cannot justify an excessive length of proceedings (*Probstmeier v. Germany*, 1 July 1997, § 64, Reports of Judgments and Decisions 1997-IV), nor can the fact that backlog

situations have become commonplace (*Unión Alimentaria Sanders S.A. v. Spain*, 7 July 1989, § 40, Series A no. 157).

89. The Court has recognised that in civil proceedings the principal obligation for progressing proceedings lies on the parties themselves, who have a duty to diligently carry out the relevant procedural steps (see *Unión Alimentaria Sanders S.A. v. Spain*, cited above, § 35, and *Healy v. Ireland*, cited above, § 55).

90. However, a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see, for example, *McMullen v. Ireland*, no. 42297/98, § 38, 29 July 2004, with further references).

91. In addition, the Court has repeatedly stated that even if a system allows a party to apply to expedite proceedings, this does not exempt the courts from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities (see *Philis v. Greece* (no. 2), judgment of 27 June 1997, Reports 1997-IV, § 49; *Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 56, 17 December 2002, *Doroshenko v. Ukraine*, no. 1328/04, § 41, 26 May 2011)."

A framework for assessing the present case

95. Taking all of the above into consideration as guidance in the present case, I propose to examine to the appellant's claim for damages in the following stages:

(i) Identify the overall time-period for the progress of the case from beginning to end, and then break down the overall period into sub-periods. At this stage, I propose merely to set out a neutral factual or chronological description;

(ii) Identify any sub-period(s) within the overall time-frame which *prima facie* raise(s) the Court's concern (and conversely, exclude any periods in respect of which there is no complaint or which clearly fall within the 'reasonable range'). At this stage, I propose to highlight any areas of concern without reaching a firm conclusion as to the ultimate issue, which I reserve to the final stage of the analysis;

(iii) Consider whether the State is responsible for any sub-period(s) of time which have been identified at (ii) as being periods about which the Court has a *prima facie* concern;

(iv) Consider whether the appellant in any way contributed to the delay within any period(s) of concern (i.e. those identified at (ii))by failing to employ available mechanisms to speed up the progress of the case;

(v) Discuss what was at stake for the appellant in the case and/or the impact upon the appellant of any delay;

(vi) Consider whether there are any other relevant factors, including the complexity of the case;

(vii) Decide the ultimate issue: whether the appellant is entitled to a remedy in damages for breach of his right to trial with reasonable expedition.

96. It seems to me that the trial judge in effect examined these various matters, albeit not in that explicit framework of analysis. As I disagree with some of what I might call her sub-conclusions, I propose to address each of the issues identified above and to comment on the trial judge's conclusions within the above framework as I proceed through it.

97. Before I embark upon this task, I wish to make some preliminary observations. First, I do not propose to import into the above framework a phrase such as "significant delay" or "egregious delay", as it would in my view add an extra layer of complexity into the analysis.

Insofar as the constitutional right in question is the right to trial with "reasonable" expedition, the simplest approach is to focus the question simply on whether the period of time to complete the process from start to finish was, in all the circumstances, "unreasonable". Of course, this is a qualitive analysis which should be sensitive not only to the chronology in the sense of the ticking of the clock but also to the many other factors which have affected or impeded the progress of the case and have contributed to the impact upon this particular appellant, as described by the Chief Justice in *Nash v. DPP* [2017] 3 IR 320. The word "reasonable" is a simple one, but it encompasses a complex analysis of numerous different factors, both quantitative and qualitative.

98. Secondly, sight should not be lost of the fact that the burden of proof lies upon the appellant to establish the individual ingredients within his case as well as to prove the overall proposition that there was breach of his constitutional right to a trial with reasonable expedition which entitles him to damages.

(1) Identify the overall time-period for the progress of the case from beginning to end and then break down the overall period into sub-periods for ease of analysis

99. In the present case, time starts to run from the date upon which the appellant was arrested. The end-date is the date upon which final judgment was delivered in the process, in this case being the judgment quashing his conviction which was delivered on appeal by the Court of Criminal Appeal. I note that the Chief Justice in *Nash* left open the possibility that there might, in some cases, be arguments to be made about a divergence between Convention claims and Constitution claims concerning the commencement date of the process, but that issue does not present any difficulty in this case. The appellant was arrested nineteen days after the alleged offence was committed and all parties were in agreement that time should run from the date of his arrest.

100. I would summarise some of the relevant chronological periods in the present case in the following terms:

a) *Pre-arrest stage - period from alleged offence to arrest: 19 days*. The offence of which the appellant was convicted was committed on 26th March, 2009. He was arrested on the 14th April, 2009, so there was no pre-arrest or pre-charge delay in this case.

b) *Total period from arrest to final judgment: 4 years, 3 months and 17 days.* The appellant was arrested on 14th April, 2009, and the final judgment of the Court of Criminal Appeal was delivered on 31st July, 2013.

c) *Pre-trial stage - period from arrest to trial*: *22 months*. The appellant was arrested on 14th April, 2009, and his trial took place in February 2011. I note that there is here is no complaint with regard to this period of time.

d) *Appellate stage - period from lodging of notice of appeal to final judgment:29 months*. The appellate stage lasted from 18th February, 2011 (when he lodged his notice of appeal) to 31st July, 2013 (delivery of judgment of the Court of Criminal Appeal quashing conviction). This is the period about which the appellant complains.

Concentrating then on the *appellate stage* which was one of 29 months in total, the following periods within it may be identified:

e) *Period from lodging of notice of appeal to appeal hearing: 26 months.* This period runs from February, 2011 to 18th April, 2013.

f) *Period from lodging of notice of appeal to first appearance in the list to fix dates: 9 months and 17 days*. This is the period from February, 2011 to 5th December, 2011.

g) *Period between first appearance in the list to fix dates and the appeal hearing*: *1 year, 4 months and two weeks.* This is the period from 5th December, 2011 to 18th April, 2013.

h) *Period between first appearance in the list to fix dates and final outcome*: *1 year, 7 months, 3 weeks and 5 days.* This is the period from 5th December, 2011 to 31st July, 2013.

i) *Period for which applicant was in custody pending appeal on this conviction alone: 1 year, 11 months, 3 weeks and 3 days.* This runs from 7th August, 2011 (when the sentence on another matter he was serving expired) to 31st July, 2013.

j) *Period from hearing of appeal to judgment on appeal: 3 months.* This period runs from the 18th April, 2013 to 31st July, 2013. No complaint was made with regard to this period of time and, in my view, rightly so.

(2) Identify any sub-period(s) within the overall time-frame which prima facie raise(s) the Court's concern (and conversely, exclude any periods in respect of which there is no complaint or which clearly fall within the 'reasonable range')

101. Two periods arise for consideration in this regard. The first is the period from February 2011 to December 2011. The trial judge considered the date of December 2011 as important, as is clear from the following passage in her judgment:

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

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

[…]

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

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

102. Counsel on behalf of the appellant was critical of the trial judge's view that the relevant period of concern commenced in December 2011 and sought to blame the DPP for delay prior to November 2011, which was when the amendment to the grounds of appeal was consented to by the DPP. The appellant complains that no consent was forthcoming to the amendment of the grounds of appeal until the matter appeared in court on 28th November, 2011 and he submits that consent could have been given prior to that date by the prosecution. However, the Court's attention was not drawn to any attempt by the appellant to seek the State's consent to the amendment prior to the date of amendment. The case was not ready for hearing until the grounds of appeal had been finalised and responsibility for finalising them lay upon the appellant. In circumstances where he sought to amend the grounds originally filed, the onus was on him to obtain the amendment either by consent or by court

order. No evidence was adduced to show that the appellant sought the prosecution's consent in correspondence and in those circumstances, the appellant has failed to discharge the onus of establishing that the responsibility for this period of time is the responsibility of the prosecution in the case. I would note, however, that the transcript was not available to the appellant until 26th April, 2011, more than two months after his notice of appeal had been filed; and that period of time must be attributed to the State.

103. The appellant next complains about the period during which the case was simply sitting in a queue waiting for the next available appeal hearing date because of the backlog of cases in the appellate system generally which, in turn, was due to the systemic problems relating to the absence of a sufficient number of judges in the appellate sector of the judiciary. If one looks at the waiting time between first list to fix dates and appeal hearing, it was a period of 16 months **(**December 2011 to April 2013**).** This period is the only period which raises a concern for the Court. That is not to say that all of that period is a matter of (even *prima facie*) concern, as there will always be a period of time during which a case waits in a queue for a date for hearing, a point made by McMahon J. in *Kemmy v. Ireland* [2009] 4 IR 74. But it is also clear from the evidence that the period of time which elapsed between this appeal's first appearance in the list to fix dates and the hearing date was beyond what was hitherto normal for the Court of Criminal Appeal, according to the evidence of Ms. Manners alluded to earlier in this judgment.

(3) Consider whether the State is responsible for any sub-period(s) of time about which the Court has a prima facie concern

104. Who was responsible for the fact that the waiting time for an appeal hearing was longer than usual? Although there was much discussion by the parties in their submissions of the principle of judicial immunity, I do not think that this case in fact presents any issue of "judicial delay" properly so-called; it also follows that the issue of judicial immunity does

not arise. Judicial delay, in the normal sense, generally arises where, for example, a judge has allowed an unreasonable period of time to elapse before delivering a judgment or finalising the formalities of a transcript or agreed note, or something of that kind. It can only be fair to characterise a delay as "judicial delay" if a judge or the judiciary has or have control over the particular action which impacts upon the progress of the case. In jurisdictions other than common law ones, judges may have a greater range of duties to perform in connection with a case and a correspondingly greater number of potential reasons for judicial delay may arise. In common law jurisdictions, the most likely cause of a judicial delay is a delay connected to the delivery of judgment.

105. The delay in the present case was of a different kind. It was attributable quite simply to the fact that there was, at that particular time, an insufficient number of judges to carry out the necessary appellate duties. In our system, with its particular configuration of the separation of powers under the Constitution, the power to erect important aspects of the "scaffolding" of the justice system, including the appointment of judges, lies in the hands of the executive and legislative branches of government. Indeed, that is where the solution was ultimately found; a Working Group was established to canvas solutions, a referendum was initiated, a new court was established, and new judges were appointed. The problem was not created by judges, nor did the solution lie within their hands. I cannot see how the delay in this case could possibly be described as one of judicial delay. It was a systemic delay rather than a judicial delay.

106. That being so, it does not seem to me that the principle of judicial immunity, as discussed in *Kemmy v. Ireland* [2009] 4 IR 74¸ arises at all on the facts of this case. If this is correct, the question, debated before the Court, of whether the view of the ECJ in *Kobler v. Austria* (Case C – 224/01) or of the European Court of Human Rights in *McFarlane* v. *Ireland* (2011) 52 EHRR 20 in any way alters the parameters of judicial immunity under

domestic law simply does not arise. For example, the appellant extracted a quotation from paragraph 21 of the majority judgment of the European Court of Human Rights in *McFarlane* where the Grand Chamber opined that there was likely to be an exception in Irish law to the right to damages for delay when a judge was responsible for the delay, and that this carve-out from any domestic action for damages was not compatible with the Article 6 jurisprudence. The point was also alluded to (as noted earlier in this judgment) by the Chief Justice in *Nash v. DPP* [2017] 3 IR 320. However, in *McFarlane,* there was a judicial delay in the true sense (a delay in approving a transcript of the judgment). In the present case, there was no delay of that kind. The inability of the case to obtain a date for the hearing of the appeal throughout the relevant period arose from the failure of the State to put in place the necessary courts and judges to have enabled his appeal to proceed with greater expedition; therefore, the issue of judicial immunity simply does not arise as a potential obstacle to his claim, in my view. Therefore it is not necessary to consider the interaction between European Court of Human Rights and Irish constitutional jurisprudence on this issue. The case instead falls within the type of case identified by Clarke C.J. in *Nash* when he said that:

> "**[51]** … [T]here could be cases where, on a proper analysis, any delay within the courts system might properly be attributed to a failure on the part of the State itself to provide adequate resources to enable the courts system to deliver trials which met the constitutional requirement of timeliness.".

107. I am not aware of any reason for Irish law to diverge from Convention law on the issue of systemic delay. The position of the European Court of Human Rights, in holding States answerable for systemic delays, has been repeatedly expressed, including in *Healy v. Ireland* [2018] ECHR 85 and *Keaney v. Ireland* [2020] ECHR 292. The *Healy* and *Keaney* cases are, of course, interesting because what was at issue was the same systemic problem as arises in the present case with regard to the progressing of appeals in Ireland prior to the establishment

of the Court of Appeal, albeit that both of the cases were civil claims. In *Healy*, the proceedings had been commenced in May 2004 and ultimately concluded in March 2016 (a period of some 12 years), and this included a period of four years (June 2010 - October 2014) where there was no activity in the appellate process due to the log-jam of cases pending before the Supreme Court in those years. The European Court of Human Rights concluded that, even taking full cognisance of the serious and substantial efforts on the part of the State to overcome a clear structural deficiency in its legal system and of the positive impact of this for the applicant at a late stage, the duration of the proceedings at the appeal stage was excessive and that there had been a breach of Article 6(1) of the Convention. In *Keaney*, the overall period was one of eleven years over two levels of court. The European Court of Human Rights took the view that, although the applicant's conduct had contributed to the delays, it could not justify the entire length of proceedings, particularly at Supreme Court level. The court was critical of the failure of the domestic courts to take action in the face of the applicant's delays in prosecuting his appeal, saying that "no adequate explanation has been given for the significant periods of between five and seven years when the appeals were allowed to lie dormant" (at paragraph 98).

108. The issue of systemic delay was much discussed by the Supreme Court in *McFarlane v. DPP* [2008] 4 IR 117, albeit in the context of an application for prohibition, and there was a divergence of opinion between the judges on the issue. Kearns J. (with whom Hardiman and Macken JJ. agreed) thought that systemic delay caused by failures of the criminal justice system should be governed by the same principles as those which govern prosecutorial delay. Geoghegan J. opined that systemic and prosecutorial delay were not the same and that systemic delay was a new concept which was dependent on the application of the European Convention on Human Rights within the limits of its applicability under the ECHR Act, 2003. He thought that, in the absence of a firm ruling to the contrary by the European Court

of Human Rights, it should be confined to a situation where there was a positively negligent failure of the system, with the resources that existed, of administering criminal justice.

109. It seems to me that the comments of the majority in *McFarlane* have been endorsed by the Chief Justice's judgment of the Court in *Nash* and there appears to be no reason in principle why systemic delays caused by inadequate resourcing should not ground a constitutional claim in damages in an appropriate case.

110. Before leaving this topic, I would also observe in passing that although responsibility for delay in delivering judgment might (as discussed above) appear primarily to be attributable to a judge or court ("judicial delay"), in a particular case it may be that there is in reality a "systemic" cause. For example, there is currently a statutory requirement that judges deliver judgment within two months. This requirement is in my view utterly unrealistic unless resources are put in place to render it possible for judges to have adequate "writing time"; with busy daily hearing lists in the courts and little time allocated to judges for writing their judgments, the failure of a judge to meet the statutory time limit is usually less a function of judicial "fault" and more a function of inadequate resources.

Were there any periods of "inactivity" by the State or its agents ?

111. One of the issues debated before the Court during this appeal was whether the fact that the case appeared regularly in lists to fix dates operated to negative the suggestion that was a period of 'inactivity' on the part of the respondent or its agents in dealing with the appellant's appeal. Where there has been a period of inactivity, this is given considerable emphasis in the Strasbourg jurisprudence. For example in *Kalashnikov v. Russia* (2003) 36 EHRR 34, where the applicant succeeded in an Article 6 complaint, the case had been "practically dormant" for almost two years following the removal from office of the trial judge and his replacement by another judge. Similarly, in *Solovyev v. Russia* [2007] ECHR 411, the European Court of Human Rights laid emphasis upon periods of inactivity,

including a period of one year and nine months from the time when the court received the case for trial and a hearing was fixed and held; and a period of one year when the case was pending before the Regional Court.

112. The respondents argue that the appearance of the appellant's case in the list to fix dates at periodic intervals meant that the case was kept under regular review. The appellant argues that this was not a review in any meaningful sense because the case could not be assigned a trial date due to the lack of judges. In the exceptional circumstances of the period in question, I agree with the appellant; I do not think that the fact that the appellant's appeal was appearing in regular lists to fix dates is of assistance to the respondents in circumstances where the pace of movement in those lists was (for reasons beyond the control of the judiciary) so slow. I agree that the fact that a case is under regular "review" by a judge is somewhat meaningless if the judge has little or no capacity to progress the case at a faster pace. The fact is that the case could not progress, not because something was outstanding on the part of either of the parties, but because there were too few judges available to hear appeal cases. This was not a "review" in any meaningful sense of the word. On this point, I disagree with the trial judge insofar as she considered that the supervision of the appellant's appeal in the sense that it regularly appeared before a judge in a list to fix dates was a factor weighing in the balance in favour of the State. In normal circumstances, this would be relevant; but the circumstances were not normal and this feature of the case does not assist the respondent

(4) Consider whether the appellant in any way contributed to the delay within any of those period(s) about which the Court has a concern by failing to employ available procedural mechanisms to speed up the progress of the case

113. The trial judge's conclusion that the appellant was at fault in failing to use available mechanisms for speeding up the process was hotly contested before the Court. Two matters

fall for consideration here: (i) should the appellant be blamed for a failure to make any application for priority of his appeal? And (ii) should the applicant be blamed for a failure to make any bail application pending appeal?

114. *Failure to make any application for priority:* It will be recalled that the Chief Justice in *Nash v. DPP* [2017] 3 IR 320 emphasised that a person who claims delay must have utilised whatever means were at his or her disposal to progress the case within a reasonable time. There can be no doubt that, in the ordinary run of things, this must be the correct approach. However, it seems to me that the situation which obtained at the particular time when the appellant's case was in the queue for an appeal hearing was not ordinary. It was a situation which had come to a head after years in the making, and it was ultimately remedied by exceptional measures (a constitutional referendum and the establishment of this Court). There is nothing to suggest that if the appellant had made an application for priority *simpliciter* at that time, he would have succeeded; on the contrary, it seems almost certain that he would have failed. In my view, what the Chief Justice said in *Nash* was premised on an assumption that there would be some point to making such an application and that it would not be futile. Because of the unusual circumstances which prevailed in the appellate system at that particular time, such an application was likely to have been futile and I do not think that blame can be laid at the appellant's door for failing to make an application for priority. I therefore respectfully disagree with the trial judge when she took the view that the appellant should be blamed for failing to make an application for priority. However, I say this subject to the possibility, mentioned below, that a failed bail application might have led the court to consider a priority hearing as a fall-back (as distinct from an application for priority *simpliciter*

115. *Failure to make a bail application:* The situation pertaining to a bail application is slightly different to an application for priority *simpliciter*. Such an application would not

have been contingent upon the availability of judges for a full appeal hearing; any such application would take less time than a full appeal (although, admittedly, it would still have required some amount of time in order to explain the overall case and seek to persuade the Court that the appellant satisfied the relevant criteria for post-conviction bail). For present purposes, the relevant question as to whether the appellant should have made a bail application turns on an objective assessment of whether he had a reasonable prospect of succeeding in such an application. The threshold for obtaining bail post-conviction is very high, as set out by the Supreme Court in *DPP v. Corbally* [2001] 1 IR 180, where it was described as follows (at page 186):

> "…bail should be granted where notwithstanding that the applicant comes before the court as a convicted person, the interests of justice requires it, either because of the apparent strength of the applicant's appeal or the impending expiry of the sentence or some other special circumstance. It must always be borne in mind that the applicant for bail in this situation is a convicted person and the Court of Criminal Appeal should therefore exercise its discretion to grant bail sparingly."

116. An objective assessment of the likelihood of success is difficult in the present case because there is a risk of a distortion arising from hindsight, namely the fact that the Court of Criminal Appeal ultimately decided to quash the conviction on the ground that the case should not have gone to the jury. There is a danger of assuming that something which has now moved clearly into the foreground (the "DNA point") was always and obviously likely to be a successful appeal point. Curiously, however, this particular ground of appeal i.e. that upon which the conviction was ultimately set aside, does not appear to have loomed large in the thinking of the appellant's legal team prior to the delivery of the appellate judgment. Indeed, at the hearing before us, it was stated by counsel on behalf of the appellant that the "exceptional nature" of the case did not become apparent until the Court of Criminal Appeal

decision was handed down. The point on which success ultimately turned (the "DNA point") was one of seven grounds of appeal and does not appear to have been given particular prominence prior to the appeal. The appellant (or presumably his legal team) did not think, apparently, that this point might reach the *Corbally* threshold for bail pending appeal. It may also be noted that although the appellant had brought Article 40 proceedings during the period between the trial and the appeal, and included a point which was a ground of appeal, this was a ground *other* than the "DNA point" which was ultimately successful. The appellant now finds himself in the somewhat odd position of arguing in this case both: (a) that it would have been futile to make a pre-appeal bail application because the prospect of success was not within the *Corbally* criteria; and (b) that the basis upon which his conviction was quashed was manifestly a miscarriage of justice of a highly unusual kind and now warrants special recognition in the form of damages

117. Thus, this case, insofar as it concerns the pre-appeal bail issue, presents an unusual feature; with hindsight, there appears to have been a discrete, strong ground of appeal which might have satisfied the *Corbally* criteria, but while the appellant was actually queuing for an appeal date, this point appears to have been viewed as merely one of a number of other appeal points and was not laden with the significance it later came to have. In this regard, I note that the *Corbally* threshold is usually possible to surmount only where there is a clear-cut, discrete ground of appeal which is sufficiently strong. The conspicuous point which ultimately led to the quashing of the conviction in the present case was apparently not so conspicuous prior to the appeal itself, or perhaps even until the Court's decision on appeal. I am therefore cautious about imposing blame on the appellant for his failure to make the bail application.

118. Despite my caution in this regard, it nonetheless seems to me, on balance, that the absence of a bail application while the appeal was pending does weigh against the appellant

in the present proceedings and I agree with the trial judge in this regard. The appellate court simply did not have any opportunity to consider whether there was sufficient reason to grant bail because the appellant never put that issue before the Court by means of any application. As the appellate court ultimately found the "DNA point" persuasive enough as a basis for quashing the conviction, it might have thought that it was sufficient to meet the *Corbally* criteria if it had been presented with the issue at an earlier stage. It is also possible that the Court of Criminal Appeal might have been more sympathetic to such applications at that particular time, given the backlog of cases. The court was acutely aware of the problem, as evidenced by the remarks of Hardiman J., and the longer the period of time which had elapsed, the more persuasive a bail application would have become. The appellant did not bring any bail application because he did not think it would be successful; but this subjective view (or perhaps, more accurately, that of his legal advisers) seen with the benefit of hindsight (the ultimate outcome) could be viewed as objectively wrong. Therefore, I have reached the conclusion that, objectively speaking, the appellant failed to employ a mechanism which might have set him at liberty pending the appeal.

119. Another important point is that even if the appellant had failed in his pre-appeal post-conviction bail application, the Court might have granted him priority as the next best alternative, a practice sometimes adopted by the Court. All of these matters are hypothetical, necessarily, because the appellant did not put any of this before the Court at that time. However, this is precisely the problem; as the application was not made, it is impossible to be certain what the outcome would have been. I would nonetheless characterise it as a measure which could reasonably have been attempted or which had a reasonable prospect of success.

120. I will return to the significance of these findings in the concluding paragraphs

(5) What was at stake for the appellant in the case and/or the impact upon the appellant of any delay?

121. It is of course a significant factor that the litigation in question concerned a criminal charge in respect of a robbery, which in and of itself necessarily meant that any delay in the process would have had an impact of a serious nature upon the appellant.

122. Separately, an important factor was that the appellant was in custody awaiting appeal. During the appeal hearing there was argument as to whether and/or to what extent it is relevant to an assessment of delay/reasonable expedition that the appellant was in custody pending the appeal. In particular, the question was raised as to whether this factor is relevant: (1) only to the quantum of damages if and when a court finds that the line of reasonable time has been crossed; or (2) to the assessment of *whether* the line of reasonable time has been crossed. In my view, the latter approach is correct. It is always the case that the Irish criminal courts prioritise "custody cases" when setting trial and appeal dates, and for good reason. The right to liberty is a fundamental constitutional right, and the impact upon a person's life caused by delay in the administration of justice is significantly greater when that person is in custody than it is in a case where the person is at liberty awaiting trial and/or appeal. Any assessment of whether there has been reasonable expedition in criminal proceedings, in my view, must take into account whether the person was in custody. To borrow the terminology of the Strasbourg jurisprudence, there is even more "at stake" for a person in pre-trial custody and/or in custody post-conviction awaiting an appeal hearing than there is for someone who is on bail (see *Abdoella v. The Netherlands* (1995) 20 EHRR 585, and *Salmanov v. Russia* [2008] ECHR 753, at paragraph 89, where the European Court of Human Rights said: "Finally, the Court takes into account that throughout the proceedings the applicant remained in custody, so that particular diligence on the part of the authorities was required"). The constitutional right in respect of liberty has to be read harmoniously with Articles 38 and 34,

and any analysis of the right to trial with reasonable expedition must maintain sight of the fact (if it be the case) that the appellant was in custody, just as it is in Strasbourg jurisprudence. It also appears to me to follow from the above that, in principle, a particular period of time pending trial or appeal which might be acceptable in respect of a person who is at liberty might not be acceptable in respect of a person who was in custody.

123. I hasten to add that this does *not* mean that if there is a finding of unreasonable delay, any award of damages is somehow on the basis that the person 'should not have been in custody' or that his or her custody was somehow wrongful or unlawful. Whether a person was in detention while awaiting trial or appeal is relevant to the analysis of whether a period of time was reasonable in the context of the *right to trial with reasonable expedition* and any compensation awarded would be awarded for the excessive length of the waiting time (to which the fact that a person 'waited' in custody is relevant); not compensation for deprivation of liberty *simpliciter.*

(6) Other relevant factors, if any

124. For completeness, I mention the issue of complexity because it is a factor which is usually a significant feature in any analysis of delay. In many cases, the length of proceedings may stem from the complexity of the case, and this is usually an important factor to consider, both in relation to periods of time awaiting trial and periods of time awaiting appeal. Obviously, one would not in the normal case expect the same level of preparation (and therefore length of time) to be required for an appeal as prior to a trial; but nonetheless the preparation for an appeal of what was a lengthy trial with numerous difficult legal issues can in principle be distinguished from the preparation for an appeal in a relatively short matter with (for example) a simple net point on appeal.

125. It was not suggested by the respondents in the present case that the complexity of the case was a reason for any delay which had occurred. Reference was made to the fact that

there were seven grounds of appeal, but I think this was merely to negative any possibility that the appeal was so obviously simple and straightforward that it could have been disposed of in a brief hearing. The case had a degree of complexity, but the respondents did not seek to rely upon it because the reality was that the cause of delay during which the appellant was waiting for an appeal date was systemic, as discussed earlier.

(7) The ultimate issue: whether the appellant is entitled to a remedy in damages for breach of his right to trial with reasonable expedition

126. In this section, I address the ultimate issue: whether the lapse of time in the present case, from start to finish, brings the case beyond the range of what could be considered 'reasonable' under the Constitution having regard to all of the circumstances discussed above. In this regard it may be helpful to summarise the essential points arising from the above discussion as follows.

127. First, the most relevant periods are: the total period of 4 years and 4 months or 52 months from arrest to final outcome (the judgment quashing conviction); the period of 29 months constituting the entirety of the appellate process; the period of 17 months between first appearance in the (appeal) list to fix dates and the appeal hearing; and the period of 20 months between first appearance in the (appeal) list to fix dates and final outcome.

128. Secondly, the appellant was in custody throughout the period but, as regards the appellate process, his custody can be solely referenced to this case only during the latter two periods (17 months, and 20 months respectively), because he was serving a sentence on another matter until August 2011.

129. Thirdly, the primary period of concern to the Court is the period during which the appellant was waiting for a date for his appeal hearing. Some passage of time between the filing of a notice of appeal and the hearing of an appeal is to be expected in the normal run of litigation; but the length of the waiting period at this stage of the process was due to

systemic problems at that particular time which were the responsibility of the State or its agents.

130. Fourthly, the appellant did not try to bring a bail application before the appellate court which might have been successful in either securing his liberty pending the appeal or in achieving an earlier appeal hearing date.

131. Fifthly, although the appellant lodged his grounds of appeal in February 2011, he issued a motion to amend those grounds in July 2011, and they were ultimately amended by consent in November 2011. I do not consider that the case was ready for the appeal hearing until then and responsibility for having his side of the case ready lay at the door of the appellant (with the exception of the two months, approximately, while the transcript was awaited, between February and April 2011). Therefore, in my view, the period from February 2011-November 2011 cannot simplistically be considered a period of 'delay' which can be attributed to the State, but it is nonetheless the case that the total period for the appellate process must be deemed to run from February 2011, that it took two months for the transcript to be made available to the appellant, and this cannot be lost sight of.

132. In all of those circumstances, was the trial judge correct in her ultimate conclusion that the appellant was not entitled to succeed in his claim? This is a difficult matter to assess for a number of reasons, about which I would like to make a number of points.

133. *Absence of previous Irish authority on the remedy of damages*: The first and most obvious reason for the difficult situation in which the Court finds itself is the absence of any previous Irish authority granting this particular remedy (damages) for breach of the right to a trial with reasonable expedition. Previous Irish cases concerning delay in litigation concerned prohibition applications, in respect of which different considerations apply, and therefore one cannot simply extract periods of time discussed in those cases and extrapolate from them for present purposes. I should however mention *O'Donoghue v. Legal Aid Board*

[2006] 4 IR 204 in which the plaintiff obtained an award of damages (almost €9,000) in circumstances where a delay in obtaining legal aid for the purpose of litigation was found to constitute a breach of constitutional rights; it involves similar and related principles to the present case, although it differs slightly insofar as it appears to have been decided on the basis of the constitutional right of access to the courts and the right to an (administrative) decision within a reasonable time.

134. *Absence of comparator evidence*: A second reason for the difficulty of the assessment is the absence of comparator evidence before the Court. While it is true that there was evidence from Ms. Manners, the Registrar to the Court of Criminal Appeal, as described earlier, there was no evidence of a type I would call, strictly speaking, "comparator" evidence. For example, there was no evidence as to the *current* waiting times for criminal appeals before this Court nor was there any evidence of the waiting times *prior* to the period of which the appellant complains; nor was there any attempt to put before the Court any evidence of waiting times in any other comparable (or any) jurisdictions.

135. The question of the duty placed upon an applicant to lay appropriate comparator evidence before the Court was alluded to several times by Kearns J. in *McFarlane v. DPP* [2008] 4 IR 117. It is true that his comments were made in the context of an application for prohibition but the same would seem to me to apply, in principle, in a claim for damages for delay. He said:

> "**[143]** Before an entitlement to prohibition arises it seems to me that a number of requirements must be met. Firstly, an applicant must go further than merely point to a lengthy lapse of time from the inception of criminal proceedings until the date when prohibition is sought. He must demonstrate that the prosecutorial and/or systemic delay complained of is well outside the norm for the particular proceedings and procedures involved. Not every delay is significant and not every delay warrants the description

of being blameworthy to such a degree as to trigger an inquiry by the court under *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172 or *Barker v. Wingo* (1972) 407 U.S. 514. In my view an applicant should adduce and place before the court some evidence of what the norm is in terms of time taken for the particular process. This is not to impose an unrealistic obstacle in the way of an applicant. Information as to the average length of time it takes for various forms of proceedings to get on for hearing both in the High Court and in this court is readily available from the courts service."

136. He also said:

"**[164]** Despite allegations of systemic delay, no evidence of what might be an appropriate period for this process was led by the applicant. In those circumstances both counsel for the respondent and the court have had to do the best they can to determine if the system was in any way at fault for delay. This evidential shortfall was commented upon by Quirke J. in the judgment he delivered in the High Court. I can only base my opinion therefore on my own personal experience as a High Court Judge who dealt with judicial review matters from time to time."

137. Later, when talking about the delay in obtaining the transcript of the High Court judgment and the progress of the appeal to the Supreme Court, Kearns J. went on to say:

"**[169]** … *Judges should not substitute their own subjective feelings about the reasonableness or otherwise of periods of alleged systemic delay without having evidence of the normal period of time taken by the particular type of proceedings or procedures within them. It is only against such norms that deviations from what is appropriate can be measured and assessed*. I find that, in the absence of evidence as to the norm for this part of the process, it is impossible to find that there was a significant or blameworthy delay of such a degree which would enable me to conclude

that this case even lends itself to the application of the principles in *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172 or *Barker v. Wingo* (1972) 407 U.S. 514 in the sense that any supposed delay is such as to trigger an inquiry and the application of a balancing test thereunder." (emphasis added)

138. The appellant in the present case has certainly established *some* relevant matters, including that there was a backlog in the appeals process at the relevant time; that this was a significant problem which had led to the establishment of a Working Group; and the particular periods of time which elapsed in relation to his own case. However, he has not pointed to any comparator information which might have assisted the Court in forming a view as to (a) what might be considered "normal" or "usual" for the progression of a conviction appeal, and (b) the extent of the deviation from the range of "normal" or "usual" in his case. I accept that the location of sources for such evidence and finding an appropriate method to present it in court could be challenging, but reasonable steps should be taken to secure such evidence as might be available and, in my view, the appellant could have gone further than he did.

139. *Citation of individual cases presents a partial picture:* Thirdly, while it is true that periods of time condemned in individual cases were cited to the Court, this type of approach necessarily presents a very partial picture. One can look to the European cases, for example, but many of these involved much longer periods of time and it should not be forgotten that the Court is dealing with the present claim as a breach of constitutional right and not as a claim for breach of a Convention right as such, by reason of the conclusion reached in Part 2 of this judgment. *McFarlane v. Ireland* (2011) 52 EHRR 20 involved a total period 10 years and 6 months. *Healy v. Ireland* [2018] ECHR 85 involved a total period of 12 years, which included a period of four years in the appellate process for precisely the same systemic reason as has been identified in the present case (between June 2010 - October 2014). It was

of course a civil case and there was no question of anyone being in custody. In *Keaney v. Ireland* [2020] ECHR 292, the overall period was one of 11 years with delays of "between five and seven years when the appeals were allowed to lie dormant" (paragraph 98 of the court's judgment). In *Abdoella v. The Netherlands* (1995) 20 EHRR 585, which is perhaps the high-point of the appellant's case, the overall period concerned totalled 4 years and 4 months with regard to a murder conviction and appeal, and the Court found a breach of Article 6 in circumstances where there had been a period of 21 months of inactivity (a period calculated by adding two separate periods together) in the progress of the appeal. This was caused by delays in transmitting papers relating to the case from one level of court to another.

140. *The applicant's own conduct:* There is also the question of the appellant's own conduct, in particular the issue of the bail application that he could have made (as discussed in detail earlier in this judgment). While, of course, there is a weighty public interest in the progress of litigation which places obligations on the State organs to ensure that cases proceed with reasonable expedition quite independently of individual litigants, the Irish system as established under the Constitution is primarily an adversarial one and the conduct of a litigant is still relevant to some degree when considering whether he is entitled to damages for a breach of the right to trial with reasonable expedition. This was made clear by the Chief Justice in the *Nash v. DPP* [2017] 3 IR 320 case.

141. In all of these circumstances, while I am prepared to (and must) take a view in this particular case, I would not be satisfied to suggest any general guidance in terms of time periods for cases in which this remedy is sought; nor should the decision I have reached be taken as extending beyond the facts of this particular case; for I am forced back to precisely what Kearns J. deprecated in the *McFarlane v. Ireland* (2011) 52 EHRR 20 case, namely having substitute my own subjective feelings about the reasonableness of the periods in question for evidence which might have anchored the decision in a more objective analysis.

A decision on a subjective basis and in something of an evidential vacuum cannot carry much, if any, precedential weight.

Conclusion

142. With the overall proceedings taking a little over four years across two levels of jurisdiction, this case is, in my view, a borderline case. On the one hand, I am persuaded that there was a period of time during which the case failed to progress at a reasonable pace because of a systemic delay, and I am keenly aware that the appellant was in custody pending the outcome of his appeal. If this case were one in which the criminal appeal had been ready for hearing within a short time of the notice of appeal and obtaining of the transcript, I would probably have been willing to find that there had been a breach of the constitutional right warranting a remedy in damages. However, three factors, in my view, tip the balance in the other direction: (1) the absence of any evidence, comparator or otherwise, which would enable the Court anchor its conclusions, objectively, in terms of what is reasonable and what is not; (2) the fact that by reason of the appellant's own inaction, the appeal was not in a state of readiness to get a date for trial until the grounds of appeal (which were the appellant's responsibility) had been amended (bearing in mind that there was a period of approximately six or seven months from when the appellant obtained the transcript to the amendment of the grounds of appeal) ; and (3) to a lesser extent, the failure of the appellant to make a bail application pending the appeal which might have released him from custody for some of the period pending the appeal hearing and/or led to the fixing of an earlier appeal date.

143. Regarding the second factor identified above, I would observe that although the State has, of course, overall responsibility for ensuring that cases proceed at a reasonable pace, the adversarial system under the Constitution is party-led and the failure of a party to have his case in a state of readiness for hearing must be considered a matter of some importance when reckoning the periods of time alleged to constitute delay and whether or not a litigant is

entitled to damages from the State. In this regard, it is possible that there might be a nuance of difference (in terms of the weight to be attributed to this factor) as between the Constitution and the European Convention on Human Rights. Through the appellant's own failure to bring his application for a remedy under the European Convention on Human Rights Act, 2003 in time (or provide an explanation as to why time should be extended) as discussed in Part 2 of this judgment, the Court is dealing with a claim under the Constitution and not the Convention. This judgment deals with his right to a remedy under the Constitution and not the Convention.

144. If one counts the period of time between the issuing of the motion to amend the grounds of appeal (July 2011) to final judgment, that is a period of two years – at least part of which must be allocated to the writing of the judgment (in respect of which a period of three months was not unreasonable). In the absence of objective evidence that this period of time is unreasonable and in view of the appellant's failure to take any steps to make a bail application, I am not prepared to find that the time which elapsed in this case was unreasonable and constituted a breach of the right to trial with reasonable expedition together with any consequent remedy in damages that would flow from such a finding.

145. I would not hesitate to make a finding of breach and award appropriate damages in a case where there was clearly unreasonable delay in the progress of a case, particularly if a litigant had moved the case along with reasonable expedition and availed of all possible mechanisms to do so. However, where the case is borderline, as I consider the present case to be, the three factors identified above prevent me from reaching a conclusion that the appellant's claim should succeed. Accordingly, I would dismiss the appeal and uphold the conclusion of the trial judge in this regard.

146. As this judgment is being delivered electronically, it is appropriate to record the agreement of the other members of the Court.

Donnelly J.: I have read this judgment and agree with it.

Power J.: I have read this judgment and agree with it.