THE HIGH COURT

[2024] IEHC 224

[Record No. 2023/315 JR]

BETWEEN

LT (A MINOR)

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSEUCTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Barr delivered electronically on the 18th day of April 2024.

Introduction.

1. Section 4 of the Criminal Justice (Public Order) Act 1994, as amended, (hereinafter 'the 1994 Act') provides that it is an offence for any person to be present in a public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself, or any other person in his vicinity.

2. Sections 23A and B were inserted into the 1994 Act by a combination of the Criminal Justice Act 2006 and the Intoxicating Liquor Act 2008. These sections provide for the serving of a notice known as a fixed charged notice (hereinafter 'FCN') by the arresting garda on the person who has been arrested, *inter alia*, for an offence committed under s.4 of the Act. When the person receives the FCN, they can elect to pay the fine stipulated therein. If they do that, that will be the end of the matter. They will not acquire any criminal conviction. Alternatively, if they wish to challenge the accusation that they had committed an offence under s.4, they can ignore the notice and the matter will proceed to a summary trial in the District Court in the usual way.

3. The FCN procedure provided for under the 1994 Act, is only available to people who are not less than 18 years of age.

4. The applicant is charged with an offence of being intoxicated in a public place contrary to s.4 of the 1994 Act on 17 July 2022, when he was 16 years of age.

5. The applicant was not eligible to receive an FCN under s.23 of the 1994 Act, as he was under 18 years of age at the relevant time. Instead, he was processed under the provisions of the Juvenile Diversion Programme provided for under the Children Act 2001 (hereinafter 'the 2001 Act'). The director of the diversion programme deemed that the applicant was unsuitable to be dealt with on that occasion under the diversion programme. Accordingly, he was brought for trial before the District Court.

6. In these proceedings, the applicant challenges his exclusion from the FCN provisions of the 1994 Act. He maintains that his exclusion therefrom, contravenes his right to equal treatment before the law, as provided in Art. 40.1 of the Constitution.

Background.

7. The relevant facts in this case are not in dispute. The applicant was summoned to appear before Dungarvan District Court on 06 March 2023, to answer one charge of being intoxicated in a public place contrary to the provisions of s.4 of the 1994 Act, as amended. When the matter came before the District Court, the applicant's solicitor raised a query as to whether or not the applicant had received an FCN. He was informed by the prosecution garda inspector that such notices were not issued to juveniles, as they had no source of income to pay them. The matter was adjourned to 03 April 2023, for hearing.

8. The applicant's solicitor wrote to the Garda Síochána seeking clarity in respect of the matter. On 14 March 2023, he received a response from the gardaí, stating that an FCN had not issued in the case and stating that the issue of such a notice was always a discretionary matter for the arresting garda. Upon making further inquiry in the matter, the applicant's solicitor received a further response wherein it was indicated that it was at the discretion of An Garda Síochána as to what sanction to apply.

9. The applicant's solicitor stated in his affidavit that the penalty for an offence under s.4 of the 1994 Act, is a fine not exceeding €500. However, s.108 of the 2001 Act provides that where a court is satisfied of the guilt of a child, on an offence which is dealt with summarily and that the appropriate remedy is a fine, the fine shall not exceed half the amount which the District Court could impose in the case of a person of full age and capacity. The applicant's solicitor stated that he had been instructed that had an FCN been issued in this case, the applicant would have paid the fine stipulated therein.

10. In his affidavit sworn on 10 October 2023, verifying the statement of opposition in this case, Inspector Alan Kissane stated that children who are suspected of public order

offences under the 1994 Act, have the possibility of having these matters disposed of through a non-court option in the form of the diversion programme created under part IV of the 2001 Act. The diversion programme provides an alternative to prosecution for children between the ages of 12 and 17 years. The objective of the programme is to divert any child who accepts responsibility for his or her criminal or anti-social behaviour, from committing further offences or engaging in further anti-social behaviour. Inspector Kissane stated that that objective was achieved primarily by administering a formal, or informal, caution to such a child and, where appropriate, by placing him or her under the supervision of a juvenile liaison officer ("JLO") and by convening a conference to be attended by the child, family members and other concerned persons.

11. He stated that the director of the diversion programme is a member of An Garda Síochána, not below the rank of superintendent, who is assigned for that purpose by the Commissioner of An Garda Síochána. The director decides whether to admit a child to the diversion programme and the category of caution to be administered to any child so admitted. A child shall not be prosecuted for the criminal behaviour, or for any related behaviour, in respect of which he or she has been admitted to the diversion programme. If the director decides not to admit a child to the diversion programme in respect of a particular offence, the child may be prosecuted in the normal manner.

12. Inspector Kissane outlined the different forms of caution that can be administered under the diversion programme. Where a formal caution is issued, the child is placed by the director under the supervision of a JLO for a period of twelve months from the date of the administration of the caution. Where an informal caution has been issued, the child is not placed under the supervision of a JLO; however, in exceptional circumstances, the child who has received an informal caution, may be placed by the director of the programme under the supervision of a JLO for a period of six months from the date of administration of the caution.

13. Admission to the diversion programme is only available to children who are at least 12 years of age and who are under 18 years of age. The age for admission to the programme is determined by the age of the child on the date on which the criminal, or anti-social behaviour, took place.

14. Inspector Kissane stated that due to the provisions of s.48(1) of the 2001 Act, he was significantly limited in what he could say about the applicant's prior involvement in the

diversion programme. He had been advised that he could only state that the applicant had been considered for inclusion in the diversion programme on a number of occasions in the past. On some of those occasions, he had been deemed unsuitable for inclusion in the programme.

15. In the present case, the applicant had been considered for admission to the diversion programme in relation to the alleged s.4 offence. By decision dated 04 August 2022, the applicant had been deemed 'unsuitable in this case only' for admission to the diversion programme. It was therefore considered appropriate to issue a summons and to prosecute the offence in the usual way.

The Law.

16. Article 40.1 of the Constitution provides:

> *"All citizens shall, as human persons, be held equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

17. The relevant provisions of the Criminal Justice (Public Order) Act 1994, as amended, have been summarised earlier in the judgment. It is not necessary to set out these statutory provisions in more detail.

18. The provisions of the Children Act 2001, as amended, sets up a comprehensive regime for dealing with children who may be entering, or may be within, or may be leaving, the criminal justice system. The long title to the Act provides as follows:

> *"An Act to make further provision in relation to the care, protection and control of children and, in particular, to replace the Children Act, 1908, and other enactments relating to juvenile offenders, to amend and extend the Child Care Act, 1991, and to provide for related matters."*

19. As already noted, the Act makes extensive provision for the establishment of a diversion programme, which is designed to provide a mechanism whereby children who are accused of criminal offences, can avoid a criminal conviction, if they admit responsibility for their behaviour and consent to receiving either an informal or a formal caution. The Act also provides for significant differences in treatment between children and adults who come in contact with the criminal justice system. In particular, part V deals with the issue of criminal responsibility of children; part VI deals with treatment in custody; part VII deals with the venue for trials relating to children; part VIII deals with proceedings in court

dealing with children; and part IX deals with provisions concerning sentencing and detention of children. It is not necessary to set out the detailed provisions that are provided for in the 2001 Act, save to note that the Act provides a comprehensive system for dealing with children coming into, within, or exiting, the criminal justice system.

20. There have been a number of cases which have looked at the issue of the right to equal treatment as provided for in Art. 40.1 and in particular, where differences in treatment are based on age. In the case of *Re Art. 26 and the matter of the Employment Equality Bill* [1997] 2 IR 321, it was held that the Oireachtas was entitled to legislate in respect of different categories of workers based on age, as long as that was not done in an arbitrary, capricious or irrational way and could be justified as being for a legitimate purpose. Hamilton CJ stated as follows at p.346:

> "*The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, classifications based on age cannot be regarded as, of themselves, constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in Brennan & ors. v. Attorney General [1983] ILRM 449 at p. 480 as follows:—*
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> > *'the classification must be for a legitimate legislative purpose . . . it must be relevant to that purpose, and that each class must be treated fairly.'"*

21. That dictum was endorsed by Murray CJ in *JD v Residential Institutions Redress Review Committee* [2010] 2 ILRM 181, where the Chief Justice noted that age was frequently used as a classification of inclusion or exclusion for many legislative purposes. He stated that there was nothing in such classification, taken on its own, to suggest that it was invidious, unfair or, in the legal sense, discriminatory.

22. In *B v Director of Oberstown Children Detention Centre & Ors*. [2020] IESC 18, the Supreme Court considered whether the provisions relating to remission of a prison sentence, which applied to adults, and which included the possibility of obtaining enhanced remission, were discriminatory; insofar as such favourable remission provisions were not available in identical terms to child offenders, who were sentenced to a period of detention in a juvenile detention centre.

23. In examining this issue, O'Malley J, delivering the judgment of the court, noted that the 2001 Act was "*a comprehensive and radical overhaul, of the law governing the juvenile criminal justice system*". She noted that among other innovations, it treated all persons under the age of 18 years, as children. A wide variety of procedures and processes had been put in place, that had as their objective, the diversion of children away from crime and from the formal criminal justice system. She went on to note that the Act also envisaged prosecution and punishment, including deprivation of liberty.

24. The court noted that the core contention put forward by the applicant in that case, was that he had not been treated equally *vis-à-vis* adults, who, he maintained, were in objectively the same situation as him, in that they were undergoing custodial sentences. The court held that that claim was not well founded. It could only be successfully maintained, if the rationale of the Children Act, which distinguished clearly between children and adults, was to be challenged and undermined. The court noted that the Oireachtas had determined that children up to the age of 17 years, should be treated differently to adults, because of their age. It was held that in so doing, the Oireachtas had clearly acted on the basis of a perceived difference, that was seen as relevant in the context of the criminal justice system, in the capacity and social function of adults and children. The court noted that there was undoubtedly a constitutional imperative to protect children. Since the Constitution left it to the Oireachtas to decide when the status of childhood would end, the differential treatment could only be challenged on the basis that it was, in principle, unconstitutionally invidious; the court held that that argument had not been made out in the case before it.

25. Having examined the rationale between the operation of the remission system for juvenile offenders, which was based on an incremental short term benefit basis, whereby child offenders would get remission, or leave of absence from the prison on a short term basis if they behaved appropriately; the court held that there was a rational justification for the difference in treatment between adults and children serving sentences of imprisonment. The court held that the presumption of the legislature, that the differences that existed between children and adults called for different regimes, had not been shown to be factually incorrect, or unfair in principle. Accordingly, the challenge to the legislative provisions failed.

26. The Supreme Court examined the application of the rights conferred by Art. 40.1 in the context of the right to obtain domiciliary care allowance in *Donnelly v Ireland* [2022] 2 ILRM 185. Having reviewed the authorities in this area, O'Malley J, delivering the judgment of the court, set down the following principles at para. 188:

> "*The authorities do demonstrate support for the following propositions:*
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> *(i) Article 40.1° provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
>
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1°.*
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> *(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
>
> *(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*
>
> *(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.*
>
> *(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case.*"

27. In setting out the test that had to be met for a successful claim for breach of the right to equal treatment, the court accepted the test that had been set down by Barrington J in the *Brennan* case and held that the relevant test was as follows: the statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose. The court went on to note that the legislature was entitled to make policy choices and therefore must be entitled to distinguish between classes of persons. The court held that the equality guarantee in Art. 40.1 was not to be interpreted as meaning that the State

shall not, in its enactments, have "due regard" to differences of physical and moral capacity and of social function. The court held that the challenge to the legislation could only succeed if the legislative exclusion was grounded upon some constitutionally illegitimate consideration and thus drew an irrational distinction, resulting in some people being treated as inferior for no justifiable reason. The court noted that the Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing the same relevant characteristic into the class, would be "fairer".

28. The court pointed out that the guarantee in Art. 40.1 was grounded upon the respect due to all human persons. The question must in the first instance be whether the legislation drew a distinction on the basis of intrinsic aspects of the human personality. The reason why the grounds concerning those intrinsic aspects of human personality were considered "suspect", was that a differentiation based on such grounds, may in fact be the result of either irrational prejudices, or groundless assumptions. The obligation of the court under Art. 40.1, included ensuring that groundless assumptions or prejudices had no role in determining the legal rights of the individual.

29. Finally, in *O'Meara v Minister for Social Protection & Ors.* [2024] IESC 1, O'Donnell CJ, delivering a concurring judgment, stated that the concept of equality involved not only treating like cases alike and unlike cases unalike, but also that where differentiation was made, that it was made and justified by reference to the manner in which the comparators are unalike. He pointed out that it would not be possible, for example, to justify a provision which discriminated against marriage or a married couple, by pointing to the fact that the Constitution identified a married couple as different from an unmarried couple in Art. 41.3. Any such discrimination would run counter to the distinction made in the Constitution, and could not therefore, be justified by reference to it. However, it seemed to be accepted by the parties to the appeal, that it was permissible to provide for different legislative treatment on the basis of marriage.

Discussion.

30. On behalf of the applicant, Mr Cahill SC described the FCN procedure as one which had a number of benefits both for the common good and for people charged with such offences. It provided a mechanism under the 1994 Act, whereby minor offences could be accepted by the offender by payment of a fine, thereby saving both garda time and court

time in prosecuting the matter, while at the same time enabling the offender to avoid a criminal conviction.

31. It was submitted that as both an adult and a juvenile could commit the offence provided for in s.4 of the 1997 Act, there was no rational or fair reason why the benefit of the FCN procedure, was available to adults, but was denied to juveniles in the same circumstances.

32. It was submitted that Art. 40.1 contained one of the most important rights that were guaranteed to persons under the Constitution. In *Murphy v Ireland* [2014] 1 IR 198, it had been noted by O'Donnell J (as he then was) that it was "not insignificant" that the right to equal treatment had been placed at the outset of the section in the Constitution dealing with fundamental rights. In that case, the court had noted that the phrase "human persons" in Art. 40.1 referred to those immutable characteristics of human beings, or choices made in relation to their status, which were central to their identity and sense of self and which, on occasion, had given rise to prejudice, discrimination or stereotyping. Counsel submitted that matters such as gender, race, religion, marital status and political affiliation might not all be immutable, but could be said to be intrinsic to a human being's sense of themselves.

33. It was submitted that having regard to the principles set down by the Supreme Court in *Donnelly v Ireland*, the discrimination in this case, being based on age, which was one of the recognised immutable characteristics of a human person, meant that the court had to approach the discrimination in treatment, with particular scrutiny.

34. It was submitted that when one looked at the provisions of s.23 of the 1994 Act and at the legislative objective which was intended to be achieved, which was the saving of garda time and court time and the avoiding of a conviction for minor offences, there was no rational or fair basis on which juveniles, such as the applicant, were excluded from its provisions. It was submitted that whilst the law frequently discriminated in favour of children, this was a case where children were being excluded from a provision that would otherwise benefit them. It was submitted that as that exclusion was not for any legitimate statutory purpose, it had to be seen as being arbitrary, capricious and irrational. It was submitted that there was no rational basis for the blanket exclusion of all persons under 18 years of age from these statutory provisions.

35. Counsel accepted that there was a diversionary provision provided for in the 2001 Act. However, it was submitted that the existence of that programme, was not mutually exclusive to the participation of juveniles in the FCN process provided for under the 1994 Act. Counsel further submitted that the diversionary programme provided for under the 2001 Act, while achieving the same objective of avoiding a criminal conviction for the child, was considerably more cumbersome than the straightforward procedure provided for under s.23 of the 1994 Act.

36. On behalf of the respondents, Ms Leader SC accepted that the law had been set down by the Supreme Court in the *Donnelly* case. She submitted that it was recognised that the Oireachtas could treat persons differently, as long as there was a rational and legitimate basis for so doing. The Oireachtas had done that by enacting the 2001 Act, which made extensive provision for children who were charged with the entire range of criminal offences.

37. It was submitted that by inserting s.23A and B into the 1994 Act, which was done by means of the amendments in 2006 and 2008, the Oireachtas was entitled to have regard to the state of the law at that time: see *Sheehan v Solicitors Disciplinary Tribunal* [2020] IECA 77.

38. It was submitted that the Oireachtas was entitled to have had regard, when providing for the FCN procedure under the 1994 Act, that there was already a comprehensive regime in place to cater for juveniles who might enter the criminal justice system provided for under the 2001 Act. It was submitted that the Oireachtas was entitled to reach the decision that it was more appropriate to deal with juvenile offenders under the 2001 Act, which procedures entailed a level of supervision, either by the JLO, with or without a case conference, or by the trial judge, who had the power to deal with the matter without imposing a criminal conviction. It was submitted that the Oireachtas was entitled to reach that decision having regard to the age and maturity of children and the objective of ensuring that they did not enter the criminal justice system, and did not repeat their offending behaviour. It was submitted that this was a legitimate policy choice that had been made by the Oireachtas. It was an area in which the courts were not entitled to intervene, unless it could be said that the policy pursued was capricious, arbitrary or irrational.

Conclusions.

39. The court has carefully considered all the submissions made by counsel in this case. The court is satisfied that the Oireachtas is entitled to make policy decisions whereby it treats different sections within society differently. That is permissible, as long as the policy does not unfairly discriminate in favour of one group, or against another group. In other words, the discrimination between different classes of people, must not be irrational, arbitrary or capricious and it must be for the legitimate purpose of achieving an objective in the legislation.

40. As described by O'Malley J in *B v Director of Oberstown*, the 2001 Act was a comprehensive and radical overhaul of the law governing the juvenile criminal justice system. The court has already summarised in broad terms the extensive provisions in that Act, which cater for children at various stages: such as when, entering the criminal justice system; while in the criminal justice system; and when leaving that system. As already noted, it has extensive provisions in part IV of the Act, designed to divert children from entering the formal criminal justice system and in particular, for avoiding a criminal conviction. This is available to children in respect of all criminal offences, be they minor, or serious.

41. I accept the submission made on behalf of the respondents, that in enacting the amendments to the 1994 Act, which was done by the insertion of s.23A and B in 2006 and 2008, the Oireachtas was entitled to have had regard to the fact that juveniles accused of an offence under s.4 of the 1994 Act, would automatically have to be considered under the provisions of the 2001 Act, which included provisions relating to the diversion programme, which was specifically designed to do the same thing as an FCN, namely enabling the child to avoid obtaining a criminal conviction.

42. While counsel on behalf of the applicant was correct in his assertion that there are differences between the FCN procedure under the 1994 Act and the diversion programme under the 2001 Act, I accept the submission made by counsel on behalf of the respondent, that the Oireachtas was entitled to make provision for a form of supervision of children who accepted their criminal or anti-social behaviour, as provided for under the diversion programme under the 2001 Act.

43. Under the 2001 Act, there is supervision of the child once he or she has accepted responsibility for the offence. That supervision can be at a number of levels, depending on whether the caution that is administered, is an informal, or formal one. There is then a

further level of supervision if the child is deemed unsuitable for inclusion in the programme and the matter is referred on for summary, or indictable trial. The trial judge still has the power to deal with the matter in a manner that avoids the child acquiring a criminal conviction, while at the same time ensuring that there is adequate supervision of the child to prevent, or at least deter, further criminal or anti-social behaviour.

44. The court is satisfied that the Oireachtas is entitled to treat people differently based on age, as long as this is done for a legitimate purpose. This has been recognised in a number of decisions, such as in *Re Art.26 and the Employment Equality Bill* and in *B v Director of Oberstown Detention Centre*.

45. I am further satisfied that the exclusion of persons under 18 years from the FCN regime under the 1994 Act, while providing that such persons can be considered under the relevant provisions of the 2001 Act, is relevant to, and supports the legislative purpose of ensuring oversight over suspected criminal behaviour by children.

46. I hold that the Oireachtas was entitled to reach the decision when enacting the amendment to the 1994 Act, which provided for the insertion of s.23A and B therein, that it was preferable that children accused of offences under s.4 of the 1994 Act, should have the benefit of the extensive regime set out in the 2001 Act, where supervision is a key element, rather than allowing them to come within the informal regime established under s.23A and B of the 1994 Act.

47. I hold that the interests of a juvenile, who is accused of an offence under s.4 of the 1994 Act, are more than adequately catered for under the provisions of the 2001 Act. It is rational and reasonable, that having regard to their age, the Oireachtas came to the conclusion that it was preferable that children be dealt with under the 2001 Act, where they could avoid a conviction, but would be subject to an adequate level of supervision.

48. I find that the exclusion of children from the FCN regime provided for under s.23A and B of the 1994 Act, is not an arbitrary, capricious or irrational discrimination. Accordingly, I hold that the exclusion of the applicant from the provisions of that section, does not constitute a breach of his rights under Art. 40.1 of the Constitution.

49. The subsidiary argument, that the applicant's rights to a fair trial as guaranteed under Art. 38 of the Constitution, were infringed by his exclusion from the FCN regime, was not seriously pursued at the hearing of this application. In *Cully v Minister for Transport & Ors.* [2022] IEHC 113, it was held that the applicant's rights to a trial in due

course of law guaranteed under Art. 38 of the Constitution, were not engaged by the issuance of an FCN in relation to an alleged speeding offence (see para. 58); the court accepts that it might be argued that a person's right to a fair trial, could be said to commence upon his arrest. Nevertheless, the court is satisfied that there is no basis for arguing that the applicant's rights to a fair trial were infringed in the circumstances of this case.

50. The decision of the director of the diversion programme, not to admit the applicant to the diversion programme in this case, was not challenged in these proceedings. The applicant's right to a fair trial in due course of law, remains fully intact at all stages of the criminal process.

51. For the reasons set out herein the court refuses all the reliefs sought by the applicant in his statement of grounds.

52. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

53. The matter will be listed for mention at 10.30 hours on 14 May 2024 for the purpose of making final orders.