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Contact: John Darcy
Tel: 03 88 41 31 56

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Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action plan (29/03/2018)

Communication from Ireland concerning the case of McFARLANE v. Ireland (Application No. 31333/06)

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Réunion : 1318e réunion (juin 2018) (DH)

Référence du point : Plan d'action

Communication de l'Irlande concernant l'affaire McFARLANE c. Irlande (Requête n° 31333/06)
(anglais uniquement)

ACTION PLAN
Mc Farlane v. Ireland
Application no 31333/2006
Grand Chamber judgment 10 September 2010
Information submitted by the Government of Ireland on 29 March 2018

Introduction

1. In January 1998 the applicant in this case was charged with criminal offences which were finally disposed of in June 2008 with an acquittal. By way of judicial review proceedings, the applicant sought to prevent any trial taking place on the basis of delay, that key evidence was lost and that it would be unfair to proceed against him. These proceedings concluded (against the applicant) in March 2006. The applicant then brought a second set of judicial review proceedings seeking to prevent his trial taking place on the grounds of delay. These proceedings concluded (against the applicant) in March 2008. The Applicant's trial commenced before the Special Criminal Court in June 2008. Following a ruling by the Special Criminal Court that the principal evidence in the case was inadmissible the prosecution indicated that it did not propose to call any further evidence and the charges were dismissed.

2. In its judgment delivered on 10 September 2010 the Grand Chamber determined there had been a violation of Articles 6 and 13 of the Convention and awarded the applicant €5,500 in non-pecuniary damage and €10,000 in costs and expenses.

3. As will be evident from submissions following previous judgments (the Doran group of cases) considerable progress has been made in reducing delays in domestic litigation. The McFarlane judgment also highlights the need to ensure that persons experiencing delays in litigation have available to them an effective domestic remedy as required by Article 13. This issue touches upon the organisation of the Irish Courts system and requires detailed consideration and consultation with key actors within the domestic system.

General measures

4. In May 2011 an Expert Group was established to develop policy and legislative proposals for an effective domestic remedy in the event of a violation of the right to a trial within a reasonable time. The Expert Group was chaired by an independent Senior Counsel (subsequently appointed to the High Court in June 2012) and included senior officials from the Department of Justice and Equality, the Courts Service, the Department of Foreign Affairs and Trade, the Office of the Director of Public Prosecutions and the Office of the Attorney General. The Expert Group met on 31 occasions and finalised its report in May 2013.

5. In carrying out its work the Expert Group examined not only how to provide an effective domestic remedy for delays in litigation but how to further reduce the possibility of delay occurring in the first instance. In that regard it makes a number of recommendations aimed at achieving greater efficiencies and improving case management in civil and criminal litigation and judicial

review. As regards the provision of an effective domestic remedy, the Expert Group has made a number of recommendations suggesting expediting measures coupled with compensation, declaration and/or reduced sentence where appropriate as the most effective form of remedy. It should be noted that unanimity on the proposed remedies in criminal cases could not be achieved in the Group, indicating the complexities of recommendations in this area.

6. The Report of the Expert Group was transmitted to Government on 30 October 2013. Following its presentation to Government, it was laid before both houses of the National Parliament on 6 November 2013. A copy of the Report has been transmitted to the Council of Europe.

Developments since submission of the previous Action Plan

New Criminal Procedure Bill

7. As previously reported several of the recommendations relevant to criminal proceedings were to be proposed as part of a Criminal Procedure Bill. The heads of the Criminal Procedure Bill (a general scheme of the proposed legislation) was published for public consultation in March 2014 and includes proposals as follows:

a. The introduction of preliminary trial hearings in indictable trial Courts.

b. Provision of a statutory power to indictable trial judges to stop a trial if there has been a failure to preserve evidence or the accused will be prejudiced by delay to the extent that he or she could not be afforded a fair trial.

c. Provision of an increased jurisdiction to courts of first instance to correct errors in their orders, thus reducing the need to seek potentially expensive and time-consuming reliefs currently only available via judicial review suit in the High Court.

d. A Provision which encourages applicants to avail of the more accessible remedies referred to in paragraphs b and c above prior to seeking judicial review

8. Public consultation on the scheme of the Bill took quite a long time because of the novelty of the legislative provisions involved. Traditionally the law on criminal procedure has been largely regulated by common law conventions rather than detailed statutory provisions. It was important, therefore, to obtain the views of key stakeholders on the proposed legislation in order to ensure that it was seen as practicable by those who would have to implement it in practice. Drafting of the Bill is continuing.

Civil litigation

9. With regard to case management in civil litigation, rules of court were promulgated on 5 April 2016, which, in particular:

(i) Provide for case management of High Court civil proceedings (Chancery and Non-jury proceedings and other types of civil proceedings designated by direction of the President of the High Court) and

(ii) Regulate the management of time at trial and reform the procedure regulating the adducing of expert evidence.

The rules at (i) will come into effective operation once the appropriate necessary judicial and personnel resources become available.

10. As reported previously, the Expert Group endorsed recommendations of the Legal Costs Implementation Advisory Group that courts, when determining liability for costs, would be required to take into account, among other things, whether a party has caused costs to be unreasonably incurred. This could operate as a sanction for a party delaying proceedings unnecessarily. This recommendation has since been enacted in section 169 of the Legal Services Regulation Act 2015 which provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases,
(d) whether a successful party exaggerated his or her claim,
(e) whether a party made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

Section 169 currently awaits commencement.

Judicial Review (general)

11. In light, inter alia, of issues identified in the McFarlane judgment the judicial review procedure set out in Order 84 rule 24 of the Rules of the Superior Courts was revised. The Court can now, when hearing an application for leave to apply for judicial review, having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason, direct that the application for leave be heard on notice and adjourn the application for leave and give such directions as to the service of notice of the application for leave on the intended respondent and on any other person. The Court is also empowered

(i) with the consent of all of the parties, or

(ii) on the application of a party or of its own motion, where there is good and sufficient reason for so doing and it is just and equitable in all the circumstances,

to treat an application for leave as if it were the hearing of the application for judicial review.

Court of Appeal

12. We advised in previous Action Plans on the setting up of the Court of Appeal in 2014. The Court of Appeal has clearly made a significant impact on the backlog of appeals transferred to it. In the period from the Court of Appeal's establishment on the 28 October 2014 to the end of June 2015, a total of 600 appeals (civil and criminal) before the Court were resolved by disposal or withdrawal. That court's clearance rates[1] for 2015 and 2016 were as follows[2]:

	2015	2016
Criminal cases	137%	101%
Civil cases	117%	99.5%

Under the Court of Appeal's procedural rules, every appeal newly lodged with the Court immediately receives a return date before a case management judge for a directions hearing to prepare the appeal for full hearing. It is expected the Court of Appeal will continue to contribute significantly to ensuring litigation before the Irish courts is dealt with expeditiously.

Effective Remedy

13. As indicated in previous Action Plans, with regard to the proposals of the Expert Group on remedies for breaches of Article 6 set out in the report, work on scoping out the implications of the remedies proposed highlighted concerns about the accessibility of those remedies for affected persons and about their potential to add to the workload of the courts and thus add to delays themselves.

14. Alternative remedy proposals which would be easily accessible to affected persons and which would not themselves add to court delays were examined in consultation with key stakeholders.

15. Following extensive consideration of the issues raised, one alternative remedy is preferred. This compensation mechanism will take the form of a non-court based remedy and will be an exclusive alternative to formal litigation for breach of Article 6[3]. Under the compensation mechanism, the Minister for Justice and Equality will appoint independent assessors who will be former judges. An assessor will be responsible for considering applications, determining if there has been a breach of Article 6.1, and if necessary, awarding compensation to reflect the awards of the European Court of Human Rights for breach of the Article 6 right to a hearing within a reasonable time. Other remedies will not be precluded by this mechanism.

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[1] The clearance rate is calculated by dividing the number of resolved cases by the number of incoming cases, and expressing this in percentage terms: see CEPEJ Guidelines on Judicial Statistics (GOJUST) CEPEJ (2008)11.

[2] See Courts Service Annual report 2016 at page 40:
http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/300A3D2A10D824E88025816800370ED2/$FILE/Courts%20Service%20Annual%20Report%202016.pdf

[3] The Supreme Court in a judgment delivered in October 2016 (*Nash v the DPP*) confirmed at the level of general principle that damages may be available for the breach of a right to a timely trial under either the European Convention on Human Rights Act 2003 or the Constitution. On the facts of this particular case, no award was deemed necessary and consequently, the parameters of such claims remain to be defined.

Next Steps

16. A proposal will shortly be submitted to Government to approve the drafting of a general scheme of a bill to provide for a statutory compensation mechanism for delays in civil and criminal trials to meet the requirements of Article 13 of the judgment in Mc Farlane. An updated action plan will be submitted on 30th June 2018.