

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

FIFTH SECTION

# CASE OF HEALY v. IRELAND

*(Application no. 27291/16)*

JUDGMENT

STRASBOURG

18 January 2018

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



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

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Nona Tsotsoria, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having deliberated in private on 12 December 2017,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 27291/16) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Ms Mary Healy ("the applicant"), on 12 May 2016.

2. The applicant was represented by Denis O'Sullivan & Co. Solicitors, a law firm in Cork. The Irish Government ("the Government") were represented by their Agent, Mr P. White of the Department of Foreign Affairs and Trade.

3. On 29 September 2016 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1946 and lives in Cork.

5. She has been receiving treatment for a pituitary brain tumour since 1982. In that year, she underwent surgery to remove as much of the tumour as possible. In the following years she received a variety of treatments for her condition. In 1995 she became the patient of Dr B, a consultant endocrinologist. He referred her for an MRI scan of the tumour, performed that same year, and monitored her condition in the following years. In August 2000, at the request of Dr B, the applicant underwent another MRI scan. This indicated that there had in fact been no significant change since 1995, but the tumour remained large. The applicant also underwent two types of test to determine her level of growth hormone.

6. Dr B received the result of the first test on 5 September 2000. He spoke by phone with the applicant, telling her that the tumour was very

unsatisfactory. Prior to that conversation, the applicant was under the belief that the operation in 1982 had removed almost the entire tumour. She therefore understood the information given to her by Dr B about the tumour to mean that it was growing rapidly, gravely endangering her health.

7. The applicant was prescribed a newly-available drug to treat her condition, to be injected by her general practitioner on a monthly basis from September 2000. As the drug led to severe gastrointestinal side effects within a short time, Dr B reduced the dosage by half. It appears there were no side effects following the injections of October and November 2000. At the end of the year the applicant was unwell, and was hospitalised in early January 2001 suffering from vomiting, diarrhoea, severe exhaustion, headaches, cramps and muscular spasms in her arms and legs. A blood test indicated that she was also severely hypothyroid. It was later established that this was a side-effect of the drug, not known at the time.

8. The applicant had further discussions with Dr B about her condition and treatment. Dr B proposed to defer the next injection until the following month. The applicant received two more injections, in February and March 2001. From February 2001 she became the patient of another endocrinologist.

9. In May 2004 the applicant commenced civil proceedings in the High Court against Dr B and the hospital. Her case in negligence was that Dr B had failed in his duty of care towards her in the prescribing of the drug and the monitoring of its administration to her. She further argued that her consent to the treatment was vitiated for lack of sufficient information, or for misinformation, about her condition and the appropriateness of the medication proposed to her.

10. The applicant's statement of claim was served on the defendants in October 2004. Dr B entered his defence in February 2005, seeking further and better particulars from the applicant, which the applicant's solicitor provided in June 2005. The hospital entered its defence in June 2005, and also sought further and better particulars.

11. According to the Government, between February 2005 and September 2008 eleven motions seeking various forms of interim relief were brought before the High Court and decided in relation to the case.

12. In October 2009, the case was included in a procedure before a judge of the High Court known as a "positive callover". The purpose of this was to assign hearing dates to cases that had already been waiting for a considerable period of time. A hearing date in April 2010 was set for the case.

13. In January 2010 the applicant's solicitor replied to the request for further and better particulars made by the second defendant in June 2005. The hearing commenced on 13 April 2010 and took place over twelve days. Two expert witnesses appeared for the applicant and two for the defence.

The hearing concluded on 7 May 2010. Judgment was given on 20 May 2010.

14. The High Court ruled against the applicant on all grounds. The judge preferred the evidence given by the witnesses appearing on behalf of the defence, deeming their qualifications to be more relevant to this specialised area than those of the experts retained by the applicant. He found that Dr B had complied with the therapeutic indications on the data sheet of the drug. The doctor's decision to place the applicant directly on the long-acting form of the drug was supported by the expert opinion given on his behalf. The judge did not accept that Dr B had failed to monitor adequately the effects of the drug on the applicant during the months that she received it. Likewise, he rejected the claim that the doctor had failed in his duty of care in the manner in which he had explained the proposed course of treatment to the applicant and the possible side effects.

15. On the question of consent, the judge considered that while the applicant had misunderstood the exact state of her tumour, this was not to be blamed upon Dr B, who had fulfilled his legal duty by giving her accurate and appropriate information about her condition. The applicant's mistaken impression was neither caused nor contributed to by the doctor's explanations. He found that Dr B had not been aware of the applicant's misunderstanding and could not be blamed for the deficiencies in her knowledge of her condition. Moreover, he had given sufficient warning to the applicant regarding the gastro-intestinal side effects of the drug. Other potential side-effects (gallstones, hepatic dysfunction) had not been raised, but as they had not in fact materialised there were no grounds for complaint. The judge concluded that the applicant had given her valid, informed consent to the treatment.

16. The applicant appealed against the judgment, advancing numerous grounds. The appeal was filed on 1 July 2010. It remained pending before the Supreme Court until it was transferred to the newly-established Court of Appeal on 29 October 2014. The hearing of the appeal took place on 30 July 2015.

17. In a judgment of 17 November 2015 the Court of Appeal dismissed the appeal. The Court of Appeal addressed two issues. First, regarding the treatment of the applicant with the particular drug, it saw no basis to criticise the findings of the trial judge. His preference for the evidence of the defendants' experts was rationally grounded, and his rejection of the applicant's criticisms of Dr B was based on careful consideration of the evidence.

18. Second, on the issue of consent, the Court of Appeal reviewed the evidence about what Dr B knew of the applicant's understanding of her condition. It rejected her claim that the High Court had made a clear error on this point. It considered that Dr B's actions had been in keeping with the relevant domestic legal principles. It noted that Dr B's opinion at the time

was that the applicant had a serious condition that required treatment. As surgery was not possible, the only alternative was medication. It was, the Court of Appeal held, reasonably open to him to hold that view. He had explained to the applicant the expected benefits of the drug prescribed, as well as the unpleasant side effects. As for the argument that the doctor should have also presented a "do nothing" option, the Court of Appeal described this as "somewhat unreal". Where a person seeks referral from a general practitioner to a specialist, it could be reasonably assumed that they wished to receive treatment, and that they had excluded the non-treatment option.

19. The applicant sought leave to appeal. On 8 March 2016 the Supreme Court refused.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

20. On 24 October 2016 the Supreme Court gave judgment in the case of *Nash v. D.P.P.* ([2016] IESC 60) in which the appellant claimed that there had been excessive delay in the criminal proceedings brought against him and sought an award of damages. While the Supreme Court rejected his claim on the facts of the case, the judgment also addressed in more general terms the possibility of claiming damages where legal proceedings, criminal or civil, are not completed within a reasonable time. The judgment referred first to the possibility of a claim under the European Convention on Human Rights Act, 2003:

> "[I]t is clear that, at least at the level of principle and at least in many cases, a claim can be maintained in damages against an organ of the State (as defined in that Act) in respect of a breach of the rights conferred by the ECHR."

21. However, since an award of damages under the 2003 Act may be sought only if no other remedy in damages is available (Section 3(2)), the judgment then considered the constitutional basis for such a claim. It recalled:

> "2.8 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."

22. The judgment later stated:

> "5.1 ... For the reasons already addressed it has been clear for some time that, at the level of principle, a potential claim for damages for breach of a right to a timely trial arises under the Constitution. For the reasons identified in the case law to which

reference has already been made, I am satisfied that the Constitution does guarantee a right to a timely trial. 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."

# THE LAW

## I. ADMISSIBILITY OF THE COMPLAINTS

23. The applicant complained under Article 6 § 1 that the proceedings in her case had not been completed within a reasonable time, with particular reference to the duration of the appellate stage. She further complained under the same provision that the trial of her action had not been fair. Under Article 8 she complained that by not recognising that her consent to the treatment proposed by Dr B was invalid, the domestic courts had breached her right to respect for private life. Lastly, in connection with each of the three complaints above the applicant also complained under Article 13 of the absence of remedies in the domestic system.

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

24. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by a ... tribunal..."

Article 13 of the Convention provides:

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

25. The parties disagreed over the existence within the domestic system of remedies for complaints about the excessive length of judicial proceedings. The Government argued that the applicant had had various means at her disposal to expedite the proceedings, but that she had not made use of them. They further argued that the applicant could have sought a remedy in damages, and referred to the decision of the Supreme Court in *Nash v. D.P.P.*. The applicant rejected these arguments.

26. Regarding the means available to expedite the proceedings, the Court recalls that this issue goes to the substance of the complaint under

Article 6 § 1 (see *McFarlane v. Ireland* [GC], no. 31333/06, §§ 126 and 152, 10 September 2010). It will therefore examine it below.

27. Regarding the availability of damages, the Court notes that the Government have relied on a development in domestic case-law that occurred after this application was communicated. In these particular circumstances, and given the close affinity between the requirement under Article 35 § 1 to exhaust domestic remedies and the right under the Convention to an effective remedy (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI), the Court considers that the issue of exhaustion should be joined to the merits of the complaint under Article 13 (see also *McFarlane*, cited above, § 75). It further notes that these complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

### B. Article 6 § 1 (fairness) and Article 13 of the Convention

28. The applicant criticised the manner in which the High Court conducted the trial, complaining that the trial judge only took account of the evidence that favoured the defendants and ignored the admissions that were made by the defence witnesses during cross-examination. In this way, her right to an adversarial procedure had been nullified, as had her right to receive reasons, since the judgment did not explain how the judge had evaluated the evidence given at the trial. She also criticised the Court of Appeal for failing to address this issue, which she had expressly raised before it.

29. The Court refers to the relevant principles of its case-law, as recently reiterated by the Grand Chamber (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017):

> "... Article 6 § 1 of the Convention does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable ..."

30. Finding nothing arbitrary or manifestly unreasonable in the assessment of the evidence by the domestic courts, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. Likewise, there being no arguable claim in this respect, the applicant's related complaint under Article 13 is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

### C. Article 8 and Article 13 of the Convention

31. The applicant argued that the respondent State was under a duty to ensure respect for the individual's personal autonomy and self-determination by protecting against interference with physical and psychological integrity in the form of medical treatment administered without informed consent. The domestic courts had failed to recognise that her consent to the treatment proposed by Dr B had been vitiated by her misunderstanding of the nature of her condition.

32. The Court has established in its case-law that the High Contracting Parties are under a positive obligation, deriving from Article 8, to have in place regulations ensuring that medical practitioners consider the foreseeable consequences of planned medical procedures on their patients' physical integrity and inform patients of these beforehand in such a way that they are able to give informed consent (see *Vasileva v. Bulgaria*, no. 23796/10, § 69, 17 March 2016, with further references).

33. In the present case, the High Court was satisfied on the evidence that Dr B had complied with his duty to explain to the applicant the nature of her condition, the treatment proposed and the potential negative side-effects. It considered that he could not be held responsible for the error in understanding on the part of the applicant, of which he had been unaware. The Court of Appeal agreed. The Court considers that the reasoning of the domestic courts was consistent with its own case-law on the issue, and is not persuaded by the applicant's argument in favour a more exigent concept of informed consent.

34. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

35. Furthermore, there being no arguable claim under Article 8, the applicant's related complaint under Article 13 is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention (*Reilly v Ireland* (dec.), no. 51083/09, 23 September 2014).

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant complained about the length of the proceedings overall, with particular reference to the duration of the appellate stage. Article 6 § 1 of the Convention reads, in so far as relevant, follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by a ... tribunal..."

## A. The parties' submissions

### *1. The applicant*

37. The applicant argued that the domestic courts had not decided her case within a reasonable time. She denied causing any delay in the proceedings. Regarding the delay of more than four years before replying to the second defendant's request for further and better particulars (see paragraph 13 above), she noted that the second defendant had not reiterated the initial request, nor sought an order from the High Court directing her to reply. She pointed out that in mid-2005 the second defendant changed solicitor, retaining the same firm that was already representing the first defendant. She inferred that, having already received further and better particulars in relation to the claim against the first defendant, the solicitors no longer required further details from her regarding the claim against the second defendant. It could not therefore be said that this had delayed the hearing of the case in the High Court.

38. She disagreed with the Government that the setting of a date for hearing her case represented pro-active case management (see paragraph 12 above); it was instead just a general check of the list of pending cases. Her legal representative had attended that day in order to confirm to the High Court that the case was still live and required a hearing date. At the appellate stage, her case had simply been caught in the backlog of the Supreme Court, where it remained completely inactive until it was transferred to the Court of Appeal. The facts of the case were not such as might have justified a request for priority treatment by the Supreme Court, as argued by the Government.

39. She rejected the Government's submission that there had been a failure of diligence on her part at the appellate stage for not having filed her written submissions on the appeal earlier on. Her counsel had correctly waited until he had received a direction in this sense from the Court of Appeal, which came in February 2015.

40. While the Court of Appeal had remarked critically on the number of grounds she had raised in her appeal, this was not a source of delay in the proceedings and so should not be taken into account.

41. Moreover, the fact that the Court of Appeal was created could not justify the excessive length of the proceedings in her case. The authorities had been very slow to react to an obvious, systemic problem of delay, and had chosen a course of action that took many years to complete. They could have responded more quickly and effectively simply by appointing additional judges to the Supreme Court so as to immediately begin to alleviate the congestion on that court's docket, pending the establishment of the new court.

*2. The Government*

42. The Government contended that the facts of the case did not disclose any breach of Article 6 of the Convention. No delays or periods of inactivity should be attributed to the domestic courts, they argued.

43. Regarding the period preceding the hearing of the action, the Government noted that the High Court had dealt in a timely way with numerous motions seeking various forms of interim relief (between February 2005 and September 2008). In contrast, the applicant herself had not displayed diligence at this stage, allowing more than four years to pass (June 2005-January 2010) before providing the further and better particulars requested by the second defendant. Yet this material had been essential in order for the case to be heard, and the hearing had in fact taken place shortly after the applicant had provided it.

44. The Government considered that the High Court had taken a pro-active stance towards the case when it reviewed the state of proceedings in October 2009 and assigned a hearing date six months later. The trial had been conducted efficiently, and the judge had given a lengthy ruling on the case just two weeks later.

45. Regarding the appeal stage, the Government criticised the applicant for failing to file written submissions with the Supreme Court, and also for failing to seek a priority hearing, which, if granted, could have taken place within a year of the lodging of the appeal.

46. The Government explained that at the time this case was pending on appeal, the respondent State was in the middle of a process to address the backlog of the Supreme Court. A 2009 working group report had proposed the creation of the Court of Appeal as the best option. The working group had also given consideration to simply increasing the number of judges on the Supreme Court, but had concluded that the idea was inherently problematic. The creation of additional judicial formations in the Supreme Court could lead to judicial inconsistency and would also obscure the true role of a court of last resort. The Government of the day had accepted the report, which necessitated the organisation of a referendum to amend the Constitution, and subsequently the enactment of legislation establishing the new court. It was the first such reform in the history of the Irish State and inevitably took time to complete. The Government regarded the applicant's proposed solution as simplistic and misleading. They emphasised the right of the respondent State to carefully consider which reforms to make to its judicial system, satisfying the concerns regarding the role and functioning of the Supreme Court and the need for legal certainty.

47. Following the transfer of the case to the Court of Appeal, it was dealt with within a reasonable time, the decision coming just over one year later. The last stage, before the Supreme Court, had also been free of any delay.

## B. The Court's assessment

48. The Court notes that the period to be taken into consideration began on 25 May 2004, when the applicant instituted the proceedings before the High Court, and ended on 8 March 2016 when the Supreme Court refused leave to appeal. The proceedings thus lasted for eleven years and nine months overall. The applicant complained particularly of the time taken for her appeal to be heard, which was more than five years and four months.

### *1. General principles*

49. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case, which call for an overall assessment, and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute. 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], no. 30979/96, § 43, ECHR 2000-VII, and *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, § 34, 8 September 2011). 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, according to the Court's established case-law, 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).

### *2. Application to the present case*

#### (a) Complexity of the case

50. The Court considers that the case was of some complexity, in terms of facts and evidence at least. It required twelve days of hearings in the High Court, with medical experts giving evidence on both sides. Legally speaking, however, it does not appear from the decisions of the domestic courts that the case was a complex one. As noted by the Supreme Court when it refused leave to appeal, in relation to the issue of informed consent, both the High Court and the Court of Appeal applied well-established legal principles. Accordingly, the factual and evidentiary difficulties of the case cannot alone explain or justify the duration of the proceedings.

51. As noted by the Government, however, the proceedings before the High Court were procedurally time-consuming with a large number of motions seeking various forms of interim relief being issued and disposed of between 2005 and 2008.

**(b) Conduct of the applicant**

52. From the material placed before it, it appears to the Court that in the initial stage of the proceedings, i.e. from May 2004 to June 2005, the applicant acted with normal diligence.

53. At that point, however, she omitted to reply to the request of the second applicant for further and better particulars, these not being provided until almost five years later in January 2010. The parties disagreed on what significance should be accorded to this point. The applicant argued that in reality there had been no impact on the course of the proceedings, and suggested that the request had lost its relevance in view of the material she had provided to the same firm of solicitors concerning the first defendant in the case. The Government considered that this was a serious lapse of diligence that had substantially delayed the trial of the action.

54. The Court is not in a position to establish the actual significance for the second defendant of the information sought from the applicant in June 2005, and which was not received until January 2010, that party not being associated with the present Convention proceedings. The applicant's assertion that the information was rendered unnecessary because of the replies she provided to the first defendant is in any event speculative. The Court would nevertheless note that the request on behalf of the second defendant was made some weeks after the applicant's reply to the first defendant (3 June 2005 and 22 June 2005 respectively), i.e. when the solicitor would have been in receipt of the particulars already provided. Moreover, while some of the questions included were the same as those raised regarding the first defendant, others referred to the claims made specifically against the hospital. The fact that the applicant did eventually comply with the request, four and a half years later, suggests that the information in question was, and remained, of relevance to the defence.

55. For the Court, this remarkably long delay, directly attributable to the applicant, remains without explanation. As the Supreme Court recalled in the *Nash* judgment (see paragraph 22 above), the principal obligation for progressing proceedings lies on the parties themselves. A similar obligation arises under Article 6 of the Convention (see *Unión Alimentaria Sanders S.A. v. Spain*, cited above, § 35). The Court considers that the applicant's conduct was, in this particular respect, at odds with her duty to diligently carry out the relevant procedural steps. The fact that the other party did not take steps to compel her to provide the particulars requested does not relieve the applicant of her duty of diligence. The applicant cannot rely, in support of her complaint, on the periods during which her actions – or inaction –

caused delay (see *Brennan v. Ireland* [Committee] no. 44360/15, §§ 49-50, 2 November 2017; see also *McNamara v. the United Kingdom* [Committee], no. 22510/13, 12 January 2017, § 59, with further references).

56. Turning to the appellate stage, the Court notes that the applicant lodged her appeal on 1 July 2010. The Government criticised the applicant for not filing submissions once the appeal was certified as ready for hearing, or for seeking directions from the Supreme Court. The Court is not persuaded, on the basis of the information before it, that these omissions – for which the applicant has provided a reasonable explanation – had the effect of increasing the duration of this stage of the proceedings. Nor is the Court persuaded that the applicant's case, which was essentially an ordinary action in negligence (see also paragraph 63 below), would have merited priority consideration by the Supreme Court. It does not therefore discern any causative link between the absence of a request for priority treatment and the delay that occurred at the appellate stage.

57. Once the case was transferred to the Court of Appeal, it seems to the Court that the applicant acted with normal diligence until the end of the proceedings.

**(c) Conduct of the authorities**

58. The Court reiterates its well-established case-law that 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 (see paragraph 55 above) does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see *McMullen v. Ireland*, no. 42297/98, § 38, 29 July 2004, with further references).

59. Regarding the pre-trial phase, the Government indicated that between February 2005 and September 2008 there were numerous applications to the High Court in connection with the pending case, seeking various forms of relief and all dealt with in a timely manner. The applicant did not dispute this – indeed she made no reference at any point to these procedural acts. Nor did she argue or provide any material from which the Court could infer that the duration of this phase of the litigation, which was pending for more than five years when the hearing date was assigned in October 2009, was due to any failing on the part of the High Court. By the time the hearing commenced in April 2010 the proceedings had been pending for almost six years. As stated above (see paragraph 55 above), the Court considers that this delay was largely brought about by the applicant's unexplained failure to respond to the request of the second defendant to provide further and better particulars and to progress her own legal proceedings.

60. Coming to the trial of the action, the Court considers that this was conducted in a very efficient manner, the judgment coming within two weeks of the close of the hearing.

61. The appellate stage included a lengthy period of inactivity that lasted for more than four years (June 2010-October 2014), due to the logjam of cases pending before the Supreme Court in those years. As the Government recognised in its submissions, during those years the domestic system lacked the capacity to deal with appeals from the High Court within a reasonable timeframe. While the Supreme Court was effectively unable to deal with the applicant's case for a prolonged period, the Court should also have regard, more broadly, to the actions of the respondent State in seeking to devise a solution to the problem. It is clear that the authorities were conscious of their responsibilities in the matter (see *Buchholz v. Germany*, 6 May 1981, § 61, Series A no. 42). Furthermore, the Government have explained why the option of creating a new court was preferred to that of increasing the size of the Supreme Court. The creation of the Court of Appeal represented a significant modification of the domestic legal system, involving amendment of the Constitution by referendum, the passage of legislation and the allocation of the necessary resources to the new court (see also in this respect *Brennan v. Ireland*, cited above, §§ 54-55, and *P.H. v. Ireland* (dec.) [Committee], no. 45046/16, § 33, 2 November 2017). The Court considers that once the proposal had been accepted, the respondent State proceeded to implement it without delay.

62. The effect of this reform on the applicant's case was positive. Her appeal was immediately transferred to the new court. Four months later, a hearing date was assigned. The appeal was heard five months after that, and by the date the Court of Appeal gave judgment, the case had been pending before it for just over one year. While the applicant had some general criticism regarding the capacity of the Court of Appeal, the Court agrees with the Government that these remarks are not relevant to the facts of her complaint.

**(d) What was at stake for the applicant**

63. The applicant referred to her age – 58 years when the proceedings began, 69 when they finished – and to the state of her health. The Government did not specifically comment on this aspect. The applicant's stake in the proceedings was not limited to the possibility of compensation, but included as well a point of principle regarding the manner in which she had been treated by the doctor and the hospital. However, the Court does not discern in the case any reason of a medical nature requiring a greater degree of diligence from the authorities (see, *a contrario*, the cases of *X v. France*, 31 March 1992, § 47, Series A no. 234-C, and *A. and Others v. Denmark*, 8 February 1996, § 78, *Reports of Judgments and Decisions* 1996-I).

**(e) Conclusion**

64. Having examined all the materials submitted to it, and in light of the various considerations set out above, the Court cannot but find that the length of the proceedings at the appellate level was excessive. The applicant's own conduct generated most of the delay before the trial of the case but the appeal stage was clearly protracted, lasting over five years and four months. Even taking full cognizance of the serious and substantial efforts on the part of the respondent 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 Court must nevertheless conclude that the duration of the proceedings at the appeal stage was excessive. The Court thus finds, to this limited extent, that the proceedings failed to meet the reasonable time requirement.

65. There has therefore been a breach of Article 6 § 1 of the Convention.

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

66. The applicant complained that she had no effective remedy in relation to the allegedly excessive duration of the proceedings in her case.

### A. The parties' submissions

#### *1. The applicant*

67. The applicant disputed the relevance of the *Nash* judgment referred to by the Government. She argued that any possible constitutional cause of action would not be for a breach of Article 6 § 1 of the Convention, but for a breach of a constitutional right of undefined content. The *Nash* judgment had not clarified the scope of any remedy for a failure to decide a case in a timely manner. Instead, it had underlined just how complex it would be to obtain a remedy in such circumstances. She objected that to require her to bring such an action at the domestic level would mean obliging her to continue with litigation towards an uncertain outcome, involving further substantial delay and major expense. She considered that the respondent State should have responded to earlier judgments against it by this Court regarding the excessive length of proceedings by introducing a statutory remedy.

#### *2. The Government*

68. The Government submitted that the *Nash* judgment had definitively confirmed the existence of an action for constitutional damages for delay in judicial proceedings. They also referred to legislation under preparation in the respondent State to further implement this Court's *McFarlane* judgment.

## B. The Court's assessment

69. The Court recalls that as from its judgment in *Doran v. Ireland*, no. 50389/99, ECHR 2003-X (extracts) it has consistently found the domestic legal system to lack a remedy for complaints of excessive length of proceedings. The objection of non-exhaustion of domestic remedies could not therefore be raised in such cases, and the Court found a violation of Article 13 each time such a complaint was raised in conjunction with Article 6 § 1 (see as the most recent example involving civil proceedings *Rooney v. Ireland*, no. 32614/10, 31 October 2013). More recently again, the Court struck out an application in light of the respondent Government's acceptance, in a unilateral declaration dated 19 January 2017, that "the length of the proceedings and the lack of an effective remedy in that regard was incompatible with the reasonable time requirement contained in Article 6(1) and Article 13 of the Convention" (see *Blehein v. Ireland* (dec.) [Committee], no. 14704/16, 25 April 2017). It therefore takes note with interest of this first example brought to its attention of an action in damages for excessive length of proceedings, and of the Supreme Court's analysis of this issue in light of the relevant principles of the Constitution and the Convention.

70. However, it must be recalled that, according to the Court's well-established case-law, the effectiveness of a remedy is normally assessed with reference to the date on which the application was lodged (see *Valada Matos das Neves v. Portugal*, no. 73798/13, § 102, 29 October 2015, with further references). Given the close affinity between Article 35 § 1 and Article 13, the same approach must be taken under the latter provision (see *Casse v. Luxembourg*, no. 40327/02, § 66, 27 April 2006).

71. The present application was introduced on 12 May 2016. It is clear that at that point in time there was no basis to reconsider the Court's conclusion regarding the inexistence of a remedy in domestic law for length of proceedings, the Supreme Court's decision in *Nash* coming more than five months later on 24 October 2016, and indeed following communication of the application.

72. It is true that the Court has approved a number of exceptions to this rule, justified by the specific circumstances of the cases in question. This refers in particular to the enactment of new legislation by States to remedy the systemic problem of length of judicial proceedings (see the cases referred to in *Valada Matos das Neves*, cited above, at § 102). Where the change in domestic law comes about through case-law, the Court's approach has been, for reasons of fairness, to allow a certain time for applicants to familiarise themselves with the new jurisprudence, the exact period depending on the circumstances of each case, especially the publicity given to the decision in question (*ibid*., §§ 104-105). Periods ranging from

one and a half months (see *Poulain v. France* (dec.), no. 16470/15, § 29, 21 March 2017) to eight months (see *Leandro Da Silva v. Luxembourg*, no. 30273/07, § 50, 11 February 2010) have been allowed. It follows that even were the Court to modify its assessment of the domestic system in this regard, this would not have any bearing on its conclusion on the complaint raised in the present case. Accordingly, the Court will refrain on this occasion from determining the significance of the *Nash* decision for the purposes of Articles 35 § 1 and 13.

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

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

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

### A. Damage

75. The applicant requested the Court to award her such amount as it deemed appropriate for non-pecuniary loss arising out of the violation of her rights under Articles 6 and 13.

76. The Government considered that any award should be in line with the sums granted in similar cases. They pointed out that since the real delay in the proceedings occurred at the appellate stage, any award should be calculated on that basis rather than in light of the overall duration of the proceedings.

77. As stated above (see paragraph 64), the violation of Article 6 § 1 pertains only to the appellate stage. Considering that the applicant must have sustained non-pecuniary damage, and ruling on an equitable basis, the Court awards award her EUR 5,000 under this head of damage.

### B. Costs and expenses

78. The applicant claimed a total of EUR 5,827 in legal fees incurred before the Court. This comprised EUR 2,875 charged by counsel for 11.5 hours of work at a rate of EUR 250 per hour. The remainder comprised EUR 2,952 charged by her solicitor, for 8 hours of work at a rate of EUR 300 per hour, plus VAT.

79. The Government did not express an opinion on the matter.

80. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000.

### C. Default interest

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

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 6 § 1 (reasonable time) and the related complaint under Article 13 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 18 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Anne-Marie Dougin | Nona Tsotsoria |
| Acting Deputy Registrar | President |