Neutral Citation Number: [2007] IEHC 481

THE HIGH COURT

2003 No. 503 J.R.

BETWEEN

R. D.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice William M. McKechnie delivered on the 11th day of July, 2007

General Background

1. By order of this Court dated the 7th July, 2003, the applicant, in the above entitled judicial review proceedings, was granted leave to apply, by way of an application for judicial review, for the reliefs specified at paras. D1 – D4 of the Statement grounding the application and to do so on the grounds contained in para. E thereof. In essence he seeks an order preventing the Director of Public Prosecutions from taking any further step in the prosecution of certain charges which stand levelled against him. He seeks this order on the grounds (i) of delay (both complainant and prosecutorial), (ii) of the State's failure to conduct "such proper and necessary inquiries" as were demanded by the circumstances of the case, (iii) of the prosecution's failure to make any or any proper or timely disclosure of material which may be of benefit to his defence, and (iv) on the grounds that such charges lack specificity and particularity. This application is grounded upon the applicant's own affidavit as well as an affidavit from his Solicitor. Superintendent Anthony Dowd has sworn the principle replying affidavit in support of the filed Statement of Opposition. In addition, there are several further affidavits from many other individuals referring to documents, records, reports, maps and sketches, all of which constitute exhibits in such affidavits. Both parties have presented written submissions to this Court and have supplemented these by way of oral presentation. No cross examination took place and accordingly this case was dealt with by affidavit evidence only.

2. The applicant is a former member of a religious order and in that capacity served as a school teacher for many years in an industrial school in the West of Ireland. He presently stands accused of a number of charges which are set out in the Statement of Charges contained in the Book of Evidence. In all there are sixty such charges involving ten named individuals. The details of these charges are as follows:-

> (i) There are ten charges of indecent assault, contrary to s. 62 of the Offences Against the Person Act 1861, involving one T. B. and these are said to have occurred between November, 1967 and August or September, 1968,
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> (ii) There are four similar charges relative to one M. W. and these are alleged to have occurred between January, 1966 and December, 1966,
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> (iii) There are five such charges of indecent assault and five charges of buggery, contrary to s. 61 of the Offences Against the Person Act 1861, involving one D. D., and all are said to have been committed between the 30th August, 1965 and March, 1967,
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> (iv) There are six charges under s. 62 and six charges under s. 61 of the Act of 1861, against one G. C., covering the period between August, 1965 and April, 1967,
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> (v) There is single charge of buggery involving one B. O'N. which is said to have happened between August, 1965 and October, 1966,
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> (vi) There are four charges, all under s. 62 of the Act of 1861, relative to one E. C. and these allegedly occurred between August, 1966 and September, 1966,
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> (vii) There are three charges of buggery allegedly committed on one M. B. which are dated between August, 1965 and August, 1968,
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> (viii) There is a single buggery charge against M. O'R. which is dated somewhere between the 1st February, 1967 and the 30th March of that year,
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> (ix) There are eight charges under s. 61 involving N. B. which are alleged to have taken place between the 7th December, 1966, and the 30th August, 1968, and finally,
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> (x) There are seven indecent assault charges, against J. P. L. covering a period from the 1st September, 1966, to January, 1968.

3. The applicant in these proceedings was born in 1940 and joined the Christian Brothers at age 15. He left in 1976 and married in 1983. His wife died some years later. He acted as a teacher in this industrial school between the 30th August, 1965, and the 30th August, 1968. After leaving that institution he held a number of teaching posts, both at primary and secondary school level, in the West of Ireland, in Dublin and elsewhere in the country. On the 14th January, 2003, he was suspended from his then post in view of his pending appearance before the local District Court which took place on the day following. He has not apparently worked since.

4. At the outset it is important to set out the most significant dates, events and circumstances which constitute the background to this application. In so doing I propose to give, in general terms only, a chronology of such events and then later in the judgment to comment in more detail on certain specific matters. This chronology is as follows:-

> 30th August, 1965 – 30th August, 1968: Range of dates for the alleged offences;
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> 12th April, 1996 – 30th May 2001: Period within which the following complaints were made, all of which ground the present prosecution;
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> 12th April, 1996: Complaint made by Mr. J. P. L.;
>
> 5th November, 1999: Complaint made by Mr. G. C.;

22nd November, 1999: Complaint made by Mr. M. O'R.;

30th November, 1999: Complaint made by Mr. M. B.;

11th February, 2000: Complaint made by Mr. T. B.;

6th March, 2000: Complaint made by Mr. N. B.;

29th March, 2000: Complaint made by Mr. D. D.;

15th April, 2000: Complaint made by Mr. E. C.;

27th July, 2000: Complaint made by Mr. M. W.;

30th May, 2001: Complaint made by Mr. B. O'N.;

12th April, 1996: The first of the above ten complaints is made;

27th April, 1996 – 8th March, 2000: Thirty five statements were taken in connection with the applicant, but no prosecutions have been directed in respect of those complaints;

7th March, 1997: Accused person interviewed as part of this investigation. Only one of the present ten complainants was involved in that investigation;

23rd January, 1998: Gardaí send file to the D.P.P. relative to the investigation last mentioned;

April, 1998: D.P.P. directs further investigations;

November, 1999: Three of the above ten individuals make formal complaints;

February – March, 2000: Three further such persons make complaints;

April – July, 2000: A further two persons make complaints;

31st August, 2000: Accused person is arrested, detained and questioned about nine of the above complaints;

24th October, 2000: Gardaí send file to the D.P.P. on this investigation;

30th May, 2001: Last complaint involving Mr. B. O'N. is made;

1st November, 2001: Accused person is again interviewed in relation to a number of persons, only one of whom Mr. B. O'N, is involved in the current charges;

10th December, 2001: Gardaí send further file to the D.P.P. to cover the complaint of Mr. B. O'N. and several other persons unrelated to this prosecution;

7th May, 2002: Gardaí send third file to the D.P.P. on this investigation;

16th October, 2002: D.P.P. issues instructions to prefer charges against the applicant;

15th January, 2003: Applicant is charged at the local District Court with the sixty charges above described;

31st March, 2003: Book of Evidence is served on the applicant;

18th June, 2003: Applicant is returned for trial at the next sitting of the appropriate Circuit Criminal Court;

7th July, 2003: Applicant obtains leave from this Court to institute the within judicial review proceedings.

Affidavit Evidence on behalf of the Applicant

5. In his grounding affidavit Mr. R.D., the applicant, completely denies any and all allegations of physical and sexual abuse which the preferred charges allege against him. He says that he is entirely innocent and that during his time in the West of Ireland he was not conscious of any such abuse and was not personally aware of others engaging in such practises. He claims that, because of the lapse of time, it is now impossible for him to obtain a fair trial, or to properly defend himself at any such trial. In addition, he says that witnesses of potential benefit are unavailable because of death, that records which must have once existed have been lost or destroyed and that certain avenues of inquiry, previously available, are now closed to him. Furthermore, because of his advanced age and failing memory, he claims that he will not be in a position to adequately instruct his lawyers in the defence of these allegations. Accordingly, he has suffered general prejudice.

6. In addition however, the applicant also asserts specific or particular prejudice in a number of areas. These areas are as follows:-

Absence of Witnesses

(i) The applicant in this respect refers to a Nurse O. and a Doctor F. as well as to a number of fellow Christian brothers whom he identifies by name. He says that if the allegations of physical abuse are correct, then the victims would almost certainly have been seen, and if necessary treated, by either Nurse O. or Doctor F. who was the local G.P. Both are now dead.

(ii) He also claims that if a Brother K. was alive, having been the deputy of the school at the time, he would have been able to corroborate the applicant's own evidence as to what dormitory he lived in. He did not have, as some of the

complainants allege, a room in either St. Michaels or St. Joseph's dormitory; rather he roomed opposite Brother K. in St. Patrick's dormitory.

(iii) Brother H., now deceased, was the manager of the farm attached to the school, and if alive could confirm that the applicant had no connection with this farm. In this way he could challenge the allegation that some abuse allegedly took place on the farm.

(iv) Brother B., who kept records about the school, could provide details on the movements of all persons into and out of the school and how in fact the school operated. These could have been of assistance in his defence, but neither the Brother or the records are now available.

(v) Two other Brothers, a Brother D. and a Brother H., who were at this school during the applicant's period in residence, could have offered some unspecified information which inferentially would have been of benefit to him.

(vi) Apart from those above named, many other Brothers overlapped with the applicant's time in this school, and some if not all, could have been of assistance to him.

He therefore claims specific prejudice under this heading.

Absence of Records – Personal Records

(vii) Mr. R. D. claims that the congregation had only the "barest" of records of his time at the school and since he did not keep a diary or other notes detailing his movement within the Order, he is greatly prejudiced by the lack of such material. If available "a great amount of information" would have been obtainable from them and of benefit to him.

Absence of Records – Adminstration Records

(viii) The absence of these records are a source of great concern to the applicant, since having been able to identify numerous "factual inaccuracies" in various statements of the complainants, he believes that there must surely be other such inaccuracies which he cannot identify because of the passage of time. In particular in this regard, there must have been records available showing the periods in which the individual complainants were resident in this industrial school, and accordingly, these might be of assistance in challenging the allegations of abuse now made against him.

7. The applicant also points out that the physical layout of the industrial school has altered dramatically over the past number of years. As he has not seen the building since the 1960s, it is impossible for him to adduce evidence contradicting the allegation that the sweet shop, where it is alleged by some that physical and sexual abuse took place, was sufficiently large to accommodate two persons (when locked). Moreover, he has no memory of the existence of any store room. Therefore a contemporary physical inspection of the building would yield no material benefit given the substantial changes to its layout which have occurred.

8. Mr. R. D. also refers to his suspicion that by reason of a number of common mistakes (as described by him), which are found in the statements of many witnesses, there must have been some level of contact or collusion between the witnesses. In addition, he is at a loss to understand how one victim could suggest that he, the applicant, as early as the 1960s, wore glasses when in fact he did not start to so do until 1993. Overall he believes that at least some of the alleged victims may have discussed their evidence with each other and that as a result the purported statement of each, is not truly individual to that person, but rather is a combined version of many.

In fact the applicant claims that he has no recollection whatsoever of any of the former inmates of this school who have made complaints against him. Again, if his colleagues and fellow Brothers were alive, they could offer help in this regard.

9. At para. 9 of his affidavit he recounts being first interviewed by the gardaí on the 7th March, 1997, and being informed by one Garda McWalter that he did not "have to contact a solicitor as (he) might not need one". His next interview was on the 31st August, 2000, during which the gardaí were much more searching and questioned him intensely with regard to nine out of the ten alleged victims; on the first occasion they inquired about three only. With regard to the complainant, Mr. B. O'N., who makes but one allegation, he was not interviewed until the 1st November, 2001. In these circumstances he cannot explain, and strongly complains about: the delays which occurred between his first interview and his ultimate charging on the 15th January, 2003; the delay between his second interview and the date of charging; and, the thirteen month period which elapsed between November, 2001 and January, 2003.

10. The applicant firmly believes that, given the clear lack of documentation, An Garda Síochána have failed to carry out further investigations and obtain further materials which might be available from, amongst others, the Department of Education. Despite correspondence from his solicitor in this regard, the response has been valueless. He believes that in such circumstances, where unsupported allegations are made in relation to events that have occurred over thirty years ago, there is an acute obligation on the gardaí to pursue all available measures so as to mitigate the prejudice which the passage of time undoubtedly causes. As third party discovery is not available he is therefore restricted to what information both the investigatory and prosecutorial agencies of the State decide he should have. This in his view is contrary to fair procedures.

11. The applicant refers to the first garda interview in 1997 at which these allegations were put to him. After the initial shock of being so confronted he was not particularly traumatised, as he knew of multiple complaints then generally being made against the Christian Brothers. He believed that in such a climate, some false allegations could be made, and in his case were being. He therefore effectively put these matters aside and continued with life. However, he was greatly troubled by the events of the 31st August, 2000, and his life "has been dreadful ever since". He claims that his peace of mind and his ability to sleep have been completely destroyed by these events and by the nature of that August interview. His personal stress was compounded by further questioning in November, 2001, and whilst at all times he knew that the allegations were false, he could not understand why they had been made and why they were being persisted with.

12. He then refers to media coverage over the years dealing with what he termed "clerical sexual abuse" and in particular that referral to residential institutions like the school in question. In particular, he complains of an attempt by a television crew to identify him at his initial remand hearing on the 20th January, 2003. He was, in that regard, particularly concerned about the negative impact his identity could have on potential jury members. He says that the whole experience "was extremely distressing and traumatic" and that he was greatly concerned in respect of potential prejudice arising from such images.

13. In conclusion he claims that the delay, both pre-complaint and thereafter on the prosecutorial side, are excessive and are such as to violate his constitutional right to a fair trial. Moreover, he believes that his right to a trial with reasonable expedition has also been interfered with. He therefore seeks the reliefs sought.

14. This application is also supported by the applicant's solicitor, Mr. Fergus Mullen of Woods Ahern Mullen, Solicitors. In his affidavit he claims that it is now impossible for his client to obtain a fair trial by reason of delay. One of the consequences of having to face charges more than thirty years old is that the passage of time reduces, or even eliminates, any area of undisputed fact. In his view it is almost impossible to recall any event of such antiquity unless it was of the most noticeable kind. It is beyond a person's experience to remember ordinary and mundane things. This perfectly understandable frailty makes it particularly difficult for an accused person who must try and cast doubts on the many vivid and striking incidences alleged against him. The lack of specificity, the absence of records and the unavailability of potential witnesses all compound this problem. Despite endeavours to so do, it has not been possible for him to get any records either to undermine the allegations made, or to assist with his client's defence.

15. Mr. Mullen also believes that both the gardaí and the D.P.P. must do more when the allegations are so old. They should seek out material, further to the statements of the complainants, which might corroborate, support or refute the basis of the charges in question. If they did the inevitable prejudice may be lessened.

16. In addition, he raises issues relative to the period of five years (sic) which elapsed between Mr. J. P. L. making a complaint and the accused person being charged in respect thereof. In respect of eight of the other alleged victims the comparable period was 31 months and in the case of Mr. B. O'N. it was seventeen months. Surely, it is claimed, the state agencies had sufficient opportunity within these time frames to fully investigate all matters and not rely, as they appear to have done, on bare allegations. This state of affairs puts an accused person in an impossible position. In effect, it reverses the burden of proof and removes the presumption of innocence. This most unsatisfactory situation is made worse by the absence of any process akin to discovery, with the prosecution's duty to disclose not being sufficient in this regard. More investigations should have been done, and any prejudicial contact or communications which co-complainants may have had with each other, should have been looked at.

17. In all of the circumstances of this case the accused person's right to a trial in due course of law, as well as his right to a trial with reasonable expedition, have been violated.

Statement of Opposition / Affidavit Evidence on behalf of D.P.P.
18. In the statement of opposition the D.P.P. makes the following points:-

> (i) Until the D.P.P. has sufficient information to properly charge a person, any lapse of time prior to that cannot be relied upon by an accused person to prohibit his trial on the basis that his right to a trial with reasonable expedition has been breached;
>
> (ii) If there was any delay in this case, it was not of such duration as would justify terminating the criminal process;
>
> (iii) Again, if there was any such delay in this case, which is denied, it was solely the responsibility of the accused person as he used his position of dominance to threaten or intimidate his alleged victims so as to prevent the making of such complaints;
>
> (iv) Disclosure is an ongoing process in a criminal trial and in any event the trial judge has full jurisdiction in respect of any shortcomings in that regard; and,
>
> (v) Likewise regarding the complaint about the lack of particularity in the charges.

19. Superintendent Anthony Dowd was the investigating officer in the prosecution of these charges. He was also involved in the broader investigation of the alleged physical and sexual abuse committed at this industrial school, which involved, but was not confined to, the ten complainants relevant to this prosecution. He says that the investigation was one of the longest of this type ever to have been conducted by An Garda Síochána, with six officers working full time for a period of almost two years on the project. A specific incident room was devoted exclusively to the investigation. At the conclusion of his inquiries he was confident to give the following chilling description of "authority" in the school: "conditions…appear to have been Dickensian. Living conditions were sparse and the regime was tough and often brutal. Control appears to have been maintained through fear and intimidation".

20. Having received complaints from eleven former pupils of the school, the applicant denied, at interview with the gardaí on the 7th March, 1997, that he abused or was involved in the abuse of any of these boys. On the 23rd January, 1998, a file in respect of this investigation was sent to the D.P.P.. Only one of these pupils, Mr. J. P. L. is a complainant in the instant prosecution against the applicant. In April, 1998 the D.P.P. returned this file and directed the carrying out of further inquiries.

21. Whilst these were being attended to, a large number of other former pupils contacted the gardaí and indicated that they also wished to make complaints about how they were treated at this school. This led to almost 160 statements being taken, resulting in the compilation of 22 separate garda files, all of which were sent to the D.P.P.. Many of these were large and required considerable garda input. The investigation was wide ranging, comprehensive and complex. Some of the complaints were very general in nature but others were quite specific. With the exception of a small number, all alleged physical and/or sexual abuse. Continuing with the general, the superintendent says that criminal proceedings were instituted against five individuals, including the applicant. One has pleaded guilty to three sample charges of indecent assault and has received a three year suspended sentence. That was in July, 2002. A second, who had been charged with 137 offences in respect of 25 different victims, received twelve years with four years suspended. Proceedings against a lay employee were dismissed, with the position of the fourth being unclear.

22. In respect of the applicant, the gardaí took a total of 45 statements alleging sexual and physical abuse. In relation to the current prosecution, the first complaint was received on the 12th April, 1996, and the other nine between November, 1999 and May, 2001. On the 31st August, 2000, the applicant was arrested and detained under s. 4 of the Criminal Justice Act 1984, and whilst in custody was interviewed in respect of all present complainants, save for Mr. B. O'N. whose complaint was not made until the 30th May, 2001. A number of memoranda were taken in respect of this interview. On the 24th October, 2000, the Garda file in relation to all the present complainants, save for Mr. B. O'N., was sent to the Director of Public Prosecutions. On the 30th May, 2001, the last complaint from Mr. B. O'N. was received and thereafter investigated. On the 1st November, 2001, the applicant was again interviewed in relation to a number of complaints, only one of which is referable to the existing prosecution. A further file was then sent to the D.P.P. on the 10th December, 2001, which included the gardaí's investigation of the complaint made by Mr. B. O'N. And finally, a third file was sent to the Director on the 7th May, 2002.

23. Having received instructions from the D.P.P. to prefer charges against the applicant, the latter was taken to the local District Court and on the 15th January, 2003, the sixty charges, above described, were preferred against him there. On the 31st March the Book of Evidence was served and he was returned for trial on the 18th June, 2003.

24. On the 7th July, 2003, the applicant obtained leave to issue these proceedings and, as part of the D.P.P. response, it was necessary for the gardaí to obtain statements in which eight of the instant persons explained the reasons why their complaints had not been made before the dates above specified. This exercise was done in October and November, 2003. However, in view of the Supreme Court's decision in *H. v. D.P.P.* [2006] 3 I.R. 575, there is no longer any issue in respect of complainant delay in this case.

25. In further response to the grounding affidavit, Superintendent Dowd makes the point that a significant issue in the criminal trial will be the credibility of the applicant, who maintains that he was not conscious of and did not engage in any abuse of children during his three year period at the school. Apart from administering corporate punishment on two occasions, he was quite unaware of what has been described as the culture of abuse which existed at the school. As the result of this approach it is said that the acceptance or rejection of the applicant's position, if he chooses to give evidence, is largely one of credibility which is entirely within the province of a jury in a criminal trial.

26. Superintendent Dowd then refers to extracts from the statements of a number of victims so as to demonstrate the culture of violence, intimidation and abuse which he claims was perpetrated in this school during the relevant period. It is not in my view necessary, however, to dwell on such detail as the same is fully set forth in the Book of Evidence.

27. On the issue of specific prejudice, the following submissions were made on behalf of the Director:-

> (i) It is conceded that Nurse O., Dr. F., and Brothers K., H., B., H. and D. are all now dead. However at no stage of the interview process did the applicant claim that witnesses existed, or had existed, who might be helpful or even relevant to his defence of these charges. In any event, even if these persons were alive, it is doubtful as to what real assistance, if any, they could give to the applicant since, in accordance with the evidence, the perpetration of the abuse almost always took place in private and, in addition, one can assume that such perpetrators took considerable care to conceal their crimes;
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> (ii) The gardaí have been able to obtain records from the Department of Education and Science which include birth certificates, conviction orders and history sheets of each of the boys involved in this prosecution. This means that there is evidence available as to the dates upon which these people were detained in and were released from this school. Copy statements from Officers of the Department of Education, confirming these points, have been made available; and,
>
> (iii) Despite making every attempt, the gardaí have been unable to procure any medical records of the pupils who attended at this school.

28. The physical layout of the school had undoubtedly changed much over the years but there is available a very rough sketch made by the applicant of some interior as it was back in the 1960s. Externally it remains much the same, but internally it is now different with many walls and partitions having been removed to accommodate its subsequent use. However, the applicant's contention that he is prejudiced in this regard, and in particular by the specific references to the sweet shop and store room, must be looked at in context. It is the belief of the respondent that the applicant has a good recollection of the layout of the school, as is evidenced by the following description given by him during the course of interview:-

> "My bedroom was situated at the top of the stairs, there was a wash room after you left the stone steps, my bedroom was next to it (wash room). After the wash room you had a long press where the boys' clothes were."

See p. 110 of the Book of Evidence. Also, at p. 116 the applicant stated:-

> "There was little cubby hole under the stairs where the sweets were kept."

29. It is entirely incorrect to say that the matters under discussion were not fully investigated by the gardaí. Every attempt was made to ensure that the investigation would be comprehensive and would unearth, if possible, any material which might cast doubts upon the complaints made or which might help and assist in the defence of such complaints. This approach, it is claimed, is evidenced by the fact that in respect of 45 statements of complaints which were made against the applicant, only ten prosecutions have resulted. In addition, there has been much correspondence between the local State Solicitor and Woods Ahern Mullen, in which the issue of documentation, *et cetera*, has been raised and satisfactorily dealt with.

30. Even if the applicant is correct in alleging that "numerous factual inaccuracies in the various statements of the complainants" exists, this can be dealt with as a matter of relevance and credibility both of which are issues for a jury.

31. Before referring to the legal submissions, I should mention the references to Detective Garda Cosgrave and Garda McWalter, which are made at para. 9 of the applicant's grounding affidavit, it being convenient to deal with their involvement at this stage. It is claimed by Mr. R. D. that during an interview the detective garda made "an unsolicited comment" to the effect that there had been no collusion between the complainants. According to the affidavit evidence of the detective garda this is not what occurred. Rather, during the course of an interview the applicant suggested that there might have been collusion between the complainants. In response to that suggestion he was assured that the detective garda "had not found any such evidence". As there was no cross examination of the applicant or Detective Garda Cosgrave, it is not of course possible to reach a conclusive decision on the correct context in which this discussion took place. However, this has no significant bearing on the outcome of these proceedings, as in my opinion the point is purely a contextual one.

32. With regard to Garda McWalter, it is said that this garda, again at interview, told the applicant that he did not have to contact a solicitor; thereby implying that the gardaí were not taking these allegations seriously. This is denied by Garda McWalter who points out in his affidavit that at all times the gardaí took these allegations most seriously. As with the issue regarding Detective Garda Cosgrave, it is not possible to make a definitive finding on this issue in the absence of cross-examination, though it would be strange if such a comment was made given the clear importance which the gardaí attached to this matter. However it is not suggested that any adverse consequence has resulted from such a comment, even if made, and therefore I do not consider the point as being material.

Submissions on behalf of the Applicant

33. The following submissions were made on behalf of the applicant:-

(i) The injunctive relief which is sought is based on two separate and independent rights, namely a right to a fair trial and secondly a right to a trial with reasonable expedition. Whilst both are grounded on the question of delay and the consequences thereof, it is important to bear in mind the following passage from the judgment of McGuiness J. in *J.K. v. D.P.P.* [2006] IESC 56, where the learned judge emphasised the distinction between these rights. She said:-

> "It is important to note that a clear distinction is made in this as in other cases between the core issue of a right to a fair trial and the separate and more nuanced right to an expeditious trial";

(ii) The right to a fair trial, as asserted in this case, is not dependent on establishing any blameworthiness or unreasonableness on the part of a complainant or the investigating authorities. Rather it can be asserted on the facts themselves;

(iii) When considering this matter the court must be quite conscious of the dangers inherent for any accused in trying to fairly deal with allegations which are rooted in the historical past. Cases such as *P.L. v. D.P.P. & Anor* [2004] IESC 110, *T.S. v. D.P.P.* [2005] 2 I.R. 595, and *C.K. v. D.P.P.* [2007] IESC 5, are all important in this regard as are cases such as *O'Callaghan v. Mahon and Ors* [2007] IESC 17, and *J.F. v. D.P.P.* [2005] 2 I.R. 174;

(iv) The true test in this regard has now been firmly established by the Supreme Court in *H. v. D.P.P.* [2006] 3 I.R. 575, and is whether or not the delay in question has resulted in prejudice to an accused person which gives rise to a real or serious risk of an unfair trial. This is now the sole criteria which must be met before a criminal trial will be prohibited on the grounds of delay. Therefore, whilst cases such as *J.M. v. D.P.P.* [2004] IESC 47 and *D.P.P. v. C.C* [2006] 4 I.R. 286 are helpful within the specific ambit of their individual facts, nevertheless the test, as propounded in H. is now determinative in this regard; and

(v) Under this heading the delay being relied upon covers the period from 1968 to January, 2003 which necessarily involves both pre and post complaint delay.

34. To succeed in establishing a violation of the right to a trial with reasonable expedition an applicant must demonstrate the existence of inordinate and inexcusable delay, which has been caused by some blameworthy conduct on the part of a state agency; in this case the gardaí. Such a person must also show that one or more of the interests protected by this right has been interfered with. Such interests are those as set out in *Barker v. Wingo* 407 U.S. 514 (1972). In addition, it is necessary for the court, before granting relief for a violation of this right to embark upon a balancing process in order to determine whether such right should or should not take precedence over society's right to prosecute. See *P.M. v. Malone* [2002] 2 I.R. 560, *J.M. v. D.P.P.* [2004] IESC 47, *P.M. v. D.P.P.* [2006] 3 I.R. 172 and *J.K. v. D.P.P.* [2006] IESC 56.

35. The applicant has also relied upon the judgment of Geoghegan J., in *P.M. v. D.P.P.* [2006] 3 I.R. 172, and in particular on the following passage which reads:-

> "Where post complaint delay is involved however, the discreet right to an expeditious trial comes into play…Where however there is a serious issue of blameworthy prosecutorial delay and eases the right to an expeditious trial it would not always be essential to prove actual prejudice in order to obtain injunctive relief. The court is entitled to consider the anxiety caused by the delay. That anxiety however great may not necessarily constitute prejudice in the defence. Nevertheless it is clear that it is a crucial factor in the balancing exercise indicated by Keane C.J. at least where the offences are sex offences (referring to *P.M. v. Malone* [2002] 2 I.R. 560 at 572). I do not think that the courts should normally concern themselves with the degree of anxiety in a quantative sense requiring proof thereof. It is perfectly obvious that a person who was told that he is on suspicion of having committed a sexual offence, and who is innocent of the offence… will suffer a high degree of anxiety. The size of the anxiety will be determined by the length of time rather than on any qualatative basis."

36. The delay relied on in the context of the right to reasonable expedition, is that between the date of complaint to the gardaí and January, 2003 when the applicant was charged with the offences above referred to. This however must be viewed in the context of the overall time scale being that from 1968 to 2003. When evaluating this type of delay the following passage from the judgment of Kearns J. in *P.M. v. D.P.P.* [2006] 3 I.R. 172 has been referred to:-

> "The appellant does not contend however that unexplained delays for which the prosecution bears responsibility are to be disregarded when determining whether an applicant is entitled to a stay by reason of the lapse of time to when the commission of the alleged offences are sent to trial. Moreover the appellant accepts the premise that where there has been a long delay between the commission of the alleged offences and their coming to the attention of the prosecution authorities, the latter are under a special obligation to expedite any subsequent investigation and prosecution. What the appellant contests however is the notion that an applicant if entitled to a stay upon criminal charges solely be reason of delay for which the prosecution authorities are deemed to be responsible."

37. And finally, it is submitted that the evidence contained in the applicant's affidavit outlining the stress and anxiety suffered by him is sufficient to merit the granting of the relief sought.

Submissions on behalf of the Respondent

38. Counsel on behalf of the Director of Public Prosecutions submitted as follows:-

(i) Referring to the decision of Denham J., in *D.C. v. D.P.P.* [2005] 4 I.R. 281 wherein the learned judge described the courts jurisdiction to prohibit a trial on the grounds of delay as being "an exceptional jurisdiction." It was claimed that the applicant had failed to discharge the burden of proof in satisfying this test and no relief should issue;

(ii) Since *H. v. D.P.P* [2006] 3 I.R. 575, it was no longer necessary to inquire into the reasons for any delay in the making of a complaint; rather, under the heading of complainants delay, the only issue was whether or not prejudice (if it exists) gave rise to a real and serious risk of an unfair trial;

(iii) Since *P.M. v. D.P.P.* [2006] 3 I.R. 172, an applicant will not succeed in having his trial stopped merely by reason of his right to reasonable expedition having been violated. In addition he must "put something more into the balance" before a court will conclude that his right outweighs the right of the public to have accused persons brought to trial;

(iv) In deciding whether or not to grant relief, a court will be influenced by matters such as the availability of evidence

from a different or alternative source to that relied upon by the applicant (*P.H. v. D.P.P.* [2007] IESC 3), the availability of directions and warnings which may be given during the course of a trial by a trial judge (see *K. v. D.P.P.* [2007] IEHC 45), and the extent to which the applicant has engaged with the facts of the case (*J.B. v. D.P.P.* [2006] IESC 66).

39. Reference was then made to the circumstances relied upon by the applicant as allegedly constituting specific prejudice in his case. These include the unavailability of witnesses, the absence of certain records including medical records (which may or may not ever have existed), and the subsequent alterations to the internal layout of the school. These matters are again touched upon later in this judgment.

40. In addition having pointed out that any person who is charged with child sexual abuse will almost certainly, as a matter of probability, be stressed, it was said that such stress, of itself, is not sufficient to obtain an injunction prohibiting the continuation of the trial.

41. In conclusion it was submitted on behalf of the D.P.P. that no sustainable case had been established as would justify the termination of the criminal proceedings which are presently standing against the applicant.

Decision

42. In a judgment delivered on 6th July, 2007, entitled *Cunningham v. President of the Circuit Court and the D.P.P.*, this particular court reviewed some of the more important cases relative to delay. It did so not only in the context of sex delay cases but also in the context of unrelated cases which have no connection with the special jurisprudence which has developed in the former type of case. Whilst some controversy may exist as to how and to what extent this special jurisprudence has found its way into the corpus of the general law, that is when dealing with non sex delay cases, the legal principles applicable to abuse cases would now appear, at least to a major extent, to be well established and firmly accepted. Accordingly, in my view, these principles can be stated as follows:-

(1) Where pre-complaint delay is involved it is no longer necessary to establish the reasons for such delay. This is subject only to where wholly "exceptional circumstances" can be established. In the absence of such circumstances, "the test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case" (*H. v. D.P.P.* [2006] 3 I.R. 575).

(2) In the legal application of this test the following subsidiary rules also apply:-

(i) The onus of establishing the existence of a real or serious risk is on an applicant who must discharge this onus to the standard of probability;

(ii) An applicant seeking injunctive or prohibitive relief must engage fully with the facts so as to present a complete picture to the court (*J.B. v. D.P.P.* [2006] IESC 66);

(iii) The unavailability of an original source of evidence may not be a ground to prohibit a trial, if the evidence complained of, or its essence, can be obtained by or from other means (*P.H. v. D.P.P.* [2007] IESC 3);

(iv) No relief will be granted to an applicant who is only able to identify some area of difficulty or complexity after having 'minutely parsed and analysed' the proposed evidence, (*D.C. v. D.P.P.* [2005] 4 I.R. 281);

(v) When assessing the degree of prejudice alleged, the court should be conscious of the trial judge's ability to issue specific directions and warnings (*C.K. v. D.P.P.* [2007] IESC 5), although in my view the appropriateness of this type of safeguard must not be overstated, overviewed or excessively weighed;

(vi) The court must likewise be mindful of the continuing obligations of a trial judge to apply the principles of natural and constitutional justice and to ensure, if necessary by the discharge of an accused person, that the trial process is conducted in due course of law.

(3) If an applicant, in accordance with these principles, is able to establish prejudice to such an extent that his right to a fair trial has been imperilled, then his criminal trial must be stopped. As this right is a stand alone right and is superior to society's right to prosecute, there is no requirement to engage in any balancing process between this core right and society's subsidiary right (Article 38.1 of the Constitution and *D. v. D.P.P.* [1994] 2 I.R. 465).

43. The above principles save for those set out at subpara. (1), equally apply where the issue is one of post complaint delay.

44. If the discreet right to a trial with reasonable expedition should arise, the court will determine a violation or not, by reference to the length of the delay, the reasons for the delay, the accused person's assertion of his rights and the "question of prejudice". (*Barker v. Wingo* 407 U.S. 514(1972)). In more general terms it is also said that where the delay, through no fault of the applicant, is inordinate and inexcusable, is significant and culpable, or can be described as "blameworthy prosecutorial delay", then a breach may be established. This delay, although essentially post complaint delay, must however be viewed against the entire landscape of time starting from the date of the alleged abuse. Further, a violation of this right, *per se*, will not automatically attract injunctive or prohibitive relief. After such a finding it is necessary for the court to adjudicate on vindicating either that right or society's right to prosecute crime. To succeed on this issue an applicant must also establish that one or more of the interests protected by this right has been interfered with (*P.M. v. Malone* [2002] 2 I.R. 560, and *P. M. v. D.P.P.* [2006] 3 I.R. 172).

45. Such interests, which form some, but not all, of the components which constitute the "question of prejudice" referred to above, are three in number and are:-

(i) to prevent oppressive pre-trial incarceration;

(ii) to minimise anxiety and concern of the accused;

(iii) to limit the possibility that the defence will be impaired.

The first such matter rarely if ever arises in this jurisdiction largely because of our bail laws. The third factor is almost exclusively

dealt with under Article 38.1 of the Constitution, so consequently it is the second "interest" which is most frequently relied upon. The type of 'anxiety and concern' envisaged may, but does not necessarily have to, amount to prejudice (*P.M. v. D.P.P.* [2006] 3 I.R. 172 and *J.B. v. D.P.P.* [2006] IESC 66).

46. Consequently, for an applicant to succeed in obtaining relief based on a breach of his right to a trial with reasonable expedition, he must not only prove a delay of the type as mentioned, but he must also prove that he has suffered from such a sufficient degree of anxiety and concern as would justify the court in giving primacy to the vindication of his right over the society's to prosecute (Article 30.3 of the Constitution).

47. In general I find much of what is offered by the applicant in support of his claim in prejudice, to be vague, uncertain and non specific. Whilst admitting that he spent three years at this industrial school between August, 1965 and August, 1968, his memory and recall of this period, particularly with regard to the inmates, seems to be almost entirely non-existent. He appears to have been totally oblivious to the culture of physical and sexual abuse perpetrated thereat to which a great number of complainants have been sworn. Apart from being involved in two episodes of physical discipline which in itself is evidence of a precise memory, in this regard, he steadfastly maintains a complete lack of knowledge of any Brother being involved in any physical (even permissible discipline) or sexual activity with these boys. Given that a number of witnesses were able to relate specifics of abuse to the applicant (see for example paras. 27 – 38 of the affidavit of Superintendent Dowd), I cannot help but believe that Mr. R. D. has deliberately refrained for engaging with the allegations made against him and almost certainly in my view has made no serious attempt to involve himself with the substance of such allegations. In addition as many of the points raised by him are discreet and are also at least to some extent remote from the core allegations made, I believe as a matter of probability that he has consciously refrained from engaging his memory with the events as described.

48. The applicant has identified many persons who if available might be of assistance to him. These include a number of Brothers and Nurse O. and Dr. F. With regard to Brother K. who was the Deputy of the school, Mr. R. D. would have relied upon this witness to confirm that both of them roomed in St. Patrick's dormitory and not elsewhere as has been suggested. If the applicant is right in this regard, it is difficult to believe that there is no other Brother available who served with him at the time who could offer similar evidence. In fact a significant feature of this case is the applicant's failure to specify what steps taken, if any, to ascertain who might be available as alternative witnesses to assist with the issues in question. This is a further illustration of his failure to engage with the facts. In addition, even if Brother K. was available, it must be highly questionable whether he would give evidence on behalf of the applicant. Given the fact that a number of complainants have described incidences of serious abuse involving Brother K., it is difficult to believe that he would have volunteered himself as a witness in this case; in fact one witness (witness No. 11) who is not a complainant, described Brother K., as one of "the worst Brothers for cruelty".

49. The role of the farm in the abuse allegations is peripheral and in any event it is likely that if abuse took place on it, the same was perpetrated in maximum privacy. With regards to Brother D. and a second brother known as Brother H. there is no suggestion as to what relevant evidence if any they might be in a position to give.

50. Six of the ten complainants make no reference to medical treatment in their statements as contained in the Book of Evidence. The other four, Mr. G. C., Mr. B. O'N., Mr. E. C. and Mr. M. B. do. However, it has never been suggested by any of them that they received attention from either Nurse O. or Dr. F., or indeed from anybody else for injuries or illnesses related to physical or sexual abuse. Consequently it could not be expected that even if available Nurse O. or Dr. F. could give oral evidence or produce records which might be material to this case.

51. In his affidavit the applicant complains about the lack of records including those which might show class schedules, seating arrangements and internal administrative procedures. It is unclear what attempts if any he has made to get information from the Christian Brothers, as an organisation, or from present or former individual members of that organisation who might have been in this industrial school at the relevant time. If he has had any communication with the organisation or with such members, he has not exhibited any correspondence in his affidavit in support of this. In any event I cannot see how details relative to class schedules or seating arrangements could possibly be relevant as there is no allegation that abuse took place during the currency of any class or classes. Moreover, I am entirely unaware as to what is meant by the reference to "internal administrative procedures" and how records of these, if available could assist in his defence of the charges against him.

52. Mr. R. D., also refers to the absence of any records containing "full details of my history with the congregation". I presume that the purpose behind this complaint relates to his whereabouts at the relevant time. In this regard it must be noted that there is no dispute but that he was stationed at this industrial school from August, 1965 to August, 1968 which is the entire period within which the allegations are founded. In addition he does not suggest that he was relocated or was otherwise absent from this school for any appreciable period during these three years, nor does he identify any outside location where he might have spent part of this time.

53. By way of a separate complaint he refers to the absence of any records which might assist in identifying those boys who were at the school during this period. A Brother B. is mentioned as having kept records, which if available would have shown, *inter alia*, the movement of boys in and out of the school, including presumably the complainants above mentioned. The applicant's complaint in this regard is not correct. At para. 41 of Superintendent Dowd's affidavit, this member of An Garda Síochána indicates that the birth certificates, the conviction orders and the history sheets of the pupils in question are available. Moreover, there are also some records and statements from officers of the Department of Education and Science which have been forwarded to the applicant. His concerns therefore in this regard are not well founded.

54. With regard to the physical location of the school, it is true to say that throughout the years many of the internal walls and partitions have been removed and that as a result its layout in this regard is now different to what it was back in the 1960s. In this context however, it is important to look at the actual evidence. Three of the complainants say that the applicant had a room at the end of the dormitory. One puts his room "over St. Michael's dormitory" with another stating that it was "at the end of St. Patrick's dormitory". Some of the other complainants allege that the individual abuse perpetrated on them took place in the store room, in the sweet shop, in a wash room and in another place where "bits and pieces were kept". There is also evidence of the internal layout from a number of witnesses who are not complainants in this case. The applicant himself, when questioned about this matter, was in a position to draw a rough sketch map which is described at p. 84 of the Book of Evidence as showing "…the hall, stone steps leading up to the Brothers wash room, his bedroom, an adjoining clothes press and a dormitory"; so the case is not entirely bereft of evidence in this regard. In addition the applicant strongly takes issue with the suggestion that the sweet shop was sufficiently large to accommodate two people with the door locked. Moreover he says with regard to the store room that he simply cannot recall it. In my view insofar as there are inaccuracies or inconsistencies in the complainants' statements, whether with regard to the location of the various rooms or areas herein mentioned, these are matters which will go to accuracy of recall and/or credibility of the witnesses and accordingly under court scrutiny are within the purview of the jury.

55. As previously stated the applicant, by way of general allegation, essentially maintains the position that he has no real memory of the events and circumstances which are alleged to have occurred at the school during the relevant period. It is difficult to understand how this could be so in the absence of any medical, psychological or physical reasons for it. Indeed, all the more so if the allegations of depravity are correct. Even if no abuse, either physical or sexual took place, it is difficult to understand, even allowing for the passage of time, how as a young teacher in his mid-twenties he would not remember this formative period of his life.

56. As a result, it is my opinion that the applicant has failed on the body of evidence to demonstrate the existence of either general or specific prejudice in any one or more of the areas in which he has engaged. Whilst undoubtedly there has been a long passage of time between the mid 1960s and the present day, nevertheless given the nature of the evidence which exists, and my evaluation of it as a whole, I cannot conclude that the applicant has shown the existence of a real or serious risk of obtaining an unfair trial. I believe that if, during the course of the evidence and particularly on the "run of the case", issues should arise which might be prejudicial to the applicant, the trial judge, in whom I would have every confidence, will take whatever appropriate steps are necessary, including the issuing of directions and warnings, so as to prevent any such prejudice. I therefore do not believe that the applicant can succeed on this aspect of his case.

57. In addition to seeking injunctive relief on the above grounds, the applicant also seeks to prohibit his trial on the basis that his right to reasonable expedition has been breached. To succeed, he must in the first instance prove that there was delay between the date of complaint and the date of charging, secondly, that this delay was both inordinate and inexcusable (by reference to the principles above described) and thirdly, that the vindication of his right (even if established) should take precedence over the right of the public to prosecute.

58. The first complaint, which the applicant may have to face in his criminal trial, was made by Mr. J. P. L. on 12th April, 1996. Eight of the other nine complaints were received by the gardaí between November, 1999 and July, 2000 a period of eight months, with the final complaint of Mr. B. O. N. being made in May, 2001. Disregarding for a moment the date of the first complaint, the period which lapsed between November, 1999 and the date of charging, namely January, 2003 is just over three years. To put his timeframe into context it is necessary to once again briefly refer to the evidence of Superintendent Dowd. In his affidavit, he deposes to a belief that the overall investigation into the allegations of physical and sexual abuse committed at this industrial school was one of the longest ever conducted by An Garda Síochána. He had six officers working full time on this project for over a period of two years. A specific incident room was allocated exclusively to the investigation. There were multiple complaints made by a large number of former pupils of the school. Well over a 150 statements were taken, whilst the full investigation gave rise to a creation of 22 separate garda files. By its very nature, the conduct of any such investigation must be sensitive and must be dealt with in a considerate and humane way. The alleged victims must be afforded a reasonable opportunity to compose themselves and to gather their individual recollection so as to decide consciously whether or not to make a complaint and thus potentially expose themselves to public identity. This manner of approach by the gardaí, appreciating as they did the deep concerns of the complainants, was, in my view, entirely reasonable and of necessity, required a considerable period of time.

59. As above stated, between November, 1999 and July, 2000 eight of the ten complaints relevant to this case were received. On 31st August, 2000, the accused person was arrested, detained and questioned about those, as well as about the first complaint made by Mr. J. P. L. Within two months a file was sent to the D.P.P. The last complaint of Mr. B. O'N. was made in May, 2001 and again, in November of that year, the accused was interviewed in respect of a number of persons including the said Mr. B. O' N. A further file was sent to the D.P.P. in December, 2001 and a third file was sent in May, 2003. In October of that year, directions were issued to prefer charges against the applicant and such charges were levied in January, 2003.

60. As will be noted from an earlier part of this judgment, the gardaí's investigation was not confined to those alleged victims who are referable to the criminal prosecution now standing against the accused person. Rather, it was much more extensive and much more wide-ranging than that. Several other individuals, who also spent periods at this school, made statements of complaint to the gardaí about the alleged physical and sexual abuse perpetrated on them during their period of detention there. Whilst there was no evidence as to the dates of these complaints, the accused person was interviewed in March, 1997 about them. It can be assumed that the gardaí had to treat each complaint in an individual manner and to investigate the precise details thereof. In addition, however, it was reasonable for the gardaí to acknowledge the connectivity between all complaints given the common establishment involved and the common category of alleged offender. Apart, perhaps, from the complaint of Mr. J. P. L., I cannot agree when viewing the overall circumstances (see para. 4, 19-22 *supra*.) that the actions of the gardaí could be described as involving inordinate delay. This view applies to the overall period involved, to include the two distinct periods between 7th March, 1997, and 15th January, 2003, and 31st August, 2000, and 15th January, 2003, which the applicant has highlighted. If, however, I am wrong in this and the time period(s) was or were excessive (including the time relating to Mr. J. P. L.), I am satisfied for the reasons above given that the gardaí were justified in taking the period in question. I therefore, do not believe that there was any blameworthy prosecutorial delay in this case.

61. Even however, if I am wrong in arriving at these conclusions and if, in the circumstances outlined, the applicant's right to a trial with reasonable expedition has been violated, I must now go on to balance the conflicting rights of halting his criminal trial or of allowing the prosecution to proceed. In that regard, it is incumbent upon the applicant to identify an interference with some "interest" which the right to a speedy trial is designed to protect. In that context, he relies upon stress and anxiety. In my view, the matters referred to at paras. 4 and 11 of his grounding affidavit, fall very far short of what would be necessary in order to reach the required threshold so as to terminate the criminal proceedings. Relying on the decision of *J.B. v. D.P.P.* [2006] IESC 66 and *D. v. D.P.P.* [1994] 2 I.R. 465, it seems to me that society's right to continue with these criminal proceedings far outweighs any possible vindication of the right to a speedy trial in the circumstances herein mentioned. These allegations involve serious charges of child sex abuse, which quite evidently the public has a major interest in seeing to a conclusion. All the more so given the multiplicity of complaints and complainants with alleged abuse extending over a three year period. This Court, in my view, must afford greater prominence to the public interest and to the interest of the administration of justice in having the applicant prosecuted to trial, rather than to upholding the latter's private right to halt these proceedings.

In consequence, I cannot agree that the applicant is entitled to any relief in this case.

62. Finally, there are three miscellaneous matters which I should mention. Firstly, I am quite satisfied that the gardaí discharged their duty to fully and properly investigate the complaints above mentioned; secondly, there is no substance whatsoever in the publicity or media point made by the applicant; and, thirdly, for the avoidance of any doubt, I should say that the delay on the "prosecutorial side" was addressed in the context of gardaí activity and not D.P.P. activity.

63. In conclusion, I dismiss the case.