

**THE HIGH COURT**  
**JUDICIAL REVIEW**

[2014 No. 68 JR]

**BETWEEN****M.P.****APPLICANT****AND****THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****JUDGMENT of Kearns P. delivered on 30th day of January, 2015**

By notice of motion dated 12th February 2014 the applicant seeks an order restraining the respondent from continuing to prosecute the applicant on Bills of Indictment 748/2012 and 885/2013 which is presently pending before Dublin Circuit Criminal Court.

**BACKGROUND**

The applicant has been charged with 70 counts relating to allegations of indecent assault contrary to common law and child cruelty contrary to section 12(1) of the Childrens' Act 1908 as amended. In relation to Bill 748/2012 the applicant was originally charged with 56 indecent assault offences on 24th May 2012 on foot of complaints made by two of his sons. The offences are alleged to have occurred between 1973 and 1983 when the two sons were aged between 5 and 15 and 11 and 14 respectively. On 1st November 2013 an indictment was lodged containing fourteen additional counts of child cruelty. In Bill 885/2013 the applicant is further charged with alleged indecent assaults on another son which are said to have commenced in December 1979 and ceased in March 1986.

The complainants moved to the UK in or around 1986 and are said to have made complaints to a UK police force in 2008. In May 2009 one of the complainants met with a Detective Garda Woods and statements were taken from the complainant and other family members. A further statement was made to Gardaí by another of the applicant's sons in December 2010 and the applicant was subsequently arrested and questioned on 29th March 2011. Directions to prosecute in relation to the first two complainants issued from the Director of Public Prosecutions in April 2012. The applicant was charged on 24th May 2012. The third complainant first made a formal complaint to Gardaí in October 2012. The applicant was arrested and questioned in relation to these fresh allegations on 13th November 2012 and directions from the DPP issued in August 2013. The applicant was charged in relation to these offences on 13th September 2013.

The Court has been furnished with the specific details of each of the complainants' allegations of indecent assault and child cruelty. It is not necessary for the purposes of this application to reiterate these allegations in any detail herein. In broad terms, it is alleged the applicant repeatedly sexually abused the three complainants over a lengthy period of time. It is further alleged that the complainants were subject to regular physical violence. The applicant refutes each allegation of sexual abuse as well as the depiction of the circumstances and atmosphere in the family home as advanced by the complainants.

The DPP intends on prosecuting the applicant on both Bills in one trial. A date has been set down for trial but a stay was granted on an ex parte application made on 3rd February 2014.

**ORDER 84 RULE 21 OF THE RULES OF SUPERIOR COURTS**

Submissions have been made by counsel for both parties in relation to the well established principles of complainant delay, prosecutorial delay, prejudice caused to the applicant, and the role of a trial judge in safeguarding an accused person's constitutional rights. However, counsel for the respondent correctly submits that if there has been a failure on the part of the applicant to comply with the requirements of Order 84 rule 21 of the Rules of Superior Courts then the application for relief must fail.

Order 84 rule 21, as amended by SI 691 of 2011 provides as follows –

*21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.*

*(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.*

*(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—*

*(a) there is good and sufficient reason for doing so, and*

*(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—*

*(i) were outside the control of, or*

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

Counsel for the respondent submits that the status of the Rules of the Superior Courts and in particular Order 84 was considered by the Supreme Court *Shell & P Ireland Limited v. Phillip McGrath and Others and the Minister for Communications, Marine and Natural Resources, Ireland and the Attorney General* [2013] IESC 1 where Clarke J. held that the restrictions contained in Order 84 "have the same status as time limits to be found in primary legislation".

It is submitted that in relation to the first two complainants, the applicant was charged on 24th May 2012 and a Book of Evidence was served on 12th July 2012. In relation to the third complainant's allegations the applicant was charged on 13th September 2013 and served with a Book of Evidence on 18th October 2013. The respondent contends that for the purposes of Order 84 rule 21 the clock starts running from when the applicant knows he is being charged with offences which give rise to grounds of prejudice such as those he now relies upon. It is submitted that in the present case this date of knowledge was 24th May 2012 or, taking the applicant's case at its height, 18th October 2013. It is further submitted that while leave was granted to seek an extension of time by Peart J., no such application was ever made to the court of hearing and no basis for seeking such an extension was ever advanced on affidavit.

Counsel for the applicant submits that the relevant date from which the clock began to run is 1st November 2013 as this was when an indictment was lodged containing additional counts of child cruelty and which also seemingly widened the relevant location at which the alleged offences occurred, referring to the relevant city rather than the specific address. It is submitted that it was only at this stage that the respondent's case finally crystallised and that the applicant was in a position to make an application pursuant to Order 84 rule 21. As the application was advanced on 3rd February 2014, some 3 days outside the suggested time limit, counsel urges the Court to exercise its discretion, having regard to the serious nature of the offences alleged.

## DISCUSSION

I have carefully considered the submissions of both parties in relation to Order 84 rule 21. It is clear from the decision of the Supreme Court in *Shell & P Ireland Limited v. Phillip McGrath and Others and the Minister for Communications, Marine and Natural Resources, Ireland and the Attorney General* that the requirements in relation to the time limits for taking an application as set out in the rule are mandatory.

This being so, the question then arises as to when the clock began to run in the present case. I am satisfied that in relation to the Bill No. 748/2012 and the allegations of the first two complainants the applicant had the requisite knowledge to advance an application pursuant to Order 84 rule 21 by 12th July 2012 when he was served with the first Book of Evidence. Central to the applicant's contention that there is a serious risk of an unfair trial is a list of persons whom the applicant contends would have been in a position to offer testimony in his defence. However, the Court is satisfied that by the time the applicant was served with the first Book of Evidence he had been arrested and questioned by Gardaí in relation to the alleged offences and the nature of the alleged offences, the locations at which they allegedly occurred, and the persons whom the applicant was likely to identify as being relevant witnesses would have been known to him. For that reason, the application to restrain the respondent from continuing to prosecute the applicant on Bill 748/2012 is dismissed.

In relation to the third complainant's allegations and the Bill No. 855/2013, the relevant date for the purposes of Order 84 rule 21 could be no later than 18th October 2013 when the second Book of Evidence was served. Leave to make the present application was granted on 3rd February 2014, placing the application in respect of the third complainant's allegations approximately two weeks out of time. While in some cases the Court might be persuaded exercise its discretion to grant an extension having regard to the relatively short delay and the seriousness of the alleged offences, I am satisfied that in the present circumstances the application should be dismissed. By 18th October 2013 it had been some seventeen months since the applicant was charged on foot of the first two complainants' statements to Gardaí and he also had full knowledge of the third complainant's allegations. There is a considerable overlap in relation to the allegations of all three complainants, both in terms of the nature of the offences and the locations at which they occurred, and the witnesses whose unavailability the applicant contends gives rise to prejudice are the same in relation to all complainants. It is also worth noting that the present application was only made only after a date was set down for trial. Therefore, taking the applicant's case at its height, the application in respect of the third complainant was also made out of time and must be dismissed.

As the failure to comply with Order 84 rule 21 disposes of the application, the questions of complainant delay, prosecutorial delay, prejudice to the applicant and the role of the trial Judge as set out above do not fall to be considered. However, for the sake of completeness it is appropriate to indicate that, after considering the submissions in detail and the supposed prejudice relied upon by the applicant, and having regard to the well established principles as set out in cases such as *SH v Director of Public Prosecutions* [2006] 3 IR 575, *PM v DPP* [2006] IESC 22, *MacFarlane v DPP* [2007] 1 I.R. 134, the Court, had it been necessary to so decide, would have allowed the matter to proceed to trial. In arriving at this decision, the Court has had careful regard to the role of the trial judge in protecting the applicant's constitutional right to a fair trial.

## DECISION

In light of the foregoing the application to restrain the respondent from continuing to prosecute the applicant on Bills of Indictment 748/2012 and 855/2013 is dismissed. The application to grant an extension of time within which to issue these proceedings is also dismissed.

