

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No 1128 JR]

BETWEEN

D. O'L.

APPLICANT

**AND
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENT

Judgment of Mr. Justice de Valera delivered on the 30th day of July 2007

1. The applicant has been charged with forty one offences of indecent assault. Eight of these offences are alleged to have been committed against his sister, MB, on various dates from 1965 to 1968 (inclusive). The thirty three remaining offences are alleged to have been committed against another of his sisters, EO'L, on various dates from 1966 to 1974 (inclusive). He has sought an injunction by way of judicial review to restrain the respondent from proceeding further with the prosecution of the said offences, principally on the ground of delay.

2. At the time this application was heard (December 2006) the decision in the matter of *H. v. The Director of Public Prosecutions* (31st July, 2006) held that the sole issue for consideration in matters such as this of delay was "whether the delay has resulted in prejudice to an accused, so as to give a real or serious risk of an unfair trial".

3. That court went on to re-state the test as:-

"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 the light of the circumstances of the case."

4. The judgment went on to state:-

"Thus the onus rests on the applicant to demonstrate, on the balance of probabilities, that he runs an unavoidable risk of an unfair trial as a consequence of the lapse of time."

5. The decision in *H. v. The Director of Public Prosecutions* has been considered again in *W.M. v. The Director of Public Prosecutions* a decision of Kearns J. (Supreme Court, 21st May 2007) and therefore not available to the parties in this matter at the time of the hearing in December 2006 or at the time the written submissions were delivered.

6. The learned judge reiterated the test as set down in *H. v The Director of Public Prosecutions* and went on to point out that:-

"In many instances general prejudice arising from a lapse of time between the commission of the alleged offences at the time of trial can be mitigated by rulings and directions on the part of the trial judge."

7. The offences in the *W.M.* case were alleged to have occurred between 1971 and 1981; the offences in this matter are alleged to have occurred between 1965 and 1974 – the period of delay is, therefore, not dissimilar.

8. It has been submitted to me by the respondent, and I accept, that the applicant has not established, on the balance of probabilities, there is any evidence to establish:-

"That the lengthy passage of time which has undoubtedly occurred in this case has operated to the detriment or prejudice of the applicant in any material way ..."

9. Per Kearns J in *W.M. v The Director of Public Prosecutions*.

10. In my view there is nothing in the affidavit filed on behalf of the applicant in this matter by B.L. dated 8th December, 2004 which might cause the specific prejudice which would allow a continuation of this prosecution to be prohibited, or which would interfere with the trial judge's capacity to take the necessary steps to ensure a fair trial.