THE COURT OF APPEAL

MILITARY

Sheehan J
Mahon J
Edwards J

Record No:172CM/15

THE DIRECTOR OF MILITARY PROSECUTIONS

Respondent/Applicant

- V –

COMMANDANT NILE DONOHOE

Appellant/Respondent

Judgment of the Court delivered the 9th of March 2017 by Mr. Justice Edwards.

Introduction.
1. In this case the appellant, an officer in the Permanent Defence Force holding the rank of Commandant, and attached to the Central Medical Unit (CMU) of the Defence Forces, appeals against his conviction at a General Court-Martial held at the Military Justice Centre at McKee Barracks, Blackhorse Ave, Dublin 7, on two charges set out on the Court-Martial Charge Sheet dated 14th July 2009; namely, Charge No 3 which was a charge of committing a civil offence, contrary to s.169 of the Defence Act 1954 (the Act of 1954), to wit assault contrary to s.2 of the Non Fatal Offences Against the Person Act 1997, and Charge No 5 which was a charge of using insulting language to a superior officer contrary to s.133 of the Act of 1954. The General Court-Martial was held on numerous dates between the 1st of June 2014 and the 22nd of April 2015, and its finding of conviction made on the 22nd of April 2015 was promulgated on the 12th June 2015.

2. Following his conviction the appellant was sentenced in respect of both charges to reduction to the fourth point of the pay scale for the rank of Commandant with effect from the 1st day of August 2015 and to a fine of an amount equal to 10 days pay.

3. The Director of Military Prosecutions, the respondent to the conviction appeal, has also brought what is in effect a cross appeal in which he seeks a review of the said sentence pursuant to s.2 of the Criminal Justice Act 1993 on the grounds that it was unduly lenient.

4. This judgment will deal solely with the appellant's appeal against his conviction and an associated motion seeking leave to add new grounds of appeal against conviction and for leave to adduce evidence of new or newly discovered facts in support of the appeal against conviction.

5. For simplicity and the avoidance of confusion The Director of Military Prosecutions will hereinafter be referred to as "the Director" and Commandant Donohoe will hereinafter be referred to as "the defendant".

The Initial Grounds of Appeal
6. Following the defendant's conviction a Notice of Appeal dated the 3rd of July 2015 was filed on his behalf which pleaded the following complaints in respect of the defendant's conviction:

- "There were ineligible members sitting on the board.

- The selection process to select the members of the board was carried out otherwise than in public and in a manner by which the randomness of the selection process cannot be ascertained.

- There has been an inordinate and inexcusable delay in the prosecution of the accused in breach of the European Convention on Human Rights Act 2004 and the time limit for trial relied upon by the Director of Military Prosecutions is also incompatible with the European Convention on Human Rights Act 2004

- The Director of Legal Services and the Director of Military Prosecutions were acting in a manner which was incompatible with the European Convention on Human Rights Act 2004.

- There was prior involvement in the matter by the Chief Prosecutor, the Director of Military Prosecutions and a Prosecutor was also listed as a defence witness.

- There was non-disclosure of evidence and the prosecution did not seek to preserve any evidence that could exculpate the accused."

Procedural history of these appeal proceedings.
7. As is usual since the establishment of this Court, all appeals are the subject of active case management. Based on these grounds of appeal both the defendant and the Director were directed at a case management hearing to file legal submissions in support of their respective positions and the appeal was listed for hearing on the 11th of May 2016.

8. Shortly before the said hearing date, on the 5th of May 2016, the defendant filed detailed legal submissions running to 49 pages of single spaced text. Despite the lateness of receipt of the defendant's submissions the Director's side managed to file replying submissions on the 10th of May 2016, i.e., the day before the scheduled appeal hearing. In those submissions the Director noted that

the defendant's submissions purported to be in support of what the defendant characterized therein as his "expanded grounds of appeal". This was despite the fact that no leave had been sought from, or granted by, this Court to add additional grounds of appeal.

9. When the case was called on the 11th of May 2016 counsel for the defendant sought an adjournment on the basis that he was not ready to go on as his submissions required to be revised, both to address objections made by the Director in his submissions and also in the light of some new information lately received by the defendant. With considerable reluctance the Court acceded to the adjournment application, and a new date of the 28th of July 2016 was fixed for the hearing of the appeal.

10. On the 27th of May 2016 the defendant filed revised submissions. These were somewhat shorter than the initial submissions, running to 21 pages of single spaced type. However, these again purported to speak to what were characterized therein as "expanded grounds of appeal". Notwithstanding that the defendant had been on notice since the 10th of May 2016 that the Director was objecting to any reliance without the leave of the Court on additional grounds of appeal beyond those pleaded in the Notice of Appeal filed on the 3rd of July 2015, the defendant had not brought any motion in the meantime seeking leave to expand his grounds of appeal. The Director's side filed further submissions on the 30th of June 2016 in response to the defendant's revised submissions, and in these further submissions re-iterated yet again that the attempt by the defendant to rely on so-called "expanded grounds" was being vehemently objected to. However, the so-called "expanded grounds of appeal" were nonetheless responded to effectively on the basis that the Director's response was without prejudice to his objection that the defendant was seeking to rely on additional grounds without having obtained leave to do so.

11. When the matter came on for hearing on the 28th of July 2016 the Court was advised just prior to the call-over of cases for hearing that "new evidence" had come to light as a result of which the defendant required an adjournment. The Court deprecated the lateness of the application but acceded, though again with reluctance, to the request for an adjournment. In doing so we noted that this was the second time that the Court had been unable to proceed with the hearing of the appeal. The Court directed that any motion and affidavit to ground an application to introduce new evidence should be filed and served by the end of the first week in September and adjourned the matter for mention to 7 October. The defendant did not seek on this occasion, nor was he granted, permission to rely on additional grounds of appeal. The Court's permission extended solely to the bringing of a motion seeking leave to adduce evidence of new or newly discovered facts. Despite the direction of the Court the defendant did not issue and serve his motion, with supporting affidavit, seeking leave to adduce such evidence until 3 October 2016. The actual Notice of Motion was dated 30 September 2016. This was despite having sworn the affidavit in support of the application on 9 September 2016.

12. The motion that was in fact issued and served went beyond seeking leave to adduce new evidence. It also sought leave to rely on additional grounds of appeal. It prayed for the following reliefs:

> "1. That I be permitted to introduce a series of correspondence culminating in a letter of the 10th of May 2016 from my Commanding Officer which confirmed my chain of command as at the date of my hearing which was not previously disclosed to my legal team pursuant to Order 86 C Rule 16 (i).
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> 2. That I be granted leave to amend my ground (sic) of appeal to the
>
> following as such grounds were not available to me in the absence of the above evidence

New Grounds of Appeal

> 1. The Board was improperly constituted in that some members were serving in the chains of command as the [defendant].
>
> 2 The panel from which the Board was selected was improperly constituted in that it included officers serving in the chains of command of the [defendant] and a prosecution witness.
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> 3 The [Director] failed to inform the [defendant] of the details of his chains of command, despite request, thereby depriving him of the opportunity of meaningful involvement in the process of Board selection.
>
> 4. The selection process to select the members of the Panel and Board was carried out otherwise than in public and the manner in which it was carried out could not be challenged
>
> 5. There was inordinate, inexcusable and unexplained delay in the investigation and prosecution of the complaints against the [defendant] which caused irremediable prejudice to the defence.
>
> 6. There was a failure to preserve available and relevant evidence as a result of which the [defendant] was prejudiced in his defence."

The background to this appeal.

13. This military prosecution arises out of an interaction that occurred on Friday the 10th of August 2007 between the defendant and Lieutenant Colonel John Moloney at Lt. Col. Moloney's office at Casement Aerodrome, Baldonnel, Co Dublin. The Director contends that in the course of this interaction the defendant assaulted Lt. Col. Moloney and used insulting language towards him.

14. The evidence at trial was that Lt Col Maloney was at all material times a superior officer for the purpose of the Act of 1954 and in addition to being Commandant Donohoe's superior officer, he was also his commanding officer being the officer commanding No. 4 Support Wing in which Commandant Donohoe was serving as squadron commander.

15. The evidence of Lt Col Moloney was that he had contacted the defendant to visit his office in No. 4 Support Wing Headquarters in Casement Aerodrome to sign some documentation relating to some complaints that the defendant had previously submitted. His evidence was that the defendant had become verbally abusive to him. Lt Col Moloney stated that he repeatedly asked the defendant to leave his office but the defendant had refused and had *"approached me and squared up to me".* Lt Col Moloney felt obliged to leave his office in an attempt to end the altercation. He went to the men's locker room and toilet but was followed by the defendant who continued his verbal abuse, and again *"squared up to"* Lt. Col. Moloney and prodded him in the chest with his finger. Lt. Col. Moloney further gave evidence *"I stood my ground and then turned away to avoid any further trouble and, after I turned away, he called me a piece of shit'.* Lt. Col. Moloney's evidence was that he had tried to get the defendant to calm down to no avail, that the behaviour was inexplicable and unprovoked and he had never in 24 years of service had an encounter like it.

16. It is unnecessary for the purposes of this appeal to delve any deeper into the alleged facts or the evidence in support of the charges in circumstances where the appeal, whether as originally framed, or on the extended basis that the defendant now seeks to advance (if this Court is minded to allow it), focuses entirely on issues of military criminal procedure and procedural fairness in the Court-Martial process rather than on the minutiae of the trial itself. The suggestion is not that there was a want of evidence sufficient to convict the defendant, or that some inadmissible evidence was led in the trial, or that rulings by the military judge in the course of the trial were unfair to the defendant, or that the military judge misdirected the Court-Martial Board (in effect the jury in the case) in some matter of law. Rather, the appeal focuses on issues such as the selection process for, and the composition of, the Court-Martial Board; alleged prosecutorial delay; alleged prosecutorial misconduct, alleged prosecutorial bias / conflict of interest, and alleged non-disclosure.

17. In order to fully appreciate the background to these proceedings there are three further details which require to be noted although they are not of central importance. The first is that the Court-Martial Charge Sheet dated 14th July 2009 had originally contained twelve charges altogether, eleven of which related to incidents at Casement Aerodrome which allegedly took place between June 2007 and 21st August, 2008 (including the incident on the 10th of August 2007 giving rise to the charges the subject matter of this appeal), and the twelfth of which related to an entirely different incident which had allegedly occurred on the 30th of January 2009. At a certain point the twelfth charge was severed, and it was ultimately tried separately by another General Court-Martial in May 2010. (Though nothing turns on it, there was subsequently, we understand, a further severance of what remained with five charges arising from the incident of the 10th of August 2007 being grouped and dealt with together).

18. The second detail to be noted is that with respect to the remaining eleven charges, including those now the subject of this appeal, the appellant brought judicial review proceedings in the early autumn of 2009 seeking to prohibit his General Court-Martial, which was due to commence on the 6th of October 2009 from going ahead. As stated already the eleven charges related to incidents which allegedly took place between June 2007 and 215t August, 2008. The Act of 1954 was substantially amended by the Defence (Amendment) Act, of 2007, which amendments took effect on and from the 151 September, 2008. With reference to ss.57 to 59 of the 2007 Act, the appellant argued that under the amended regime he would be liable on conviction, to the imposition of a separate sentence for each offence of which he was convicted: whereas, but for the delay of the prosecution, as alleged, he would, if prosecuted solely under the Act of 1954, have been liable foe one sentence only. The Director denied that such was the effect of the amendments. However, pending the determination of these proceedings the holding of the Court-Martial was deferred.

19. Then in December 2009 the defendant then instituted a second set of judicial review proceedings relating to Charge No 12, and successfully obtained leave to apply to apply for prohibition of his General Court-Martial in respect of that charge on a single ground relating to the manner in which the members of the Courts-Martial Board and "persons in waiting" had been selected /appointed.

20. Both judicial review cases were listed for hearing together on the 2nd of March 2010, and were settled. It was agreed in respect of the first set of proceedings that, firstly, if the defendant were to be convicted he should not receive more than one sentence in respect of all of the offences for which he might be convicted, and that the military judge would be so informed; and secondly that any such sentence would be based on the regime pertaining prior to the 1st of September 2008, i.e., solely under the Defence Act 1954. The second set of proceedings was struck out by consent with no order.

21. The third detail is that, as already alluded to, the General Court-Martial in respect of the 12th charge went ahead in May 2010. The appellant was convicted of that charge, but subsequently successfully appealed to this Court's predecessor, the Courts-Martial Appeal Court. The appeal succeeded on the grounds that the Courts-Martial Board convened for that General Court-Martial was not lawfully constituted, on the basis that the Courts-Martial Administrator had determined the rank structure and distribution of the Courts-Martial Board, which he was not entitled to do.

The motion seeking leave adduce evidence of new or newly discovered facts

22. The motion is grounded upon the aforementioned affidavit of the defendant sworn on the 9th of September 2016. In that affidavit the defendant sets out three categories of what he characterizes as "fresh evidence" on which he now wishes to rely. These categories were identified as being evidence relevant to:

> "(i) The Chain of Command and ineligible Court-Martial Panellists/Board Members
>
> (ii) The prejudice I experienced following the extraordinary delay in prosecuting the case
>
> (iii) The prejudice I experienced following the loss/ destruction of CCTV footage."

23. Without engaging at this point with the merits of any of the substantive grounds of appeal that the defendant wishes to advance, whether those originally pleaded, or the expanded grounds he now wishes to advance, it is necessary to examine the evidence of the alleged new or newly discovered facts, both as to the nature of that evidence and as regards the contention that it contains new or newly discovered facts.

24. The law governing applications for leave to adduce evidence of new or newly discovered facts at an appeal such as the present is to be found in s.33(1) of the Courts of Justice Act 1924 ("the Act of 1924) as substituted by s.31 of the Criminal Procedure Act 2010 ("the Act of 2010"), and as amended by s.78 of the Court of Appeal Act 2014, and in the jurisprudence of the Supreme Court as contained in *The People (Director of Public Prosecutions) v O'Regan* [2007] 3 I.R. 805.

25. Section 33(1) of the Act of 1924 as substituted and amended provide:

> "(1) The appeal shall be heard and determined by the Court of Appeal ('the court') on—
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> (a) a record of the proceedings at the trial and on a transcript thereof verified by the judge before whom the case was tried, and
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> (b) where the trial judge is of opinion that the record or transcript referred to in paragraph (a) of this subsection does not reflect what took place during the trial, a report by him as to the defects which he considers such record or transcript, as the case may be, contains,
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> **with power to the court to hear new or additional evidence**, and to refer any matter for report by the said judge."(our emphasis)

26. In *The People (Director of Public Prosecutions) v O'Regan* the Supreme Court considered the criteria according to which the discretion to grant leave to adduce new or additional evidence ought to be exercised and endorsed those previously commended by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005). Giving judgment in the Supreme Court in *O'Regan's* case, Kearns J, (with whom Murray CJ, Geoghegan J, Fennelly J, and Macken J all agreed) stated (at para 69):

> "Having reviewed both the Irish authorities cited above and a number of English authorities, the court [i.e.,the Court of Criminal Appeal in Willoughby's case] considered it could formulate principles appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal as follows at pp. 21 and 22:-
>
> > '(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
> >
> > (b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.
> >
> > (c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
> >
> > (d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation.' "

27. Kearns J went on to say:

> "71. The court sees no reason to substitute for the principles enunciated in *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005) those which are contained in the English Criminal Appeal Act 1968, as amended. Counsel for the accused has, wrongly in the opinion of the court, characterised the "*Willoughby* principles" as rigid and inflexible preconditions to the making of an application for the admission of new evidence. In the view of the court, the "saver" for exceptional circumstances defeats this submission. While the requirement for "exceptional circumstances" may be seen as setting the bar at a fairly high level, the policy considerations to which reference has already been made demand no less. The entire criminal justice system would be incapable of functioning if every trial was subject to a re-run on new grounds or new evidence in an appellate court. Thus it is entirely reasonable to insist upon a "due diligence" test in respect of evidence which was known to exist, or which could reasonably have been obtained at the time of trial but was not. Equally, it can only be seen as entirely reasonable and proportionate to incorporate in the principles a requirement that the proposed new evidence is credible and, if admitted, that it might have a material or important, though not necessarily decisive, influence on the result on the case. The court is also satisfied that any consideration of materiality must be conducted by reference to all the other evidence at the trial and not be considered in isolation.
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> 72 The application of these principles should not be seen as displacing or negativing in any way the overarching requirement that justice be seen to be done having regard to all the circumstances and facts of the particular case. In this regard, the court is again satisfied that the "saver" contained in the first of the stated principles is adequate to safeguard that particular requirement. No statement of principle enunciated in *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005) is to be seen or understood as abrogating that requirement."

28. In relation to the first category of "fresh evidence", as he puts it, that the defendant now seeks leave to adduce, the context is as follows. The defendant seeks to make the case that a General Courts-Martial is an ad hoc military tribunal the convening of which is provided for in military law, and specifically in the Defence Acts 1954 to 2011 ("the Defence Acts"), in the Rules of Procedure (Defence Forces) 2008 [S.I. 204 of 2008], and in the Courts-Martial Rules 2008 [S.I. 205 of 2008] which together govern military criminal procedure. In so far as General Courts-Martial are concerned military law provides that such a tribunal, where lawfully convened, is to be presided over by a military judge, who will sit together with a Courts-Martial Board of not less than five members. The Courts-Martial Board is selected by the Courts-Martial Administrator in accordance with s.191 of the Act of 1954 (as amended by s. 191 of the Defence (Amendment Act) 2007). S. 191 of the Act of 1954 specifies, *inter alia*, that certain persons shall be ineligible to serve on a Courts-Martial Board including (in subsection (j)) *"an officer or non-commissioned officer who is serving in the same military chain of command as the accused."*

29. The defendant contends that in order for him to know whether the members of the Courts-Martial Board selected in his case were in fact eligible to serve as such, and for him to object if any of them were not eligible, he had to be able to ascertain both in what chain of command the Board candidates were serving, and indeed in what chain of command he himself was serving. The defendant contends that he attempted to obtain confirmation before his trial as to his own chain of command, and in effect maintains that this information was withheld from him by the military hierarchy and the military prosecuting authorities.

30. He says that he only received a definitive answer to his enquiry when his present commanding officer, a Colonel Mannion, wrote to him on the 10th of May 2016 confirming in writing his chain of command.

31. Col Mannion's letter was in the following terms:

> "1. Hereunder please find my response to your request to me to identify and confirm in writing your Chain of Command for discipline/security/routine administration purposes as per Defence Force Regulation A18, both now and as of the 19th of March 2015.
>
> 2. From the establishment of the CMU in 2012, OC CMU assumed command of CMU, which included the operational deployment, command and control of all CMU personnel. CMU is echeloned under Support Division. For issues of administrative, security and discipline matters, common to all units, the Chain of Command is through OC CMU to the respective Bde/Fmn Comd; per Draft DFR A18. From the date of your attachment to CMU, for such issues, Your Chain of Command has included General Officer Commanding Defence Forces Training Centre."

32. Having received this document he now believes that a suspicion that he had long harbored, namely that members of the Court-

Martial Board that heard his case were ineligible because those persons was in the same military chain of command as him, has been confirmed and he wishes to introduce the letter of the 10th of May 2016, and related correspondence, in support of an argument before this Court that he was tried by a tribunal that was not lawfully constituted. The interpretation the defendant has placed on Col Mannion's letter is that the CMU to which he is attached has two separate military chains of command, one governing operational deployment, command and control under the Support Division of Defence Forces Headquarters (DFHQ); and the other governing issues of administration, security and discipline under the General Officer Commanding (GOC) of the Defence Forces Training Centre (DFTC); such that officers or non-commissioned officers serving in either chain were ineligible to serve on his Court-Martial Board on the basis as that they were in the same chain of command as him.

33. Accordingly the defendant complained in paragraph 10 of his grounding affidavit sworn on the 9th of September 2016 that the Courts-Martial Administrator in appointing seven members of the Court-Martial Board, and seven members in waiting, for his case proceeded *"to appoint officers who were members of my chain of command for operational deployment, command and control matters echeloned under Support Division, and other officers who were members of my military chain of command for issues of administration security and discipline."*

34. The defendant points out that as he had not received any confirmation of his chain of command by the middle of March 2015, and in circumstances where his General Court-Martial was scheduled to commence in April 2015, he had instructed his solicitor to seek yet again leave on his behalf to apply for prohibition by way of judicial review. In an affidavit sworn by him on the 9th of April 2015 to ground his application he asserted his belief that members of the Court-Martial Board in his pending case were in the same chain of command as him. In regard to that he has stated in his affidavit sworn on the 9th of September 2016 in support of the motion before this Court:

> "I could not identify or challenge those members or persons in waiting because my chain of command had not been definitively identified at that time and was not so identified until May 2016"

35. However, even if that is so, it bears remarking upon that the defendant has still not identified the members of the Court-Martial Board or persons in waiting who are said to have been ineligible as being in the same chain of command as him even though he now claims to know his chain of command since receiving the letter of the 10th of May 2016 from Col Mannion.

36. Be that as it may, it should be mentioned for completeness that in April 2015 the defendant had also asserted a belief on his part that one member of the Court-Martial Board, a Lieut Col Thomas Roche, was ineligible because he was "a listed prosecution witness and gave evidence to the officer who took down the Abstract of Evidence".

37. In regard both to that, and his earlier complaint, the defendant has stated in his affidavit sworn on the 9th of September 2016 :

> "My belief could not be supported by evidence as this was within the exclusive possession and procurement of the prosecution and all my reasonable efforts to secure its release were unsuccessful. I have no reason to believe that any of the members of the Court-Martial Board were aware that any member was serving in my chains of command during the trial."

38. The defendant went on to point out:

> "I was unsuccessful in obtaining leave to proceed by way of Judicial review as the High Court ruled that the matters I sought to raise ought to be raised before the Military Judge in the first instance. My legal representative proceeded to raise the issue of the chain of command and the possible appointment of ineligible members to the Court-Martial panel and board. The Prosecuting Military Counsel and Court-Martial Administrator did not provide me or the Court with evidence of my Chain of Command nor confirm compliance with section 191 of the Defence Act, and that no members of my chain of command would be participating in my Court-Martial. It was completely impossible for me to ascertain my chain of command and I took all reasonable steps to do so and, in the end, only succeeded in doing so, with the assistance of my commanding officer, who, himself could not solve the matter without, as he did, consulting the appropriate army authorities."

39. The judicial review proceedings brought by the defendant in April 2015 in fact involved three separate applications seeking leave to apply for various reliefs including prohibition and certiorari by way of judicial review, that were heard and ruled upon together (by Noonan J) on the 14th of April 2015. One set of proceedings had named the Director of Military Prosecutions as respondent, another had named the Military Judge, and the third had named the Courts-Martial Administrator. Leave to apply for reliefs claimed in each instance was sought on a variety of grounds. In so far as can be gleaned from the transcript of the ruling and judgment of Noonan J, which is before us, the present issue relating to the chain of command does not appear to have featured in the proceedings involving either the Director of Military Prosecutions or the Military Judge. Though the position is not entirely clear, it appears to have been possibly raised in the proceedings against the Courts-Martial Administrator. This conclusion is based on the following remarks of Noonan J in dismissing the application:

> *"Finally, in the case against the Court-Martial Administrator I am of the opinion that the complaints here about selection of the Board are without merit and the applicant is fully entitled under the Act to challenge jurors in the normal way. I will refuse leave here also and for the same reasons."*

40. The "same reasons" referred to included a failure to meet the arguability threshold in *G v The Director of Public Prosecutions* [1994] 1 I.R. 374; and the fact that some of the various matters relied upon had been available to the defendant as grounds for seeking judicial review for some time and he had not moved sooner. Moreover, the defendant had taken other judicial review proceedings in 2009 and Noonan J, unimpressed to learn that that was so and that the defendant had failed to mention it *"other than in a very tangential way"*, referred to *Henderson v Henderson* and the obligation on a litigant to bring forward his entire case at the first appropriate opportunity. He further stated that complaints about procedures *"are clearly matters in my view more appropriately dealt with by the judge during the course of the trial"*

41. There is no doubt but that the defendant's original grounds of appeal pleaded that "there were ineligible members sitting on the board" and accordingly he does not require to amend his grounds in order to be permitted to argue this particular matter on appeal. However, the issue as to whether the defendant should be allowed to introduce and rely upon on the letter of the 10th of May 2016 in support of this point is and remains live.

42. The grounding affidavit of the defendant was replied to by an affidavit of Major General Kevin Cotter, Deputy Chief of Staff (Support), sworn on the 8th of December 2016. In it he describes in detail the organisation and command structure of the defence

forces based in the first instance on Articles 13.4 and 13.5 of the Constitution of Ireland which vest supreme command of the Defence Forces in the President of Ireland, based in the second instance on s.17 of the Defence Act 1954 which vests military command of the Defence Forces in the Government and, in particular, the Minister for Defence, and in the third instance in Defence Forces Regulation CS4 which is entitled "Organisation of the Defence Forces". Defence Forces Regulation CS4 sets out the organisational structure of the Defence Forces, which comprise a number of Brigades and Formations, and within those entities smaller entities such as Battalions and Regiments, and yet smaller entities again such as Companies and Training Schools. There is also Defence Forces Headquarters which is an entity separate from the Brigades and Formations, the head of which is the Chief of Staff to whom are assigned duties in connection with the business of the Department of Defence as determined by the Minister for Defence. Certain of these are delegated by the Chief of Staff, with the approval of the Minister, to the Deputy Chief of Staff (Operations) and to the Deputy Chief of Staff (Support).

43. Major General Cotter goes on to state that the term "chain of command" has a plain and ordinary meaning which is routinely understood and applied in the context of military life in the Defence Forces, *"being the direct linear chain from an individual to his commanding officer and thereafter to the next person vested with the military command upwards to the Minister for Defence."* In support of this he quotes the Defence Forces Land Component Handbook which defines the chain of command as *"the succession of commanding officers from a superior to a subordinate and from a subordinate to a superior through which command is exercised. It is the factor that enables a commander to retain unity of command over all elements of his units without exceeding the maximum span of control."* Major General Cotter contends that the term "chain of command" in s.191(1) of the Act of 1954 means, when given its natural and ordinary meaning, a chain of command that operates vertically as opposed to horizontally. A chain of command is not a web that extends vertically and horizontally because if it did then, logically, every member of the Defence Forces would be serving in the same chain of command because all of the various chains of command end with the Minister for Defence

44. Major General Cotter contends that Col Mannion's letter of the 10th of May 2016, while not incorrect, does not bear the meaning which the defendant seeks to attribute to it.

45. Major General Cotter states that:

> "…in so far as the Defendant may assert (in paragraph 10 of his affidavit) that officers serving in Support Division in Defence Forces Headquarters are serving in the same chain of command as the Defendant, it is not the case that all officers in Defence Forces Headquarters, whether generally, or specifically in Support Division in Defence Forces Headquarters, are serving in the same chain of command as the Defendant. The only officers of Defence Forces Headquarters that are serving in the same chain of command as the appellant are other officers serving in the Central Medical Unit (including the Commanding Officer of the CMU)."

15. The chain of command of the Defendant is: Defendant —► Officer Commanding the Central Medical Unit —► Deputy Chief of Staff (Support) —► the Minister for Defence.

> 16. In asserting (at para. 10 of his Affidavit) that the Court-Martial Administrator appointed to the board officers *"who were members of my chain of command for operational deployment, command and control matters echeloned under Support Division, and other officers who were members of my military chain of command for issues of administration, security and discipline"* the Defendant incorrectly applies the information given to him by his Officer Commanding in the letter dated 10 May 2016.
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> 17. The letter correctly confirms that the Officer Commanding (OC) CMU is the direct superior in the chain of command and that the OC's powers of command include the operational deployment, command and control of all CMU personnel. The CMU is established as a unit under the Support Division of DFHQ, and DFR A18 (13)(2) requires OC CMU to deal directly with the Deputy Chief of Staff (Support) in regard to all matters other than discipline, security and routine administration. Accordingly, the Defendant's chain of command is to OC CMU, then to Deputy Chief of Staff (Support), onward to the Minister.
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> 18. However, the chain of command in which the accused serves is not the same as that of officers serving in other branches in DFHQ because officers serving in other branches report to their branch head and not to OC CMU. The only officers serving in the same chain of command as the Defendant in DFHQ would be other officers of the CMU. No officer from the Central Medical Unit was appointed to the board in the Defendant's court-martial."

46. Later in his same affidavit, the Major General adds:

> "21. At all material times, the Defendant was serving in the "Defence Forces Training Centre Detachment" of the Central Medical Unit. The CMU comprises a number of detachments i.e. bodies of medical corps personnel that are detached to operate in each of the brigades and formations of the Defence Forces. The detachment to which the Defendant belongs is geographically located in the Defence Forces Training Centre (DFTC), which is a Formation under the command of the General Officer Commanding DFTC. Defence Forces Regulation A18 sets out specific exemptions and limitations in respect of military command over units and elements of the Support Division, which are located in the geographical area of another Brigade Commander. The exercise by the GOC of command over the CMU detachment in his formation is limited in scope by regulation 13(1) of DFR A.18 to the extent that his command over the detachment extends only to discipline, security and matters of routine administration common to all units.
>
> 22. Most importantly of all however, even if the GOC enjoyed unlimited command over the CMU detachment in his brigade/formation, in that event, the only officers in the Defence Forces Training Centre (DFTC) serving in the same chain of command as the Defendant in the DFTC, would be officers of the Central Medical Unit, DFTC Detachment. No such officers were appointed to the Court-Martial Board.
>
> 23. It will be clear that the special case described above in which detachments from the CMU might be regarded as having two distinct chains of command is both limited and of no application to the present case. It is simply set out in detail for the purpose of completeness and accuracy."

47. Finally, Major General Cotter makes the points that following the establishment of the Central Medical Unit which took place through an amendment to Defence Force Regulations C.S.4, the officer appointed to be the Officer Commanding the Central Medical Unit was automatically vested with military command over that unit and its personnel, by operation of regulation 4(4) of Defence Force Regulations A. 18 which provides in respect of "Army Command" that: *the command over a staff or unit or sub-unit and the personnel belonging thereto is vested in the officer appointed to command that staff unit or other element*. Defence Force

Regulations are published for the general information and guidance of Defence Forces members. In addition, as a senior commissioned officer with many years' service, the Defendant is expected to be familiar with all such regulations and also with service practice and customs. In conclusion he asserts categorically that:

> "… irrespective of the state of Defendant's knowledge of his chain of command, the actual position is that no-one serving in the same chain of command was appointed to the Court-Martial Board in his case".

48. The defendant has filed a further affidavit sworn by him on the 17th of January 2017 in reply to that of Major General Cotter and in which he joins issue with him concerning his interpretation of s. 191 of the Act of 1954. He relies in particular on the fact that prior to March 2015 *"the Courts-Martial Administrator did not select, deselect and appoint officers to the boards consistent with the Unit application theory which is advanced by Major General Cotter".* That is conceded as being a correct statement by the Director. However, the Director contends, it does not imply that Major General Cotter is incorrect in his interpretation of the legislation. In a letter from McDowell Purcell, Solicitors for the Director to Kelly Caulfield Shaw, Solicitors for the defendant, dated 13th February 2017 the point is made that:

> "Major General Cotter's affidavit was sworn in the context of the within appeal and deals with what is meant by Military Chain of Command pursuant to section 191 of the 1954 Act (as amended). It does not deal with the selection process methodology (nor does it purport to) beyond the application of section 191 of the 1954 Act to that methodology."

49. It is conceded by the Director that the selection methodology employed by the Courts-Martial Administrator has changed since March 2015, but it is maintained that this is irrelevant to the issue as to whether a person serving in the same military command as the defendant was appointed to his Court-Martial Board. The Director maintain that the position remains as stated by Major General Cotter, namely that no-one serving in the same chain of command as the defendant was appointed to the Court-Martial Board in his case.

50. It is necessary at this point to consider whether the evidence that the defendant now wishes to rely upon in support of the ground that there were ineligible members on the Court-Martial Board in his case, namely Col Mannion's letter of the 10th of May 2016 and related correspondence, comprises new or newly discovered facts. To qualify the relevant information contained in that correspondence must not have been known about at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

51. In his affidavit Major General Cotter suggests that the defendant's chain of command was readily ascertainable. He states that following the establishment of the Central Medical Unit which took place through an amendment to Defence Force Regulations C.S.4, the officer appointed to be the Officer Commanding the Central Medical Unit was automatically vested with military command over that unit and its personnel, by operation of regulation 4(4) of Defence Force Regulations A 18 which provides in respect of "Army Command" that*: the command over a staff or unit or sub-unit and the personnel belonging thereto is vested in the officer appointed to command that staff, unit or other element.* He states that Defence Forces Regulations are published for the general information and guidance of Defence Forces members. In addition, as a senior commissioned officer with many years service, the Defendant is expected to be familiar with all such regulations and also with service practice and customs.

52. In fairness to the defendant, while the Major General's point in relation to the expectation that senior commissioned officers would be familiar with the regulations is well made at one level, it is also true to say that the regulations, being regulations made by the Minister for Defence under the powers vested in him by ss 17 and 26 of the Act of 1954, the equivalent of a statutory instrument, are dense with detail and arguably require expert legal interpretation to be correctly understood as to all their implications. In addition the position of the Central Medical Unit appears to have been unusual within the defence forces in terms of having two different chains of command, (albeit, if Major General Cotter is correct, having only one "military" chain of command). A further nuance that requires to be taken into account is that it apparently was, at the time of the defendant's trial, both service practice and customary for the Courts-Martial Administrator, in selecting a panel of Court-Martial Board members and, persons in waiting to exclude officers who were posted to or attached to the brigade or formation of the accused, whereas that practice has now changed to one in which only such officers as are in the same military chain of command as the accused are excluded.

53. All of that having been said, however, it goes no further than to explain, and perhaps evoke some sympathy for, the defendant's difficulties in determining his military chain of command. Nevertheless, it all comes down to a question of statutory interpretation in terms of s. 191(j) of the Act of 1954 as amended, and there are well established canons or principles of statutory interpretation to assist in that regard. Moreover, it is clear that the defendant had the assistance of legal advisors expert in military law, and so the correct statutory interpretation of s. 191(j) would have been capable of being ascertained by him at the relevant time. S.191(j) refers quite specifically to *"an officer or non-commissioned officer who is serving in the same* **military** *chain of command as the accused."* (our emphasis). There is a presumption in statutory interpretation that every word in a provision is placed there intentionally, that it has meaning and that it is not surplusage. Accordingly, the use of the adjective "military" in describing the applicable chain of command makes it plain that the provision is being confined in its application to the military chain of command, thereby implicitly recognizing that there may be more than one chain of command. If there was only one possible chain of command it would be unnecessary to qualify it by the addition of the adjective "military".

54. We are persuaded that the defendant has failed to satisfy the second of the *Willoughby* principles, endorsed by the Supreme Court in *The People (Director of Public Prosecutions) v O'Regan* in as much as he cannot show that the supposed new evidence, i.e., the contents of letter of the 10th of May 2016 from Col Mannion and related correspondence, represents material that could not reasonably have been known or acquired at the time of the trial.

55. We are also satisfied that he has failed to satisfy the third of the Willoughby criteria in as much as he has not demonstrated that the contents of the letter of the 10th of May 2016 from Col Mannion, and related correspondence, might have a material and important influence on the result of the case. This is particularly so in circumstances where he does not purport to identify any individual said to have served on his Court-Martial Board who was in the same military chain of command (within the meaning of s.191 of the Act of 1954) as him. Moreover, there has been no engagement by him with Major General Cotter's categoric assertion that "the actual position is that no-one serving in the same chain of command was appointed to the Court-Martial Board in his case".

56. We must turn now to the other two claimed categories of "fresh evidence" as referred to in the defendant's affidavit of the 9th of September 2016, namely:

> "(ii) The prejudice I experienced following the extraordinary delay in prosecuting the case
>
> (iii) The prejudice I experienced following the loss/destruction of CCTV footage."

57. The appellant has not demonstrated in any way that there are new or newly discovered facts relating to these issues. It was open to the defendant to raise the issue of alleged prosecutorial delay at his trial, but he did not do so. His claim is based upon mere assertion and he does not point to any discrete piece of evidence that could potentially bear on such an issue that was not known or was not capable of being ascertained at the time. Similarly, in respect of the alleged non-disclosure, the defendant does not identify or point to any piece of alleged new evidence that could bear on that issue. He does not suggest that CCTV material has been uncovered by him *ex post facto* that ought to have been disclosed and which was not disclosed. He simply makes a bald assertion that "*the loss or destruction of CCTV evidence meant that I could not corroborate the fact that I did not enter or follow the Colonel into a changing room, that I did engage in a 10 or 15 minute altercation as alleged and that I had driven to the office with Sergeant Byrne."* The absence of CCTV evidence was known about, or was capable of being ascertained, at the time of the trial. There is nothing in the defendant's affidavit to suggest that some new evidence to do with CCTV footage, representing or providing a new or newly discovered fact, has emerged since the trial.

58. For all of these reasons we refuse the motion and are not disposed to allow the defendant to rely on the additional material that he seeks to rely upon as representing so called "fresh evidence", or to allow him to rely on the suggested additional grounds.

The substantive appeal
59. The Court is not prepared to deal with the defendant's appeal on the basis of "expanded grounds" which he has not obtained leave to advance. However, it is proposed to approach references to "expanded grounds" in the defendant's revised submission as being references to amplified arguments based upon the original grounds of appeal filed, and not upon any new grounds not contained in the Notice of Appeal.

60. Counsel on behalf of the Director has suggested, and we agree, that the appellant's original grounds can fairly be summarized as follows:

> (i) Some of the members of the Board were ineligible and the selection of the members of the Board was unlawful;
>
> (ii) There was inordinate delay in the prosecution of the Appellant;
>
> (iii) The Director of Legal Services and the Director of Military Prosecutions acted contrary to the European Convention on Human Rights Act, 2004;
>
> (iv) There was "*prior involvement in the matter"* on the part of the Chief Prosecutor of the Director of Military Prosecutions and one of the prosecutors involved *was "listed as a defence witness"*;
>
> (v) There was a failure to preserve and disclose evidence;

It is proposed to deal with each of these seriatim.

Complaints re the eligibility and selection of Board Members
61. At the trial the defendant's solicitor objected on day 1 (the 14th of April 2015) to the composition of the panel from which the Court-Martial Board members would be selected on Day 1, stating (inter alia):

> *"There were other persons who were here selected as jurors whom I say are not eligible officers, and their eligibility hasn't changed since the point where they were on the list of potential jurors that the Court-Martial Administrator was working from. And therefore I say that the fact that they're not eligible goes to the randomness of the selection and can't be cured by me challenging them here. The issue with a challenge is to do with perhaps we suddenly become aware that they are personally familiar with the defendant, same as might apply in a civilian court. That's not the issue here, the issue here is that when the Court-Martial Administrator was putting together his panel, he wasn't selecting randomly because the pool of people he was looking at included ineligible officers. And I say that's not a matter that should prevent this trial going ahead, it's a matter that can be easily cured by the Court-Martial Administrator being directed, and that was one of the reliefs that we sought in the High Court. We quashed we sought an order of certiorari to quash his decisions in relation to the appointment. But we also sought an order, an order of mandamus directing him to go back and do it again and effectively that's what I'm asking you here to do. If you've any concern that this jury was not selected randomly and if you've any concern that the issues of eligibility go to the randomness of the selection, then I think you should ask for a fresh jury to be empanelled and that's a matter that we wouldn't challenge, …"*

62. The thrust of the complaint was that a number of persons initially randomly selected to be on the panel from which the members of a Court-Martial Board would be drawn were ineligible (for various reasons). The ineligibility of these persons has never been disputed by the Director. However, none of them were ultimately chosen as Court-Martial Board Members. The defendant's solicitor cited the judgment of the Courts-Martial Appeals Court in *Director of Military Prosecutions v Donohoe* (unreported, Courts-Martial Appeals Court, McKechnie J, 24th of May 2012), referred to earlier at paragraph 21 of this judgment, in purported support of his argument that a fresh jury required to be empanelled in the light of what had occurred.

63. Counsel for the Director points out, and in our judgment he is correct in this, that to the extent that the defendant's solicitor's submission is predicated upon the idea that a random selection does not occur when persons who are ineligible are selected as the persons in waiting, the judgment of McKechnie J does not in fact provide support for that proposition.

64. Be that as it may, it became unnecessary for the Military Judge to rule substantively on the application in the following circumstances. The defendant's Solicitor went on to inform the Military Judge of the outcome of the judicial review application that had been made to Noonan J resulting in the ex tempore judgment of the same date, to which we have already made reference (at paragraph 39 ante). This led to the following exchange:

> "MR SHAW: Well, certainly the Court ruled against us on that point and I have to be straight and say that. We made the same points on all fours that I've made here today on affidavit and in our statement of grounds to the Court, the judge hasn't held in our favour on that issue.
>
> MILITARY JUDGE: So had you been aware of that ruling you wouldn't have made your application to me there this afternoon?
>
> MR SHAW: Judge, the judgment was delivered ex tempore and I was writing down and I have to say I didn't expect to see that as it looks in writing to be perfectly honest. I was satisfied that he had us to raise issues regarding the selection of

the jury with the Court here today. I thought that what he had said went further than that, but it is as it is.

MILITARY JUDGE: Yes. Well, so I think it's very clear cut there that there's no there's no question in relation to the selection of the board or sorry, in relation to the complaints that you've made regarding the selection of the board are without merit according to the judge in the High Court.

MR SHAW: That's his ruling.

MILITARY JUDGE: So if you have an objection to members of the board, you can deal with them by way of challenge when we get to that point in the procedure.

MR SHAW: Sorry, Judge, sorry, I was speaking to my friend very briefly there. I accept that the Court has found against us, there's a High Court order now saying that, the points that were being made in relation to the process of selection of the jury, he says they were without merit.

MILITARY JUDGE: Yes.

MR SHAW: That's the order.

MILITARY JUDGE: So so they are without merit, so there was no point in repeating those arguments to me here this afternoon.

MR SHAW: Well, Judge, I wouldn't have repeated them

MILITARY JUDGE: If you'd been aware of this?

MR SHAW: Yes.

MILITARY JUDGE: Yes, I accept I

MR SHAW: There were other relevant issues that I did raise in relation to the jury and there are more issues that will be addressed in the course of swearing in the jury and they are matters to be brought up.

MILITARY JUDGE: Yes. But the application you've made to me that I have adjourned to consider

MR SHAW: Yes, Judge.

MILITARY JUDGE: now is disposed of by virtue of what the judge had already said this morning?

MR SHAW: It's moot, I accept that it's moot, Judge, yes, yes, Judge.

MILITARY JUDGE: So any objection that you may have to in relation to the board can be dealt with by way of challenge to the board when they're being empanelled.

MR SHAW: That's the High Court order we have, Judge, yes."

65. The defendant's legal representatives did not in fact re-visit the issue of either the composition of the panel, or the eligibility of persons who were subsequently actually selected to serve on the Court-Martial Board, at any point during the trial.

66. In those circumstances the Director now argues that in circumstances where these issues were raised by the defendant in the trial, and were then dropped and not proceeded with, the defendant cannot now seek to raise those issues again on the appeal, having regard to the decision in *The People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 I.R. 329.

67. We consider that this submission is well founded and we dismiss the grounds of appeal arising under this heading.

Delay

68. Delay was first raised as an issue on behalf of the defendant at a pre-trial hearing on the 30th of July 2014. In response to this the Military Judge ruled as follows:

> *"The next item you raised was in relation to delay and if you are seeking an order from this court prohibiting the trial on the grounds of delay that isn't a matter that this court has jurisdiction to deal with. That's a matter for the High Court if you have concerns regarding delay and its impact on the trial. You know during the trial a trial judge must take account of any issues that arises from delay if it has an impact on fairness of the trial, for example, if it has an effect on the memory of witnesses or so forth but they are matters that fall within the general obligation of the trial judge to ensure that a fair trial ~ or that a trial when it proceeds is a fair trial and to that extent delay will be taken into account by this court but it's not a matter that the Court can rule on now to ground an order for prohibition of the trial."*

69. We are satisfied that this represented an entirely correct statement of the law. The defendant then sought to raise the issue in relation to delay again at another pre-trial hearing on 15 October 2014. On this occasion the prosecutor made the learned Military Judge aware of what the Director believed was the primary reason for the delay in bringing the matter to trial:

> *"Judge, the facts of the matter in relation to 123(IB)(e) is that Commandant Donohoe, regardless of his claims, was unavailable for prosecution due to illness for a protracted period. His time in attendance for that period shows that for the year 2010, the calendar year, he had 246 days sick leave. For the calendar year 2011, he had 335 days' sick leave. For the calendar years 2012, he had 365 days' sick leave. For the calendar year 2013, he had 311 days' sick leave. For 2014, he has no days' sick leave. What I'm saying is, from the period 1st of January 2010 to the 18th of July of this year, so I am not up-to-date, but on 1,257 of those days, Commandant Donohoe was on sick leave and thus unavailable for investigation due to illness. So, therefore the time, the clock does not run against the Director in this matter… ."*

On the same occasion the defendant offered the following by way of explanation for his extended sick leave:

"There is, and there is a record that shows, on the PMS system, that I have been and was not available for work because I was sick. This was because the PMS system can reflect nothing else. There's a whole medical file which shows that, because of the concerns that existed in the medical corps in relation to the inappropriate bullying and victimization that I tried to raise earlier in this hearing that occurred, that is prevalent in Baldonnell, a medical advocate was appointed by the Director of Medical Services. Now, I received no sick leave from him. What I got was leave associated with health and safety because of the toxic environment that was my working environment in Baldonnell and it took the defence forces six years to address this issue in some format. They did it by ordering that a medical board would be convened for the purpose of examining whether I was fit to serve or not and that medical board, in its substance, took all of two minutes because it was established that there was no medical issue; that I didn't suffer from any medical matter and the whole of my medical file and the documents retained by my medical advocate show us that I expressly indicated that I would be allowed and made available to attend any investigation and I have missed no dates, no dates."

70. Taken at its highest, the explanation put forward would allow the defendant to contend, as he does, that such delays as have arisen were not his fault and that they arguably fall into the category of culpable prosecutorial delay. However, even if that be so, and assuming for the purposes of the argument (without deciding the point) that it is legitimate for him to rely on a delay point raised at a pre-trial hearing, rather than in the course of the trial itself, in the course of this appeal, the defendant cannot point to any cogent evidence that his trial was unfair due to a specific prejudice arising out of the alleged delays, or that he has suffered any of the prejudices identified in *Barker v Wingo* (1972) 407 U.S. 514 (cited by the Supreme court with approval in *P.M. v Director of Public Prosecutions* [2006] 3 I.R. 172) as being protected against by the right to an expeditious trial, namely:-

- the right to prevent oppressive pre-trial incarceration;
- the right to minimise anxiety and concern to the accused, and
- the right to limit the possibility that the defence will be impaired.

71. Clearly the first point does not apply as he has been on bail at all material times. Moreover, the second is only justiciable in the context of High Court judicial review proceedings, and the defendant has never sought to contend before the High Court that he has suffered stress and anxiety at a level that might have justified intervention. He was perhaps wise in that regard as the bar is set at a very high level where stress and anxiety is relied upon – see *Kennedy v The Director of Public Prosecutions* [2012] IESC 34. As regards the third point, namely prejudice to his ability to defend himself, he never asserted at the trial any specific prejudice in that regard. He did not point to any missing witness, or document or any matter of that sort. Although he has belatedly sought to raise an issue concerning CCTV recordings allegedly not recovered or preserved this issue was never raised at the trial.

72. Moreover, as counsel for the Director points out in his submissions, even where prejudice is established the onus is on the defendant to establish why he could not rely on warnings from the trial judge to ensure a fair trial. In *C.K. v Director of Public Prosecutions* [2007] IESC 5 the Supreme Court emphasised the value of warnings by the trial judge in countering any asserted prejudice. Kearns J, giving the judgment of the Court, stated:

"Either the accused's ability to defend proceedings has been fatally compromised or compromised to such a degree as to be incapable of being rectified by appropriate directions or warnings from the trial judge or it has not. The resolution of that issue will turn on the facts and circumstances of each individual case. It is therefore now essential in these applications for prohibition in old sexual cases to fully and actively engage with the facts of the particular case. That is the main consequence of the simplification brought about by the decision in H. v Director of Public Prosecutions.

In this regard the first question to be addressed is whether or not the applicant has discharged the onus of establishing on the balance of probabilities that he has been prejudiced by the consequences of delay to the extent that there is a real risk of an unfair trial. If that question is answered affirmatively, the applicant must further satisfy the court that it is a degree or type of prejudice which can not be overcome or countered by appropriate directions or warnings to the jury to be given by the trial judge. Only if he succeeds in both respects is he entitled to an order."

73. The defendant did not in fact raise culpable prosecutorial delay at all in the course of his actual trial, as opposed to the pre-trial hearings. In fact his solicitor said on day 2 *"I should say, Judge, in relation to the issue of delay that I'm alleging, I'm not going to be alleging prosecutorial delay, I'm going to be alleging statutory delay and failure to comply with the Act".* Notably did not request the Military Judge to give a delay warning to the Board. The appellant in fact gave evidence in his own defence and called two other witnesses and never at any stage of the trial suggested that his ability to respond to the charges was in any way compromised by reason of delay in the case.

74. We are satisfied that there has been no breach of European Convention on Human Rights Act 2003 on account of alleged delays. (The defendant's submissions refer to the European Convention on Human Rights Act 2004. There is no such Act, and it is presumed that he intended to refer to the Act of 2003.) The Act of 2003 does not in any event incorporate the provisions of the Convention into Irish law. It merely requires organs of the State to have regard to the Convention, and rulings of the E.Ct.H.R. in the performance of their functions. Assuming the defendant's complaint is that the Military Judge and the military prosecuting authorities failed to have regard to the defendant's rights as guaranteed under Article 6 of the ECHR, we are satisfied on the evidence that no such complaint is borne out.

75. It is further complained that the time limit for trial relied upon by the Director of Military Prosecutions is also incompatible with the "European Convention on Human Rights Act 2004" (sic). We make the same points in response to this as in the last paragraph. Moreover, the defendant has not sought a declaration of incompatibility with the ECHR in respect of the regulations or rules setting the time limits of which he complains.

76. In the circumstances we are also not disposed to uphold the grounds of appeal arising under this heading.

Alleged actions by the prosecuting authorities contrary to the ECHR

77. In so far as the defendant complains that the Director of Legal Services and the Director of Military Prosecutions acted in the trial in a manner which was incompatible with the European Convention on Human Rights Act 2004 (sic) (we again assume the intended reference was to the Act of 2003), we find no evidence from the transcript to support any such contention and dismiss it *in limine.*

Alleged prior involvement of the Director, and alleged conflict of interest.

78. This appears to be a collateral attack on the decision to prosecute based on a suggestion that the prosecuting authorities were neither independent nor impartial. It appears to be based upon an allegation of conflict of interest and objective bias because the

same person was appointed to both the role of Director of Legal Services and Director of Military Prosecutions. There is in fact no evidence whatever that this Court can discern that the prosecuting authorities did not exercise their functions properly, independently and in accordance with statute. Although the defendant's submission contain a long list of complaints against Lieutenant Colonel Lane, who was appointed to prosecute the case by the Director, we find no evidence that Lieut Col Lane's conduct of the trial was improper or unfair to the defendant in any respect. Be that as it may, neither the Director of Legal Services, nor the Director of Military Prosecutions, nor Lieutenant Colonel Lane, decided the case against the defendant. This Court is solely concerned with how the trial itself was conducted. The Military Judge oversaw the trial and was the arbiter on issues of fairness arising within the trial, and was clearly vigilant to ensure that the proceedings were in fact fair. No complaint is made about any ruling of the Military Judge relevant to the allegations of prosecutorial conflicts of interest and objective bias now being relied upon. While the issues raised might have been capable of being ventilated by way of judicial review or a plenary challenge to the enabling legislation, they are not capable of being ventilated on an appeal such as this, in circumstances where no specific relevant action or ruling of the Military Judge is being impugned. Again, in circumstances where we, as an appellate court, have no jurisdiction to entertain the complaint that the defendant seeks to make, we dismiss it *in limine*.

Alleged failure to preserve and disclose evidence

79. In so far as the defendant complains about alleged non-disclosure, and non preservation of evidence, he does not engage with the actual evidence adduced and say how evidence not disclosed or not preserved might have assisted him in his defence. In fact, apart from CCTV footage (already dealt with) he does not identify any specific evidence that was either not disclosed, or not preserved, that could have availed him. His main complaint seems to be that disclosure was made on an ongoing basis throughout the trial. His solicitor flagged to the Military Judge on Day 2 that:

> *"I'm also going to adduce evidence, Judge, regarding disclosure issues that have been canvassed before in relation to compliance with rules 18 and 19 and there are a number of other issues, Judge, that I may raise, but I'll be raising them by way of submissions rather than calling evidence in relation to whether or not a public interests test has been satisfied and so forth. They will be very short points, Judge, but I will be making them nonetheless."*

80. The issue does not appear to have been returned to at any stage, and the defendant has not sought to complain, either in his written submissions, or in the oral arguments advanced by counsel on his behalf at the appeal hearing, about any specific ruling or determination of the Military Judge with respect to a disclosure related issue in the course of the trial. In fact disclosure was never mentioned again in the course of the trial. This was despite the judgment of Noonan J, received by the defendant on the opening day of the trial, extracts of which were read into the record, in which the High Court judge had specifically said *"This is a complaint about procedures and non disclosure. But these are clearly matters in my view more appropriately dealt with by the military judge during the course of trial."* It was therefore clearly flagged to the defendant's legal team that if they had an ongoing complaint about disclosure it should be raised during the course of the trial. The failure to do so is not explained, and in the circumstances the defendant cannot now seek to argue non-disclosure on the appeal, having regard to the decision in *The People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 I.R. 329.

81. In the circumstances we also dismiss this ground of appeal as not being made out.

Conclusion

82. In circumstances where we are not in a position to uphold any of the grounds of appeal advanced by the defendant, we are satisfied that his Court-Martial was satisfactory and his conviction is safe. It is therefore appropriate to dismiss his appeal against conviction.