

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No. 542 J.R.]

**BETWEEN****BRENDAN MCFARLANE****APPLICANT**

**AND  
THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND  
THE MEMBERS OF THE SPECIAL CRIMINAL COURT**

**NOTICE PARTIES****Judgment of Mr. Justice Quirke delivered on the 8th day of November 2006.**

By Order of the High Court (Peart J.) dated the 15th day of May, 2006, the applicant was granted leave to seek certain declaratory and other relief including an injunction restraining the respondent (hereafter "the D.P.P.") from prosecuting the applicant in respect of certain criminal charges preferred against him in respect of alleged false imprisonment and the possession of firearms on various dates between the 25th November, 1983, and the 16th December, 1983.

It is claimed on behalf of the applicant that the delay on the part of the State in providing a hearing and determination of the criminal proceedings within a reasonable time has *inter alia* violated the applicant's constitutional right to a trial with reasonable expedition and exposed him to a real and serious risk of an unfair trial in respect of the charges preferred against him.

**Relevant Facts**

1. On the 5th January, 1998, the applicant was arrested and detained by the Gardaí pursuant to the provisions of s. 30 of the Offences Against the State Act 1939 as amended. Subsequently he was charged with the commission of two offences namely, (a), the false imprisonment of Donald James Tidey contrary to common law and to the provisions of s. 11 of the Criminal Law Act, 1976, and (b), the unlawful possession of fire arms contrary to various provisions of the Fire Arms Acts 1925 and 1964 as amended. The offences were alleged to have occurred between the 25th November, 1983 and the 16th December, 1983.
  2. A Book of Evidence was served upon the applicant on the 14th July, 1998 and his trial was fixed for the 9th November, 1999.
  3. On the 1st November, 1999, the applicant, by Order of the High Court (McGuinness J.), was granted leave to seek various reliefs by way of judicial review including an injunction restraining the D.P.P. from prosecuting the applicant in respect of the charges preferred against him
  4. Relief was sought by the applicant on the grounds, (i), that the delay in the institution of criminal proceedings against the applicant had irreparably prejudiced his prospect of obtaining a fair trial and, (ii), that the failure of the prosecuting authorities to maintain and have available for inspection certain items of evidence had limited his ability to fully contest the nature and strength of the evidence proposed to be introduced at his trial.
  5. The D.P.P delivered a Statement of Opposition on the 5th April, 2000, but declined to comply with a request made on behalf of the applicant on 15th May, 2000, for voluntary discovery of various documents.
- In consequence the applicant issued a Notice of Motion returnable before the Master of the High Court on 13th October, 2000, seeking discovery of the documents sought. After adjournments by consent of the parties on two occasions and a further mutual misunderstanding between the parties the motion before the Master was struck out on the 12th January, 2001, for non- appearance. A fresh motion was issued on 2nd October, 2001, returnable before the Master on 16th November, 2001.
- On that date and thereafter the matter was adjourned on successive occasions until 8th February, 2002, when an Affidavit of Discovery was delivered on behalf of the D.P.P.
6. On 11th March, 2002 the proceedings were re-entered in the Judicial Review List where they were listed to be heard in the High Court on 14th March, 2003. On 14th March, 2003, the proceedings were adjourned due to the unavailability on that date of a judge to hear the case.
  7. The matter was relisted and the case was heard in the High Court, (Ó Caoimh J.), on 11th July, 2003. Judgment was delivered on 18th July, 2003.

The Court made an order which restrained the trial of the applicant in respect of the charges preferred against him on the grounds that the failure by the prosecuting authorities to preserve certain evidence inhibited the ability of the applicant to defend the charges preferred against him. The Court refused to grant relief on the grounds of delay.

8. On 19th August, 2003, an appeal was lodged in the Supreme Court on behalf of the D.P.P. Subsequently a cross-appeal was delivered on behalf of the applicant in respect of the finding of the High Court in relation to the issue of delay. Books of Appeal were lodged on behalf of the D.P.P. on 15th November, 2004, and on 27th January, 2005, the D.P.P. certified the case as ready to proceed in the Supreme Court. On 2nd February, 2006, the applicant was granted leave to have his cross- appeal heard concurrently with the appeal on behalf of the D.P.P.
9. The appeal was heard by the Supreme Court on 16th February, 2006. On 7th March, 2006, the Court delivered its judgment allowing the appeal on behalf of the D.P.P. and refusing relief to the applicant. The applicant's cross-appeal was also dismissed.

In a dissenting judgment Kearns J. upheld the findings of the learned High Court judge and dismissed both appeals.

10. In an affidavit sworn in these proceedings the applicant's solicitor, Mr. James MacGuill averred that from the time of his arrest in 1998 the applicant has complied with the terms of the bail which he was granted which requires him to travel large distances twice every month.

Additionally the applicant has had to attend at the Special Criminal Court on more than 40 occasions since 1998. Mr. MacGuill also

averred that in order to attend at these hearings the applicant is required to make a round trip from his home in Belfast to Dublin which is an overall distance of some 320 kilometres.

Mr. MacGuill also averred that the applicant has been under considerable pressure during the period of more than eight years which have elapsed since he was first charged with these serious criminal offences.

He married on 31st May, 2001. He has three children ranging in age from seven years to three years. His youngest daughter has special needs and his elderly mother is dependent upon him.

### **The Issues**

On behalf of the applicant Mr. Gageby S.C. contends that this application to prohibit the applicant's trial is to be distinguished from the earlier application made on his behalf for the same relief.

He says that the applicant's constitutional right to a trial with reasonable expedition has been violated by reason of delays inherent in the court process within this jurisdiction. He argues that the right conferred upon the applicant by Article 6 (1) of the European Convention on Human Rights to a hearing within a reasonable time has also been violated by the delay.

He says that this application for relief on grounds of delay differs from the application made in the earlier proceedings for relief on grounds of delay. He contends that the earlier application was concerned solely with the question of delay on the part of the prosecuting authorities in bringing the applicant before the courts.

He says that the applicant is now entitled to relief by reason of the combination of delay on the part of the prosecution authorities in bringing the applicant before the court and delay within the court process itself. He categorises the overall delay as "culpable" or "blameworthy" delay. He says that it has subjected the applicant to presumptive prejudice and to physical and emotional hardship, distress and inconvenience so grave that it is sufficient to require that his trial in respect of the alleged offences should be prohibited.

He has specifically identified the delay as follows;

1. The period of approximately 13 months which elapsed between the 12th January, 2001, when the applicant's motion for Discovery was struck out by the Master and the 8th February, 2002, when an Affidavit of Discovery was delivered on behalf of the D.P.P.
2. The period of approximately four months which elapsed between the 14th March, 2003, when the applicant's judicial review proceedings were listed to be heard in the High Court, and the 11th July, 2003, when the proceedings were heard.
3. The period of approximately 18 months which elapsed between the 19th August, 2003, when an appeal was lodged on behalf of the D.P.P. in the Supreme Court and the 27th January, 2005, when the D.P.P. certified the case as ready to proceed in the Supreme Court and
4. The period of approximately 14 months which elapsed between the 27th January, 2005, when the case was certified by the D.P.P. as ready to proceed and the 7th March, 2006, when the Supreme Court delivered its judgment.

Mr. Gageby S.C also argues that the identified delay on the part of the prosecuting authorities and the State's court process has contributed to an unacceptable overall delay in the prosecution of the applicant which is compounded by the earlier 15 year period which elapsed between the date of the commission of the offences and the date of arrest. He points to the State's duty to act with particular expedition in such circumstances.

The arguments of Mr. Collins S.C, on behalf of the D.P.P can be summarised as follows:

1. If there were delays on the part of the D.P.P. at different times during the course of the proceedings there were corresponding delays on the part of the applicant. At no point was there was "culpable" or "blameworthy" delay on the part of the prosecuting authorities or within the court process of the State.
2. It was open to the applicant to seek to amend his pleadings in the earlier proceedings before the High Court and Supreme Court in order to seek the relief which he now seeks. He failed to do so and is accordingly estopped from seeking the same relief at this late remove.
3. The applicant's claim for relief in these proceedings comprises an abuse of process because it constitutes a collateral attack upon the earlier judgment of the Supreme Court. These proceedings comprise no more than an attempt to appeal against the proceedings in the Supreme Court which expressly rejected the applicant's claim that the same delay exposed him to the risk of an unfair trial.

### **Decision**

In this case the applicant was charged with the relevant offences in early 1998. A Book of Evidence was served upon him on the 14th July, 1998. He was professionally represented and participated within the criminal process. His criminal trial was fixed for the 9th November, 1999.

Eight days before his trial was due to commence the applicant applied for leave to seek relief by way of judicial review including an order prohibiting his trial.

The applicant was entirely within his legal and constitutional rights to seek the relief which he sought. He also sought and was granted an order restraining his trial in respect of the criminal charges preferred against him pending the outcome of his judicial review application. That order which was made upon his application remained in force until the 7th March, 2006, when his judicial review application was finally determined.

On the 15th May, 2006, (two months later), he sought and was granted a further order restraining his trial in respect of the same charges pending the outcome of these proceedings.

It is undeniable that the applicant was not brought to trial in respect of the relevant offences on the 9th November, 1999, and has

not been brought to trial since because he has been successful in preventing his trial from proceeding.

The Supreme Court has held that the applicant's constitutional right to a trial with reasonable expedition has not been violated by reason of any delay on the part of the State in prosecuting the applicant up to and including the 1st November 1999.

The applicant now says that his trial should not proceed because the DPP and the courts did not deal with his judicial review application with sufficient expedition.

The fundamental question now to be determined by this court can be summarised in the following simple terms:

- (a) Has there been unnecessary delay on the part of the prosecuting authorities and within the courts process of the State between 1st November, 1999, and 7th March, 2006, in dealing with the applicant's judicial review proceedings;
- (b) If so was the delay of such a character, and its impact upon the prosecution of the applicant of such gravity and significance that his trial in respect of those offences should be permanently prohibited;
- (c) Is the applicant estopped, in any event from seeking the relief which he seeks and,
- (d) Should the applicant's claim be dismissed as an abuse of process.

#### **(a) Has there been unnecessary delay?**

Mr. Gageby S.C. identifies the following four periods of time between January, 2001, and March, 2006, which he said were examples of "culpable" or "blameworthy" delay on the part of the State:

1. The 13 month period between the 12th January, 2001, and the 8th February, 2002.

Conflicting evidence has been adduced as to why 13 months elapsed between the date when the applicant's Motion for Discovery was struck out and the date when an Affidavit of Discovery was delivered on behalf of the D.P.P. That period of time was excessive in the circumstances. Culpability for that delay can be attributed to both parties.

2. The period of 4 months between the 14th March, 2003, (when the applicant's judicial appeal proceedings were listed to be heard in the High Court), and the 11th July, 2003, (when the proceedings were heard).

No judge was available to hear the case on the 14th March, 2003, by reason of inadequate judicial resources within the courts on that date. The case was, accordingly, adjourned for 4 months to accommodate a full hearing. No particular evidence has been adduced which would suggest that an adjournment of such duration was unreasonable or unnecessary in the circumstances.

3. The period of approximately 18 months between the 19th August, 2003, (when an appeal was lodged on behalf of the D.P.P. in the Supreme Court), and the 27th January, 2005, (when the D.P.P. certified the case as ready to proceed).

Whilst a certain amount of time would have been necessary for the prosecuting authorities to adequately prepare for the appeal, a period of 18 months was excessive in the circumstances and no adequate explanation has been provided by way of evidence on behalf of the D.P.P. which explains the delay. Accordingly I am satisfied that the appeal on behalf of the D.P.P. ought to have been processed more speedily than was the case and that the appeal was unnecessarily delayed on that account.

4. The period of 14 months between the 27th January, 2005, (when the appeal to the Supreme Court was certified by the D.P.P. as ready to proceed), and the 7th March, 2006, (when the Supreme Court delivered its judgment).

It is contended that this period of time comprised an unnecessary delay on the part of the State's court process in dealing with the applicant's judicial review proceedings.

No evidence has been adduced in these proceedings indicating that a 14 month waiting period for an appeal hearing is necessarily excessive in this or other jurisdictions. It is contended that on behalf of the applicant that there was a duty upon the D.P.P. to apply to the Supreme Court to have the appeal heard as a matter of urgency in the circumstances. It is not without significance that no application was made on behalf of the applicant to the Supreme Court or to the DPP for such priority.

#### **(b) The nature of the delay.**

In *T.H. v. D.P.P. and His Honour Judge Smithwick*, (Unreported, 25th July, 2006), the Supreme Court, (Fennelly J.), considered, on similar grounds of delay, an application for the prohibition of the trial of an applicant charged with a sexual assault. The applicant had commenced judicial review proceedings in 1997 which were not finally determined until March, 2004.

The High Court (McKechnie J.) prohibited the trial on the grounds that there had been "blameworthy" delay on the part of the State during the 7 year period between the commencement and conclusion of the applicant's judicial review proceedings which comprised a violation of the applicant's constitutional right to a trial with reasonable expedition and subjected him to the risk of an unfair trial.

The D.P.P. appealed, claiming that the delay had in fact been caused by unmeritorious judicial review proceedings taken by the applicant and the way in which the applicant had conducted them.

The Supreme Court, (Fennelly J.) agreed that the judicial review proceedings were without merit noting that:

*"... from the moment of commencement of the judicial review proceedings, the Director has been restrained, at the behest of the applicant, by injunction from continuing with the criminal prosecution.*

*This is not to say that the Court will not, in an appropriate case, consider that there has been such extreme and*

*reprehensible delay on the part of the State authorities in handling judicial review proceedings that restraint on further prosecution would be justified.*

*I believe that the learned trial judge was mistaken in applying to this situation the case-law relating to prosecutorial delay."*

Later the court continued:

*"In this respect, in spite of my expressed reservations, I approach the case as if the test in cases of prosecutorial delay applied." This matter has been clarified quite recently in the judgments of this Court in P.M. v. Director of Public Prosecutions (Unreported, 6th April, 2006)... Kearns J. in a judgment with which the other members of the Court agreed, discussed the test to be applied in cases of prosecutorial delay. He referred to P.M. v. Malone [2002] 2 I.R. 560, citing the following passage from the judgment of Keane C.J. in that case, at p. 581:*

*"Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side, is there the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay."*

*Kearns J. continued:*

*"I believe that the balancing exercise referred to by Keane C.J. in P. M. v. Malone is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition.*

*It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to be taken into account the length of such blameworthy delay, because if it is a short delay rather than one of years the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial.....in conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to an expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."*

Applying that test to the facts of the case before him Fennelly J. concluded that a prohibition of the criminal prosecution "could not possibly" be justified.

In the instant case, the Supreme Court has held that the applicant's constitutional right to a trial with reasonable expedition has not been violated by any delay on the part of the State in prosecuting the applicant up to and including the 1st November, 1999.

It is of considerable significance that no evidence has been adduced on behalf of the applicant suggesting that anything has occurred since November, 1999, which has prejudiced the applicant's capacity to defend himself in respect of the charges preferred against him. Nor has evidence been adduced indicating that he has suffered any additional presumptive prejudice by reason of the additional passage of time.

At its highest point the evidence adduced on behalf of the applicant has established two, or perhaps three periods of unnecessary delay on the part of the prosecuting authorities in dealing with the applicant's judicial review proceedings and in particular the State's appeal against the decision of the High Court in those proceedings.

No evidence has been adduced indicating that any consequence flowed from those delays which has interfered with any interest which the applicant's right to an expeditious trial was intended to protect.

It has been argued on behalf of the applicant that the right conferred upon him by Article 6 (1) of the European Convention on Human Rights has been violated by the delay complained of.

I am not sure that the applicant has established that such is the case but it is not necessary for me to make any finding on that issue. Both parties referred to the decision of the European Court of Human Rights in *Barry v. Ireland* ( 15th December, 2005, Application No. 18273/04) in support of their respective contentions.

The Supreme Court, (Fennelly J.), in *T.H. v. D.P.P. (supra)* noting (at p. 25) that "there are some similarities between that case and the present" reviewed the decision of the Court of Human Rights in *Barry* and noted further that there had been a finding in that case by the Court of Human Rights of a breach by the State of Article 6 (1) of the Convention. This resulted in an award in the sum of €8,000.00 to the applicant in respect of non-pecuniary damage. The Supreme Court, (Fennelly J.), went on to emphasise that:

*"It is important to clear up any misunderstanding concerning the import of such decisions of the Court of Human Rights. The Court does not and did not, in that case, hold that the prosecution had to be stopped. It would be most surprising if a judgment of that Court holding that the prosecuting authorities were "partially or completely responsible" for certain periods of delay had the automatic consequence that a prosecution had to be halted. Such a conclusion would, in any legal system, call for some consideration of the public interest in the prosecution of crime. We know, of course, from other parts of the case-law of the Court that it does recognise the public interest in prosecuting crime... thus, the decision of the Court leads to a monetary award. It has no consequence for the pending prosecution.*

*In brief, the decision in Barry v. Ireland adds nothing to the applicant's claim to have his trial stopped. The applicant has not, at any stage, advanced a claim for damages as part of the relief sought in these proceedings. As in almost all such cases, his principal objective has been to seek to prevent his trial from proceeding."*

Precisely the same considerations apply to the instant case.

Accordingly this court is required to apply the balancing exercise referred to *P.M. v. Malone* [2002] 2 I.R. 560 and identified again by Kearns J. in *P.M. v. D.P.P.* (Unreported, 5th April, 2006).

The applicant has adduced evidence of the stress and anxiety which has been caused by the delay which he has suffered and the physical and psychological stress and inconvenience which he has undergone as a result of the delays of which he complains.

It is to be inferred that the applicant suffered an increase in the level of his anxiety, stress and inconvenience as a result of the additional delays attributed to the State during particular periods of time throughout the conduct of the judicial review proceedings. However, any increased levels of stress, anxiety and inconvenience cannot be said to outweigh the community's very considerable interest in having offences of the gravity of those which are the subject of these proceedings prosecuted to a conclusion.

Furthermore if there has been a culpable or blameworthy delay on the part of the prosecuting authorities in and about the manner in which they sought to conduct the judicial review proceedings that delay was not of a kind which would warrant prohibition of the applicant's trial.

Furthermore the applicant has not established by way of evidence or otherwise in these proceedings that culpable or blameworthy delay within the State's court process has affected or interfered with any constitutional or other right enjoyed by him.

It follows from what I have found that the applicant is not entitled to the relief which he seeks and his claim will be dismissed.

In the light of that finding it is unnecessary for this court to consider the issues of *estoppel by omission and abuse of process*.