

**THE HIGH COURT  
JUDICIAL REVIEW**

**2002 No. 184 J.R.**

**BETWEEN**

**D. D.**

**APPLICANT**

**AND  
THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice Murphy dated the 3rd day of June, 2005.**

**1. Pleadings**

The applicant seeks an order of prohibition by way of application for judicial review prohibiting the respondent Director herein from allowing the further prosecution of the applicant on Bill No. 1172/99 and an injunction restraining the respondent from taking any further steps in relation to that bill.

The notice of motion dated 26th April, 2002 was grounded on the affidavit of the applicant's solicitor, Garrett Sheehan, sworn 12th April, 2002 and a further affidavit sworn by the same deponent on 11th December, 2002.

Leave was granted by McKechnie J. on 15th April, 2002. Three affidavits on behalf of the respondent were sworn in November/December, 2003. Submissions were filed in October, 2004.

**2. Grounding affidavit of 12th April, 2002**

Mr. S. referred to the 34 counts of assault made against the applicant in respect of 10 complainants from dates unknown between 1st September, 1970 and 1st March, 1994, all in the county of Galway. The earliest incident referred to two counts of assault occasioning actual bodily harm on dates unknown between 1st September, 1970 and 30th September, 1977, a period of seven years, the longest span. The shortest span referred to dates unknown between March and July, 1975 in respect of two counts of indecent assault and one of assault occasioning actual bodily harm. The most recent incidents, made by the tenth complainant, were in respect of one count of assault between 1989 and 1994; three counts of indecent assault between 1st January, 1990 and 17th January, 1991 and eleven counts of sexual assault between 18th January, 1991 and 1st March, 1994.

All counts referred to assaults within the county of Galway. All but one of the complainants were boys born between 1962 and 1968, who lived in an industrial school. The other complainant in respect of the most recent matters was born in 1979.

The deponent referred to the indictment being laid in such broad and unspecified terms with such wide geographic areas and time periods.

The first statement of complaint was made to Gardai on 25th November, 1994 in relation to the shortest period (March – July, 1975). The complaint in respect to the earliest period and widest span (1970 – 1977) was made on 7th June, 1995 (18 to 25 years later). The complaint relating to the most recent incidents (1989 – 1994) was made on 21st May, 1996 between two and seven years later.

The applicant was, at the date of the swearing of the affidavit, 72 years of age and is and was at all material times a member of an order of brothers, and from 1973 was the Director of the industrial school. He first became aware that serious allegations were made against him around September, 1994. He received a direction from his superior that he should not visit the industrial school while the investigation was continuing. The deponent wrote to the Western Health Board on his behalf in March, 1995, protesting his innocence and indicating that he would make himself available for interview.

The applicant was invited to attend Athlone Garda Station for questioning which he did, by arrangement, on 16th May, 1995, in relation to allegations made by three of the ten complainants. He consistently denied sexually abusing any boy in his care. He attended that garda station on 29th June, 1995 and on 8th September, 1995, in relation to one of the three complainants referred to and a further three complainants.

On 8th October, 1996, the applicant was arrested and denied the allegations put to him.

A file was sent to the respondent Director on either 29th November, 1995 or on 20th January, 1997. The respondent's directions to proceed were received by the Gardai on 6th June, 1997. In July, 1997 the applicant was requested to attend at S. Garda Station where he was arrested, charged with 32 counts of assault and brought before the District Court in Galway. The matter was remanded until 1st October, 1997 to allow for the preparation of the book of evidence. On 31st October, 1997 the applicant was served with a list of witnesses and a booklet of statements in evidence.

The first statement of complaint made to the Gardai was on 25th November, 1995, by the first named complainant, subsequent statements being made by eight other complainants between 1st January, 1995 and 21st May, 1996.

Disclosure in respect of 144 statements, memos of interviews and lists of previous convictions of the complainants were furnished on 26th November, 1997. A further book of evidence was served on the applicant in February, 1999, in respect of a further complaint made by a tenth complainant on 1st July, 1997.

On 7th July, 1999 the applicant was sent forward for trial. On 5th October, 1999 a successful application was made on behalf of the applicant to have the matter transferred for trial in Dublin on the grounds of adverse pre-trial publicity. The 8th May, 2000 was then fixed for the trial of the applicant. An adjournment was made on consent and continued to be adjourned from time to time in order to allow the defence to consider certain documents and to allow the prosecution to comply with its disclosure requirements. In December, 2000, six volumes of material were furnished to the defence. On 30th January, 2002 the applicant was furnished with four large volumes of material comprising disclosure of the Western Health Board. Further material was served on 19th March, 2002.

Mr. S. averred that the delay of the institution of proceedings had prejudiced the preparation of the applicant's defence in that his recollection of the events is no longer clear. Had the complaints been made earlier, he might have been able to collate or call evidence to refute them. Several potential witnesses were now deceased. He said and believed that the testimony of the night watchman, R.D., would have been crucial to the rebuttal of the allegations and would have been able to testify as to who entered

the dormitories at night. The night watchman's books were burnt or lost in the changeover from S.J. to the Health Board premises in 1995.

The testimony of the tailor attached to S.J., who died in the early 1980s, would have been central to the defence of the allegation of two of the complainants of fondling when in the tailor's shop.

One of the kitchen workers, who died in the late 1970s, could have given evidence regarding an allegation of injury inflicted by the applicant on another of the complainants which necessitated him being fed liquidised food.

Several parts of the old building had been demolished and new houses built on the site, in respect of which several places had been indicated as being locations where alleged abuse had taken place.

The applicant had a heart by-pass in 1994 and high blood pressure. Stomach problems were due to be investigated in April, 2002.

Widespread media coverage of abuses including "The Boys of St. Vincent's" television programme, resulted in several complainants coming forward, resulting in the tarnishing of the reputation of the order of brothers to which the applicant belonged. The first newspaper reports of the alleged abuse at S.J. were made in December, 1994. Forty-eight articles appeared in newspapers from that date up to July, 1997, all but a few of which mentioned S.J. and only five of which mentioned that the allegations were denied.

On 29th March, 1996, the first complainant appeared as a guest on the "Late Late Show" and, during a 30-minute interview, gave an account of the alleged abuse. At no stage was it indicated that the accounts were allegations or that the allegations were denied.

It appeared from the interview that the complainant was in receipt of counselling. It had not been possible from the disclosure to ascertain how many other complainants were similarly in receipt of counselling. From disclosure furnished in December, 2000 and January, 2002, it appeared that a Mr. G.F. controlled or directed the investigation into S.J. in S. on behalf of the Health Board and, the deponent averred, took an active and unusually suggestive role in eliciting material from persons who were allegedly injured parties or witnesses. Statements were taken by the Gardaí after such persons had been interviewed by Mr. G.F. and his team. The deponent raised concerns regarding the methods employed by the Western Health Board though written evidence thereof is not apparent.

The deponent then analysed the disclosure furnished in December, 2000, which showed that Mr. F. had worked as a child-care worker in S.J. in S. from mid-1975 until mid-1981. In 1982 he was invited back and accused of making adverse comments about S.J. and told that he was not welcome. No statement from Mr. F. was included in the book of evidence.

It was also disclosed that a Mr. P.G. was also involved in the investigation. A Mr. M. of the Western Health Board had attended the garda station on 3rd November, 1993, and indicated that there had been allegations of paedophilia at S.J. Mr. M. sought a meeting with the Gardaí to develop a strategy that would allow both their services to go forward into inquiring and investigating the allegations of impropriety.

A letter of February, 1995 by Superintendent S. to Mr. J.S., referred to Mr. F.:

"For some reason best known to himself, now vehemently denies that he said to me in my office on November 3rd, 1994, that 'buggery on a large scale' had taken place in S.J. School, S. .... It was agreed that Mr. F. and Mr. G. would continue their search for witnesses from the 41 names supplied by your office to me and if any of these people were prepared to make statements they should be referred to (the Gardaí)".

Further correspondence ensued.

Some of the documentation disclosed related to a Mr. T.S. who was referred to the Western Health Board and met Mr. F. and Mr. G. and led to what the deponent termed "an embarrassing and distressing mix-up regarding the taking of a statement which was the subject matter of a letter to Superintendent S. of 19th October, 1995".

Subsequent correspondent regarding other staff members who were still working with children at S.J. was referred to.

A letter from E.M., Psychologist, a Family Guidance Centre, of 9th November, 1999, expressed concern at the methods used by certain health board staff "in trawling information indiscriminately and apparently without proper guidelines ... the livelihood, status and reputation [of those implicated] had been placed in jeopardy by the relentless pursuit of information by some individuals who undertook their task with myopic vision".

Further disclosure furnished on 30th January, 2002, gave rise to real and substantial concerns with regard to the role of Mr. F. and the health board keeping an eye on what had been happening to a lot of religious around the country which was not something that "we could not stand and sit on".

Mr. F. first became aware of a complaint by the first named complainant on 2nd November, 1994, and met the complainant and repeated to him threats he had made to the then Director of S.J., that he would go to the Sunday World with his story. He met the first complainant in London, telling him that there was another ex-resident of S.J. who was also making similar allegations.

Mr. S. referred to a note dated 21st September, 1995 in relation to a meeting held with Mr. J.M., at which meeting the deponent said was attended by Mr. F. and Mr. G. That note stated, *inter alia*, as follows:

"Our position was that in relation to Bro. D., etc., if the D.P.P. did not prosecute and it did not go to court, he (Jim said) would not have any alternative but to accept these people back working.

We had words about this and said that under the circumstances we knew that D. (the applicant herein) was guilty.

Our position as workers within the Health Board was to protect the rights of children and there was no way we could justify standing behind Bro. D. being taken back and being accepted as part of the workforce here."

The record of 16th November, 1995 relates to another named complainant who had no problems in admitting to having been physically abused by the applicant but could not admit to the sexual abuse due to the hurt and trauma of it all. In a transcript of an interview with the first named complainant it was stated, *inter alia*, by Mr. F., that "I am trying to trigger your memory, in the sense that when

you come to talk to the guards next week, they will want ... If I can give you a mental picture, my mind is a bit more, as an adult at the time, a much more of an adult viewer". This would appear to have been followed by some leading questions.

It appeared that Mr. F. was accompanied by a garda to London to take the statement and that the first named complainant said that he was feeling under a lot of pressure.

A report dated 6th December, 1994, included in the 2002 disclosure, showed some tension between the Gardaí and the social workers in relation, *inter alia*, to interviewing others in England.

The affidavit continued in relation to the interviewing of the other complainants and the role of Mr. F. in relation thereto. There were references to minutes of a meeting of 20th April, 1995, indicating that Superintendent S. was not happy with the way statements were being taken and that it might be construed that they were coached.

A memorandum sent to the programme manager (of the health board) by Mr. F. and Mr. G. on 22nd November, 1995, refers to their withdrawing from the inquiry and their being extremely busy working with ex-residents wishing to make statements, which had increased from twelve to twenty-three, emphasising strong evidence of a culture of abuse, both physical and sexual. The memorandum referred to some of the [ex-residents] forging strong links with investigative journalists and solicitors.

The report criticised several features of the inquiry and referred to their having been withdrawn prematurely from the inquiry.

### **3. Supplemental affidavit of 11th December, 2002**

The lengthy grounding affidavit (of 114 paragraphs) was followed eight months later by a further affidavit of 33 paragraphs which went into more detail in relation to the interviews with and statements of complainants referring, in one instance, to a fiasco of a statement and to the need to discuss strategy with the investigating Gardaí.

References were made to other investigations, and in particular, to one which had been closed where "no abuse had been found – it was obviously whitewashed ..."

A meeting on 29th June, 1995 with a Mr. P.R. was also referred to where the latter is reported to have said that he had never been abused while in S.J. He had never given any indication that there was abuse taking place and he would be surprised and wondered how fellows could come up with this after so many years.

Further instances of difficult meetings of 28th July, 1995 were referred to. By letter of 7th September, 1995 Mr. F. and Mr. G. were informed that Mr. M. (presumably of the Health Board) was terminating their commitment to the inquiry from 11th October.

The minutes of a board meeting held between the Health Board and the Gardaí on 4th April, 1996 referred to persistent publicity and the extent to which the press were being fed fairly confidential information.

The supplemental affidavit of G.S. referred to the respondent counsel's objection that the application for leave by way of judicial review was out of time. He said he was completely taken by surprise, considered it prudent to defer making a hasty application given that the respondent continued to disclose an enormous flow of information contained therein.

He said that it was manifest not only that there had been a delay on the part of the complainants but that there had also been a curious relationship between the Western Health Board and the Gardaí. No complainant was interviewed by Gardaí until after extensive meetings with Western Health Board personnel.

Moreover, the extensive submissions on behalf of the respondent did not raise issues of delay or want of promptness.

### **4. Statement of Opposition**

The respondent denied that there had been any delay in the institution of criminal proceedings such as to violate the applicant's right to a trial with reasonable expedition or due process of law. There was no obligation on the respondent to excuse or justify any lapse of time prior to a complaint being made to the Gardaí. Insofar as there was a delay, that was excusable and justifiable in the circumstances of the case.

The applicant had failed to adduce any substantive evidence of prejudice resulting from the alleged delay. It was denied that the power of investigation of allegations of criminal offences entrusted to the Gardaí was usurped by the Western Health Board. The criminal investigation was properly conducted by the Gardaí.

The respondent was a stranger to the allegations made against the Western Health Board and is not answerable at law for the actions of that board. The decision to prosecute the applicant may not be impugned in these proceedings, absent any *mala fides* or improper policy.

The Gardaí did not co-ordinate media relations as alleged.

Any issues which the applicant seeks to raise as to the veracity or otherwise of the complainants' statements are matters for the trial of the offences and not matters which should be determined in the judicial review.

### **5. Affidavit on behalf of the respondent**

Sergeant D.C. said that the respondent had already indicated to the solicitors for the applicant that he was not proceeding with charges arising out of complaints made against the applicant by three of the complainants.

The respondent was not obliged to "justify" or "explain" any lapse of time between the occurrence of the matters the subject matter of the charges faced by the applicant and the time when a complaint or complaints were made to a member of the Gardaí.

In relation to the alleged prejudice to the applicant, the applicant had not sworn to such prejudice. He could not, accordingly, have been cross-examined. Objection would be taken to hearsay, hypothesis and supposition contained in the affidavit of Mr. S. No attempt was made by the deponent to explain why the demolition of part of the buildings was relevant.

In relation to the death of the tailor, the night watchman and the cook, no effort appears to have been made to establish if any other brothers or pupils could give evidence. Instances of child sexual abuse, of their very nature, occur in private.

Any suggestion that the applicant has little recollection is hearsay and should not be relied on. No medical evidence was furnished in relation to the applicant's present medical condition.

The respondent did not accept that publicity in the media in relation to the role of the applicant's order had any prejudicial effect on the applicant's case. In particular, nothing in what is alleged to have been said by the first named complainant on the Late Late Show on 29th March, 1996, identified or was likely to identify the applicant.

In relation to the garda investigation on the role of the Western Health Board which is extracted from the disclosure in the criminal proceedings, which disclosure was furnished in December, 2000 and in January, 2002 and, to a great extent is founded on hearsay, the respondent does not accept that the complaints made had been borne out by the material referred to in the affidavit. In any event it is a matter for the criminal trial. It is improper for this court to be asked to effectively try the criminal charges by testing the extent to which the complainants' statements may hold up in cross-examination or otherwise. The complaint in regard to the conduct of Mr. F. could be properly, fully and adequately dealt with by way of cross-examination of the various witnesses at the trial. All of these matters were disclosed in the context of pre-trial disclosure in the criminal proceedings. This court should not usurp the role of the criminal trial judge by determining the credibility and veracity of proposed trial witnesses before the trial takes place.

Sergeant C. was responsible for supervising the investigation and was personally aware of all of the developments in the investigation. That investigation continued up to November, 1995 when a file consisting of twelve complaints of sexual and physical assault were together forwarded to the offices of the D.P.P. This took some time given the difficulties in locating and interviewing a number of staff and Christian Brothers at S.J. Further complaints were made to the Gardaí arising out of the ongoing investigation on 18th March, 1998 and on 17th December, 2000. In respect of the latter complaint, the D.P.P. directed that there should be no prosecution.

The respondent did not accept that Mr. F. and Mr. G. controlled or directed the investigation which resulted in the file being forwarded to the respondent. The investigation was at all times conducted and controlled by the Gardaí who liaised with the health board as appropriate, to assist in their investigations. The statements, which form the basis of the complaints leading to the charges in this matter, were obtained by Gardaí following the appropriate procedures for such statements.

Sergeant C. dealt specifically with a number of the points raised in the affidavits of Mr. S. There was no pressure put on specific witnesses. It was not accepted that the early period of the investigation had been fraught with misunderstanding or that the relationship between the Gardaí and the health board was unclear. The Gardaí had the sole and exclusive role of pursuing the criminal investigation. With the exception of the first named complainant, whose statement was made to an English policeman, all statements from the complainants in question were made to the Gardaí.

The affidavit of Sergeant C. was verified by Garda M.M. and Detective Garda P.H. on 5th December, 2003.

## **6. Submissions on behalf of the applicant**

Mr. Gageby, S.C., made extensive submissions in relation to the application to prohibit the prosecution of the applicant by outlining the facts already deposed to in the applicant's solicitor's affidavits and referring, in particular, to the Western Health Board inquiry and the role of Mr. G.F.

Counsel also referred to the adverse media coverage from 3rd December, 1994, to the publication of the programme entitled "The Boys of St. Vincent's". He said that none of the media reports mentioned either a preliminary or a parallel investigation being carried out by the Western Health Board.

Counsel also instanced delays in the proceedings from 25th November, 1994, the date of the first complaint, to the service of the book of evidence on 31st October, 1997.

Supplemental material was furnished to the defence consisting of 108 statements of evidence after that date.

In February, 1999 a book of evidence in relation to a further complaint was made and the applicant was sent forward for trial to the Circuit Court in Galway on 7th July, 1999.

There was a successful application for the transfer of the trial to Dublin and adjournments followed. On 8th May, 2000, the case was listed for trial and adjourned on consent. Further documentation was furnished on 6th June, 2000, in December, 2000, and on 30th January, 2002. The case was listed for trial in the Dublin Circuit Court on 8th April, 2002 and adjourned.

Mr. Gageby S.C. referred to the following in relation to the general principles:

Article 38.1 – trial in due course of law;

*State (Healy) v. Donohue* [1976] I.R. 325;

*Barker v. Wingo* [1972] 407 U.S. 514;

*D. v. D.P.P.* [1994] 2 I.R. 465;

*Z. v. D.P.P.* [1994] 2 I.R. 476; and

*J.L. v. D.P.P.* [2000] 3 I.R. 122 in relation to the right to fair trial being superior to the community's right to prosecute.

*P.O'C.* [2000] 3 I.R. 87;

*P.M. v. D.P.P.* [2000] 2 I.R. 560.

In relation to the special category of cases applicable Mr. Gageby referred to the following:

*Hogan v. President of the Circuit Court* [1994] 2 I.R. 513 at 521;

*G. v. D.P.P.* [1994] 1 I.R. 374;

*B. v. D.P.P.* [1997] 3 I.R. 140;

*P.C. v. D.P.P.* [1999] 2 I.R. 25 at 68;

*N.C. v. D.P.P.* Unreported, Supreme Court, 5th July, 2001, and

*D. v. D.P.P.* Unreported, Supreme Court, 19th May, 2004.

He submitted that the applicable test was that contained in *P.C. v. D.P.P.* [1999] 2 I.R. 25 per Keane J., at pp. 68 – 69.

It was the duty of the respondent to explain that delay. If the delay was not attributable to the applicant then there was prejudice to the applicant. There was a real and serious risk of an unfair trial. The D.P.P.'s arguments were rejected by the Supreme Court in *P. O'C. v. D.P.P.* and in *J.L. v. D.P.P.* Where there is inordinate delay in making a complaint it is inexcusable delay unless there is uncontradicted evidence of a psychologist justifying the complainant's delay. For the purpose of judicial review the complaints are presumed to be true but if there is an issue of fault present it should be tested. In the present case there was no psychological evidence and no reasons given for the delay. In this case the culpable delay of the complainants was not explained. The applicant's constitutional rights have been affected. In addition to the complainants' delay there had been prosecutorial delay. The preponderance of the complaints ended in 1995. The direction to prosecute was in June, 1997 and the accused was sent forward for trial on 7th July, 1999. This was four years since the last complaint and two years after the direction to prosecute.

Since leave was granted two and half years had passed which was nine years after the last complaint. Accordingly, there was presumptive prejudice. So, in addition to the application *in limine*, the substantive ground of delay both of the complainants and of the prosecution are relevant. The court was not being told why there was this delay.

Submissions were made relating to delay, the onus of proof in relation thereto, to the duty to investigate and to prosecutorial delay. A number of authorities were offered in relation to psychological evidence. Submissions were made in relation to the issue of prejudice, miscarriages of justice and dangers involved in cases of delay.

Reference was also made to authorities in relation to the general approach to missing witnesses and the effect of delay on the memory of potential defence witnesses and on the applicant.

## **7. Submissions on behalf of the respondent**

Mr. Feichín McDonagh, S.C., on behalf of the Director, addressed the issue of delay raised by the applicant in this judicial review application.

He submitted that when leave was granted on 15th April, 2002, no extension of time had been granted and there was no express ground of prosecutorial delay.

The case being made by the applicant was that the prosecution was tainted by the interference of the Western Health Board. That ground had only arisen after disclosure by the respondent in 2000 and 2002.

The matters now relied on were known in July, 1999, at the date of return for trial. Judicial review should have been sought at that stage.

Trial dates came and went. The book of evidence had been served on 31st October, 1997.

Given the complexity and interrelationship of the complaints made, further disclosure had been given and considered. The date for the trial was fixed for 8th May, 2000, at which time the applicant could have applied for judicial review.

Mr. McDonagh referred to *De Roiste v. Ireland* [2001] 1 I.R. 208, *per* Denham J., who outlined the factors to be taken into account for the extension of time. Good reasons must be furnished. Fennelly J., at 216, referred to *O'Donnell* [1991] I.L.R.M. which held that good reasons to explain and justify delay in relation to O. 84, r. 21, was an objective test.

Counsel submitted that there was no justification in not pursuing judicial review between 7th July, 1999 and 15th April, 2002. He referred to *Redmond v. D.P.P.* (*per* Kearns J.) where the application for judicial review failed on this point.

The arguments in relation to adverse publicity were not part of the judicial review proceedings and should not be taken into account by the court.

The prejudice alleged was weak. The demolition of parts of the building was not shown to be relevant. It was not significant as the locks on the music room had been in *P. O'C. v. D.P.P.*

The housekeeper who worked in the kitchen died in the late 1970s and was, accordingly, not relevant. There were no dates in relation to the incidents which might have been seen by the night watchman, who died in 1996. There were too many suppositions in relation to what evidence might have been given by parties now deceased.

The pre-trial delay was justified. No matter how valid the claims were relating to the Western Health Board it did not explain the delay in taking judicial review.

Mr. S., in his affidavit, had thought it prudent to wait for documents. That, however, does not explain the delay from 1999 to 2002.

The respondent is not required to offer any explanation for complainants' delay. The Supreme Court has never stopped a trial because of unexplained complainant delay. It has stopped a trial because of prejudice. The only test is the ability to get a fair trial (see *Z. v. D.P.P.*) – where there is a real risk of the absence of a fair trial a court should grant prohibition.

He referred to *The State (O'Connell) v. Fawcett* [1986] I.R. 362.

Sergeant C.'s averments as to the complexity of evidence and the decision not to have piecemeal prosecution explained the delays. There was a need for time to track witnesses and to obtain statements.

Significantly, Sergeant C., and the other Gardaí, were not cross-examined.

Significantly too was the fact that there were no allegations of periods of inactivity. Ground E(f) was not being pursued. What was

being claimed was that the investigation was flawed and tainted. This was too vague and not related to the claim that there was undue delay.

In any event, delay on its own is not sufficient to stop a trial continuing.

Mr. McDonagh, S.C., referred to the role of the Director of Public Prosecutions. In *M.K. v Judge Groarke and the D.P.P.* (Unreported, Supreme Court, 25th June, 2002) at p. 11 of the unreported judgment Denham J., on behalf of the court stated:

"The decision to prosecute may be a complex decision involving the balancing of many factors ... the office of the Director of Public Prosecutions seeks to provide on behalf of the people of Ireland a prosecution service which is independent, fair and effective. It is not for this or any court to assume the burden of that office."

It formed no part of the court's function to formulate a policy regarding the propriety of a trial proceeding after five, ten, fifteen or twenty years.

Only in exceptional circumstances should the courts intervene to prohibit a trial, only where the risk of an unfair trial is a real risk should the trial be stopped. The onus is on the applicant to establish such real risk of an unfair trial which necessarily and inevitably means that an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge.

The applicant must be able to show that the lapse of time was such as to raise an inference that the risk of an unfair trial had been established as a reality (see *D.P.P. v. Byrne* [1994] 2 I.R. 236, 244-245 per Finlay J. (Dis); *D.O'R. v. D.P.P.* [1997] 2 I.R. 273, 283 per Kelly J. and *P.M. v. Malone*, Supreme Court, 7th June, 2002, Keane C.J., 23-24.

In relation to the alleged prejudice caused by the deaths referred to, Murphy J. in *S.F. v. D.P.P.* [1999] 3 I.R. 235 at 244 held:

"It must be rare that this would happen. Even the death of a crucial witness or witnesses could hardly constitute such terms unless the death occurred within a period of delay for which the State or its agents were responsible."

In relation to pre-complaint delay, the U.S. Supreme Court identified at least four factors to be taken into account: the length of the delay, the reasons for the delay, the accused's assertion of his rights and prejudice (*Barker v. Wingo* [1972] 407 U.S. 514 at 521-2.

Mr. McDonagh referred to the development of cases in the Supreme Court and referred, in particular, to *Hogan v. President of the Circuit Court* where Finlay C.J. held:

"In any case where the prosecuting authorities on the information available to them have not got proper grounds for charging any person with an offence, their failure to do so and a lapse of time before they are in a position to do so cannot give an accused a right to prohibit a trial on the basis of the defeat of his constitutional rights to an expeditious trial. For example, cases consisting of charges by young children in regard to the assaults on them at an early age which are not brought to the attention of the authorities by such children until very many years after they occurred involve wholly different considerations to those applicable to the present case." [1994] 2 I.R. 513, 521.

Mr. McDonagh further submitted that there was no obligation on the D.P.P. to justify pre-complaint delay. He referred to *W. v. D.P.P.* [1997] 3 I.R.140 where the Supreme Court referred to the custom of the D.P.P. proffering evidence of a clinical psychologist and questioned whether certain aspects of cross-examination, particularly those relating to the technical meaning of particular words, were really necessary or of much assistance to the court. It was for the court to form its own opinion on the influence of the factors set out by expert witnesses within the parameters of the other evidence in the particular case.

Mr. McDonagh addressed the court on the alleged prosecutorial delay which he said was not blameworthy and, in any event, did not prejudice the applicant.

In relation to prejudicial publicity the authorities (*D. v. D.P.P.* and *Z. v. D.P.P.*) established that an applicant is required to establish the existence of a real or serious risk of an unfair trial and, that in the circumstances there was no such evidence in relation to the adverse publicity adversely affecting the applicant himself.

## **8. Applicant's Reply**

In reply, Mr. Gageby, S.C., submitted that there should be some evidence, even from the complainants themselves, as to the delays. All had been at the same institution and their complaints involved the same defendant. They gave no reasons for the delay. The court was not entitled to make any assumption. The law leans against delay and a delay from the late 1970s to late 1994 carried with it an assumption of prejudice which was all the stronger where no reason had been given. The absence of evidence of "islands of fact" further prejudices the applicant.

Mr. Gageby argued on the totality of the case, the age of the applicant, lack of corroboration evidence, adverse publicity and prosecutorial delay, all causing specific prejudice to the applicant.

## **9. Decision of the Court**

There have been delays in instituting the judicial review proceedings in this case involving interrelated complaints.

The right to a fair trial requires a right to thorough investigation. That decision is a complex decision. In the instant case of a number of complaints the Gardaí must necessarily investigate each thoroughly. It is common case that initial complaints were followed by subsequent complaints. It is significant that not all complaints were the subject of charges by the Gardaí. Sergeant D.C.'s evidence, supported by Garda M.M. and Detective Garda P.H., to the effect that the investigation was conducted independently by the Gardaí has not been rebutted by the applicant. Sergeant C. was not cross-examined.

Indeed, the applicant's case is largely devoted to the role of the Western Health Board, and in particular two of its employees, in relation to the prosecution. This court is not in a position to adjudicate on the merits or otherwise of that allegation. The investigation of this allegation is more properly a matter for the trial judge and for the jury in the prosecution.

The court is not persuaded that the powers of investigation entrusted to the Gardaí were usurped by the Western Health Board. It is significant that the Gardaí declined to prosecute in respect of some of the complaints.

The court is of the view that the applicant has not, on the balance of probabilities, established a case for prejudice in relation to the

death of potential witnesses. There is no evidence that these were the only parties who could have given evidence. Indeed the court is mindful of instances such as those alleged against the applicant being done in private.

The adverse publicity would appear to be adverse to the institution and the order but does not name the applicant. It seems to me, at this remove, that the "fade factor" is sufficient to avoid any prejudice arising in relation thereto. In any event it was not a ground in respect of which leave was given.

There has been considerable delay in respect of some of the complaints. I have considered the authorities referred to by counsel and, in particular, *P.C. v. D.P.P. and Another* [1999] 2 I.R. 25; *P.O'C v. D.P.P. and Another* [2000] 3 I.R. 87, *J.H. v. DPP*, (Unreported, Murphy J., 2nd April 2004) and, more recently the judgments of the Supreme Court in *P.L. v. Her Honour Judge Buttmer and D.P.P.* delivered 20th December, 2004.

The court is concerned at the delay in making complaint in respect of the earlier alleged incidents. The first complainant was the source of two counts of alleged assault between 1970 and 1977. Complaint was made on 7th June, 1995, was between 18 and 25 years after the event. The second, third, fourth and ninth complainants complained of incidents with spans of 5, 6, 3 and 5 years, where complaints were made on 28th September, 1995, 9th April, 1995, 22nd August, 1995 and 22nd August, 1995. Delays in making these complaints are 19 to 24 years; 16 to 22 years; 19 to 22 years and 11 to 17 years, respectively.

No evidence was offered as to the reason for this vagueness in time and delay in making a complaint. While delay, in itself, is not necessarily a reason for prohibition, especially in the case of alleged sexual abuse of children, the vagueness in timing and the absence of any reason for vagueness and delay are grounds to acceding to the order sought.

It is difficult to understand why such complaints are so vague as to dates and seems difficult to understand the delay in complaining. I would allow the application for prohibition in relation to these five complaints. I am informed that the respondent has decided not to proceed in relation to the seventh complainant, William Larkin (count 14).

The arguments in relation to prosecutorial delay can, in the circumstances of the affidavit of Sergeant C. and the submissions made by counsel, in the circumstances, do not establish delay which is inordinate. Some of the delay, as the transfer of the trial to Dublin, would appear to be of the applicant's making. Delay was also occasioned in relation to the role of the Health Board personnel. Though served with a notice to cross-examine it is significant that no cross-examination of the respondent's witness took place. Moreover, the application for judicial review could have been made in July, 1999.

In the circumstance, the court grants an order of prohibition restraining the respondent from taking any further steps with the prosecution of the applicant on foot of Bill No. 1172/99 in respect of charges arising out of the complaints of S.C., J.D., G.T., P.G. and J.B. The court refuses such order in respect of charges arising out of the complaints of K.S., J.C., P.H. and B.C.H.

Accordingly, the Court will make an order prohibiting all but counts 9, 10, 11 (S.); 12, 13 (C.); 15, 16, 17 (H.) and 20 -34 (H.) of the 34 charges contained in Bill No. 1172/99.