2005 IEHC 454

THE HIGH COURT

[1997 Rec. No. 212 JR]

BETWEEN

PATRICK ENRIGHT

APPLICANT

AND
DISTRICT JUDGE TERENCE FINN
AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of O'Neill J. delivered the 21st day of December, 2005.

1. In this case the applicant seeks an order of prohibition to prevent the second named respondent continuing to prosecute the applicant in respect of ten charges of forgery. The history of this matter goes back to 1994. The applicant who is a Solicitor, had been employed as an assistant manager by a company known as Nylerin Group Claims Office, which was a subsidiary of an American insurance company known as the New York Life Insurance Company and the business carried on by the subsidiary company was that of processing group health insurance claims on behalf of New York Life Insurance Company.

2. The plaintiff took up his employment with this company in 1988 and it would appear that by 1992 and 1993 the business of this company had not progressed as expected and it is the applicant's contention on affidavit that plans were made for him to leave this company with the benefit of a redundancy package. However when the applicant did leave the employment of this company on 10th June, 1994, it was without any redundancy payment or other form of financial compensation being paid to him by his former employer.

3. On 21st October, 1994, the applicant received a visit from three members of An Garda Siochána. The affidavits filed in these proceedings revealed a complete conflict of evidence as to what happens in the course of this visit. However it is clear that as a result of this visit the applicant made a written statement which is in the usual form starting with the recitation of the usual caution having been given. The applicant avers on affidavit that the statement was made as a result of threats made to him by the gardaí, to the effect that were he not to sign a statement and cooperate that he would be arrested and forthwith taken to Tralee Garda Station where he would be exposed to reporters from a newspaper and that a report would be made to the Law Society. He avers that he was also warned not to telephone to seek the assistance of a colleague. He also says in his affidavit that the statement was handwritten by the gardaí and contains a number of errors, which were inserted at the behest of the gardaí.

4. The applicant further swears that on 28th October, 1994, as a result of representations made to him by the second named respondent or his servants or agents or representations from his former employer he entered into a written undertaking addressed to New York life Insurance Company in which he waived his legal and constitutional rights and undertook to repay certain monies, which he repaid. Although the applicant does not say so in his grounding affidavit, in his statement of grounds he makes the case at paragraph (e) (iii) (a) 1, that the second named respondent is estopped from pursuing the aforesaid prosecution against him on the ground that having repaid the monies in question that it was represented to the applicant that the investigation and hence the prosecution would cease.

5. On 27th October, 1994, an investigation was commenced by the Law Society into the affairs of the applicant and the applicant has made extensive complaints about this and in particular has sought to ascertain and attempt to demonstrate that this investigation was initiated at the behest of the gardaí in breach of some constitutional rights of the applicant and indeed issued proceedings against the Law Society in due course and in the course of these judicial review proceedings sought third party discovery against the Law Society which was vigorously resisted by the Law Society successfully in the High Court, but on appeal to the Supreme Court the applicant succeeded in obtaining discovery limited to the question of complaints made to the Law Society about him. The subsequent affidavit of discovery on behalf of the Law Society revealed that the Law Society had no documents concerning any such complaints.

6. The applicant also makes extensive complaints concerning articles which appeared in the media concerning the police investigation and Law Society investigation and he intimates that the gardaí were the source of information for these articles.

7. Early in January, 1995, on foot of a search warrant, a search was carried out of the applicants residence by members of An Garda Siochána. Nothing was found on foot of this search but as a result of such interview as took place between the applicant and the members of An Garda Siochána at that time, the applicant made a further statement. This statement is not mentioned by the applicant in his grounding affidavit. The statement is exhibited in the affidavit of Patrick O'Sullivan filed on behalf of the respondents. It would appear that the applicant does not complain that this was not a voluntary statement.

8. It would appear that the investigation into what ultimately was described by Patrick O'Sullivan in his affidavit as a complex fraud continued during 1995 and on the 15th August, 1996, the applicant was brought before a special sitting of the District Court at Tralee and charged with the aforesaid ten counts of forgery. The applicant's case was remanded in the District Court until the 27th January, 1997, at which stage the applicant elected for trial on indictment on a not guilty plea. At the request of the State Solicitor the matter was adjourned to the 28th February, 1997, to enable the prosecution to obtain additional evidence from outside the jurisdiction. An extension of time for the purpose of serving the Book of Evidence was granted. The Book of Evidence was served on 25th February, 1997 and it would appear that the matter was adjourned to the 20th March, to enable further evidence to be obtained from outside of the jurisdiction. On 20th March, 1997, the solicitor acting for the applicant sought a full preliminary examination and the first named respondent fixed the 28th April, 1997, for this. Thereafter a great deal of correspondence passed between the applicant's solicitor and later himself and the Chief State Solicitor concerning the conduct of the preliminary examination. On 28th April, 1997, the matter was further adjourned to a sitting of Tralee District Court on 9th June, 1997, for a preliminary examination and the time was extended further for wherever extra documents needed to be served.

9. When the preliminary examination commenced on the 9th June, 1997, it would appear that the applicant made an application to the court which was in effect a challenge to the jurisdiction of the court to conduct a preliminary examination on the grounds, it was contended by the applicant, that there had not been compliance with ss. 6 and 7 of the Criminal Procedure Act 1967. The order of the District Court on that day which is exhibited in a supplemental affidavit of the applicant, indicates that the preliminary application of the applicant as aforesaid was refused by the court, whereupon it would appear from the order that the applicant applied to the court for the production of certain documentation from the second named respondent and that it was agreed that certain documentation would be produced and that it would take approximately seven to ten days for this and that the applicant needed time to consider these documents before calling for depositions naming those required by him and that as a result, by consent, the applicant was remanded on continuing bail to a special sitting of Tralee District Court to be held on 30th June, 1997, for preliminary

examination.

10. That preliminary examination however never took place because on the 17th June, 1997, the applicant applied to this court for leave to apply for this judicial review and the reliefs claimed herein and leave was granted on that day by Kelly J. *Inter alia* Kelly J. in his order stayed the aforesaid prosecution pending the determination of these judicial review proceedings. The order of Kelly J. gave leave to the applicant to pursue the following reliefs;

> *"(i) An order of prohibition prohibiting the first named respondent from proceeding with the purported preliminary examination which he purportedly embarked upon at Tralee District Court at Tralee in the County of Kerry on the 9th day of June, 1997. …*
>
> *(iii) An order of prohibition prohibiting the second named respondent from taking up or dealing with the prosecution of the applicant herein on all or any of the ten charges in respect of which the applicant was charged by the second named respondent on 15th August, 1996.*
>
> *(iv) A declaration that the second named respondent is estopped from dealing further with this matter as his servants or agents advised the applicant herein that if certain monies were tendered to the complainant, namely New York Life Insurance Company, no further detriment will be caused to the applicant by the second named respondent, his servants or agents."*

11. The grounds upon which the applicant was given leave to apply for judicial review are as follows:

> "(i) In respect of the relief sought at
>
> (i) here over:- the district justice lacks jurisdiction to embark upon the preliminary examination because:
>
> (a) Before the date for the preliminary examination, the State failed to furnish the applicant with a substantial number of exhibits (40%)referred to in the Book of Evidence by the witnesses wherein.
>
> (b) The State failed to make available to the district justice a substantial number of exhibits (40%) for consideration by him at or before the preliminary examination, and accordingly, in purporting to embark upon the preliminary examination of the charges against the applicant, the honourable district judge, acted without jurisdiction contrary to the provisions of s. 6 and 7 of the Criminal Procedure Act 1967 and contrary to the constitutional rights of the applicant….
>
> (iii) In respect of the reliefs sought at (iii) and (iv) here over the applicant will rely on the grounds set out in the preceding paragraphs, together with the following:-
>
> (a) the second named respondent, by his servant or agents,
> (1) represented to the applicant that if certain monies were paid to the complainant then the investigation would cease, and accordingly the second named defendant is estopped from pursuing this case,
>
> (2) have failed in their obligation to provide and protect the applicant's positive constitutional right to an expeditious trial which has resulted in hardship, anxiety and distress to the applicant and his family over and above any question of prejudice in the preparation of his defence.
>
> (b) That by reason of the conduct of the second named defendant his servants or agents in deliberately misleading the applicant herein into believing that no prosecution would be brought against him and involving the Incorporated Law Society of Ireland and unlawfully permitting details of the investigation to be furnished to the media and in deliberately allowing him to believe that no action would be taken against the applicant for 22 months during which time they delayed their investigations for an improper purpose or purposes, it would be an abuse of the due process of the court to permit the trial of the alleged offences to proceed.
>
> (c) By virtue of the delay between the commencement of the investigation and the charge on 15th August, 1996 and the delay in serving the Book of Evidence on 25th February, 1997 and the failure of the State to furnish all the necessary exhibits (portion of which the applicant requested on the 19th April, 1997,) prior to the 9th June, 1997, being the date set for the preliminary hearing, the applicant has been prejudiced in the preparation of his defence to the alleged offences.
>
> (d) The second named defendant, its servants or agents having commenced criminal investigation using statutory powers, wrongfully and unlawfully and in breach of the applicants constitutional rights and before any charges were brought, caused to be invoked the statutory investigative powers of the Incorporated Law Society of Ireland which body completed an investigation and imposed a sanction being a £1,000 fine.

12. I propose to deal with each of these grounds in the order in which they are set out above.

Lack of Jurisdiction on the part of the first named Respondent to embark upon a Preliminary Examination

13. The applicant submits that 40% of the exhibits referred to in statements contained in the Book of Evidence were not furnished to him nor were they furnished to the first named respondent prior to the time of the preliminary examination on 9th June, and that because of that failure there was not compliance with the mandatory provisions of s. 6 and 7 of the Criminal Procedure Act, 1997 and relying upon the case of State (Williams) v. Kelleher [1983] I.R. 119 he submits that he is entitled to the order of prohibition claimed.

14. Section 6 of the Criminal Procedure Act, 1967 provides as follows:

> *"(1) The prosecutor shall cause the following documents to be served on the accused-*
>
> *(a) a statement of the charges against him,*

(b) a copy of any sworn information in writing upon which the proceedings were initiated,

(c) a list of the witnesses whom it is proposed to call at the trial,

(d) a statement of the evidence that is to be given by each of them, and(e) a list of exhibits (if any).

(2) Copies of the documents shall also be furnished to the Court.

(3) The accused shall have the right to inspect all exhibits.

(4) The prosecutor may cause to be served on the accused and furnished to the Court a further statement of the evidence to be given by any witness a statement of whose evidence has already been supplied."

15. It would appear from the correspondence and from the written submission provided by the applicant to the District Court and exhibited in his affidavit and indeed from the contents of his affidavit and his written submission to this court on this judicial review application, that the applicant is of the view that he was entitled to treat as an exhibit every document referred to in statements furnished in the Book of Evidence and that he was entitled to be furnished with all these documents prior to a preliminary application taking place and that in the absence of these documents being furnished that the first named respondent lacked a jurisdiction to conduct a preliminary examination. The applicant when the preliminary examination opened on 9th June, in the District Court in Tralee appears to have made such an application to the district judge, and the operative part of the order of the District Court is as follows:

"AND The Court hear preliminary argument regarding case of Patrick Enright acting on his own behalf. Mr. O'Connell, solicitor applied to come off record for the accused and this was granted. Preliminary application was refused. The accused then applied to the court for production of certain documentation from the prosecutor. Certain documentation agreed to be produced, but will take approximately seven to ten days. The accused wishes to consider these documents before calling for depositions and naming those required by him.

By consent the accused remanded on continuing bail to a special sitting of Tralee District Court to be held on 30th June, 1997, at 11.00 am for preliminary examination.

Accused consented."

16. I am satisfied that the order thus quoted reveals that it is probable that the application which was refused by the court was the applicants application to the court to the effect that the court had no jurisdiction to embark upon the preliminary examination. It is clear that the court refused that application and the rest of the order indicates that the court moved on to consider what was necessary to be done for the purposes of completing the preliminary examination.

17. As is apparent from s. 6 of the Criminal Procedure Act, 1967 what has to be done before a preliminary examination takes place so far as exhibits are concerned is that the Book of Evidence must contain a list of the exhibits and an accused such as the applicant in this case has a right to inspect all of those exhibits.

18. The first question which necessarily arises is what is meant by "exhibits". For the respondents in this case it is submitted that all that is referred to there, are the exhibits which it is intended to adduce in evidence at the trial, and no more. The mere fact that documents may be referred to in statements does not make these documents exhibits and they only become exhibits if it is intended by the prosecution to adduce them in evidence and rely upon them at the trial, in which case there is then a statutory obligation to list them in the Book of Evidence as exhibits and make them available for inspection by the accused/applicant. It was further submitted by the respondent that all of the documents intended to be relied upon at the trial were listed as the 49 exhibits listed in the Book of Evidence and all of these were furnished to the applicant as part of the Book of Evidence. Insofar as the applicant complains that some of these may have been illegible because of poor photocopying, it was submitted that is not a ground of complaint leading to a prohibition given that the applicant is entitled to inspect the exhibits in their original form and that all that is required to remedy a complaint such as this, is for the applicant to seek either to exercise his right to inspect the originals or to request clean copies which would be furnished.

19. I am satisfied that the extent of the obligation on the second named respondent to list exhibits in the list of exhibits which must be included in the Book of Evidence is confined to those exhibits which it is intended by the prosecution to bring into evidence at the trial. The non-listing amongst the exhibits, of documents referred to in statements in the Book of Evidence carries with it the necessary implication that these documents will not be sought by the prosecution to be brought into evidence at the trial. Hence for the purposes of the preliminary examination it necessarily follows that there is no obligation on the part of the second named respondent to furnish documents other than those listed in the list of exhibits. Indeed it could be said that there isn't a statutory obligation to furnish exhibits, the extent of the obligation being to list the exhibits, whereupon the applicant has, of course, a right to inspect these documents.

20. All of the documents listed in the list of exhibits however have been furnished and are included as part of the Book of Evidence and have been available as such to the applicant well in advance of the preliminary hearing on 9th June, 1997. That being so I am satisfied that the applicant was correct in submitting to the first named respondent that he lacked the jurisdiction to embark upon the preliminary hearing and it is quite clear therefore that the judgment of Henchy J. in the State (Williams) v. Kelleher in [1983] I.R. 119 does not assist the applicant.

21. I have come to the conclusion therefore that this ground for judicial review fails.

Is the second named Respondent estopped from pursuing the prosecution because of representations made to the applicant

22. In the course of his grounding affidavit the applicant states that various threats were made to him to induce his initial statement on the 21st October, 1994. He also states that on 28th October, 1994, as a result of representations made to him by or on behalf of the second named respondent and representatives of his former employer that he entered into a written undertaking addressed to New York Life Insurance Company in which he agreed to repay certain monies to them. This agreement is exhibited as exhibit K to his grounding affidavit. The first paragraph of this document reads as follows:

"AS AGREED IN" consideration of New York Life and others dropping civil or criminal proceedings howsoever arising in

connection with the above matter, I now waive my constitutional and other legal rights and agree to cooperate fully with them in giving details of how monies were obtained and I further agree to reimburse all monies due on foot of internal procedural errors to New York Life prior to November, 9th, 1994. Further I undertake not to bring any other proceedings in this matter or do anything further to the detriment of New York Life …".

23. This document appears to be signed by the applicant. The copy of same exhibited does not reveal any other signature.

24. The affidavit of Patrick O'Sullivan filed on behalf of the respondents emphatically denies the making of any threats of whatsoever kind in respect of the making of the first statement of the applicant and also denies the making of any representations to the effect that no prosecution would be brought. The applicant has not sought to cross-examine Patrick O'Sullivan on any of his affidavits. I am satisfied that the applicant has failed to discharge the onus which is on him of establishing on the balance of probabilities that the facts alleged by him in his affidavits are true, in particular that any representations were made by or on behalf of the second named respondents or any other state agency to the effect that there would be no prosecution arising out of any agreements entered into between the applicant and his former employers or any admissions or concessions made by the applicant in the course of the investigation.

25. Even if such representations were made I am satisfied that the submission made by the second named respondent to the effect that the second named respondent is the only person who has the statutory function of deciding whether or not to bring a prosecution and that function cannot be usurped by any other official of the State be they a member of An Garda Siochána or otherwise is correct. Hence if any representation was made it would be ineffective to estop the second named respondent from exercising his statutory function of deciding whether or not to bring the prosecution which is sought to be prohibited in this case.

26. I am also satisfied that the applicant has failed to prove to my satisfaction that any threats were made to him to induce him to make the statement of the 21st October, 1994. Even if any such threats were made, they could not be a ground for prohibition, but could be the basis of a challenge to the admissibility of the statement in the trial.

Failing to have provided the Applicant with an expeditious trial

27. There is no doubt that a lengthy period has elapsed since the commencement of the police investigation in this matter in the Autumn of 1994 and the present time i.e. in excess of ten years. The undisputed evidence on affidavit is that the applicant was charged with the ten counts of forgery on 15th August, 1996, some 22 months after the commencement of the investigation. In effect the investigation was substantially complete by January of 1996 when the file in the matter was sent to the second named respondent for his directions.

28. I would be inclined to accept the explanation for the length of time taken to complete the investigation set out in the affidavit of Patrick O'Sullivan which is to the effect that the fraud involved was a complex one necessitating at an initial stage an application to this court for an order under the Bankers Book of Evidence Act, so that bank accounts in this jurisdiction could be examined, and also involved the assembly of proofs from another jurisdiction. It could not have been sufficient for the prosecution simply to rely upon the admissions made by the applicant in his two statements particular having regard to the fact that the applicant contends that the first statement was not a voluntary statement. It would at all times have been necessary for the prosecution to have exhaustively investigated the matter and as best they could assemble all of the relevant and available proofs.

29. I am satisfied that there was no inordinate delay in the matter leading up to the charging of the applicant on the 15th August, 1996.

30. Thereafter the matter took its course in the District Court. There appears to have been initially an adjournment to the 27th January, 1997, at which point the applicant elected for trial on indictment. Thereafter arose the necessity for a Book of Evidence and it appears at that stage some further evidence had to be obtained from abroad. This resulted in a number of adjournments which do not appear to have been opposed by the solicitor acting for the applicant. Some further delay may have been occasioned, up to the holding of the preliminary examination on 9th June. The matter had initially been put in for preliminary examination on 28th April, but as the correspondence reveals extensive requests were made of the State Solicitor both for witnesses and documents which clearly went outside the range of material to which the applicant was entitled under s. 6 of the Criminal Procedure Act of 1997. I have no doubt that the making of these requests and the efforts that were made to deal with many of them must have necessitated, or at the very least contributed to the adjournment from 28th April, 1997, to 9th June, 1997.

31. As already mentioned on 17th June, 1997, the applicant obtained leave to apply for judicial review and obtained a stay on the prosecution. Thereafter the applicant pursued an application for third party discovery against the Law Society which was not finally determined by the Supreme Court until 17th May, 2001 when the Supreme Court directed the Law Society to make discovery of a limited category of documents, namely, documents it received from the second named respondents his servants or agents or members of An Garda Siochána between 21st October and 27th October, 1994. The affidavit of Patrick Joseph Connelly Registrar of solicitors on behalf of the Law Society sworn on 13th June, 2001, averred that the Law Society did not have any documents in its power, possession of procurement covered by the order.

32. Thereafter the second named respondent sought in correspondence to have the judicial review proceedings progressed to finality and ultimately by a motion of 14th July, 2003, the second named respondent applied to this court for an order re-entering the notice of motion on 26th June, 1997 and that order was made on the 13th October, 2003. On the 19th April, 2004, the applicant's motion for specific performance of an agreement for voluntarily discovery dated 23rd May, 2003, was listed for hearing and adjourned on the applicant's application to 10th May, 2004, where it was struck out with costs reserved. Finally on 27th July, 2004, the application for judicial review was given a date for hearing.

33. I am satisfied that none of the delay from June of 1997 to the present time can be attributed to either respondent or any other state agency. All of the delay from then on was caused by these judicial review proceedings, the application for a third party discovery against the Law Society and a subsequent motion for disclosure brought by the applicant. The applicant was of course entitled to pursue these matters but the State cannot be faulted for the time lost as a result of the pursuit of these various applications by the applicant.

34. I am satisfied therefore, that it cannot be said that the respondents or indeed any agency of the State failed to provide the applicant with an expeditious trial and that ground for judicial review also must be dismissed.

Was there abuse of process on the part of this second Respondent or his servants or agents

35. In his affidavits the applicant expressly or by necessary application attributes to the Garda Siochána or other State agents the fact that an investigation into his affairs was commenced by the Law Society. In his affidavits Patrick J. O'Sullivan emphatically and

repeatedly denies any such activity or indeed any knowledge of it or on his own part or any other members of An Garda Siochána. The applicant has not sought to cross-examine this deponent on any of his affidavits. I am satisfied that the applicant has failed to discharge the onus which is on him of proving on the balance of probabilities the truth of these allegations, innuendos and implications.

36. The applicant alleges that details of the investigation were furnished to the media. Again this allegation is vehemently denied in the affidavits of Patrick J. O'Sullivan and I am satisfied that the applicant has failed to discharge the onus on him of proving this allegation on the balance of probabilities.

37. The applicant claims that he was for a period of 22 months allowed to believe that no action would be taken against him and that during that time the investigation was delayed for an improper purpose.

38. In the first instance as already discussed above, I am quite satisfied that there was no inordinate delay in the completion of the investigation. The applicant has failed to challenge the denials on affidavit of Patrick J. O'Sullivan that any representation was made to him that no action would be taken against the applicant and in the light of the foregoing the applicant has failed to prove this allegation to my satisfaction. Accordingly I am satisfied that there has been no abuse of due process of the court by reason of these allegations and therefore this ground for judicial review must fail.

Prejudice to the Applicants defence
39. The applicant contends that because of the delay between commencement of the investigation, the charging of him on the 15th August, 1996 the service of the Book of Evidence on 25th February, 1997 and the failure to furnish all of the exhibits requested by the applicant on 19th April, 1997, prior to 9th June, 1997, that the applicant has been prejudiced in the preparation of his defence to the alleged offences.

40. As already discussed I have come to the conclusion that there has been no inordinate delay on the part of the second named respondent or any other State agencies in the carrying out of the investigation, the charging of the applicant or the conduct of the District Court proceedings up to the 9th July, 1997. That conclusion of itself would be sufficient to dispose of this ground for judicial review. I think it appropriate however to observe that the grounds of prejudice put forward by the applicant in paragraph 4 of this supplemental affidavit sworn at the direction of Kelly J. on the 17th day of June, 1997, fail to satisfy me that the applicant suffered prejudice as a result of any delay up to June of 1997.

41. In paragraph 4 of this affidavit the applicant complains that a number of named persons who were in the employment of the applicants former employers were no longer available because, in the belief in the applicant they had returned to the United States. The applicant in paragraph 5 of this affidavit then refers to two letters. The first is a letter dated 10th May, 1997, in which he seeks the attendance of these witnesses and indeed a great many others as well for the purposes of the preliminary examination. This letter is replied to by letter of 4th June, in which it is made clear that these witnesses will not be in attendance for the purposes of the preliminary examination.

42. The unavailability of these witnesses for the purposes of a preliminary examination at a time when no inordinate delay had occurred at all, could not in my view be advanced as a decisive factor indicating prejudice to any defence of the applicant in his trial for the offences charged. Also as is deposed to by the applicant his former employer continued in business in Ireland until April of 1998. From this it can reasonably be inferred that if criminal proceedings had been permitted to take the normal course it is probable the applicant's trial would have taken place before the persons mentioned by the applicant had returned to the U.S. If these witnesses become unavailable for the trial, the probable cause of that loss was not any delay for which the State was responsible but the pursuit of these judicial review proceedings.

43. Apart from the foregoing the applicant does not give any indication whatsoever of what way the evidence of any of these persons could assist the applicant in his defence or of what aspect of his defence would be prejudiced by their absence. It is quite clear that his contention that his defence would be prejudiced by the absence of these witnesses is entirely speculative.

44. I am satisfied therefore that this ground also fails.

Did the second named Respondent his servants or agents invoke the Statutory investigative powers of the Law Society
45. Again this is an allegation which is repeatedly denied on affidavit by Patrick J. O'Sullivan and that denial has not been challenged in an ordinary way of cross-examining by the applicant. Moreover the discovery of documents against the Law Society has failed to reveal any documents containing any such complaint or invocation.

46. I am satisfied that the applicant has failed to discharge the onus of proving this allegation and accordingly this ground also fails.

47. In the course of submissions, counsel for the applicant argued that the applicant had a legal and moral right to the money allegedly misappropriated and relying upon the authority of the case of the *People v. O'Loughlin* [1979] I.R. 85, submitted that this was a defence which was open to the applicant in his trial. The complaint made in these proceedings is that An Garda Siochána took no steps to investigate this contention by the applicant and this failure on the part of An Garda Siochána or other state agencies was a failure to have assembled all of the relevant evidence which might be favourable to the applicant, a failure which would justify, at this stage a prohibition of any further prosecution. In this regard reliance was placed on the case of *Braddish v. Director Of Public Prosecutions* (Supreme Court judgment delivered 18th May, 2001).

48. The first thing to be noted concerning this submission is that the grounds in respect of which the applicant got leave to apply for judicial review do not include any such grounds nor could any of the grounds in respect of which leave had been obtained be given, in any kind of a rational way, a latitude which could include this complaint. This matter appears to have risen for the first time in the final affidavit sworn by the applicant on the 5th March, 2003, almost six years after he obtained leave.

49. Paragraph 4 of that affidavit says the following:

> *"4 I say that regardless of the dispute of the facts which exist above between Patrick O'Sullivan and I, I did as previously averred in my grounding affidavit contact the Chief State Solicitor on 4th April, 1996 in writing prior to any charge being made, to advise them of my entitlement legally and morally to the monies in dispute. Subsequently at paragraph 4 of the grounding affidavit herein dated 14th July, 1997, I repeated my claim regarding my entitlement to the monies in dispute. I say that to date, the prosecuting authority never undertook an investigation into the bona fides of my claim as outlined to them formally in writing on two occasions (and again orally to the investigating officers)…".*

50. Referring back to paragraph 4 of the grounding affidavit it is quite clear from the contents of that paragraph that no such claim is in fact made therein. The letter of the 4th April, 1996 to the Chief State Solicitor contains the following statement in the second paragraph;

> *"The investigating officers were advised that this writer had legal and moral entitlements to the monies allegedly misappropriated, but chose to ignore this "in the interests of finalising the investigation" in return for an alleged confession and certain assurances "to protect one's family career and Nylerin"."*

51. Having failed to include this matter as a ground in the statement of grounds, having failed to expressly refer to it as a claim in his grounding affidavit and having waited almost a full six years to draw attention to it in his final affidavit, even if it were a ground available to the applicant in this case, I would have no hesitation in concluding that it lacked any real merit or substance and should not be given any weight as a factor warranting prohibition of the prosecution.

52. The applicant also complained about a failure on the part of the second named respondent to make disclosure of documents since 9th June, 1997.

53. As is apparent from the grounds in respect of which leave was obtained, no leave was obtained in respect of any such ground. In any event I am satisfied that any such complaint is a matter to be dealt with by the trial judge and hence no relief can be granted in respect of this complaint.

54. Finally it is appropriate that I should refer to the statement made by the applicant on the 4th January, 1995. By his order of 17th June, 1997, Kelly J. at paragraph 2 of the order directed that the applicants swears a supplement affidavit exhibiting the two statements dated 21st October, 1994 and 4th January, 1995. Manifestly the applicant did not comply with that order. He did swear a supplemental affidavit dated 17th June, 1997 in purported compliance with that order and in that affidavit he does exhibit the statement dated the 21st day of October, 1994, but he omits to exhibit the statement of 4th January, 1995. The statement of 4th January, 1995, is clearly an inculpatory statement and whilst the applicant contends that the statement of the 21st October, 1994, was not a voluntary statement he makes no such contention concerning the statement of the 4th January, 1995. The latter statement comes into the proceedings as an exhibit in the affidavit of Patrick O'Sullivan sworn on 18th November, 1997. To say the least, it is surprising that the applicant failed to exhibit this latter statement in his supplemental affidavit of 17th June, 1997.

55. In an application for prohibition such as this I am of opinion that the authorities permit me to have regard to the inculpatory nature of this statement on 4th January, 1995, as a factor to which some weight be given in determining whether or not there should be an order of prohibition or not. It would necessarily follow in my view that where there is an inculpatory statement and where it is not contended that that statement is anything other than voluntary, the weight to be attached to that statement should be against the granting of an order of prohibition, and so it is in this case.

56. For all of the reasons set out above I have come to the conclusion that the reliefs sought in these proceedings should be refused.