

**THE HIGH COURT**

**2011 217 JR**

**BETWEEN:**

**JAMES KENNEDY**

**APPLICANT**

**V**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice Hedigan delivered the 28<sup>th</sup> day of July 2011**

**1.** The applicant resides at 13 Comorant Wharf, Queensway Quay, Gibraltar. The respondent is the person charged with the direction, control and supervision of prosecutions in the State and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin.

**2.** The applicant seeks the following reliefs:-

- (a) An injunction, by way of application for judicial review, prohibiting the Respondent from proceeding with the trial of the Applicant in the Dublin Circuit Court on the 16 charges set forth in a Statement of Charges dated 28<sup>th</sup> October, 2010 in proceedings entitled "The Director of Public Prosecutions v. James Kennedy, Sean Gilbride, Donal Lydon, Colm McGrath, Liam Cosgrave, Tony Fox"
- (b) An injunction restraining the Respondent from taking any or any further steps to prosecute the Applicant in the Dublin Circuit Criminal Court on the 16 charges set forth in a Statement of Charges dated 28<sup>th</sup> October, 2010 in proceedings entitled "The Director of Public Prosecutions v. James Kennedy, Sean Gilbride, Donal Lydon, Colm McGrath, Liam Cosgrave, Tony Fox."
- (c) A stay pursuant to Order 84, rule 20(7) (a) of the Rules of the Superior Courts restraining the Respondent from taking any or further steps to prosecute the Applicant in the Dublin Circuit Criminal Court on the 16 charges set forth in a Statement of Charges dated 28<sup>th</sup> October, 2010 in proceedings entitled "The Director of Public Prosecutions v. James Kennedy, Sean Gilbride, Donal Lydon, Colm McGrath, Liam Cosgrave, Tony Fox."
- (d) In the alternative, and if necessary, an injunction (including an interlocutory or interim injunction) restraining the Respondent from taking any or any further steps to prosecute the Applicant in the Dublin Circuit Criminal Court on the 16 charges set forth in a Statement of Charges dated 28<sup>th</sup> October, 2010 in proceedings entitled "The Director of Public Prosecutions v. James Kennedy, Sean Gilbride, Donal Lydon, Colm McGrath, Liam Cosgrave, Tony Fox" pending the determination of the within proceedings.
- (e) If necessary, an Order pursuant to Order 84, rule 21, extending the time for bringing this application.
- (f) Damages pursuant to section 3 of the European Convention of Human Rights Act 2003.
- (g) Liberty to serve such other parties as this Honourable Court may direct.
- (h) Liberty to file further affidavits.
- (i) Liberty to apply.
- (j) Such further or other reliefs as this Honourable Court may direct.
- (k) The costs of and incidental to these proceedings.

**Background Facts**

**3.1** These proceedings arise out of the prosecution of the applicant on indictment in the Dublin Circuit Criminal Court on sixteen charges set forth in a Statement of Charges dated 28<sup>th</sup> October, 2010. The charges relate to allegations that the applicant corruptly gave sums of money to certain county councillors as an inducement or reward for voting in favour of motions to rezone certain lands at Carrickmines, County Dublin in 1992 and 1997. Those lands were owned in 1992 by a company called Paisley Park Investments Limited (which was liquidated that year) and were owned in 1997 and are still owned by Jackson Way Properties Limited, an English registered company of which the applicant is a director.

**3.2** The first eight charges relate to alleged offences under section 1(2) of the Public Bodies Corrupt Practices Act, 1889 (as amended by section 4 (2) of the Prevention of Corruption Act 1916) allegedly committed in 1992. It is alleged in charges 1-8 that, on various dates between 4<sup>th</sup> May 1992 and 29<sup>th</sup> June 1992, the applicant corruptly gave sums of money as gifts to members of Dublin County Council, as an inducement to or reward for, or otherwise on account of each of them voting in favour of a motion to rezone as 'E' ( Industrial) in the Dublin County Development Plan 1993, approximately 108 acres of lands at Carrickmines. The second set of

eight charges relate to alleged offences under section 1 (2) of the Public Bodies Corrupt Practices Act, 1889 (as amended by section 4(2) of the Prevention of Corruption Act 1916 and section 38 of the Ethics in Public Office Act 1995) allegedly committed in 1997. It is alleged in charges 9-12, that on 30<sup>th</sup> October 1997 and 23<sup>rd</sup> December 1997, the applicant corruptly gave sums of money as gifts to a member of Dublin City Council, namely Liam Cosgrave, as an inducement to or reward for, or otherwise on account of him voting in favour of two motions relating to lands at Carrickmines in the course of the making of the Dun Laoghaire Rathdown County Development Plan. It is further alleged in charges 13-16, that on 30<sup>th</sup> October 1997, and on a date unknown between 30<sup>th</sup> October, 1997 and 25<sup>th</sup> December 1997, the applicant corruptly gave sums of money as gifts to a member of Dublin County Council, namely Tony Fox, as inducement to or reward for, or otherwise on account of him voting in favour of the said two motions.

**3.3** On 16<sup>th</sup> December, 1997 one of the motions to rezone part of the Jackson Way Lands was passed. On 15<sup>th</sup> November, 1999 the applicant met with the Criminal Assets Bureau. On 19<sup>th</sup> October, 2000 Frank Dunlop gave evidence at the Tribunal of Inquiry into Certain Planning Matters and Payments, he admitted making corrupt payments to Councillors. In December 2001, CAB commenced an investigation following receipt of information from Dun Laoghaire Rathdown County Council on 17<sup>th</sup> December, 2001. On 7<sup>th</sup> March, 2002, CAB searched the amusement arcade at Westmoreland Street. On 16<sup>th</sup> March, 2004, Frank Dunlop made a statement to the CAB. On 22<sup>nd</sup> October, 2004 a file was sent to the DPP. On 26<sup>th</sup> July 2006, the CAB initiated proceedings against Jackson Way entitled *Criminal Assets Bureau, Plaintiff v. Jackson Way Properties Ltd, Defendant*. On 13<sup>th</sup> July, 2008 the DPP directed that Frank Dunlop be charged with 16 charges of corruption. On 21<sup>st</sup> November, 2008, Frank Dunlop was arrested and charged with offences. On 16<sup>th</sup> January, 2009, Frank Dunlop pleaded guilty to 5 charges. On 26<sup>th</sup> May, 2009, Frank Dunlop was convicted and sentenced. On 2<sup>nd</sup> October, 2009 the applicant swore an affidavit in the CAB proceedings. On 24<sup>th</sup> June, 2010, the DPP directed that six persons including the applicant be charged. On 9<sup>th</sup> July, 2009, directions from the DPP were received by CAB. On 19<sup>th</sup> October, 2010, the CAB proceedings commenced and the applicant was arrested at 4:15 pm shortly after leaving the Four Courts. On 22<sup>nd</sup> October, 2010, the book of evidence was served. In the within proceedings the applicant seeks an order staying the proceedings on grounds that he has been prejudiced by the delay in these proceedings.

#### **Applicants Submissions**

**4.1** The applicant submits that the facts of this case demonstrate that there has been a very considerable delay on the part of the prosecution authorities in prosecuting the charges against the applicant. The charges against him relate to events that are alleged to have occurred some 19 years ago in respect of the first 8 charges and close to 14 years ago in respect of the second set of 8 charges. Mr. Dunlop first gave evidence of making corrupt payments as long ago as October 2000 and CAB commenced its investigation almost ten years ago in December 2001. CAB was in a position to send a file to the DPP in respect of Mr. Dunlop in October 2004 and to initiate civil proceedings against Jackson Way Properties Ltd based on the evidence of Mr. Dunlop as far back as July 2006. However, it was not until October 2010 that the applicant was charged and it will not be until October 2011 that the offences against him will be tried.

**4.2** Article 38(1) of the Constitution provides that:-

"No person shall be tried on any criminal charge save in due course of law"

In *P.M. v. Malone* [2002] 2 I.R. 560 Keane C.J. held as follows at p 572:-

"It must be acknowledged that a reading of some Irish authorities in this area might suggest that the right to a reasonably expeditious trial is recognised and protected by law solely in order to ensure the fairness of the trial process itself. As it is sometimes put, it is not the delay, but the effects of the delay that are crucial. Witnesses may die or disappear or where they are available, their memories of events in the past may be clouded and unreliable. The defendant may experience difficulty in establishing an alibi because of vagueness and imprecision as to when events are said to have occurred."

The applicant submits that the death of not one but several key witnesses who could have given evidence helpful to the applicant in his defence of the within proceedings is a significant prejudice which the Court ought to take into account in deciding whether to grant the relief sought. In May 1998, Councillor Jack Larkin died. On 24<sup>th</sup> May, 2003, Councillor Frank Smith died. On 3<sup>rd</sup> of August, 2003, Philip Monahan died. On 13<sup>th</sup> June, 2004, Dr. Brian Meehan died. On 9<sup>th</sup> October, 2007, Fintan Gunne died. On 1<sup>st</sup> January, 2011, Sean Gilbride died.

**4.3** The applicant submits that culpable prosecutorial delay is sufficient to ground an order of prohibition even in the absence of prejudice. In *B.F v. D.P.P* [2001] 1 I.R. 656 the applicant sought an order of prohibition from the High Court on the grounds that he had been prejudiced in his defence of the proceedings by an excessive delay in making extradition arrangements. In the Supreme Court Geoghegan J. (with whom Keane C.J. and Murphy J. agreed) held at p.665:-

"It is clear from the case law however that neither actual or presumed prejudice is in all cases essential to stop a criminal prosecution. In *Director of Public Prosecutions v. Byrne* [1994] 2 I.R. 236, two passages of Finlay C.J. in the Supreme Court make this clear. The first, which commences at p.244, reads as follows:-

'In many instances delay or lapse of time between the date of an alleged offence and the date of a proposed trial may have the consequence of creating a real or probable risk that the accused will be subjected to an unfair trial. This can arise in either of two ways. A court whose jurisdiction is invoked to prevent such an invasion of constitutional rights might be satisfied, from an excessive length of time itself, to raise an inference that the risk of an unfair trial has been established as a reality. More frequently as arose in *The State O'Connell v. Fawsitt* [1986] I.R. 362 the accused will be in a position to establish the real risk of a particular prejudice which would render the trial unfair.'"

The second passage of Finlay C.J., which I think it relevant to cite, is at the bottom of p.245, where he says:-

"I am driven to the further conclusion that, of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable would give rise to the necessity for a court to protect the constitutional right of the accused by preventing the trial, even where it could not be

established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

Although Finlay C.J. was in a minority in the view he took of the facts of that case, it is clear from the other judgments that the principle of law which he set out were accepted by all members of the court.

**4.4** In *PM v. Malone* [2002] 2 IR 560, Keane C.J. described the balancing exercise required of courts where prosecutorial delay is in issue, at 581:-

"The essential issue for resolution is accordingly, as to whether the stress and anxiety caused to the applicant as a result of the violation of his constitutional right to a reasonably expeditious trial justifies the prohibition of the trial proceeding at this stage. If this were a case in which it could be said that his ability to defend himself had been impaired and, as a result, there was a real and substantial risk of an unfair trial then, as pointed out by Denham J. in *D v. Director of Public Prosecutions* [1994] 2 I.R. 465, the applicants right to a fair trial would necessarily outweigh the community's right to prosecute. Whereas 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 the one hand 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, there is 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."

In the instant case, the applicant has put evidence before the Court that the delay in the prosecution of these proceedings has caused him considerable stress and anxiety as underlined by the fact that he was taken to hospital while in Garda custody. It is submitted that, consequently, the delay on the part of the prosecuting authorities has had consequences for the applicant and that he is entitled to the relief sought on that basis.

**4.5** *Fitzpatrick v. Shields* [1989] ILRM 243 involved a complaint that Ms. Fitzpatrick had committed fraud in 1983. The investigation lasted from 1983 to 1986 when Ms. Fitzpatrick was arrested. The prosecution indicated its intention to take depositions and the case was further delayed in December 1986 resulting in an adjournment until June 1987. Carroll J. in the High Court held that:-

"The cumulative effect of all of these delays is that a long delay at an early stage of the proceedings means that a short delay at a later stage which might have been unobjectionable is no longer tolerable. The delay in the preparation of the Book of Evidence is not tolerable taking all the circumstances of this case into account I hold that the Order of Prohibition sought by the Applicant should be granted."

The applicant submits that this case indicates that an order of prohibition can be obtained to restrain the prosecution of fraud charges notwithstanding the complexities involved in prosecuting such offences. This case also indicates that that the Court should readily intervene where such delay cannot be explained away on the grounds of complexity. Ultimately, as is clear from the affidavits filed on behalf of the respondent, this is a one witness case and there are no identified procedural or evidential difficulties which justify the undoubted delay.

**4.6** The applicant also seeks to rely on his rights under the European Convention of Human Rights. Article 6(1) of the Convention provides, *inter alia*, as follows:-

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Section 3 of the European Convention on Human Rights Act 2003 provides, *inter alia*, as follows:-

"3(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

As noted by O'Malley, *The Criminal Process* at paragraph 17.47:-

"The Court of Human Rights has also consistently held that in assessing the reasonableness of the time that has elapsed prior to the final disposal of the case, regard must be had to the particular circumstances of the case, the conduct of the applicant and the manner in which the matter was dealt with by the relevant authorities."

In *McFarlane v. Ireland*, the state was found to be in breach of its obligations pursuant to Article 6(1). The Court stated at paragraph 140 that:-

"the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant."

The Court concluded that the State had not provided any or any convincing explanations for the delays attributable to the State in relation to the prohibition actions, which had added to the overall length of the criminal proceedings. Accordingly, the Court concluded that the overall length of the criminal proceedings against the applicant had been excessive and failed to meet the "reasonable time" requirement in Article 6(1). The applicant submits that there has been a breach by the prosecuting authorities of section 3 of the European Convention on Human Rights Act 2003 by reason of the failure to determine the charges against the applicant within a reasonable time.

## **Respondents Submissions**

**5.1** In so far as the applicant makes any complaint in respect of prosecutorial delay it is clear that the only basis on which a prosecution can be enjoined is on the basis of the real risk test and that a complaint of delay *per se* does not provide a distinct or free standing basis for stopping a trial. The chronology of the investigation which was conducted has been addressed by D/Garda Harrington on affidavit. When considering the investigation it should be recalled that one cannot simply look at the book of evidence and work backwards with the benefit of hindsight. At the outset of an investigation of this nature the investigating authorities do not know who may have relevant testimony to give or what may emerge. The respondent submits that given the extensive nature of the

investigation, the number of persons who had to be interviewed and the serious nature of the allegations that had been made, the period of time that has elapsed is not an unreasonable time frame.

**5.2** In *PM v. DPP* [2006] 3 IR 172 the applicant was arrested, charged and cautioned on 11 December 2000, some 18 years after the first date on which it was alleged he had committed an offence. The Court decided that despite the presence of blameworthy delay, the applicant must satisfy the Court that he has suffered or is in real danger of suffering some form of prejudice as a consequence thereof in order to obtain relief. Kearns J. noted that in *Barker v. Wingo* (1972) 407 U.S. 514, a unanimous United States Supreme Court had noted that deprivation of the right to a speedy trial could work to the advantage of an accused person and that delay was not an uncommon defence since it had the effect of weakening the prosecution case upon which the burden of proof ultimately lay at the criminal trial. It followed that the deprivation of the right to a speedy trial did not per se prejudice an accused person's ability to defend himself. In *PM v. DPP* [2006] 3 IR 172, Kearns J. stated at p185:-

"I believe that the balancing exercise referred to by Keane C.J. in *P.M v. Malone* [2002] 2 I.R. 560 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 pursued to trial...

As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic."

**5.3** An issue debated in this case is the fact that the location of the applicant at any given time was unknown to An Garda Síochána. It may therefore be relevant to advert to the fact that the Supreme Court authoritatively considered the law of delay in the context of the execution of bench warrants in *Cormack v. DPP* [2009] 2 IR 208. Kearns J. (as he then was) stated at p.233:-

"...Nor should an applicant be granted relief where he himself has contributed to the delay in exercising the warrant by furnishing false particulars of his identity or address or by engaging in other forms of deceit and evasion to frustrate the Gardaí in the execution of their duties...

...However, members of the Gardaí cannot automatically be assumed to be in default where immediate execution of warrants does not occur, bearing in mind the multiple other duties and obligations requiring to be performed by them. They may encounter all sorts of difficulties when endeavouring to execute bench warrants which are brought about by deceit and false information given to them."

**5.4** In *H v. DPP* [2006] IESC 65, Murray C.J. laid down the law applicable to prejudice in the following terms:-

"...the Court is satisfied that it is no longer necessary to establish such reasons for delay. The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court would thus restate the test as:-

'the test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.'"

In *C.K. v. DPP* [2007] IESC 5, the Supreme Court emphasised the value of warnings by the trial judge in countering any asserted prejudice. Kearns J., with whom the other members of the Court agreed, held as follows:-

"The decision in *H v. DPP* [2006] IESC 65, thus ushered in a new approach to cases of this nature, being one whereby the degree of prejudice arising from the delay in bringing a prosecution is the principal test in determining whether prohibition should or should not be granted. However I do not interpret the decision in *H v. DPP* [2006] IESC 65 as establishing or laying down the proposition that if any degree of prejudice is established, that a trial must automatically be prohibited, given that there is ample judicial authority for the proposition that prejudice arising in certain circumstances may be overcome or countered by means of appropriate directions or warnings from the trial judge."

The respondent submits that in order for the applicant to raise prejudice he has to fully engage with the facts and explain why the missing witnesses are essential to his defence. Prejudice will not be sufficient to prohibit a trial if it relates to evidence the essence of which can be obtained from other sources. Even where the applicant establishes prejudice, the onus is on the applicant to establish why one cannot rely on warnings from the trial judge to ensure a fair trial.

**5.5** It is submitted that the applicant has not identified any material factors that indicate the existence of a real and serious risk of his not obtaining a fair trial as a result of the passage of time. It is further submitted that if the applicant is put on trial he will be in a position to put before the trial judge any of the matters which he alleges to be prejudicial to his defence. The alleged prejudice has been fully addressed in the affidavits of D/Garda Harrington. The respondent submits that the absence of the witnesses identified by the applicant do not give rise to a real risk of an unfair trial. The significant efforts to which the authorities went in order to speak to witnesses and to gather evidence is described in the affidavits of D/Garda Harrington. As is sometimes the case in these types of judicial reviews one is left with the impression that the applicant has no interest himself in seeking to make contact with and to call witnesses but is more interested in hoping that they are unavailable so that he can seek to suggest that he is prejudiced. While the applicant has claimed that delay has caused him stress and anxiety the respondent submits that he has not put forward a shred of objective evidence to support this aspect of his case. Indeed his grounding papers are notable for the absence of any medical evidence whatsoever. In the circumstances, to persist with this issue illustrates the wholly speculative nature of the prejudice case that is being advanced on his behalf.

**5.6** The applicant cannot seek to rely on the European Convention of Human Rights to seek to prohibit his trial. In *Barry v. Ireland* (Application 18273/04), 15<sup>th</sup> December, 2005, the Court of Human Rights found a violation of Article 6 of the Convention where an 80 year old doctor had to bear for 10 years the weight of 237 charges of a sexual nature. The Court awarded damages. In *TH v. DPP* [2006] 3 IR 520, the applicant sought to prohibit his trial on a charge of sexual assault by relying on *Barry*. Fennelly J. speaking for a unanimous Supreme Court addressed this in the following passage:-

"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... the decision of the Court leads to

a monetary award. It has no consequence for the pending prosecution.”

## Decision of the Court

**6.1** These proceedings arise out of the prosecution on indictment of the applicant in the Dublin Circuit Criminal Court on sixteen charges that the applicant corruptly gave sums of money to certain county councillors as an inducement or reward for voting in favour of motions to rezone certain lands at Carrickmines, County Dublin in 1992 and 1997.

It is alleged in charges 1-8 that, on various dates between 4<sup>th</sup> May, 1992 and 29<sup>th</sup> June, 1992, the applicant corruptly gave sums of money as gifts to members of Dublin County Council, on account of each of them voting in favour of a motion to rezone 108 acres of lands at Carrickmines. It is alleged in charges 9-12, that on 30<sup>th</sup> October, 1997 and 23<sup>rd</sup> December, 1997, the applicant corruptly gave sums of money to Councillor Liam Cosgrave, as an inducement to or reward for, voting in favour of two motions relating to lands at Carrickmines in the course of the making of the Dun Laoghaire Rathdown County Development Plan. It is further alleged in charges 13-16, that on 30<sup>th</sup> October 1997, and on a date unknown between 30<sup>th</sup> October, 1997 and 25<sup>th</sup> December, 1997, the applicant corruptly gave sums of money to a Councillor Tony Fox, as inducement to or reward for voting in favour of the said two motions. On 16<sup>th</sup> December, 1997 one of the motions to rezone part of the lands was passed. On 19<sup>th</sup> October, 2000 Frank Dunlop admitted at the Tribunal making corrupt payments to Councillors. In December 2001 CAB commenced an investigation following receipt of information from Dun Laoghaire Rathdown County Council. On 16<sup>th</sup> March, 2004 Frank Dunlop made a statement to the CAB. On 22<sup>nd</sup> October 2004 a file was sent to the DPP. On 26<sup>th</sup> July 2006, the CAB initiated proceedings against Jackson Way. On 13<sup>th</sup> July, 2008, the DPP directed that Frank Dunlop be charged with 16 charges of corruption. On 26<sup>th</sup> May, 2009 Frank Dunlop was convicted and sentenced. On 24<sup>th</sup> June, 2010, the DPP directed that six persons including the applicant be charged. On 19<sup>th</sup> October, 2010, the CAB proceedings commenced and the applicant was arrested at 4:15 pm shortly after leaving the Four Courts. On 22<sup>nd</sup> October, 2010 the book of evidence was served.

**6.2** The applicant submits that the facts of this case demonstrate that there has been a very considerable delay on the part of the prosecution authorities in prosecuting the charges against the applicant. The charges against him relate to events that took place between 14 and 19 years ago. Mr Dunlop first gave evidence of making corrupt payments as long ago as October 2000 and CAB commenced its investigation almost ten years ago in December 2001. It was not until October 2010 that the applicant was charged. While I accept the applicant's submission that there has been delay, it is now well established that delay *per se* does not provide a distinct basis for stopping a trial. In *PM v. Malone* [2002] 2 IR 560, the balancing exercise required of courts where prosecutorial delay is in issue was described by Keane C.J at p.581 as follows:-

“The essential issue for resolution is accordingly, as to whether the stress and anxiety caused to the applicant as a result of the violation of his constitutional right to a reasonably expeditious trial justifies the prohibition of the trial proceeding at this stage. If this were a case in which it could be said that his ability to defend himself had been impaired and, as a result, there was a real and substantial risk of an unfair trial then, as pointed out by Denham J. in *D v. Director of Public Prosecutions* [1994] 2 I.R. 465, the applicants right to a fair trial would necessarily outweigh the community's right to prosecute. Whereas 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 the one hand 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, there is 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.”

I am not satisfied that applicant is unable to defend himself due to stress and anxiety caused by the delay. In this regard it is noteworthy that the applicant has not put forward any medical evidence whatsoever.

**6.3** The delay involved in this case is clearly inordinate. The court must therefore consider whether it is excusable in the circumstances prevailing herein.

The two grounds advanced by the respondent in seeking to justify the delay are:-

- (i) The difficulty the authorities experience in locating the applicant because of ongoing ambiguity as to his whereabouts.
- (ii) The unavailability of the key witness Frank Dunlop to give evidence.

The respondent submits that the location of the applicant at any given time was unknown to An Garda Síochána and that they experienced great difficulty in tracking him down. On the other hand the applicant submits that he was openly living abroad, and points out that if RTE were easily able to make contact with him on the Isle of Man for an interview with Prime Time then surely the authorities would easily be able to contact him. When faced with such conflicting accounts the issue of credibility is key. In this regard it is noteworthy that the applicant has averred that he has not been resident in Ireland since 1989, when he moved overseas to pursue business interests. However in the early 1990's the applicant was the victim of an aggravated burglary at his home in Dublin. The applicant made a statement to the Gardaí stating that at that time it was his practice to drive in convoy with his wife to their house each evening. He gave a detailed account of his daily activities in Dublin that asserted his continual presence in Dublin at that time. The applicant has sworn a supplemental affidavit in which he has attempted to explain away this inconsistency by stating that at the time of this burglary he was simply visiting his wife. This is a patently unsatisfactory explanation. A blatant contradiction continues and calls into question the applicants credibility as to his location over the years. I am not satisfied that the applicants evidence as to his location at any given time is credible. The applicant has given addresses suggesting that he has been resident in Ireland, the Isle of Man, Switzerland, Gran Canaria and Gibraltar. I am reminded of the remark of the great Roman Cato the Censor who observed once that “a man with houses everywhere belongs nowhere.” In these circumstances I accept the evidence of the respondent that the applicant could not be contacted to progress his file.

**6.4** The second ground advanced by the respondent in seeking to justify the delay concerned the availability of Frank Dunlop to give evidence. On 19<sup>th</sup> October, 2000 Frank Dunlop admitted at the Tribunal to making corrupt payments to Councillors. On 16<sup>th</sup> March, 2004 Frank Dunlop made a statement to the CAB. On 13<sup>th</sup> of July 2008 the DPP directed that Frank Dunlop be charged with 16 charges of corruption. On 26<sup>th</sup> May, 2009 Frank Dunlop was convicted and sentenced. The respondent has argued that because of the absolute necessity that Frank Dunlop give evidence in the case against the applicant, the case could not proceed until the

Tribunal had concluded its work. It seems to me that had there been an attempt to initiate criminal proceedings while the Tribunal was still considering these matters, the persons involved would almost certainly have made an application to the High Court on the basis that their trial would be prejudiced by the continuance of the Tribunal. Thus, I accept the submission by the respondents that Mr. Dunlop was not available as a witness until the proceedings of the tribunal and the criminal proceedings involving him were concluded.

**6.5** The applicant has argued that as a result of the delay which has occurred in this case the state is in violation of its obligations under Article 6 of the convention which provides, *inter alia*, as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is possible that the State could be found to have acted in contravention of Article 6 due to the duration of the Tribunal and the consequent unavailability of the main witness. However, violation of Article 6 does not *ipso facto* result in a prohibition of the trial in question. In *TH v. DPP* [2006] 3 IR 520, the applicant sought to prohibit his trial on a charge of sexual assault by relying on the finding of the Court of Human Rights in *Barry v. Ireland*. Fennelly J. speaking for a unanimous Supreme Court addressed this in the following passage:-

"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... the decision of the Court leads to a monetary award. It has no consequence for the pending prosecution."

I am satisfied that while there has been an inordinate delay in these criminal proceedings, that delay is excusable by virtue of the difficulty in locating the applicant and the unavailability of the key witness.

**6.7** While the above finding is dispositive of this case, I feel that I should express my view that even if the delay was not excusable, I would find that the balance of justice lies very much in favour of the community's right to have these alleged criminal charges prosecuted. In *B v. DPP* [1997] 3 I.R. 140, Denham J. stated at 195 that:-

"It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offence with the community's right to have a criminal offence prosecuted."

The case herein arises from allegations of corruption of public officials. There is an overwhelming public interest in permitting allegations of this nature to proceed to trial before a jury. The state has invested significant resources in terms of time and money in Tribunals to investigate these allegations of corruption of public officials. Corruption of state officials is an attack on the integrity of the state itself and the whole apparatus of state governance. As such it is a crime of great gravity. Taking the entire history of this case into account including the difficulty in ascertaining where the applicant resided at any given time as exemplified by the contradictions contained on the affidavits and considering also the unavailability until recently of Frank Dunlop as a witness, I am satisfied that the delay herein is excusable. Even were this not the case, I am satisfied that the balance of justice would demand that these proceedings be allowed to take place. Finally in relation to any prejudice the applicant may encounter, there is ample judicial authority for the proposition that such prejudice may be overcome or countered by means of appropriate directions or warnings from the trial judge. In these circumstances I must refuse the relief sought.