Neutral Citation Number: [2012] IEHC 98

THE HIGH COURT

JUDICIAL REVIEW

2009 962 JR

BETWEEN

MICHAEL NOLAN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Hanna delivered the 10th day of February, 2012

On the 23rd of September 2009, leave was granted to the applicant by this Court (Edwards J.) to apply by way of judicial review to seek an injunction restraining the respondent from proceeding further to prosecute the applicant. The applicant seeks the following reliefs:

> 1. An Order restraining the respondent from continuing to prosecute the applicant in respect of the 77 offences alleged in the Statement of Charges contained at pp. 1- 17 of the Book of Evidence, at present pending before the Circuit Criminal Court and given Bill no. 344/09.
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> 2. Such further or other relief as to this Honourable Court will seem meet;
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> 3. An order pursuant to Order 84, Rule 20, of the Rules of the Superior Courts staying the further prosecution of the applicant herein on the charges complained of herein until the determination of these proceedings;
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> 4. The costs of and incidental to these proceedings.

Background facts
This case concerns the alleged sexual abuse of two persons by the applicant who is a retired member of An Garda Siochána and is a pensioner. He was born in 1938. He faces two counts of alleged sexual abuse relating to two persons as follows:

J.M.: 28 charges of indecent assault on dates unknown between 3rd of June 1978 and 2nd June 1981 beginning when the complainant was 11 years of age. J.M. came from a troubled family, her mother having had some form of psychiatric illness and her father was an alcoholic. Witness statements by the complainant set out in detail what is alleged. It is alleged that the applicant took advantage of her unfortunate and troubled circumstances, groomed her and abused her during this period. The abuse mainly took place in her bedroom, in his car, and in his house. In or about the summer of 1980 the complainant was sent to a residential home. It is alleged that the applicant visited her there, abused her there and took her away for day trips when he would also abuse her. She alleges that the applicant remained in contact with her up until 2006, such was their relationship because he had dominance over her.

E.D. (neé C): 49 charges of indecent assault on dates unknown between 1st of September 1980 and 23rd August 1986. It is alleged that the accused abused her in a similar way, the abuse starting when she was in fifth class in primary school. The alleged abuse took place at two locations including the applicant's house. The alleged abuse was frequent, once to three times a week. Witness statements by the complainant set out in detail what is alleged. It is alleged that, eventually and after she met her husband, she realised that what the applicant had been doing was wrong and she eventually confided in a friend about her suffering.

There are detailed witness statements from other persons who allegedly knew the parties at the time. For the purposes of this judgment I do not propose to outline their content.

The prosecution
Complaints were made to the Gardaí in September 2006 by E.D. and in January 2007 by J.M. The applicant was charged in January 2009. The applicant met his solicitor for an initial consultation on 11th February 2009. He had received telephone notification of the allegations in approximately 2007 and he was interviewed under caution on the 10th April 2007 by members of the Gardaí.

The prosecution came before Dublin Circuit Criminal Court. On 16th January 2009 the applicant was released on bail at Blanchardstown District Court to appear again on 27th February 2009, when the Book of Evidence was served on him and he was returned for trial to the Dublin Circuit Criminal Court. It was first listed in the Dublin Circuit Criminal Court list in Court 8 on 20th March 2009 and the Court made a s. 56 Order for videotapes and remanded the matter to a further mention date. Disclosure was sought and received by the applicant's solicitors. Further particulars on disclosure were sought in July 2009. The matter was listed on 27th May 2009 for mention when a Legal Aid Certificate for Senior Counsel was granted and on 28th July 2009 for mention for disclosure and other issues to be addressed and on that occasion it was further remanded for mention to 17th November 2009. The applicant's solicitor avers that he intends to contest the charges.

Grounds
The applicant submits that he now suffers from a condition which restricts his ability to properly and fully defend himself and has been prejudiced in that he has been denied his right to a fair trial.

He also submits that he is prejudiced because of a complainant delay and culpable prosecutorial delay between the making of the respective complaints in or about September 2006 (by E.D.) and January 2007 (by J.M) and being charged in January 2009, leading further to a deterioration in his condition and to further resulting prejudice he suffers in defending himself at trial.

Finally, the statement grounding the application states that he is prejudiced in the preparation and presentation of his defence by reason of the unavailability of eight named potential material witnesses. However it has now transpired that three of those eight people were available and they have provided statements which were exhibited on affidavit. Of the other people named by the applicant, four are deceased and one, J.M.'s father, has been uncooperative.

The application is grounded on the Affidavit of Dara Robinson, Solicitor, sworn on 21st September 2009. This sets out the history of the proceedings to that date, the applicant's initial consultation with Mr. Robinson, and details how initial medical reports were obtained. He sets out reasons why he believes this application should succeed. He submits that his client is suffering from a debilitating mental condition. He identifies what the applicant considers to be the complainants' and prosecutorial delay. He refers to potential witnesses who are not available and sets out why each of their not being available prejudices his client's case.

Statement of Opposition of the Respondent
In the Statement of Opposition, the matters set out in the applicant's statement to ground the application are denied. Further, the respondent states that the matters raised by the applicant in relation to the applicant's medical condition are matters more appropriately dealt with by means of a fitness to plead application pursuant to s. 4 of the Criminal Law (Insanity) Act 2006. The respondents deny undue complainant and prosecutorial delay but also state without prejudice to the denial that the respondent relies on the recent jurisprudence of the Supreme Court in respect of sex delay cases.

I propose to deal with each matter which it is alleged contributes to a prejudice which will be suffered by the applicant because of the delay.

The hearing of this application
The hearing of this application commenced on 2nd June 2011. The matter was part heard when it transpired that the applicant had been diagnosed as having atypical Alzheimer's disease. It appears that the applicant's legal advisors were unaware of this. A number of updated reports were provided after the hearing commenced on 2nd June 2011, and the authors of these gave evidence on the 4th of October 2011. Professor Brian Lawlor, Consultant Old Age Psychiatrist of St James Hospital diagnosed him as suffering from a form of Alzheimer's disease. Dr. Paul O'Connell, Consultant Forensic Psychiatrist at the Central Mental Hospital in Dundrum, Dublin who is a forensic psychiatrist, having read Prof. Lawlor's report agreed with it. Dr. Niall Pender Clinical Neuropsychologist attached to the Beaumont Private Clinic maintained his view that he is not disadvantaged. Oral submissions were heard from counsel on 5th October 2011.

Medical evidence
On 2nd June 2011, Dr. Anne O'Connell, Consultant Clinical Neuropsychologist, gave evidence with reference to her reports dated 27th May 2008, 14th July 2009 and 8th of February 2011 and Dr. Niall Pender gave evidence on his report dated 23rd June 2010. The applicant had Dr. Anne O'Connell's report of 27th May 2008 and that of a Dr. Coen dated 19th November 2008 in his possession on 11th February 2009 at his initial consultation with his solicitor and he gave these to his solicitor. Dr. O'Connell's first report was conducted to investigate the applicant's then level of cognitive and memory functioning, in the context of possible deep brain stimulation treatment and a family history of dementing disease. It is stated in the report that the applicant was referred to Dr. O'Connell by Dr. R.P. Murphy, Consultant Neurologist. In her affidavit of 11th September 2009 she states that the applicant was referred to her by Dr. Murphy on 27th May 2008 for an opinion on his cognitive capacity and his suitability for deep brain stimulation. The report concluded that the applicant had at the time a pattern of scores from tests which was "consistent with the presence of a mild dementing process." Margaret (second name not mentioned in the report but it is Ms. Cleary referred to later in this judgment) was interviewed separately from the applicant for a collateral history.

The applicant's solicitors wrote to Dr. O'Connell on 27th May 2009 seeking up dated reports from her in relation to the applicant's condition and the impact of same on his ability to address the case against him, and she reviewed him on the 14th July 2009. She did not get collateral information on this occasion as he attended alone. The report concluded that on neuropsychological testing he showed a significant decline in all areas of cognitive and memory functioning, to the mild range of learning disability, in the bottom 5% of the population. He showed very poor autobiographical memory and memory for public events, and when he did not know the answers he tended to confabulate, that is making up an answer rather than appearing foolish by not responding. His scores and the negative comparison with the previous report were consistent with the presence of an "ongoing dementing process." The significant rate of decline suggested that he would within 12 months be incapable of accurately or reliably reporting on life events or recalling things that have happened to him in the past. Dr. O'Connell concluded that he is not a credible or reliable informant and a further decline was expected. The addendum to be read in conjunction with the neuropsychological report on the applicant of the 14th July 2009 stated that he would not be capable of attending a 4-5 day trial, maintaining concentration and focussing on the information presented because his concentration skills were severely impaired. She swore an affidavit to this effect on 11th September 2009 referring to this addendum and her two reports.

On 8th February 2011 Dr. Anne O'Connell conducted a further assessment of the applicant, exhibited with an affidavit sworn the 18th February 2011. In advance of the review she read the report of Dr. Pender dated 23rd June 2010. She asked him about current events, and he did not have much awareness of them. She asked him about the pending court case, and he was upset thinking about his accusers. He said he could not understand why it was happening and he expressed no sense of wrong doing on his part. He scored 44/50 on recall on the test of memory malingering which she said is a satisfactory score. She concluded that neuropsychological testing indicates that on cognitive and memory tests he continues to function in the low average range of ability. His abilities had not deteriorated since his last assessment (report dated 14th July 2009), but he continues to score below his estimated pre-morbid levels of ability. However her previous conclusions continue to apply in that she believes that the applicant has suffered a decline in cognition and memory relative to pre-morbid estimates, and that this decline has an organic basis. She did not detect the presence of malingering or systematic poor effort on the applicant's part for secondary gain and she still believes that he will not be a reliable informant in court and that he will be unable to participate fully in any trial.

On the 2nd of June 2011 when giving evidence on her three reports, Dr. Anne O'Connell was asked if she carried out any specific effort tests at the time of the second report. She said that she compared the tests from the first assessment to that particular occasion and evaluated his mood also. Her reason for not doing effort tests were that she had to maximise her time with him – he would not be able for an 8 hour assessment. She said that her focus was the progress of the dementing process rather than to get into any of the criminal issues. She said that for the purposes of the second report she prepared in July 2009, she was not told in writing about the charges but was told over the phone. She was asked why the report did not refer to the fact of criminal charges being levelled against him, and she said that she was sticking to his memory. She didn't have any memorandum on how she was

informed about the charges and that they were of a sexual nature but she thinks it was from a telephone conversation. She said that she disagreed with the conclusion that the applicant was in some way deliberately underperforming. When asked by counsel for the respondent what her view was on Dr. Pender's conclusion that he could not rule out that performance has been adversely affected by secondary gain, Dr. O'Connell said that her professional judgment is that he is not trying to subvert the course of justice. When asked about effort tests, she agreed that they are a valid tool but said that they are one tool in a set of tools and that they are not always use for every single situation.

Dr. Pender gave evidence on the 2nd June 2011 in relation to his first report, dated 23rd June 2010. He saw the applicant on the 9th April 2010 and on the 23rd June 2010 and his first report is dated 23rd June 2010. During the assessment, the applicant said that he knew the two complainants well, they had wanted to marry him, he was the best thing that ever happened to them and that he knew that they were abused but that this was by their fathers and not by him. He was furnished with Dr. Anne O'Connell's reports of the 27th May 2008 and 14th July 2009, and Dr. Coen's report of the 19th November 2008 and his email dated 28th May 2009. He was furnished with the Judicial Review papers and the book of evidence in the case. He met with the applicant on two occasions prior to this report – in April 2010 and in June 2010. Dr. Pender stated that there was an inconsistent pattern in his assessment results. He appeared better than noted in the other assessments. He said that the tests of symptom validity raised serious concerns about the validity and severity of his cognitive impairments. He said that the findings were not consistent with a significant dementing illness of the Alzheimer's type. On the basis of his assessments he said he would suggest that one of the other factors that needs to be considered is poor symptom validity and poor effort which is being motivated by the secondary gain related to the case. He recommended that the applicant be reviewed by a specialist forensic psychiatrist in order to evaluate his mental health performance. He said that the neuropsychological assessment results are challenged by his performance on these tests and while he may well be suffering from some cognitive difficulties one cannot draw any firm conclusions about these due to his significantly poor performance effort.

Dr. Pender said that the applicant attended on his own and, therefore, no collateral history was available. He ruled out Alzheimer's but he agreed that there was some level of impairment. A family history of dementia increases ones risk. At that stage the MIRA clinic had not diagnosed Alzheimer's – this diagnosis was made in July 2011. He said that he had concerns in relation to variations in the tests and he could not rule out that the underperformance was adversely affected by secondary gain. He said that his report stated that the applicant's "performance fell well below even the most severe hospitalised dementia patients." The applicant failed easier parts of tests and passed harder pieces which is also extremely inconsistent. He was of the view that such inconsistencies can be caused by desire for secondary gain. He said that with dementia, once cognition becomes impaired one requires a great deal more support. Particularly at the level of severity with which he presents one would expect that he should require carers to come in every day and look after him and maintain his safety.

Medical Evidence given to the Court on 4th October 2011
As stated previously, information became available after the 2nd of June which resulted in an adjournment so that further reports be obtained. On the 4th of October Dr. Paul O'Connell, Dr. Pender and Prof. Lawlor gave evidence.

Two reports by Dr. Paul O'Connell, called by the applicant, were put in evidence: a report of the 1st of February 2011 and one of 27th July 2011. The report of the 1st February 2011 states that Dr. Paul O'Connell had received Dr. Coen's report of 19th November 2008, Dr. Anne O'Connell's report of 14th July 2009 and Dr. Pender's report of 2nd September 2010. He did not have Dr. Murphy's reports or the report of Damian Gallagher referred to by Dr. Coen. During the assessment leading to the report of 27th January 2011, Dr. O'Connell read out key points in the evidence to the applicant and noted his reactions. His conclusion on this first occasion was that the applicant could follow proceedings, and he could instruct his defence and make a proper defence. The applicant's performance in psychological tests had been inconsistent but he concluded that the applicant was fit to be tried, while accepting that given the family history of dementia there is a possibility that the applicant has a dementing illness.

In his report of 27th July 2011, a different conclusion is reached. This was influenced by Professor Lawlor's report of 11th July 2011 which had concluded that the applicant has Alzheimer's disease with an atypical presentation. It should be noted that Dr. O'Connell did not meet with the applicant before compiling his later report and had not, in fact, encountered him since the initial consultation on 27th January 2011. Dr. O'Connell's conclusion on this occasion was that the applicant had acquired a significant cognitive impairment – that his ability to make a proper defence would be impaired. He concluded that, in light of the recent clinical data from the Mercer Institute and from Prof. Lawlor supported by neuroimaging with MRI and PET scans as of July 2011, he changed his opinion and was of the view the applicant was unfit to be tried. He stated that Alzheimer's disease was a mental disorder as defined in the Criminal Law (Insanity) Act 2006.

He said that when writing his first report, he was of the view that there was evidence of cognitive impairment but this was complicated by evidence that the applicant was exaggerating that impairment in a range of tests. He gave evidence that he was of the view that there was a possibility of exaggeration or confabulation, and he said that he still thought that there is a possibility of this. However he took the view that this must be seen against the background of clear evidence of dementia. The possibility of a dementia was raised but the diagnosis was equivocal. He took a collateral history from a telephone conversation with Mrs. Cleary. He said that in July 2011 he he saw the report of Professor Lawlor which provided an up to date MRI brain scan and PET scan and clinical revaluation of the applicant's progress, and that the brain scan of July 2011 showed evidence of deterioration when compared to an earlier brain scan in 2008, which had some evidence of changes that were indicative of possible dementia. The July scan showed a wide range of changes that indicated loss of brain tissue generally in the brain, particularly in the temporal lobes and decreased functioning in parts of the frontal lobe and temporal lobes, and other changes were present too which were indicative of a separate disease process; namely a possible tendency to have small strokes. The overall pattern in Prof. Lawlor's view was that this was consistent with atypical Alzheimer's disease. This means that the progress of the disorder is slower than usual Alzheimer's. The effects of this were explained by Dr. O'Connell and can be summarised that the long term memory is generally intact but the impact is more on day to day living. It also affects a person's emotional tone, because memory and emotional reasoning and judgment can be impaired. Dr. O'Connell said that the applicant struck him as having a very bland demeanour which can be the sign of frontal lobe impairment and he was of the view that this demeanour could result in a jury regarding him as disconnected or disinterested in proceedings because he would not appear to be emotionally engaged with it.

Dr. O'Connell said that on the basis of Prof. Lawlor's report, he was of the view that there was clear evidence that the applicant suffers from Alzheimer's disease and that this would have an inevitable effect on his ability to participate in a criminal trial and compromised his ability to properly defend himself. He would be unfit to be tried. He said that he had concerns about the way in which the applicant might attend and concentrate throughout proceedings, and the extent to which his emotional tone and judgment may be at play throughout the proceedings in court.

On cross examination, he confirmed to counsel for the respondent that the issue that had changed for him was the certainty of the diagnosis of Alzheimer's and the extent to which it is likely to lead to a range of other impairments. He stated that he did not feel it

necessary to meet with the applicant again for the purposes of the second report. He said that the circumstances which obtained on day he met with the applicant in January 2011 were substantially altered with the knowledge that had arisen from the up to date brain scans and clinical view of Prof. Lawlor.

Dr. O'Connell obtained collateral history from Ms Cleary on the 27th of January 2011 which provided information on his day to day functioning and Ms Cleary's concerns over his memory and her view that he had deteriorated in the preceding two years. Dr. O'Connell confirmed that he was basing his opinion contained in his second report on Prof. Lawlor's conclusions in his July 2011 report.

On re-examination, Dr. O'Connell said that he did not disagree with the results of the tests conducted by Dr. Pender. He said that the MIRA imaging results for 2008 and more recently in 2011 showed evidence of progressive brain deterioration and that may help explain the history of deteriorating functioning over that period of time.

Dr. Pender then gave evidence with reference to his latest report. He met the applicant for the purposes of the report. He had seen Prof. Lawlor's report dated 11th July 2011 and was aware of the diagnosis of Alzheimer's disease with an atypical presentation. Dr. Pender did not have the benefit of collateral history at his examination. He said that he maintained his concerns relation to effort and poor performance. He concluded that even with the applicant's cognitive difficulties, he was fit to stand trial but he agreed with the views of Prof. Lawlor that he might require support and facilitation during the trial process.

Dr. Pender undertook a general neuropsychological examination which would normally consist of aspects of measuring cognition. He looked at aspects of intellectual ability. Symptom validity testing was undertaken, testing the efforts of the person being examined to ensure that the individual is applying good effort to the test. He failed many of the tests but there were some inconsistencies, in that there were differences between the various neuropsychological scores. In some he had improved from previous assessments and in some he had deteriorated. Dr. Pender said that his scores suggested that he was deliberately choosing alternative responses and he confirmed that he concluded that he was performing worse than people who are very severe Alzheimer's disease and who require 24-hour care. Dr. Pender said that his interpretation of the collateral history that was given to him in other reports indicated quite a degree of independent living.

On cross examination, he confirmed that he did not take a collateral history. The collateral history is usually to obtain a measure of functional deterioration or change. No person able to give a collateral history was available to be contacted. Dr. Pender agreed that the poor effort could be intentional, but it could also be because of poor mood and also it could be as a result of an unintentional psychological variable. He accepted that the applicant had been attending the MIRA clinic regularly. He accepted that that atypical Alzheimer's disease was diagnosed. However he said that there are many people with the disease who can function quite well. He agreed that there is a risk that he might or might not need assistance during the trial in the form of someone taking notes, to facilitate him and support him. He gave an example of someone who could take a record of proceedings and then go back over it with the applicant afterward to facilitate his passage through the trial. He also said that the applicant might need to take breaks more often because a full day in Court might be too much for him without such a facility. He might require clerical facilitation and support. Dr. Pender conceded that he was unfamiliar with the detail of court procedures.

He said that he thought there was a small risk that the applicant might fail to pick up on something because he wasn't prompted, or because he might fail in recall. He said that he did not witness the apathy and withdrawn presentation that Dr. O'Connell had encountered. He accepted were an accused to present peculiarly, he might be fit to stand trial in the classical sense but could be prejudiced because the jury could think him odd.

Professor Brian Lawlor, Consultant Old Age Psychiatrist of St James Hospital gave evidence with reference to his report dated the 11th July 2011. This gave the diagnosis of atypical Alzheimer's disease. He stated that this report is based on a review of records available concerning the applicant from his referring neurologist Dr. Ray Murphy, reports of his visits to the Memory Clinic at St James's Hospital between 2008 and 2011, his assessment of the 30th June 2011 and the results of brain MRI scans in 2008 and 2011 and a PET scan in 2011. Collateral history was obtained from Margaret Cleary. He concluded in the report that the history, neuropsychological testing and neuro-imaging results point to the diagnosis of Alzheimer's disease with an atypical presentation. Based on the evidence, the applicant would not be able to deal with a trial as he would find it difficult to follow and answer questions under direct and cross examination in a court setting. He also said that it is uncertain how good his recall would be for events that happened 20 years ago as there is no test or instrument that can guarantee the accuracy of a respondent's autobiographical recall in such circumstances.

Prof. Lawlor gave some background information as to the applicant's attendance at the clinic. He said that the applicant attended the memory clinic (MIRA) at St James's Hospital from 2008 to 2011 with memory complaints. Over the course of the clinic's serial assessments the staff at the clinic formed the opinion that he suffered from an atypical form of Alzheimer's disease based on the clinical picture, collateral history and the neuropsychological assessments that they performed. He said that the MRI and PET scans are consistent with the diagnosis of Alzheimer's disease. He said that scans are not absolutely diagnostic of Alzheimer's disease but they give confirmation and increased confidence in the clinical diagnosis of the disease. At the assessment in 2008, when he had memory complaints a pattern was found but that was not typical of Alzheimer's disease. But in 2010 he presented with a pattern more consistent with Alzheimer's disease on neuropsychological testing and it was also associated with the collateral history that he showed significant cognitive decline at that time. On a further assessment in 2011 again he had deteriorated. When asked about how the applicant would be able to deal with a criminal trial which might last up to five days in listening to the evidence being presented against him for the jury and being able to instruct his lawyers, Prof. Lawlor said that given that he has significant cognitive deficits, he thought it would be very difficult for someone like him with this level of cognitive deficit to be able to undergo direct and particularly cross-examination in a meaningful way in this type of setting.

In cross examination Prof. Lawlor was asked if the possibility of secondary gains was brought to bear in making assessments on the applicant, once he became aware of the nature of the charges against the applicant in or around 2009 by the applicant's solicitors. Prof. Lawlor said that it was something that he brought to bear when making the assessments, and for this reason collateral history was taken. He stated that there is no test that is absolutely definitive and diagnostic of Alzheimer's disease. It is primarily a clinical diagnosis but other tests are very much supportive and they help confirm the clinical impression of the disease. As regards Dr. Pender's evidence of a perception of some degree of exaggeration, Prof. Lawlor did not see the exaggeration and poor effort on testing. Prof. Lawlor said that MIRA Clinic does not administer malingering tests – he said that that would be in the realm of a forensic psychiatrist.

Counsel for the respondent put to Prof. Lawlor that Dr. Pender had administered a number of tests to the applicant in September 2011. The resultant scores in some were less than chance and, thus, were indicative of poor effort because less than chance means an element of deliberation. Prof. Lawlor said he had not seen the report based on those tests, and that he could only comment on the assessment that he had performed on the applicant. He confirmed that a collateral history was taken by a colleague of and he took

one in June 2011 over the phone with Ms Margaret Cleary. He was not aware that she is mentioned in the book of evidence (in the context of an allegation that the applicant and Ms Cleary were in some form of relationship, and also that he had some form of relationship with her sister Alice).

Prof. Lawlor said that had he been aware of the allegations in relation to Ms Cleary he would have also sourced further collateral from a different person. However, he said that his view had not changed as regards his diagnosis of atypical Alzheimer's disease, which is based on collateral history, the clinical assessment, the neuropsychological assessment the neuro-imaging.

A report of a Dr. Robert Coen dated the 19th November 2008 was put into evidence. It appears that the applicant had this report in his possession at his first consultation with his solicitor on 11th February 2009. The report concluded that the tests conducted revealed a striatofrontal profile of significant cognitive impairment with the findings broadly consistent with those reported in Dr. Anne O'Connell's neuropsychological assessment, dated 27th May 2008. It was stated that the findings were not Alzheimer-like – while memory was "patchy", his performance on a number of delayed recall and delayed recognition tests was entirely within normal range. Dr. Coen noted that there is a family history of dementia. He scored high for depression and high for anxiety. The applicant's solicitors wrote to Dr. Coen on 27th May 2009 seeking up dated reports from him in relation to the applicant's condition and the impact of same on his ability to recall specific events which may have occurred over 20 years previously. Dr. Coen replied by email on 28th May 2009 indicating that with current clinically available instruments it would not be possible in his opinion to answer the questions posed by his office with any real precision. He said that "[e]ven the available research instruments could only provide a very gross estimate of autobiographical memory recall from 20 years ago, and the reliability of information could be very open to question in any situation where there might be secondary gains as a potential motivating factor in determining the respondent's performance."

The Absence of Witnesses
Turning now to this aspect of the application and with reference only to the charges relating to J.M., it is argued by the applicant that the absence or loss of the evidence of potential witnesses with the efflux of time gives rise to a real and substantial risk of an unfair trial in the instant case. The following witnesses are unavailable:

J.M.'s mother
J.M.'s mother died in March 2007. At the time of the intial statement in January 2007 to the Gardaí she was alive. The applicant submits that it would be relevant to ascertain whether in fact her mother made a complaint to the Gardai as J.M. alleges and the circumstances around this in or around 1982.

J.M.' s father
J.M made allegations of serious indecent assault against her father when she was 11 years of age at a time just before she alleges the applicant began to indecently assault her. Therefore the applicant submits that he is clearly a potentially relevant witness since similar allegations are made against him. However, it is averred in Michael Kennedy's affidavit of 25th May 2011 that he has refused to co-operate.

J.M.'s grandmother
J.M.'s grandmother died in or around 1996 according to J.M. It is alleged that the Gardaí went to her house sometime in early 1982 in relation to the allegation that her mother made a complaint to the Gardaí. The prosecution have stated in disclosure that there is no record of any investigation in relation to the questioning of her grandmother or any investigation into such a complaint in or about early 1982.

J.M.'s brother (also J.M.)
J.M.'s brother died in 2008 is it stated in disclosure. Counsel for the applicant submits that he was generally close to the circumstances alleged against the applicant by the complainant J.M. in that he was living with her at all material times.

The applicant's mother
The applicant's mother is now deceased. It is alleged by the complainant that some assaults occurred in her house when she was present. Counsel for the applicant states that the fact that this person is deceased leads to a real risk of prejudice which cannot be avoided by any step open to a trial judge at a criminal trial, similar to the way in which the deceased missing spouse created a real and unavoidable risk in *C O'B v DPP* [2010] IESC 41.

The following three people were initially not located and their perceived non-availability for whatever reason was relied upon as of the applicant's case for this Judicial Review application together with those potential witnesses named above.

J.M.'s younger sister (H.M.)
H.M. is the complainant J.M.'s younger sister. Disclosure dated 24th June 2009 indicated that she is deceased. The applicant had argued that her absence created a very real risk of an unfair trial as she would be able to comment on certain matters in J.M.'s evidence. However this person was located and an Affidavit of Detective Sergeant Michael Kennedy exhibited a witness statement made, apparently, by her and dated 30th September 2011. The form indicates that it was given to the police in the Sussex area in England. I note that this statement is not signed however I accept that this must be an oversight. Also, whether or not the taking of the evidence was visually recorded is not ticked on the witness statement form. The statement confirms that the applicant used to take J.M. out in the evenings at the weekend and after school. It also confirms that the applicant visited J.M. in her bedroom during the night, but the witness said that she would "hide under the covers and go off to sleep", and that during the time that J.M lived in Warrenstown House she used to come home at weekends, and she used to get off the bus on the way back on a Sunday in the city centre to meet the applicant. At this time the applicant was banned for coming to the family home, but the witness believed it was because he used to give J.M.'s father money for alcohol. The statement also states that the applicant paid for J.M. to go on a holiday to Spain though she did not believe that he went on this holiday. She also remembers that he gave her gifts including jewellery and a very large Easter egg.

J.M.'s brother (W.M.)
In disclosure it was indicated that this witness was deceased. However, in Sergeant Kennedy's affidavit sworn on 4th November 2010 it was indicated that this witness was in fact available and he provided a statement dated 10th May 2011 to the Gardaí which is exhibited in Sergeant Kennedy's supplemental affidavit of May 25th 2011. The statement confirms that that the applicant took J.M. out regularly, and that J.M.'s mother did not agree with J.M.'s relationship with the applicant and this caused rows with his father.

A. W.
This man was located in Australia and he made a statement dated 9th April 2011 exhibited with Sgt. Kennedy's affidavit of 25th Mary 2011. J.M. alleges that the applicant abused her in April/May 1981 in a disused warehouse and that A.W. was in the area during this alleged assault and questioned her and the applicant. However, in his statement A.W. has no recollection of this. He said that he

remembered J.M. when he worked at Warrenstown House and he remembered the applicant calling to collect J.M. and take her out for the day. At the time he remembered wondering why such an older man would be taking out a physically developed teen on such a regular basis. He also states that in 1994 when he was a taxi driver he met J.M. (he had met her since Warrenstown also) and he went into her house where they had a conversation. He noticed men's shirts and he asked who owned them, she said that they were the applicant's, that he called around regularly and they were still good friends.

The Test: the Authorities
The applicant bears the burden of proof in this application. The test to be applied and it's rationale is thus described *H v DPP* [2006] IESC 55 by Murray C.J. (as he then was) at p.:

> "The Court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached. In such cases when information was presented concerning the reasons for the delay it was invariably a preliminary point to the ultimate and critical issue as to whether the accused could obtain a fair trial. In all events, having regard to the Court's knowledge and insight into these cases it considers that there is no longer a necessity to inquire into the reason for a delay in making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary.
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> …
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> This particular case illustrates the extensive affidavits and oral evidence along with psychological and medical reports which have come before the Court for the purpose of explaining the reason for an elapse of time between the alleged offence and the making of a complaint. Yet, in the end, what concerns the Court is whether an accused will receive a fair trial or whether there is a real or serious risk of an unfair trial."
>
> …"Therefore, the Court is satisfied that it is no longer necessary to establish such reasons for the 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."*
>
> Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case."

It is stated by Fennelly J. in *CD v DPP* [2009] IESC 70 "the relief of prohibition of a pending criminal trial can only arise exceptionally". In *DC v DPP* [2005] IESC 77 Denham J (as she then was) says:

> "The Director having taken such a decision the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
>
> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial."

Hardiman J in *McFarlane No 1* [2007] 1 IR 134: "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent." This requirement for such engagement was reiterated by Hardiman J in *JB v DPP* [2006] IESC 66.

Matters to be taken into account in applications such as this were summarised by Charleton J in *K v Judge Moran* [2010] IEHC 23 as follows (at para 9):

> "In all of these cases a multitude of decisions are opened to the Court. I intend to reduce these to a number of propositions:
>
> > (1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; *D.C. v. DPP* [2005] 4 I.R. 281 at p. 284.
> >
> > (2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; *P. C. v. DPP* [1999] 2 I.R. 25 at p. 77 and *The People (DPP) v J.T.* (1988) 3 Frewen 141.
> >
> > (3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable*; Z. v. DPP* [1994] 2 I.R. 476 at p. 506 – 507.
> >
> > (4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High

Court on judicial review should bear in mind that a District Judge will warn himself or herself, and that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in *The People (DPP) v. E.C.* [2006] IECCA 69.

(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; *C.K. v. DPP* [2007] IESC 5 and *McFarlane v. DPP* [2007] 1 I.R. 134 at p. 144.

(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; *H. v. DPP* [2006] 3 I.R. 575 at p. 622.

(7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; *P . T. v. DPP* [2007] IESC 39.

(8) Previous cases, insofar as they are referred on the basis facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; *H. v. DPP* [2006] 3 I.R. 575 at p. 621.

(9) I will attempt to apply these legal principles to my adjudication of the circumstances in this case. In doing so, I would simply comment, as a final observation on the law, that having read the relevant case law, it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; *The People (DPP) v. P. T.* [2007] IESC 39 and *Sparrow v Minister for Agriculture, Food and Fisheries* [2010] IESC 6.

The Omnibus Test

The applicant submits that the facts of this case give rise to wholly exceptional circumstances as envisaged in *H. v DPP.* In *PT v DPP* [2007] IESC 39, the test was applied in what authorities since have labelled "an omnibus" way by Denham J. as follows:

"In issue is the exception referred to in *H. v. The Director of Public Prosecutions:* whether it would be unfair or unjust to put the applicant on trial. Thus the relevant factors require to be identified and then a balancing exercise undertaken by the court.

In this case the factors relevant to the applicant's position are: (i) it is an old case, while this is not unusual in such a prosecution, it is a factor, (ii) the applicant is elderly, in his 87th year, and, (iii) the ill-health of the applicant.

On the other hand, the factors relevant to the prosecution require to be considered. There is the public nature of criminal law. Prosecutions are taken on behalf of the People of Ireland by the Director of Public Prosecutions. The court does not interfere lightly with a decision of the Director. As I stated in *D.C. v D.P.P.* [2005] 4 I.R. 281:-

´Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director having taken such a decision the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.

In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge.'

Factors may exist, or may develop after a decision has been made by the Director of Public Prosecutions, which would render a trial unjust. The issue in this case is whether such an exception has occurred. In this balancing exercise the court must give consideration to the right of the public to have crimes prosecuted. This is not an absolute, for prosecutions are taken when they are in the public interest. It is part of a justice system which is for the common good, which includes consideration of the constitutional requirement of due process. A prosecution is not an exercise in vengeance. While a court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole.

No single factor renders this case an exception. This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill-health may not be prosecuted. It is the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court. Of specific importance is that it is an old case, that the prosecution took some time to mount (I am not finding that there was prosecutorial delay but merely recording

the fact of the time lapse), that the applicant is an elderly man, in his 87th year, and that he is in bad health.

It demeans a system of justice if its process is one of vengeance, or has such a perception. It evokes concepts of primitive jurisprudence. The People of Ireland under the Constitution require that there be due process in the justice system. The courts are required to protect the integrity of that system, which may mean that in exceptional circumstances a prosecution should be restrained. It is a question of proportionality.

In all if the circumstances of this case I am satisfied that it is an exception as envisaged in *H. v. The Director of Public Prosecutions* and I would restrain the trial."

The applicant argues that the specific prejudice alleged arises specifically out of the delay in the bringing of these charges and accordingly he is entitled to the relief sought herein. The applicant relies on this aspect of prejudice as part of the cumulative effect of a number of factors, including his mental ill health and absent witnesses and evidence, which brings the case into the exceptional category of cases in which it is unfair or unjust to put an accused person on trial. (*P.T. v DPP* [2007] 1 IR 701).

Authorities on Trial Judges' Warnings
The respondent submitted that the trial judge may give an appropriate warning or warnings if required at the trial, citing *Z. v D.P.P.* [1994] 2 I.R. 476 at 507, where Finlay C.J. stated:

> *"With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this court in the case of D. v Director of Public Prosecutions that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."*

In *CK v DPP* [2007] IESC 5, the Supreme Court emphasised the value of warnings by the trial judge in countering any asserted prejudice. Kearns J., as he then was, stated:

> "…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. For example, the warning as to the deleterious effects of delay on human recollection …"

The Court continued:

> "Either the accused's ability to defend proceedings has been fatally compromised or compromised to such a degree as to be incapable of being rectified by appropriate directions or warnings from the trial judge or it has not. The resolution of that issue will turn on the facts and circumstances of each individual case. It is therefore now essential in these applications for prohibition in old sexual cases to fully and actively engage with the facts of the particular case. That is the main consequence of the simplification brought about by the decision in *H. v Director of Public Prosecutions.*
>
> In this regard the first question to be addressed is whether or not the applicant has discharged the onus of establishing on the balance of probabilities that he has been prejudiced by the consequences of delay to the extent that there is a real risk of an unfair trial. If that question is answered affirmatively, the applicant must further satisfy the court that it is a degree or type of prejudice which can not be overcome or countered by appropriate directions or warnings to the jury to be given by the trial judge. Only if he succeeds in both respects is he entitled to an order."

In relation to the warning to a jury, the respondent submits that the applicant has not shown how one could not rely on a warning from the trial judge to ensure a fair trial in this instance. The respondent submits 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 are prejudicial to his defence. The applicant, on the other hand, submits that there exists a real risk of an unfair trial due to the delay and that it cannot be avoided by appropriate rulings and directions to a jury on the part of the trial judge.

In *CC v DPP* [2006] IECCA 1, where a retrial was ordered because of the warning that was given, Kearns J. stated:

> "Quite obviously the nature and detail of the warning to be given to the jury in an old case will turn very much on the facts and circumstances peculiar to the case in question. A good example of an appropriate warning, being that given by Haugh J in *The People (DPP) v R.B.,* was approved on appeal in that case and was further approved in *The People (DPP) v P.J.* [2003] 3 I.R. 550 by this Court and was in the following terms:-
>
> > 'I now want to move from the general, not totally to the particular, but to this kind of case. You have heard in this case, and it is undoubtedly a further difficulty for the case, that this is a case of an old complaint. The events that you have to decide here are alleged to have occurred more than fifteen years ago. It obviously makes the task for a jury and the task for a court in trying these cases a lot more difficult. As Mr. McKeon says, they normally degenerate into one man's word against another, a 'you did, I didn't, you did, I didn't' kind of a contest and that is because when you are dealing with old complaints, you are dealing with events from a long time ago and for the very reason that they are so old they generally lack precision, they generally lack detail. And it is in precision and in detail that cross-examinations generally take place. Witnesses seldom change their stories and admit that what they had said was a fabrication or a lie. You probe looking for the truth by questioning people in relation to detail. If there are contests, as there is in this case or any case where there is a plea of not guilty, again it is much easier to defend an allegation when there is detail alleged against you. If somebody alleged that any one of you had assaulted me in the middle eighties and left it no more than that, it is very, very hard for you to defend it. I think that would be accepted by all of you and it is, no doubt, so. But if I had complained that one of you had assaulted me last July, if I had complained that one of you had assaulted me on the 17th of July, the chances are that you will be able to work out your whereabouts at that time and who can vouch for you at that time and be able to grapple with issues on the basis of detail. You will be able to look up your diaries maybe, if you keep them, or check with your employers if you have them and your may have been on holidays. But how can a person be expected to attack the allegation, to contest the allegation with any subtlety, with any detail, with any forensic form of attack if all you are told about it is that you did it about fifteen years ago on some date unknown over a period of eighteen months? That, I suggest to you, makes it far harder to defend it than it is to prosecute it. In fact, to prosecute it is easier if you do not nail your colours to the mast because there is less you can be cross-examined on. But the law does not say that stale cases, old cases, cannot be tried. But what I must tell you is that an accused person

> cannot in your minds or in your consideration be disadvantaged because the case is old, because the complaint is related to events from a long time ago. You have to be all the more careful and it should be much harder to satisfy you in relation to an event that is phrased in a vague and general way, rather than an event which carries details or particulars. You cannot let the fact that Mr. B. is handicapped by reason of the lack of precision in the charge cause you to come easier to a decision adverse to him. The State should not take benefit from old cases. Their life should not be made easier by bringing old cases. Juries must, with their hand on their heart, recognise the huge difficulty that accused persons have of dealing with old cases and be all the more careful and take that into account when arriving at a decision.'

In *The People (DPP) v Gentleman* [2003] 4 I.R. 22, Keane CJ. underlined the need to give an appropriate warning which would be adequate in the circumstances of the particular case, stating at p.25:-

> 'This was quite obviously a case in which one would not be in the least surprised to find that a trial judge would consider it necessary to give a warning for three reasons; first of all, there was no corroboration of the victims story; secondly, this happened some 22 years ago and time can do strange things to people's memories of events so long in the past; thirdly there was no complaint made at the time and while there may well have been reasons, assuming the complainant's version of events were true, as to why there was no complaint it is nevertheless a factor to be considered. These were all points to which the jury's attention had to be drawn once the trial judge had quite properly come to the conclusion that this was a case in which, clearly, a warning should be given.'
>
> It is common case that a warning most certainly had to be given in the instant case but this court is of the view that the requirements set out in *The People (DPP) v P.J.* [2003] 3 I.R. 550 as outlined above were not adequately dealt with.
>
> It seems to us that whatever prejudice arises by virtue of delay in the case of a single complainant can only be seen as exponentially magnified where there are multiple complainants and a single accused. His difficulties of recollection, his difficulties in finding witnesses, or of even remembering the identity of individual complainants are all magnified in direct relation to the number of complainants who come forward. So, while the difficulties of delay may in such circumstances recede to some degree from the prosecution's point of view, they are multiplied and exaggerated from a defendant's point of view."

Hardiman J in *JB v DPP* [2006] IESC 66 stated as follows [2006] IESC 66:

> "Firstly, I entirely agree with what is stated by Mrs. Justice Denham in her judgment in this case:
>
> > "Of course the issue of delay will be a matter of importance for the trial judge. The fact that an application for a prohibition has not succeeded does not dispense a judge from his constitutional duty to ensure due process in the trial. By its very nature the delay in this case will be a matter for a trial judge to consider and address from several aspects.
>
> As I stated in *DPP v. O'C.* [2006] IESC 54:
>
> > '... whether an application for judicial review is made or not, the trial court retains at all time its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial matters may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding. This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay.' "
>
> The jurisdiction of the trial judge will, of course, be exercised on the case as it develops before him. It may take the form of preventing the trial from proceeding, or of appropriate warnings or cautions to the jury about the case as a whole or about special aspects of it. It appears to me that this jurisdiction must be exercised in the light of a realisation that a trial of a very old case has inherently dangerous aspects to it: memories fade, witnesses or potential witnesses die or become unavailable, the allegations in themselves tend to lack specificity and the capacity to contradict a complainant on specific details may have been wholly lost due to these things, either one of them alone or in combination. It must also be borne in mind, as illustrated in cases such as *DPP v. F.* (unreported, Court of Criminal Appeal, 2nd December, 1996) and *DPP v. B.J.* [2003] 4 IR 525, and *DPP v. N.W.* (unreported, Court of Criminal Appeal, 16th December, 2005) that immensely damaging failures of memory may take place, even in trained and professional people, in periods of time which are, compared to some of the delays the Courts have become used to, very short."

Findings

Finding on the Applicant's Medical Condition as a ground for Prohibition

The applicant submits that he suffers from a cognitive impairment which has deteriorated over time to such an extent so as to create a real risk as to his ability at trial, before a jury to recall sufficiently and give evidence in chief before a jury in his defence, to answer questions under cross examination before a jury to the standard required, and to recall and instruct with sufficient clarity his lawyers to enable them to cross examine the complainants and thereby put in doubt their reliability as witnesses before a jury. The applicant relies on the evidence of Dr. Anne O'Connell, Consultant Clinical Psychologist, Prof. Lawlor and Dr. Paul O'Connell.

Counsel for the applicant submits that the applicant suffers from a cognitive impairment which has now been diagnosed as atypical Alzheimer 's disease, it affects his ability to understand and deal with complex information, and his decline in cognition and memory is to be viewed in the context of a history of dementia in the applicant's family. Counsel cites the decision of Peart J. in *J'OC v DPP,* where an order was made prohibiting the prosecution of the applicant on the basis that he was suffering from early onset Alzheimer's disease which resulted in a real and substantial risk that a fair trial of the applicant would not be possible. Peart J. stated:

> "I have arrived at my conclusion, supported by the similar conclusion of Dr. Pickett and Dr. McCarthy, that the applicant is suffering from a medical condition, Alzheimer's disease, which is clinically proven and which is of such a nature and degree as to prevent the applicant from properly and adequately instructing his legal team for his defence to serious charges, and to such a degree that there is now indeed a real and substantial risk that, were he to face trial on these charges, he could not be said to have a fair trial. I consider that this consideration outweighs the counterbalancing

consideration of the complainant's and society's right to have persons accused of offences brought to trial."

The respondent submits that issues in relation to the applicant's medical condition are more appropriately dealt with by means of a fitness to plead application pursuant to s. 4 of the Criminal Law (Insanity) Act 2006 and that it is not the purpose of judicial review proceedings to determine whether or not a person is fit to stand trial. The respondent highlighted the doubts that Dr. Pender had in relation to the severity of the applicant's medical condition.

In relation to what the applicant's actual condition is, there are obviously some conflicts in the reports. They highlight the following points: Dr. Pender has concluded that there are serious concerns about the validity and severity of the applicant's alleged cognitive impairments and has essentially suggested that he is trying to fool the doctors in order to avoid a criminal trial. The first report of Dr. Anne O'Connell (when the applicant was 69 years of age) concluded that his answers to questions are "consistent with the presence of a mild dementing process." Dr. Coen concluded that his "performance on a number of delayed recall and delayed recognition tests was entirely within normal range." Obviously matters have moved on since those tests and the applicant has been diagnosed with Alzheimer's diseased by the MIRA Clinic. However, as Dr. Pender stated, the effects of Alzheimer's disease vary and some people that suffer from it are able to function.

The conflict, such as it is, between the medical witnesses called on behalf of the applicant and Dr. Pender is difficult to resolve. Professor Lawlor (upon whose findings Dr. Paul O'Connell placed reliance) stands by his diagnosis notwithstanding the fact that it is based in part on a questionable collateral history, provided by Ms. Cleary. Indeed, had the question of the reliability of the said source been brought to his attention, he would have sought information elsewhere. On the other hand, Dr. Pender, being of the opinion that the applicant would be able to face a trial, did admit to a shortfall in his knowledge and experience of the process of criminal trials. Certainly, his suggestions as to how the applicant may, if necessary, be assisted were not entirely clear. On an overview of the evidence, I find that the change in stance as to the applicant's mental ability to face trial is somewhat undermined by reliance on potentially unsatisfactory collateral history and the tests conducted by Dr. Pender which raise the question of self-serving motivation on the applicant's part.

At day's end, the onus of proof rests with the applicant. I must weigh in the balance and must assume that the applicant faces a trial presided over by a judge who will ensure vindication of the applicant's legal and constitutional rights. I am not satisfied on this aspect of the case that the applicant has shown any sufficient denial of or prejudice to his right to a fair trial. Therefore I am of the view that the applicant's argument on this ground fails. An application may be made to the trial judge under s. 4 of the Criminal Law (Insanity) Act 2006 if the applicant and his legal team deem same appropriate.

Finding on unavailability of witnesses ground
In relation to the lack of witnesses, counsel for the applicant submits that there is a real risk that the applicant will not get a fair trial, citing *MR v DPP* [2009] IEHC 87 and *P.T. v DPP* [2007] 1 IR 701.

The respondent submits that it is not sufficient to prohibit a trial if it relates to evidence the essence of which can be obtained from other sources. The respondent submits that the applicant must fully engage with the facts and clearly explain why the missing witnesses are essential to the defence. The respondent submits that the persons identified by the applicant are not included in the book of evidence and are not therefore missing prosecution witnesses. The respondent states that the applicant has not sought out any witnesses he feels might assist his case and cites O'H v DPP, Supreme Court 28th March 2007, for the authority that it is primarily for a defendant to seek out any witnesses he feels will assist his case. The respondent points out that The unavailability of witnessed issue relates only to J.M. and not E.C.

The respondent submits, citing *H. v DPP* [2006] IESC 55, that the fact that there are two complainants in the present case is a relevant factor. Murray CJ stated:

> "The Court is satisfied that in the same way as the fact that there is one complaint is a relevant factor, so too is the fact that there are a multiplicity of complaints a relevant factor for consideration by the court in determining whether to grant the relief sought."

I am not persuaded that the evidence of those witnesses who are deceased or the rest, cooperative or otherwise, inflicts any impediment on the applicant's ability to defend himself. Much of what is referred to is neutral as far as he is concerned. Indeed, some evidence, for instance A.W., who is apparently available, might be viewed as supportive of the applicant and contradictory of J.M. The applicant has not convinced me or sufficiently addressed how any evidential shortfall prejudices him as far as J.M. is concerned. E.D. is not addressed at all under this heading.

Finding on Complainant Delay
It has been accepted that the reasons for the delay are not relevant to the test that is to be considered by the Court (*H v DPP* [2006] IESC 55, Murray C.J. referred to above).

Therefore, 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 injuncted is on the basis of the real risk test and that complainant delay no longer provides a distinct or free-standing basis for stopping a trial.

Finding on Prosecutorial Delay
The first complaint was made by E.D. on 20th September 2006. The second complaint was made by J.M on 28th January 2007. On the 13th of May the file was forwarded to the Chief Prosecution Solicitor for transmission to the respondent. On the 8th September the respondent issued directions. On 16th January 2009 the applicant was arrested and charged. On the 27th February 2009 the Book of Evidence was served (and the applicant's submissions state that on this date the accused was returned for trial). On 23rd September 2009 the applicant sought and obtained leave to bring the within proceedings. Leave to seek judicial review was granted by Edwards J.

The respondent submits that given the extensive nature of the investigation that was required to be conducted, a period of less than two and a half years between the initial complaint and the service of the Book of Evidence is not an unreasonable time frame. I am of the view, given the detailed witness statements and amount of investigation that had to be conducted, that the applicant has not demonstrated that such a period of time was unreasonable in the circumstances.

The public interest
The respondent submits that there is an overwhelming public interest in permitting allegations of this nature to proceed to trial before a jury. In *B v DPP* [1997] 3 IR 140 Denham J. stated that:

> "It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted."

Counsel for the respondent states that in that regard the public interest in seeing the allegations tested before a jury is clear. *McFarlane v DPP (No 2)* [2008] IESC 7 Kearns J. (Hardiman and Macken JJ concurring) stated:

> "Having regard to the public interest in seeing serious crime prosecuted, the onus on an applicant to engage in a specific way with the particular facts, particularly where prejudice is alleged, cannot be overstated. References to the community's right to prosecute are not mere shibboleths to which nominal lip service only must be paid. That right is an essential element in a properly functioning criminal justice system. Vague allegations of prejudice fall well short of what an applicant must demonstrate if he is to secure prohibition."

I am not persuaded that, under any of the headings or grounds advanced by the applicant, individually or collectively, that the trial should be stopped.

Section 4 of the Criminal Law (Insanity) Act 2006

The respondent contended that the applicant's medical condition is not a valid basis for prohibition and that in this regard matters should be dealt with by means of a fitness to plead application pursuant to s. 4 of the Criminal Law (Insanity) Act 2006. Counsel for the respondent cited the decision of Charleton J in *K v Judge Carroll Moran*. Notwithstanding the provisions of s. 4 being drawn to his attention, he proceeded to grant prohibition on the established test taking all of the factors into account. It was held that the applicant in that case was regarded as "one of the very few applicants who fall within the category of succeeding in showing that there is a real risk of an unfair trial due to delay." The Court's comments on s. 4 are helpful in this case however, as in this case I am not of the view that there is one ground that results in the applicant succeeding, nor under the "omnibus" test do I believe that the cumulative effect of all of the circumstances result in a prejudice to the applicant. Charleton J stated as follows in relation to s. 4:

> "One further argument has been advanced on behalf of the applicant. It is contended that I should stop the trial by reason of the fact that the accused is not fit to plead. This matter, in my view, is fully governed by s. 4 of the Criminal Law (Insanity) Act 2006. Under it, a person is unfit to be tried if he or she is unable by reason of a mental disorder to understand the nature and course of criminal proceedings so as to be able to plead guilty or not guilty to the charge, to instruct a legal representative, to elect for trial by jury where same is available, to make a proper defence, to challenge a juror who might be thought worthy of being objected to or to understand the evidence. Where a Court determines that an accused person is fit to be tried the proceedings should continue. The trial Judge determines the question of fitness to be tried sitting alone. Prior to the Act, it was determined by a jury if there is a finding made that the accused is not fit to be tried then the Judge may adjourn the proceedings and may, further, order him or her to be detained for in-patient care, or order that the accused should receive out-patient treatment. In addition, a Judge may embark on a trial, without a jury, as to whether the accused person did the act alleged in the indictment. Where the Judge finds that there is a reasonable doubt as to whether the accused did the act alleged then the Court may order that the accused should be discharged.
>
> There is no possible basis for substituting an inquiry on judicial review for this comprehensive statutory code. Nor do I find that there are any grounds made out whereby I would have an entitlement to bypass the intention of the Oireachtas on the proper disposal of those in respect of whom a question arises as to whether they are fit to plead."
>
> We have not been engaged in determining whether or not the applicant is fit to plead. That remains within the purview of the trial judge."

Decision

Returning to the test as set down in *H v DPP,* in the circumstances, I am not of the view that the applicant has proven that there is a real or serious risk that, by reason of the delay involved in this case or for any other reason advanced, he would not obtain a fair trial. This case should proceed to trial and the trial judge can deal with the conduct of the trial including such application or applications as may be made or any difficulties if they arise as appropriate. I dismiss this application.