THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 42 J.R.]

BETWEEN

MICHAEL LOWRY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

FIRST NAMED RESPONDENT

AND

HIS HONOUR JUDGE THOMAS TEEHAN

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 23rd day of February, 2016

Introduction

1. In these proceedings, the applicant seeks an order against the first respondent ("the DPP") prohibiting the continuation of a prosecution against the applicant in the Circuit Criminal Court, the proceedings having Bill No. TYDP0029/2014. In the alternative, the applicant seeks an order of prohibition of the continuation of these proceedings pending the publication of the findings arising from two matters, first the investigation by the Criminal Assets Bureau into the alleged disclosure of certain taxpayer information relating to the applicant and secondly, the referral of the dossier of Mr. Gerard Ryan to the Garda Bureau of Fraud Investigation. Various ancillary declarations are also sought.

The Indictment

2. The indictment in issue contains five counts as follows:-

> "***Count 1***
>
> **Statement of Offence**
>
> Knowingly or wilfully delivering an incorrect return, statement or account or information in connection with tax contrary to s. 1078(2)(a) of the Taxes Consolidation Act 1997.
>
> ***Particulars of Offence***
>
> Michael Lowry, being resident at Glenreigh, Holycross in the County of Tipperary, on or about 21st October, 2003, knowingly or wilfully delivered to the Collector General of the Revenue Commissioners an incorrect income tax return for the year 2002.
>
> **Count 2**
>
> **Statement of Offence**
>
> Consenting or conniving the the knowing or wilful delivering an incorrect return, statement or account or information in connection with tax by a body corporate contrary to s. 1078(2)(a) and 1078(5) of the Taxes Consolidation Act 1997.
>
> **Particulars of Offence**
>
> Garuda Limited, a body corporate, did on or about 22nd day of December, 2003, knowingly or wilfully delivered to the Inspector of Taxes for the Thurles District, incorrect accounts in connection with corporation tax for the year ending 31st December, 2002.
>
> And the said offence was committed with the consent or conniving of Michael Lowry, being resident at Glenreigh, Holycross in the County of Tipperary, who was at the time a director, manager, secretary or other officer of the said Garuda Limited.
>
> **Count 3**
>
> **Statement of Offence**
>
> Consenting or conniving the knowing or wilful delivering an incorrect return, statement or account or information in connection with tax by a body corporate contrary to s. 1078(2)(a) and 1078(5) of the Taxes Consolidation Act 1997.

Particulars of Offence

Garuda Limited, a body corporate, did on or about 22nd day of December, 2003, knowingly or wilfully deliver to the Inspector of Taxes for the Thurles District incorrect information in connection with corporation tax for the year ending 31st December, 2002, to wit an incorrect corporation tax computation.

And the said offence was committed with the consent or conniving of Michael Lowry, being resident at Glenreigh, Holycross in the County of Tipperary, who was at the time a director, manager, secretary or other officer of the said Garuda Limited.

Count 4

Statement of Offence
Consenting or conniving the knowing or wilful delivering an incorrect return, statement or account or information in connection with tax by a body corporate contrary to s. 1078(2)(a) and 1078(5) of the Taxes Consolidation Act 1997.

Particulars of Offence

Garuda Limited, a body corporate, did on or about 3rd day of August, 2007, knowingly or wilfully deliver to the Collector General of the Revenue Commissioners an incorrect information in connection with corporation tax for the year ending 31st December, 2006.

And the said offence was committed with the consent or conniving of Michael Lowry, being resident at Glenreigh, Holycross in the County of Tipperary, who was at the time a director, manager, secretary or other officer of the said Garuda Limited.

Count 4 (sic)

Statement of Offence

Wilfully causing a company to fail to keep proper books of account contrary to s. 202(1) and 202(10) of the Companies Act 1990.

Particulars of Offence

Garuda Limited, a body corporate, did between 28th day of August, 2002 and 3rd day of August, 2007, both dates inclusive fail to keep proper books of account within the meaning of s. 202 of the Companies Act 1990 insofar as the said books of account did not correctly record and explain the transactions of the company.

And the said offence was caused to be committed by reason of the wilful acts of Michael Lowry, being resident at Glenreigh, Holycross in the County of Tipperary, who was at the time a director, manager, secretary or other officer of the said Garuda Limited."

Background Facts
3. The applicant was, at all material times, a director and shareholder in Garuda Limited trading as Streamline Enterprises ("Garuda") and involved in its management. Garuda's business involved the sale and distribution of refrigeration equipment, some of which was supplied by a Finnish refrigeration manufacturing concern, Norpe OY ("Norpe"). In August, 2002, a sum was due from Norpe to Garuda in respect of commission fees in the amount of STG£248,624, its euro equivalent being €372,000.

4. On the applicant's instructions, Norpe did not pay this sum to Garuda in August, 2002, but instead, paid it into a bank account in the Isle of Man controlled by a Mr. Kevin Phelan and stated to be for the benefit of the Glebe Trust, a private family trust of Mr. Phelan. This payment did not appear in the accounts of Garuda for the year 2002 and as a consequence, Garuda showed a net loss for 2002, instead of a net profit had the payment appeared in its accounts.

5. In January, 2007, the applicant instructed Garuda's accountants to show this payment in the company's accounts for the year 2006. An invoice dated 31st December, 2006, was generated by Garuda in respect of this payment which purports to describe the payment as "Commission to 31/12/06 372,000". This invoice is alleged by the prosecution to be false.

6. The payment was then recorded in the company accounts and a sum paid in respect of tax. However, this sum was underpaid allegedly as a result of two errors. The first was that the relevant tax rate for 2006 was used instead of the higher rate applicable in 2002. Secondly, the relevant sterling to euro conversation rate for 2006 was used instead of the less favourable 2002 rate. As a result of this underpayment, additional tax and interest was paid by Garuda on 7th November, 2013, in the amount of €38,477. This comprised €13,430 for the balance of tax due with the remainder of €25,064 being interest.

7. On the 26th January, 2013, Dr. Elaine Byrne, a journalist with the Sunday Independent, met with Mr. Phelan who gave her a tape recording. This tape recording purports to be of a telephone conversation in 2004 between Mr. Phelan and the applicant in which the applicant makes certain statements concerning this payment to Mr. Phelan. This tape recording subsequently became known as "the Lowry Tapes".

8. In the days following this meeting, it is alleged by the applicant that Mr. Phelan was in contact with a company in London called Pavilion Capital Partners Ltd. ("Pavilion"), which provides litigation funding. It is alleged by the applicant that Mr. Phelan entered into a contract with Pavilion whereby he agreed to provide certain assistance to parties involved in litigation against the State and the applicant, inter alia.

9. On the 6th February, 2013, Mr. Phelan wrote a letter to the editor of the Sunday Independent. In it, he expresses dissatisfaction about the fact that a story may be published in the Sunday Independent concerning the applicant arising from material and information furnished by Mr. Phelan. In relation to the tape recording, he says:-

> "Further, I am not satisfied in the way in which a taped conversation was taken from me. I have been informed by your employee that the tape taken has been copied; this action was without my authority. I cannot confirm the accuracy of the copied version of the tape and therefore cannot authorise its use by your newspaper."

He goes on to request that the tape and documentation given to Dr. Byrne be destroyed.

10. On the 12th February, 2013, Mr. Phelan emailed Dr. Byrne advising her that he had entered into a legally binding arrangement with Pavilion who were not impressed by the fact that Mr. Phelan had disclosed information to Dr. Byrne. Mr. Phelan alleges that he was told by Pavilion that he had breached their agreement thus potentially exposing himself to litigation by them. He alleges that the letter of the 6th February, sent to the Sunday Independent was drafted and put before him for signature. He concludes the email saying:-

> "At the end of the day we all have the same target and are essentially on the same side. I know Pavilion can deliver litigation funding and my files will definitely help to make that possible. Pavilion also understand that you have worked very hard on this matter and they firmly believe that the work they are doing with the assistance of a very large firm of London solicitors will make your article easier and less risky in the circumstances. I have forwarded your further questions to Pavilion for their advice and opinion as I do not want to have any further stress with them.
>
> I trust you understand the full background now which may go some way to explain the events of last week."

11. On the 23rd February, 2013, Dr. Byrne furnished a copy of the audio recording to an officer of the Criminal Assets Bureau and made a statement to the Bureau.

12. On the 24th February, 2013, the Sunday Independent published as its lead front page story an article entitled "Revealed – Lowry Taped", the story containing a full transcript of the tape recording. Between that date and the 12th May, 2013, the Sunday Independent published some seven leading articles critical of the applicant based on the content of "the Lowry Tapes". The audio recording itself was broadcast on the 14th March, 2013, in the course of a television current affairs programme.

13. It would appear that in late March, 2013, as a result of the publication of the Lowry Tapes, an investigation was commenced by the Revenue Commissioners into the tax affairs of the applicant and Garuda in the context of the Norpe payment.

14. Pursuant to this investigation, on the 23rd July, 2013, the Revenue Commissioners applied to the District Court in Thurles for a search warrant in respect of the applicant's dwelling house and the offices of Garuda. Simultaneously, the Revenue Commissioners applied to the District Court in Blanchardstown for a search warrant in respect of the offices of the accountants of both the applicant and Garuda at Foxrock, Co. Dublin.

15. Between October and December 2013, a number of summonses were issued by the DPP against the applicant in respect of the matters which are the subject of counts 1-4 inclusive on the indictment.

16. On the 25th August, 2013, another front page article appeared in the Sunday Independent about the applicant entitled "Lowry Tax Probe now 'Criminal' – Revenue". The article refers to Revenue investigators making contact with a number of persons who they believe can help them and goes on to say:-

> "In making these contacts, the Commissioners have stated that they are conducting a 'criminal investigation' … 'arising from the belief that offences have been committed under section 1078 of the Taxes Consolidation Act 1997, as amended.' "

17. The article also discloses the fact that the applicant's home was raided pursuant to a search warrant. Arising out of this article, the applicant's solicitors made a complaint to the Gardaí about the disclosure of allegedly confidential information on the 8th July, 2014. On the 22nd July, 2014, a Garda Chief Superintendent wrote to the applicant's solicitors in the following terms:-

> "I have forwarded your complaint in relation to Mr. Michael Lowry to Detective Chief Superintendent Criminal Assets Bureau for investigation.
>
> I will correspond further with you in course when results of this investigation are to hand.
>
> Yours etc."

18. The applicant alleges that nothing further has been heard by him in relation to this investigation.

19. On foot of the summonses above referred to, the applicant was sent forward for trial on indictment to Nenagh Circuit Criminal Court. In July, 2014, the applicant applied to the Circuit Court for an order stopping his trial pursuant to section 4E of the Criminal Procedure Act 1967 or alternatively pursuant to the inherent jurisdiction of the court. At the same time, the DPP made an application pursuant to section 32 of the Court and Courts Officers Act 1995 for the transfer of the applicant's trial to the Dublin Circuit Criminal Court. The second named respondent, His Honour Judge Teehan, gave judgment on the 5th December, 2014, refusing the applicant's application and granting that of the DPP. Formal orders in that regard were made on the 20th January, 2015.

20. On the 25th January, 2015, an article was published in the Sunday Independent entitled "Michael Lowry, Enda and a nice job for the 'Lovely Girl' ". The article refers to a note allegedly given by the applicant on the floor of Dáil Éireann to An Taoiseach in which the applicant asked An Taoiseach to consider reappointing a named female to the board of a state organisation. In the note, the applicant described the person in question as "bright, intelligent and not bad looking either!"

21. The applicant alleges that this note was left behind in the Dáil Chamber by An Taoiseach and thereafter picked up by some unidentified party and passed on to the newspaper.

22. On the 20th November, 2013, the Revenue Commissioners assessed the applicant to income tax in relation to the Norpe payment diverted to Mr. Phelan. On the same date, two assessments were raised in respect of Garuda relating to PAYE/PRSI on the alleged payment of income to the applicant and Corporation Tax for the year 2002, subject to a surcharge payment respectively.

23. These three assessments were appealed by the applicant and Garuda to the Appeal Commissioners. A full oral hearing took place before two Appeal Commissioners on the 22nd and 27th April, 2015. The Appeal Commissioners delivered their judgment on the 10th June, 2015, allowed the applicant's appeal and reduced the assessment to zero. Garuda's appeal in respect of PAYE/PRSI was accordingly also reduced to zero but the appeal in respect of the surcharge was dismissed.

Arguments Advanced by the Applicant

24. On behalf of the applicant, Mr. Treacy S.C., was at pains to emphasise that there was no complaint about the original decision to prosecute the applicant. Rather the applicant's complaint concerned the continuation of the prosecution in the light of subsequent events.

25. Counsel characterised his submissions as falling into four strands. Under the first strand, the applicant contended that the continuation of the prosecution against him is unfair in circumstances where the Appeal Commissioners have determined that he has no liability to income tax in respect of the Norpe payment. After this determination by the Appeal Commissioners, the continuation of the prosecution can only be based upon the pursuit of an improper policy by the DPP. Counsel said that there was no suggestion of *mala fides* or improper motive on the part of the DPP, in relation to the prosecution. However, the pursuit of the prosecution at this stage constituted an abdication of the DPP's responsibility. The only remaining issue in the tax case related to a surcharge of €2,400, approximately in respect of the late payment of tax by Garuda. Counsel submitted that Count 1 on the indictment which relates to the applicant allegedly filing an incorrect tax return can no longer be correct in circumstances where he has been found to have no liability. It would be disproportionate to subject the applicant to a trial on indictment in respect of a tax liability of the company of some €2,000. In effect, the applicant is being tried for correcting the position about the tax return.

26. It was contended on behalf of the applicant that to allow the prosecution to proceed in circumstances where the *actus reus* of the offence has no substance represents an improper policy. No objective harm can be alleged and, therefore, there is no actus reus. The prosecution was originally predicated on an assessment to income tax in respect of the applicant of €516,749.93 whereas, in fact, that has now been found to be zero. Garuda was assessed to tax in the sum of €510,000, so that the case, in its entirety, was based on a putative tax liability of €1m which has found now to be some €2,000.

27. Under this heading, the applicant relied upon *State (McCormack) v. Curran* [1987] ILRM 225; *H. v. DPP* [1994] 2 I.R. 589; *Landers v. An Garda Síochána Compensation Board* [1977] 3 I.R. 363; *O'Sullivan v. Wallace* (Unreported, High Court, 19th April, 1999); and *Murphy v. DPP* [1989] ILRM 71.

28. The second strand relied upon by the applicant is that his right to a fair trial has been irredeemably prejudiced by the wrongful manipulation of the criminal justice system by the parties previously referred to. The applicant has been a Teachta Dála since 1987, and accepts that the media have the right to subject him to a degree of public scrutiny. However, something different has happened in this case. The applicant submitted that the attacks on him in the Sunday Independent were savage and unparalleled. When the articles concerning the Lowry Tapes were first published, the newspaper knew that the tape was controversial as the person who provided it was resiling from it. The same person was contracted to a litigation funder assisting in the prosecution of civil proceedings against the State and the applicant.

29. None of this was disclosed to the Criminal Assets Bureau when a complaint was made by the journalist concerned nor was there any disclosure of these highly material facts to the readership of the newspaper. The stories were all based on audio recordings which the newspaper and the journalist knew could not be used in evidence. This amounted to a conspiracy by the persons concerned to interfere with the applicant's right to fair trial. The DPP is under a duty to ensure that the applicant receives a fair trial but because of the publications referred to, that is now impossible. It constitutes an unwarranted interference with the administration of justice. The applicant submitted that the Sunday Independent was motivated by a clear animus against the applicant which existed prior to the publication of the Lowry tapes.

30. The applicant has further been prejudiced by the publication of the note sent privately to An Taoiseach. The newspaper published this knowing that the applicant was being prosecuted and that 50% of the potential jury panel, being female, would be prejudiced against the applicant by this publication. All of this constituted a deliberate manipulation of public opinion and potential jurors in the applicant's trial. The DPP cannot simply abdicate her function by pointing to the fact that she has no responsibility for any of these matters.

31. Under this heading, the applicant relied on *Montgomery v. H.M. Advocates* [2003] 1 AC 64, *People (DPP) v. Nevin* [2003] 3 I.R. 321, *Rattigan v. DPP* [2008] 4 I.R. 639, *D. v. DPP* [1994] 2 I.R. 465, *Z. v. DPP* [1994] 2 I.R. 476 and *Redmond v. DPP* [2002] 4 I.R. 133.

32. The third strand relied upon by the applicant is oppression. This encompasses the second strand to the extent that the applicant argues that it is oppressive for the DPP to ignore her function to consider the conduct of the Sunday Independent in complying with her duty to ensure a fair trial. It also arises separately from the wrongful obtaining of a search warrant of the applicant's dwelling and the wrongful publication of that fact by the Sunday Independent. The applicant alleges that an offence was committed by the Revenue Commissioners in disclosing "taxpayer information" relating to him contrary s. 851A of the Taxes Consolidation Act 1997 ("TCA"). This was the subject matter of complaint by the applicant, an investigation commenced and nothing further has been heard by him to date in that regard.

33. The applicant alleges that the obtaining of the search warrants was oppressive in circumstances where neither of the District Judges to whom the applications were made in respect of the applicant's home, the offices of Garuda and the offices of their accountants respectively were informed that the other application was being simultaneously made. The Revenue Commissioners had a duty of *uberrimae fidei* in relation to both applications, with which they failed to comply. The circumstances in which the search of the applicant's home was carried out were humiliating, frightening for the occupants and highly oppressive. The Sunday Independent has never explained how it came by the information in relation to these events but the applicant submits that it can only have come about in circumstances which disclose the commission of a criminal offence by a person or persons employed by the Revenue Commissioners.

34. Further, having regard to the subject matter of the prosecution, the applicant contends that the refusal of the DPP to consent to summary trial is excessive and oppressive, particularly where the maximum penalty that can be imposed is a fine of €125.00.

35. In the same context, the applicant complained of the fact that there was a failure by the prosecutor to interview him prior to serving him with the indictment. It was clear that this was because the ten year limitation period for the offences in issue was about to expire.

36. It was further argued by counsel that since the applicant resigned as a Government Minister at the end of 1996, he has in effect been under investigation by various arms of the State during all of that time, now almost twenty years. It was hard to imagine more public scrutiny directed towards a single individual.

37. A further ground of oppression arises from the fact that in the two pieces of civil litigation referred to, the State is seeking an indemnity from the applicant whilst at the same time seeking to defend those proceedings.

38. Further on this strand, the applicant submits that the State's oppressive conduct in pursuing this prosecution must be viewed in the light of the failure to prosecute other parties for tax evasion arising from the revelations contained in the dossier of Mr. Gerard Ryan. This dossier is said to relate to widespread tax evasion by publically prominent persons, including politicians, who are alleged by Mr. Ryan to have been the holder of off-shore accounts with Ansbacher (Cayman) Ltd. utilised for the purpose of tax evasion. None of those parties have been prosecuted by the Revenue Commissioners, in stark contrast to the within prosecution against the applicant. It could not be proper policy to prosecute the applicant but not the 283 identified Ansbacher account holders.

39. Finally on this issue, the applicant referred to the fact that another public representative in his constituency had been the subject matter of a criminal prosecution and no application had been made to transfer that trial away from his constituency. In contrast here, such an oppressive application was made. In support of the arguments on this strand, the applicant relied on *R. v. Inland Revenue Commissioners XP Meade* [1993] 1 All ER 772, *the State (O'Callaghan) v. O'hUadhaigh* [1997] I.R. 42 and *the State (Healy) v. Donoghue* [1965] I.R. 325.

40. The fourth and final strand of the applicant's submissions relates to the transfer of his trial from Tipperary to Dublin Circuit Criminal Court by the second named respondent pursuant to s.32 of the Courts and Court Officers Act 1995. This application was based on an affidavit from the State Solicitor who deposed to the electoral success of the applicant. Counsel submitted that this could not be a basis for denying a Teachta Dála trial by a jury in his own constituency merely on account of the fact that he was a successful election candidate. It was submitted that the intentions of jurors to vote in a particular way in a secret ballot could not preclude them from acting as jurors in the applicant's trial. The DPP was in effect saying that a Tipperary jury could not be trusted to comply with their oath and warnings given by a trial judge would not be adequate in this regard. In effect he was being punished for his success. Furthermore, there was clear error in the second respondents' judgement where he referred to the fact that no replying affidavit had been delivered by the applicant. In fact two such affidavits were delivered. In support of his submissions on this strand, counsel relied on *Zoe Developments v DPP* (Unreported, High Court, 3rd March, 1999).

Arguments of the Respondents in Reply

41. Mr. Farrell S.C., on behalf of the respondents commenced his submissions by dealing with a number of factual issues in the case. He said that the original assessment to income tax raised in respect of the applicant was on the basis that he diverted monies, the property of Garuda from that company. The applicant's Tax Inspector characterised these as "emoluments", a particular term of art in the income tax code. The issue which the Appeal Commissioners considered was whether the misappropriation of company funds could be classified as an "emolument". The Appeal Commissioners held that these monies were not an emolument and consequently a Schedule E assessment could not be raised. The Appeal Commissioners' decision in this regard was to be the subject matter of a case stated to the High Court but if that proceeds and the Revenue Commissioners lose, they are still entitled to raise an assessment against the applicant under Schedule D. Therefore it is not correct to say, as the applicant does, that he has no tax liability in respect of these funds.

42. Whilst the applicant repeatedly says that he self corrected the position, he makes no attempt to deal with the actual transaction the subject matter of the assessment. The fact is that in 2007, the applicant sought to pretend that the misappropriated monies were earned by Garuda in 2006 when they were not. A lower tax rate applied in 2006 as against that applying in 2002 and Garuda took the benefit of that. Garuda also took the benefit of the more favourable exchange rate that obtained in 2006 as against 2002. The prosecution case is that in 2007, when the applicant sought to bring the money into the company, he knew that this money was not earned by the company in 2006. He remained silent in this regard until 2013. The applicant had never even told his own accountants why the money was diverted to Mr. Phelan in 2002. He remained silent on these issues until the Lowry Tapes were published in 2013. In the circumstances, contrary to what the applicant sought to portray, he did anything but self correct.

43. Further, the prosecution would allege that the search of Garuda's premises discovered the bogus invoice for €372,000 allegedly in respect of commission earned in 2006 which was false and designed to cover up what had happened in 2002. The applicant's argument that no harm had come from what had happened was entirely immaterial. This prosecution is about fraud and falsifying documents. Even when the money was ultimately brought into Garuda, there was an underpayment of corporation tax by virtue of the matters referred to and this was not disputed by Garuda. The assessment to corporation tax was not appealed, the appeal relating solely to the issue of surcharge and that was dismissed. Far from being a vindication of the applicant, the ruling of the Appeal Commissioners was anything but.

44. The applicant was in effect contending that because he had paid up the arrears of tax having being caught, he ought not now to be prosecuted. His submissions were entirely decoupled from the facts of the case.

45. Mr. Farrell submitted that a number of propositions had been advanced by the applicant in the course of argument for which there was no authority. These included:

1. The applicant could not be prosecuted once he had paid up the tax due;

2. The applicant cannot be prosecuted for tax offences and an offence under the Companies Acts at the same time;

3. The applicant in asserting his innocence was in effect seeking an advisory ruling from the High Court by way of injunction designed to bypass the function of the jury at his trial;

4. An alleged ulterior motive on the part of certain persons in relation to the applicant's activities entitled him to immunity from prosecution;

5. The applicant has a right to be tried in his own constituency;

6. The motivation of third parties allegedly behind the publicity received by the applicant is relevant to whether he can now be prosecuted;

7. The District Judges to whom application was made for search warrants were to be given a full briefing on all details of

the prosecution against the applicant before they could be asked to grant a warrant;

8. Because the searches carried out by the Revenue Commissioners were allegedly unlawful, this conferred immunity from prosecution on the applicant.

46. Before engaging with the four strands raised by the applicant, counsel for the respondents referred to the general principles applicable to applications to judicially review the DPP. The starting point is *McCormack*. The DPP has a special position under the Constitution. The most important aspect of the DPP's function for the purposes of this application is that a decision by the DPP to prosecute is not a determination of the rights of any party. It has the same status as a decision by any party to institute proceedings in a civil case. Thus a decision by any public body to institute civil proceedings is not amenable to judicial review because it does not determine any rights. As a matter of principle, there should not be proceedings about proceedings. All issues raised by the applicant in this application were more properly matters for the trial.

47. The applicant was at pains to draw a distinction, which is entirely illusory, between commencing a prosecution and continuing a prosecution. The applicant had to concede that he could make no complaint about the institution of this prosecution and yet the reality was that there was no "decision" thereafter to continue the prosecution. There was no determination of rights in continuing the prosecution. The applicant is forced to attempt to side step the inconvenient fact that no decision was actually made that is the subject matter of his challenge.

48. Turning then to deal with the first of the four strands raised by the applicant in relation to the fact that he has been found to have no personal tax liability, the offence with which the applicant is charged under Section 1078 of the Taxes Consolidation Act 1997 ("TCA") has nothing to do with harm or loss of tax. It is a regulatory offence and no loss is required to be shown to prove the offence. The fact that the applicant may have no personal liability to tax has nothing to do with the offences that relate to Garuda, which clearly does have a tax liability. The applicant does not dispute the fact that he filed incorrect tax returns for the years 2002 and 2006. The issue of harm or loss is consequently irrelevant although it may be relevant to the issue of sentence. It is also irrelevant to the offence with which the applicant is charged under Section 202 of the Companies Act which is divorced from any issue of personal liability. Section 202 creates a strict liability offence. A term of imprisonment can be imposed where the offence is wilfully committed and this is alleged here.

49. The applicant's submission that because the *actus reus* of the offence lacks substance, the prosecution should not be allowed to proceed, is entirely novel. In effect, the applicant sought from the High Court that a declaration that because the *actus reus* was lacking, there should be a declaratory acquittal. There is no authority for the proposition that one can buy immunity by paying arrears of tax due.

50. Dealing with the applicant's second strand, counsel said that the Lowry Tapes were not in this case. That was not because they are inadmissible. The applicant is very coy in his approach to the tapes. At no time does he offer any view on what is contained in them. He does not say that he is not the person on the tape. Rather he puts forward Mr. Phelan's views on the tape but he does not seek to suggest that they are bogus. In any judicial review application, there is an obligation on the applicant to deal with the facts and in this case, the applicant relies extensively on the publication of tapes which he himself refuses to deal with.

51. The applicant has made allegations of criminal conspiracy against a whole host of parties not before the court. He has made complaint of the fact that the DPP has sworn no affidavit as to fact and yet of all of the facts about which he complains have nothing to do with the DPP. He invites the court to find facts against non parties to the litigation where that patently cannot be done.

52. Even in cases where witnesses for the prosecution could be said to have improper or ulterior motives of spite or other animus against the accused, this is not a ground for stopping the prosecution.

53. The submission in relation to the publication of the applicant's note to An Taoiseach amounts to no more than a complaint that he, as a public representative, cannot be subject to any public criticism while he is awaiting trial and is extraordinary. On the issue of the applicant's complaint about disclosure of the Revenue investigation into his tax affairs, this was not "taxpayer information" as the applicant sought to suggest.

54. At the end of the day, all of this boils down to whether or not the applicant can have a fair trial in the light of the publicity of which he complains. The law in this regard is well settled and there have been many cases with protracted saturation publicity of significantly greater duration where the court has held that this does not operate to prevent the trial proceeding. The respondents relied on cases such as *Redmond v. DPP* [2002] 4 I.R. 133, *O'Brien v. DPP* [2014] IESC 39 and *Fitzpatrick v. DPP* (High Court, Unreported, 29th August, 2015).

55. By the time the applicant's trial is determined, at least three years will have elapsed from the publication of the Lowry Tapes and this constituted more than an ample "fade factor" as in comparable cases.

56. On the third strand dealing with oppressive conduct, Mr. Farrell submitted that there was no authority for the proposition that in obtaining a search warrant, the authorities were under a duty of *uberrimae fidei*. Investigators are entitled to withhold information if they deem it appropriate. All that they are obliged to do in seeking a search warrant is to satisfy the District Court that there are reasonable grounds for suspecting that there may be relevant evidence at the locus to be searched.

57. On the issue of oppression by virtue of selective prosecution of the applicant, Mr. Farrell submitted that the reference to a penalty of €125.00 was in fact a civil penalty. Section 1078 (3) (a) of the TCA provided for a criminal penalty on indictment of five years imprisonment and/or a fine of €126,970. This could not be described as a nominal penalty and qualified the offence in issue as an arrestable offence.

58. With regard to the contention that because the applicant has been the subject matter of investigation by various State agencies for some twenty years, he cannot be prosecuted now, this was tantamount to an assertion that infamy and notoriety confers immunity from prosecution.

59. With respect to the Ryan dossier, this was the expression of a view by one person contested robustly by all parties concerned. It was presented by the applicant as though it was a fact. Many of the issues raised in the Ryan dossier are outside the ten year time limit which the applicant ignores when convenient to do so. Many of the Ansbacher accounts in issue date from the 1970's and the Revenue first became aware of them in 1999. Even if Mr. Ryan was correct in his assertions, and the applicant has been subjected to greater scrutiny than other public figures, nothing turns on this.

60. Even if it were to be said that Mr. Ryan was of the view that the prosecution of the applicant was selective and oppressive, this could not possibly be admissible or advanced as a defence in the applicant's trial.

61. The applicant seeks to prohibit his trial pending the outcome of two investigations, one into the Ryan dossier by the Gardaí and the other into the applicant's complaint to the Criminal Assets Bureau regarding publication of the search information. However, neither the Gardaí or the Criminal Assets Bureau can produce any binding conclusion in relation to their investigations if and when they conclude and even if conclusions were produced, they could not conceivably be evidence in the applicant's criminal trial.

62. Dealing finally with the transfer of the applicant's trial to Dublin, here again the decision of the DPP to make this application did not determine any rights. The DPP did not decide to transfer the trial, the second respondent did. Counsel submitted that this is an attempt to challenge the decision of the second respondent on the basis of arguments not made before him and constitutes a collateral attack on that decision. The complaint about the DPP's decision to make the application to transfer is one that should have been addressed to the judge who determined it. Here again the applicant was seeking to challenge a decision to take a step in an action. All of the applicant's submissions were in effect submissions on the merits and an attempt to appeal the second respondent's decision.

63. The applicant's complaint that he is being denied a trial in his own constituency is again unsupported by any authority. The applicant has no right to be tried in any particular venue. His right is a right to a fair trial.

Discussion

64. The first and perhaps primary ground supporting the applicant's case was the last to be introduced. When the applicant obtained leave from this Court to apply for judicial review on 5th February, 2015, his claim for relief included a claim for prohibition of his trial pending the determination of his tax appeal by the Appeal Commissioners. However, before this application came on for hearing, the Appeal Commissioners delivered their decision on 10th June, 2015. This gave rise to an application by the applicant to amend his grounds to plead that his prosecution could no longer be sustained by virtue of the Appeal Commissioners' determination.

65. Based on this determination, the applicant pleaded that the continuation of the criminal prosecution against him is manifestly unjust, unfair and contrary to the provisions of the Constitution and the European Convention on Human Rights. Thus, the applicant's core assertion as pleaded was that the entire prosecution against him was predicated upon a premise subsequently determined to be invalid by the Appeal Commissioners, namely that he had a significant tax liability when, in fact, he had none. The determination of the Appeal Commissioners was thus central and fundamental to the applicant's case. The applicant sought to convey the impression that the decision was a vindication of the position he had adopted throughout.

66. At the commencement of the hearing of this application, it emerged that when the applicant sought leave to amend his statement of grounds, he did so on the basis of an affidavit which did not exhibit the decision of the Appeal Commissioners but rather only a summary of it by his accountants and tax advisers. In response to this, the respondents delivered a subsequent affidavit exhibiting a transcript of the actual decision of the Appeal Commissioners. The applicant took exception to this and sought a ruling from the court at the commencement of this application that by virtue of the *in camera* rule which applies in relation to tax appeals in the Circuit Court and by analogy to hearings before the Appeal Commissioners, the respondents ought not be entitled to rely upon the affidavit exhibiting the full transcript of the decision of the Appeal Commissioners and should be precluded from making any reference to any part of that decision other than the actual outcome. Accordingly, the applicant was proposing to run his case without permitting the court to see the decision upon which he was placing significant reliance.

67. In ruling on this application, I said that it appeared to me to be an extraordinary proposition that the applicant should be entitled to rely on the Appeal Commissioners' decision in support of his claim for relief from this Court, while at the same time asserting that the court had no right to see or consider the decision itself. The respondents also drew my attention to the fact that the applicant had made public pronouncements about the decision of the Appeal Commissioners. In those circumstances, I came to the conclusion that in acting as he had, the applicant had waived any right to complain of the disclosure of the decision in full.

68. Whilst the transcript of the Appeal Commissioners' determination is somewhat peripheral to the issues before the court, it has to be said that on any view, it could not reasonably be characterised as a vindication of the applicant. As previously indicated, the applicant was assessed to income tax in respect of the Norpe payment which, on his instructions, was diverted to an account in the Isle of Man for his personal benefit and never appeared in the accounts of Garuda for the relevant year, 2002. The issue which the Appeal Commissioners had to decide was whether or not on these facts, the payment could be classified as an emolument and thus, be liable to income tax. In considering this point, the Appeal Commissioners said:-

> "The distinguishing factor in this case is we have very clear evidence which we accept, that the monies were misappropriated from the company. There is no question of salary along the lines – looking at the questions raised in the *Rogers* case – there is no evidence of any salary. There is evidence of the funds being misappropriated. It is quite irrelevant whether the company did or did not owe Mr. Lowry money in respect of amounts allegedly paid. Well I don't mean that word in a pejorative sense, but there was some argument about the nature of the payments that Mr. Lowry had made regarding an earlier tax settlement and quite lengthy submissions received subsequent to the hearing regarding that matter but it seems to both myself and my colleague, it doesn't matter. The question is was remuneration paid to Mr. Lowry by the company? I am dealing herewith the PAYE assessment on the company. The answer is we don't have evidence to enable us to confirm that assessment. We have clear evidence that the monies were misappropriated, and whether that resulted in a plus or minus on the director's loan account is neither here nor there. We don't have an assessment to do with the director's loan account. We have an assessment on the company for PAYE. So that assessment can stand in our view.

Similarly, the assessment on Mr. Lowry regarding the idea that it was income of his, that can't stand either on the evidence. The key distinguishing factor – I am repeating myself here, not for the first time – regarding the corporation tax assessment on Garuda in respect of the sums misappropriated, that seems to be unavoidable. It follows again from the evidence that these were monies that the company was entitled to and that it didn't actually receive, and it seems straightforward given our findings on the other matters that the assessment shall be confirmed. So those are our conclusions."

69. When this passage was opened to the court in argument by counsel for the respondents, it attracted considerable media coverage, which I am satisfied was factually accurate, and that coverage referred to the misappropriation by the applicant of some €372,000 from the company. This subsequently gave rise to bitter complaint on the part of the applicant that it had been said of him that he misappropriated money from the company when it was clear from the text of the Appeal Commissioners' decision that the word "misappropriated" was clearly not used as the Commissioners had said in a pejorative sense. The Oxford English Dictionary defines the verb "misappropriate" as follows:-

> "Dishonestly or unfairly take (something, especially money, belonging to another) for one's own use."

70. I have difficulty in understanding how the Commissioners' use of the word "misappropriated" could be other than pejorative, and even greater difficulty in comprehending how the applicant seeks to suggest or infer that the effect of this decision somehow constitutes a vindication of his position in relation to this payment.

71. One of the most striking features of this application is that the applicant has steadfastly avoided engaging in any way with the facts of the transaction at its core. He has complained repeatedly and at length about the publication of the Lowry Tapes and any media comment thereon, at a time before his prosecution was contemplated, yet remains resolutely silent on the issue of whether he is the person on the tape and whether they contain anything that is, in fact, untrue. Instead of engaging directly with this simple issue, the applicant instead chooses to make the most serious allegations of criminal conspiracy to pervert the court of justice arising from the publication of the tapes against persons who are not before the court and cannot respond in their own defence. The applicant's lack of engagement in this regard is all the more significant in the light of the fact that the publication of the tapes led to the Revenue investigation and the subsequent prosecution which he now seeks to restrain.

72. In like manner, the applicant has in his pleadings, submissions and indeed public pronouncements on the matter sought to make a virtue of the ruling of the Appeal Commissioners which he has presented as a vindication of his stated position that the entire prosecution against him is a form of witch hunt which is, in reality, much ado about nothing. In virtually the same breath, the applicant then goes on to make an application, which I described as extraordinary, to prevent the court from seeing that ruling which transpires to be anything but flattering. Here again, the applicant does not wish to engage with any facts that are inconvenient to his application.

73. Judicial review is a discretionary remedy and every applicant moving the court to exercise its discretion in his or her favour has an obligation to deal in a forthright manner with the facts of the case. The applicant is clearly reluctant to do so.

Decisions of the D.P.P. and Judicial Review

74. In *State (McCormack) v. Curran* [1987] ILRM 225, the Supreme Court held that decisions of the D.P.P. were reviewable in certain limited circumstances. These were explained by Finlay C.J. (at p. 237):

> "In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court."

75. These comments by the Chief Justice were approved by the Supreme Court in *H. v. D.P.P.* [1994] 2 IR 589. In the course of his judgment in that case, O'Flaherty J. cited with approval the previous passage from *Mc.Cormack.* He went on to explain why decisions of the D.P.P. to prosecute are only susceptible to judicial review in such limited circumstance saying (at p. 603):

> "in deciding whether to bring or not to bring a prosecution, the Director is not settling any question or dispute or deciding rights or liabilities; he is simply making a decision on whether it is appropriate to initiate a prosecution. If he does, it is afterwards for the courts to decide whether a conviction may be sustained."

76. These authorities were considered and followed by Kelly J. (as he then was) in *Landers v. Garda Síochána Complaints Board* [1997] 3 IR 347 at 363 where he said:

> "such review may take place only if it is demonstrated that the Director of Public Prosecutions, in making the decision, did so *mala fide* or was influenced by an improper motive or was influenced by an improper policy or had abdicated his functions."

77. It is thus clear that decisions of the D.P.P. in relation to prosecutions can be the subject of judicial review but in limited circumstances. The onus of proving the existence of any such circumstance rests upon the applicant. As I have already noted, counsel for the applicant made clear at the outset that he had no complaint about the D.P.P.'s decision to commence the prosecution against the applicant. The prosecution was initiated in late 2013, and the application for leave to seek judicial review was made in February 2015, long outside the three month period for seeking judicial review under O. 84.

78. At that juncture, it was far too late for the applicant to challenge any decision by the D.P.P. to prosecute him. While the applicant seeks to challenge the continuation of the prosecution, it is in reality difficult to see what distinction can be drawn between a decision to prosecute and a decision to continue a prosecution. In seeking the many reliefs he does, the applicant does not seek an order of *certiorari* quashing a decision to continue the prosecution because he has identified no such decision or when any such decision might be said to have been made. He seeks to avoid this difficulty by claiming declaratory relief and orders of prohibition restraining the continuation of the prosecution.

The Determination of the Appeal Commissioners

79. I have already commented upon the applicant's characterisation of this determination. Although this determination is said to be final, it is subject to two caveats. First, the Appeal Commissioners have been requested by the Revenue to state a case for the opinion of the High Court in relation to their findings. Secondly, it remains to be determined whether if the Appeal Commissioner's decision stands, a further assessment to tax may be raised against the applicant. Putting these caveats aside, the applicant says that the determination of the Appeal Commissioners means that the prosecution against him can no longer be sustained. If that argument has any validity, it can only be valid in respect of count 1 on the indictment. All the other counts relate to Garuda and the determination of the Appeal Commissioners that the applicant has no personal liability to income tax, can have no bearing on the subsequent counts.

80. However the applicant sought to submit that because of the Appeal Commissioners' determination, the continuation of the prosecution on any of the counts constitutes the pursuit of an improper policy and the abdication of the D.P.P.'s duty. The applicant suggests that the continuation of his prosecution on indictment is disproportionate and unjust in circumstances where all that was involved was a liability of Garuda in respect of a surcharge of approximately €2,400.00. The applicant submitted that because he has no tax liability, there was therefore no *actus reus* or objective harm that could be alleged in relation to the offence and pursuing it must therefore represent an improper policy.

81. With regard to count 1, in my view the applicant's submissions amount to no more than an assertion that he is innocent of the offence with which he is charged and therefore the pursuit of the prosecution must be improper. That is an entirely novel proposition unsupported by any authority identified by the applicant. It is not the function of judicial review to determine the guilt or innocence of a party charged with a criminal offence in advance of his trial, yet this is precisely what is sought by the applicant. Such a claim amounts to a total usurpation of the function of the jury at the applicant's trial and cannot properly be the subject matter of judicial review.

82. With respect to all of the counts, the submission is that they are devoid of any *actus reus* or substance because of the non-existence of any subjective harm in the form of unpaid tax. It seems to me that the amount of tax paid or due is entirely immaterial to the guilt or innocence of the applicant in respect of any of the offences with which he is charged. Those offences plainly concern fraud and the falsification of documents. They have nothing to do with objective harm in the sense of tax underpaid. The prosecution has squarely alleged that the Norpe payment was the property of Garuda and was misappropriated by the applicant.

83. It is alleged that the failure to show this payment in the accounts of Garuda for the 2002 tax year meant that Garuda's accounts showed a loss and thus a zero tax liability instead of the true position which was a substantial profit and significant tax liability. It is further alleged that the accounts submitted by Garuda for 2006, which purported to show this payment as having been earned in 2006, are also false and are under pinned by a false invoice which purports to show that these monies were earned in 2006 by Garuda. This is alleged by the prosecution to be an attempt by the applicant to cover up what had happened in 2002. None of this has anything to do with the amounts involved. The offences with which the applicant stands charged are very serious, carrying as they do a maximum sentence of five years imprisonment and/or fine of €126,970 .

84. The fact that Garuda may have paid up the arrears of tax many years later is of no relevance to these offences although, it may become relevant to the question of sentence in the event of conviction. The proposition that because arrears of tax are paid, there can no longer be any actus reus or harm is illogical and unsupported by precedent. As the respondents suggest, no tax payer can buy immunity from prosecution by simply paying up arrears of tax.

85. In my view, the determination by the Appeal Commissioners in this matter is of no relevance to the charges against the applicant, and further, that he has not discharged the significant onus of proving that the continuation of his prosecution, or indeed its commencement, if that were in issue, arises out of any improper motive on the part of the D.P.P.

Alleged Prejudicial Publicity and the Applicant's Right to a Fair Trial

86. The applicant has made extensive complaint about the publication of the Lowry Tapes by the Sunday Independent, although he appears to make no particular complaint about the fact that they were published by many other media outlets. He suggests that the motivation for this was some form of animus or "agenda" held by that newspaper. By the time the applicant's trial takes place, some three years or more will have elapsed since the publication complained of. I have already commented on the failure of the applicant to engage in any way with the content of the material of which he complains.

87. He has not suggested it is false and even if he did, a legal remedy would be available to him against the parties concerned. He has chosen not to invoke that. In the absence of any allegation by the applicant that the material published about him is false and defamatory, it is difficult to understand the basis upon which he seeks to suggest that it could be viewed as prejudicial. Leaving that to one side however, the applicant faces the further difficulty that this issue in its entirety predates the commencement of the prosecution and indeed led to it. If the argument is valid as regards the continuation of the prosecution by the D.P.P., it was equally valid in respect of the decision to commence that prosecution. Yet the applicant was at all time at pains to say that he has no criticism of the decision to commence the prosecution. These two positions are irreconcilable.

88. Viewed in simple terms, the applicant's concern arises from the fact that a journalist obtained evidence of alleged criminality on the part of a public representative. The journalist's newspaper published a story based on this evidence, which has yet to be controverted by the applicant, and it could hardly be gainsaid that this was a matter of significant public interest. The journalist made a complaint to the authorities and made the evidence available to them. I can see nothing whatsoever improper about this and indeed, the respondents have argued that the journalist was under a statutory duty to do so.

89. The applicant says that all of this was based on ulterior and improper motives by all concerned to manipulate the criminal justice process. One could perhaps understand the basis for the complaint if the applicant was suggesting that there had been a criminal conspiracy to have the applicant prosecuted based on false and manufactured evidence. But of course the applicant has never alleged this.

90. What remains therefore is a complaint about the motivation of the persons concerned. However, that seems to me to be entirely irrelevant to the prosecution of the applicant. As the respondents point out, criminal prosecutions are frequently based on the evidence of witnesses with "axes to grind" who may be purely motivated by self interest. One can envisage countless examples but it has never been suggested that the motivation of a witness is grounds for prohibition of a criminal trial. In any event, none of the persons who are the alleged co-conspirators are actually intended witnesses in the prosecution.

91. There is the clearest public interest in the exposure of corruption by public representatives and officials. Such stories have dominated the media in this jurisdiction, and properly so, for several decades now. It cannot seriously be suggested that the exposure of such corruption by the media must mean as a corollary that the parties exposed cannot thereafter be subjected to the criminal process. No democratic society could countenance such a proposition. Unsurprisingly, no legal authority supports it.

92. One of the leading authorities on the issue of pre-trial publicity is *Z. v. D.P.P.* [1994] 2 I.R. 476. The facts are well known but are worth recalling. The applicant was charged with sexually assaulting a fourteen year old girl, Miss X. She subsequently became pregnant as a result of the alleged rape by the applicant and intended to travel to the United Kingdom for an abortion. The Attorney General sought to restrain her from doing so in reliance on Article 40 of the Constitution which protects the right to life of the unborn. The claim ultimately failed in the Supreme Court but the X case became one of the most widely publicised and discussed cases ever to come before our courts.

93. It was the subject of saturation publicity in the media, debates in the Oireachtas and precipitated the enactment of the twelfth, thirteenth and fourteenth amendments of the Constitution. Several books were published about it and it became the subject matter of an award winning play. There was widespread negative comment about Mr. Z. and widespread reporting of DNA testing which was said to have established that Mr. Z. had impregnated Miss X. Despite all of this the Supreme Court declined to prohibit Mr. Z's. trial. Finlay C.J. delivered the unanimous decision of a five member court, following the earlier judgment of the Supreme Court in *D. v. D.P.P.* [1994] 2 I.R. 465. He said (at p. 506);

"this Court in the recent case of *D. v. D.P.P.* [1994] 2 IR 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial."

94. He continued (at 507):

> "even apart from what appears to be the submission of both sides in this case that we should follow our own judgments in *D. v. D.P.P.* [1994] 2 IR 465, I see no reason on reconsidering the judgments and statements of principle which are unanimous in that case to depart from them. Furthermore, insofar as the question of balance between the public right and interest to see the proper trial and conviction of persons guilty of criminal offences and the right of an individual to a fair trial under our Constitutional provisions, I am satisfied that no mere statement about balancing would be correct. I would prefer to follow the statement contained in the judgment of Denham J. in *D. v. D.P.P.* where at p. 474 of the judgment she stated as follows:-
>
> > 'the applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.
> >
> > A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted.'
>
> 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 *D. v. D.P.P.*, 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."

95. The Chief Justice went on to refer to the media saturation in relation to the case and concluded that it would not be possible to empanel a jury who would not, either as to the great majority of them or more likely as to all of them, be aware of the X case. He also considered that despite the passage of some two years, it was unlikely that the reference to the DNA evidence in the publicity would have obliterated those matters from the minds of prospective jurors. Despite all of that, the court came to the conclusion that the giving of an unambiguous and clear charge by the trial judge to the jury would avoid an unfair trial.

96. In *Redmond v. D.P.P.* [2002] 4 I.R. 133, the applicant sought to prohibit his trial on charges of corruption on the basis of extensive pre-trial publicity. The applicant had been the former assistant Dublin City and Council manager. He had given evidence before the Tribunal of Inquiry into Certain Planning Matters and Payments which was the subject of widespread media coverage. In the course of his judgment, Kearns J. (as he then was) identified 144 publications which had covered the story, 113 of which pre-dated the bringing of the corruption charges. The applicant was also the subject of a book which was reviewed extensively in the media. Kearns J. referred to the judgment of the Supreme Court in *D.* and *Z.* and went on to comment (at p. 141):

> "*Zoe Developments Ltd. v. D.P.P.* is an authority for the proposition that even where the court concludes that there is not a serious risk of an unfair trial, there may be circumstances which warrant an adjournment of the trial for a period of time to allow the 'fade factor' to come into play, whereby memories of detrimental publicity may dim. While acknowledging that an individual's right to a fair trial is a superior right to that of the community to prosecute, the importance of the community's right must not be devalued or given mere lip service. The efficacy of a society's system of justice involves giving due recognition to both rights and not just the former. This is not to say that one right may be traded off in some way against the other or that an accused's right to a fair trial be balanced detrimentally against the community's right to have alleged crimes prosecuted. It simply means, in my view, that there is an onus on a judge where the trial of an accused may be put in issue by allegations of prejudicial publicity to determine, firstly, if the risk of an unfair trial is a real one and, if so, if it can be overcome by the giving of appropriate warnings or directions by the trial judge in the first instance to the jury panel and, during the trial itself, to the jury."

97. Kearns J. continued at p. 143:

> "it is beyond question in the instant case that there has been a considerable amount of adverse publicity in the media concerning the applicant. Some of this publicity goes beyond the mere reporting of events in the Flood Tribunal or the applicant's later court appearances. They consist of colour pieces or other commentary which focus on the applicant himself, frequently portraying him in unflattering terms, something which arguably is even more prejudicial for that very reason. It is impossible to conclude that a jury panel convened for the purpose of empanelling a jury for the applicant's trial would not contain persons who had been exposed to some at least of this material."

98. He continued at pp. 144-145:

> "One must begin, therefore, by asking if the adverse publicity, in its character, tone and duration, is of such a degree in this case as to deprive the trial judge at the outset of the option of inviting self-disqualification of potential jurors as a method of overcoming any risk of an unfair trial due to prejudicial publicity.
>
> I do not believe that it has. Of the vast quantity of material tendered to the court, the great bulk of it goes back to 1999/2000, prior to the bringing of charges against the applicant…
>
> Insofar as the 'fade factor' is concerned, it is common case that the very bringing of this application means that the applicant's trial will not take place, at the earliest, until some time in 2003. By that time, the fade factor will undoubtedly have operated to defuse further the effects of adverse publicity in the past. Furthermore, nothing published about this hearing, or in this judgment, repeats the content of any of the detrimental material complained of."

99. The court accordingly dismissed the application. It is to be noted that the period of time which was said to have elapsed in that case between the publications complained of and the trial is broadly comparable with those arising in the instant case.

100. It is noteworthy that in *Z.* and *Redmond*, the publications complained of spanned every aspect of the media over protracted periods of time in contrast to here, where the applicant's complaint relates to one organ of the media over a period of some three months, now almost three years ago. It seems to me that what is complained of here by the applicant is most likely of a lesser order of magnitude than what was in issue in those cases where prohibition was held not to lie. In my view, any potential difficulty that might arise in relation to the publicity regarding the Lowry Tapes is capable of being more than adequately dealt with by the trial judge in making any relevant requisitions of the jury panel and in the giving of appropriate warnings and directions to the jury in the course of the trial. I am of the opinion that the applicant has not discharged the onus of proof that lies upon him to establish that there is a real risk that a fair trial cannot be had.

101. With regard to the publication of the applicant's note to An Taoiseach, this clearly has nothing whatsoever to do with the matters in issue in the prosecution. Rather the applicant complains it is a further attempt by the same newspaper to prejudice him in the eyes of 50% of the jury panel. Here again there is no complaint that anything untrue was said about the applicant and he concedes that the note in question was his. His main concern is that it was published by the same newspaper that published the Lowry Tapes, suggesting by implication that had it been published be a different organ of the media, he could have no complaint. It seems to me that it cannot be reasonably suggested that the applicant, as a public representative, has the right to be insulated from any reporting or potential criticism by the media on matters of legitimate public concern while he awaits trial. Here again, there is no authority for such a proposition. Of course, none of this can be said to be the responsibility of the D.P.P.

The Alleged Oppressive Conduct of the D.P.P.
102. The applicant raised a number of grounds under this heading. The first is that the search warrants of the applicant's home were obtained in an oppressive manner having regard to the fact that simultaneous applications were made by the Revenue to two different District Courts without either having been informed of the other application. It was argued that the Revenue Commissioners had a duty of *uberrimae fidei*, in relation to both applications. It must again be said with respect to this point that as with the last ground, it is one that has always been available to the applicant and certainly prior to the commencement of the prosecution about which he makes no complaint. The applicant cites no authority for the proposition that there is some duty of general disclosure in relation to the status of an investigation where a search warrant is sought from the District Court. There is, in my view, no basis for this contention.

103. Section 908C(2) of the TCA provides that if a judge of the District Court is satisfied by information given on oath by an authorised officer that there are reasonable grounds for suspecting:-

> "(a) that an offence is being, has been or is about to be committed; and
>
> (b)
>
> (i) that material which is likely to be of value (whether by itself or together with other information) to the investigation of the offence, or
>
> (ii) that evidence of, or relating to the commission of the offence,

is to be founded in any place,

> The judge may issue a warrant for the search of that place, and of any thing and any persons, found there."

104. There is no suggestion that the Revenue Commissioners failed to comply with the section. All that it requires is that the court be satisfied that there are reasonable grounds for the suspicion. The fact that the search subsequently turns up nothing is neither here nor there and certainly does not bear out any suggestion that there were not reasonable grounds in the first place for the suspicion of the person applying for the warrant. The applicant sought to suggest that there was something sinister in the fact that simultaneous applications were made for search warrants in different locations. However, there are obvious operational reasons why any investigative agency might want to carry out simultaneous and unannounced searches. The suggestion that the judge to whom the application has been made has to receive a general briefing about the status of the investigation and in some way reach a conclusion as to whether it might be desirable from an investigative perspective that a search should or so not take place at that particular point in time is without warrant in the statute and unsupported by authority.

105. It is also difficult to understand the basis upon which it is said that the publication of the fact of the applicant's home being searched or that he was the subject of a criminal investigation somehow confers immunity from prosecution on him. Whether or not any disclosure of "taxpayer information" within the meaning of the TCA or the commission of an offence by any member of the Revenue Commissioners occurred are entirely immaterial to the applicant's prosecution and can form no part of it. In reality, any complaint the applicant has against the Revenue Commissioners arising out of the search of his home is something in respect of which he can invoke a civil law remedy should he choose to do so. The seeking in these proceedings of a declaration by the applicant that the obtaining of the search warrant was unlawful is little more than an indirect attempt to quash the warrant several years after the event. It is, in any event, not a matter for which the D.P.P. can bear any responsibility and the allegedly culpable party is not before the court.

106. The complaint that the applicant was not interviewed prior to the institution of the prosecution is not, in my view, something of which he can be heard to complain, the remedy lying in his own hands. The suggestion that because he has been subjected to a variety of public investigations by various arms of the State for the past twenty years, he should now be immune from prosecution is, yet again, unsupported by authority and novel. Notoriety is not synonymous with immunity.

107. On the issue of the Ansbacher account holders, it is difficult to discern what precise legal principle is invoked here. There may be any number of reasons why prosecutions have not been brought and indeed a public explanation has already been furnished by the Chairman of the Revenue Commissioners in this respect. It is impossible to understand on what basis the applicant can seek to have his trial prohibited pending the outcome of an investigation by the Gardaí into this matter. Even if that investigation were concluded, no binding determination of any kind can be the result, less still anything that could conceivably be admissible in the trial of the applicant. The applicant's contentions in this regard seem to me to be unstateable.

108. The same reasoning applies to the application for prohibition pending the outcome of the investigation into the alleged leaking of information about the search of the applicant's home. Here again, the outcome of this investigation could not, for the same reasons, have any part to play in the applicant's criminal trial. It is simply not possible or permissible for the jury to embark upon a consideration of whether the applicant's prosecution is warranted.

The Transfer of the Applicant's Trial from Tipperary to Dublin
109. Section 32 of the Courts and Court Officers Act 1995, provides as follows:-

> "(1) Where a person (in this section referred to as 'the accused') has been sent forward for trial to the Circuit Court, sitting other than within the Dublin Circuit, the judge of the Circuit Court before whom the accused is triable may, on the application of the prosecutor or the accused, if satisfied that it would be manifestly unjust not to do so, transfer the trial to the Circuit Court sitting within the Dublin Circuit and the decision to grant or refuse the application shall be final and unappealable."

110. The prosecution brought a motion pursuant to s. 32 by notice of motion dated 15th July, 2014, before the Circuit Court seeking the transfer of the applicant's trial from Tipperary to Dublin. On the same date, the applicant issued a motion seeking orders pursuant to s. 4E of the Criminal Procedure Act 1967, and pursuant to the inherent jurisdiction of the court, to stop his trial. Section 4E, insofar as relevant, provides as follows:-

> "(1) At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused…
>
> (4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge."

111. The applicant's application was grounded upon a very detailed affidavit running to some 88 paragraphs with extensive exhibits together with a further 39 paragraph affidavit supplemental to the grounding affidavit with further exhibits. The grounding affidavit was sworn on 19th September, 2014, and the supplemental affidavit on 9th November, 2014. At para. 5 of the grounding affidavit, the applicant averred that he made the affidavit in support of an order dismissing or staying the proceedings and an order refusing the application to transfer the proceedings to Dublin. In the applicant's affidavits, he placed reliance upon many of the matters that are the subject matter of the within judicial review application.

112. The DPP's s. 32 application was grounded upon an affidavit of the State Solicitor, Mr. Gerard O'Brien, sworn on 16th July, 2014, and thus prior to either of the applicant's affidavits. Mr. O'Brien's affidavit was relatively short and was confined to dealing with one issue only, namely the electoral success of the applicant in Tipperary. He averred that the applicant had been a member of Dáil Éireann for the Tipperary North constituency since 1987, and in each of the General Elections held in 1997, 2002, 2007 and 2011, he topped the poll with close to 30% of all first preference votes. He averred that the applicant is a politician of immense and conspicuous popularity so far as the electorate of north Tipperary are concerned and is a frequent and ubiquitous contributor to local media on a variety of issues.

113. In concluding in his affidavit, Mr. O'Brien averred as follows:-

> "I say that in the present case the overwhelming majority of prospective jurors are likely not only to know the accused to some degree but virtually all of them will have in past had had to form a view in relation to him for the purpose of voting at a General Election. Indeed a very substantial proportion of prospective jurors will have cast a first preference vote in favour of the accused as some point in the past.

I say and am advised that it would not be permissible to seek to canvass prospective jurors for their views of the accused as part of the jury selection process."

114. Although as I have said, two lengthy affidavits were sworn by the applicant both in support of his own motion and in opposing the transfer, no issue was taken by the applicant with any averment made by Mr. O'Brien in his affidavit. It was thus entirely uncontroverted. After several days at hearing, the respondent delivered a single judgment on both applications on 5th December, 2014. The second respondent considered the defence applications first on the logical basis that if they were successful, the s. 32 application would not arise. Having considered in detail the basis for those applications, he refused them.

115. He then went on to consider the s. 32 application. He commenced his judgment in this regard by referring to the affidavit of Mr. O'Brien and commenting that no replying affidavit had been delivered. The applicant contends that this statement on its own, means that the judgment is fatally flawed and cannot stand, as replying affidavits were clearly delivered. However, I am satisfied that this contention does not stand up to any analysis. The affidavits delivered by the applicant subsequent to that of Mr. O'Brien took no issue with anything deposed to by him and could not in any realistic sense of the word be described as replying affidavits. However, even if the second respondent had been incorrect in his characterisation, it is manifestly clear from the contents of his judgment that he considered in detail all of the applicant's affidavits so that nothing of any consequence turns upon the point sought to be relied upon by the applicant.

116. Accordingly, the only relevant evidence which was before the second respondent regarding the s. 32 application was Mr. O'Brien's affidavit. That made the case in the clearest possible terms that the prosecutor was unlikely to be able to get a fair trial in Tipperary. Having appropriately considered the relevant legal authorities on this issue, the second respondent went on to say (at p. 13 of his judgment):-

> "Now, in the instant case, that possibility [*that a juror might be unconsciously influenced by his or her personal experience*] extends not in relation to one person to approximately 30% of the entire jury panel – the percentage of the electorate in Tipperary North who (as the affidavit evidence discloses) regularly entrust Mr. Lowry over many years with high public office. The right to a fair trial is usually spoken of in the context of an accused person. In furtherance of this, the defence are entitled to be put on notice of what the prosecution case is, and to be furnished with the disclosure of material not formally notified; the prosecution must shoulder the burden of proof right throughout the trial; it is required to prove to the very high standard of proof applying in criminal cases each element of each offence charged; and most fundamentally of all, the accused enjoys the presumption of innocence throughout the entire process before the jury returns its verdict. These hugely important safeguards are put in place to ensure that convictions before our criminal courts can be regarded as safe. Of its nature, however, the concept of fairness necessarily implies that there must be due weight given to legitimate concerns and arguments put forward by the prosecution also. Applying the Tobin test, it seems to me that the possibility of objective bias could not be avoided even if the most careful proportions were taken. If Mr. Treacy's argument concerning the oath were accepted, this would mean that there simply be no need for s. 32 applications and so I reject that argument."

117. This is a model of clarity. The applicant made a number of complaints, reflected in his grounds, suggesting that the second

respondent had failed to properly have regard to the matters contained in the applicant's affidavit in reaching his conclusion. In reality, the applicant is simply saying that the second respondent reached the wrong conclusion. That cannot be the subject matter of a judicial review application which is purely concerned with jurisdiction. The statute makes clear that the second respondent's decision cannot be appealed. It seems to me that this is precisely what the applicant seeks to do.

118. In both his written and oral submissions, the applicant contends that he has a right to be tried in his own constituency and he is being deprived of this right simply because he is a successful Dáil candidate. No such right is known to the law and the applicant proposes no authority to support it. No accused has a right to trial in any particular venue. The Constitution guarantees the right to a fair trial, not to be tried in a particular place. This is exemplified by the fact that had the applicant been tried summarily, his trial could have taken place at the option of the prosecution either where the offence was committed, where he resides or where he was arrested. In the course of submissions, the applicant made the rather extraordinary assertion that he was being "punished" for being successful. The logic of this contention is difficult to fathom but can only be consistent with a view by the applicant that a Tipperary jury is more likely to be biased in his favour and against the prosecution. If the applicant's apprehension in this regard is well founded, it merely serves to illustrate the correctness of the conclusion reached by the second respondent.

119. The applicant further characterises the decision of the DPP to make a s. 32 application as an additional instance of oppression. In this regard, he relies on the fact that another member of Dáil Éireann from the same constituency who was also tried on indictment for a criminal offence was not the subject of a s. 32 application. I fail to see the relevance of this. There may be any number of reasons why the DPP in her discretion decided not to seek a transfer of the trial of the other TD, very possibly because there were five co-accused in that case. I cannot see how the decision of the DPP to make the s. 32 application could conceivably amount to oppression. It was merely a procedural step not determinative of any rights. It did not and could not affect the applicant's right to a fair trial but, in any event, the ultimate decision was taken by the second respondent, not the DPP. This appears to be an attempt to indirectly undermine the second respondent's determination on the basis of grounds never argued or put before him.

120. This ground must also fail.

Conclusion

121. It is of some significance that this application for judicial review was initiated almost immediately following the applicant's failed attempt in the Circuit Court to have his prosecution halted and to prevent the transfer of his trial to Dublin. Many of the arguments advanced by the applicant in the Circuit Court were again deployed in this judicial review application. Most of the grounds relied upon in these proceedings were available to the applicant at the time his prosecution commenced.

122. It appears to me that the reality of this case is that it amounts to an attempt by the applicant to challenge the DPP's decision to prosecute him when the time to do so has long since passed. In order to make his case, the applicant is compelled to adopt the device of asserting that the continuation of his prosecution is now unlawful while accepting that the decision to prosecute was lawful. His difficulty in this regard is compounded by being unable to identify any point in time after the prosecution commenced when it became unlawful or indeed to demonstrate that any decision was made to continue it which might be amenable to review.

123. Even if that were not so, the applicant has failed by a wide margin to demonstrate anything remotely improper in the conduct of the DPP in this prosecution. His many complaints about state actors, organs of the media and various alleged co-conspirators are notable for the fact that none of these parties are before the court and none are the responsibility of the DPP. Despite raising a plethora of issues, many of which are to my mind irrelevant, the applicant conspicuously declines to engage with the transaction that lies at the heart of this case.

124. In the final analysis, the applicant's case is based on a multitude of arguments which are, in many instances, ingenious and even superficially attractive but are, in truth, devoid of any substance or merit and ultimately built on a foundation of sand.

125. For the reasons explained, I must dismiss this application.