Neutral Citation Number: [2010] IEHC 156

THE HIGH COURT

JUDICIAL REVIEW

2008 1208 JR

BETWEEN/

M. U.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin delivered the 28th day of April, 2010.

1. On 30th October, 2008, the applicant obtained an order for liberty to seek judicial review by way of prohibition or, in the alternative, an injunction by way of judicial review prohibiting or restraining the respondent from pursuing a prosecution entitled "The People at the suit of the Director of Public Prosecutions and M.U."

2. The background to this case is complex.

3. The applicant is a businessman. He is the brother of the complainant and is now in his mid fifties. He is charged with a number of accounts of indecent assault against his three sisters; B.U.; N.V. (née N.U.) and V.D.C. (née V.U.) commencing at a time when he was eleven years of age.

(i) B.U. (the first complainant)
4. It is alleged that the applicant committed indecent assault on eight occasions against his sister B.U. on various days between 21st January, 1969 and 25th January, 1971, contrary to common law, and as provided for in section 6 of the Criminal Law (Amendment) Act 1935.

(ii) N. V. (the second complainant)
5. There are 27 counts of indecent assault against the applicant in relation to his sister, N.V., said to have occurred on various dates between 22nd August, 1965 and 22nd August 1974.

(iii) V.D.C. (the third complainant)
6. Nine counts of indecent assault are alleged against his sister V.D.C. in relation to various days between 22nd August, 1970 and 22nd August, 1973. All the offences are stated to be contrary to common law and as provided for in section 6 of the Criminal Law (Amendment) Act 1935.

(i) B.U.: Background
7. B.U. is the second oldest sister. Her date of birth is 25th September, 1961. She alleges that the applicant began indecently assaulting her in 1969 at the time when she was seven years old and the applicant was fifteen years old. It appears that B.U. discussed the allegations with the other complainants over a number of years. She first made a complaint to the applicant himself ten to twelve years ago. She later informed the gardaí of the said allegations on 5th March, 2007.

(ii) N.V.: Background
8. The second complainant is N.V. She is four years older than B.U. Her date of birth is 22nd August, 1957. She alleges that the applicant began indecently assaulting her in 1965 at a time when she was eight years old and at a time when the applicant was eleven years old. She contends she began to talk about the allegations when she and the other complainants had their children. She informed the gardaí of the allegations on 6th March, 2007.

(iii) V.D.C.: Background
9. The third complainant is V.D.C. Her date of birth is 9th October, 1958. She alleges that the applicant began indecently assaulting her from the time she was eleven years old and the applicant was sixteen years old in 1970. It appears that ten years prior to the making of her complaint she discussed the allegations with the other complainants on the steps of their mother's house. The third named complainant informed the gardaí of the allegations on 25th May, 2007.

The applicant's interview by members of An Garda Síochána
10. As a result of these allegations, on 29th June, 2007, the applicant voluntarily met the gardaí. He denied any of these allegations and has maintained his innocence ever since. For reasons that will become clear, it is of some relevance that at the interview meeting which took place with members of the gardaí he did not have the services of a solicitor and had no prior warning of the questions or the complainant's statements. At all stages he has made exculpatory statements.

11. The applicant was charged with the offences arising from the allegations in question and was sent forward for trial at the next sittings of Dublin Circuit Court.

The family circumstances
12. In order to understand the context of these allegations it is necessary to describe the unfortunate family circumstances of the U. family.

13. The father of the family is R.U. He was born on 21st March, 1929. He is now aged 78 years. He currently stands charged with a range of indecent assaults against the complainants. These proceedings are pending before the courts. R.U. was married to Ma.K.

who was born on 14th December, 1923. She unfortunately died on 27th December, 1995. Prior to her death she had suffered a significant degree of mental illness.

14. There are also similar charges pending against E.U. the second oldest brother in the family. It is alleged he also sexually assaulted his sisters over a considerable time span.

15. The children of the marriage between R.U. and Ma.K. were:

(a) M.U., (the applicant,) born on 21st January, 1954;

(b) E.U. born on 6th May, 1955; (*also now charged*)

(c) J.U. born on 17th September, 1956; (*a son referred to later in the judgment*)

(d) N.U. born on 22nd August, 1957; (*now N.V., the second complainant*)

(e) V.U. born on 9th October, 1958; (*now V.D.C., the third complainant*)

(f) A sister, T.U. born on 30th September, 1959; (*who has made allegations about the applicant but is not a complainant*)

(g) B.U. born on 25th September, 1961; (*the first complainant*)

(h) A son, K.U. born in 1962 who died at age five years old on 2nd February, 1967; and

(i) A son, F.U. who was born on 6th November, 1964 and who died on 12th January, 1997.

16. The background circumstances of the family were apparently deeply dysfunctional. It is said that R.U., the father, was extremely domineering in his behaviour towards his wife and children. It is claimed he was violent and that he engaged in serious sexual misconduct with his children. Similar allegations are made against E.U., the second eldest brother. In light of the fact that criminal charges are pending against R.U., M.U., and E.U., it should be emphasised that each of the three are entitled to the presumption of innocence in relation to the charges.

The elapse of time
17. The elapse of time between the date of the offences alleged against the applicant and the grant of leave is very substantial. The earliest of the allegations go back to 1965. Thus the applicant is seeking to prohibit criminal proceedings relating to sexual offences which are said to have occurred between 34 and 43 years before the granting of leave. The applicant, M.U. was aged between eleven and twenty years of age during the period relevant to the allegations.

An irrebutable presumption
18. It has been submitted on behalf of the applicant that he benefits from an irrebutable presumption that he was incapable of committing 8 of the 44 charges that the Director has preferred against him, as at the time of their alleged commission he was a male of less than fourteen years. This point however is not relevant to the present proceedings.

The general issues
19. Leave to seek judicial review was granted to the applicant on two broad grounds. The first of these was specific prejudice to the defence arising from alleged loss of evidence due to the delay or elapse of time, causing a serious risk of an unfair trial which could not be cured by directions or warnings of a trial judge. The second claim is that there are exceptional circumstances rendering a trial unfair where the delay on the part of the second complainant N.V. in making her complaint is to be considered against a background of alleged blackmail by N.V. against the applicant.

Inadmissible evidence
20. I should preface this consideration of the evidence by pointing out that part of the affidavits filed on behalf of the respondent contain evidence which I find is inadmissible by reason of immateriality or being hearsay. For that reason I do not intend to rehearse any of such material which for the purposes of this application is inadmissible. In *O'Keeffe v. District Judge Connellan*, (Unreported, Supreme Court, 24th March, 2009) Hardiman J. commented:

> "I am unimpressed by the fact that both in written and oral submissions the third named respondents [the DPP] attempted to colour the case by including selected details of the facts of the alleged offence, quite irrelevant to the issues before the court but in the hope of invoking some reluctance to quash the conviction. We cannot be the judges of the merits of the criminal case, and to the issue of jurisdiction which is before us, the question of those merits are quite irrelevant."

I would adopt that observation.

Legal principles
21. The first essential ground which arises in this case is that of specific prejudice. The jurisprudence in this area is now so familiar as not to require repetition in any extensive way. The test, to quote Murray C.J. in *H. v. DPP* [2006] 3 I.R. 575 at p. 620:

> "… 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."

22. As was established in *H.*, an inquiry as to the reasons for the delay need no longer be made. As a consequence, this Court should not make any assumptions as to the truth of the complainant's allegations which arise solely for the purposes of the application.

23. It is necessary, of course, that in order to demonstrate the real risk of an unfair trial that an applicant engage in a specific way with the evidence actually available so as to make the risk apparent. As was pointed out by Hardiman J. in *McFarlane v. DPP* [2007] 1 I.R. 134 the onus of proof is not burdensome:

> "… what is in question, after all is the demonstration of a real risk, as opposed to an established certainty or even probability of an unfair trial …"

24. One area of focus here must be, therefore, whether the issues of specific prejudice which the applicant claims, are sufficient to cross these thresholds of onus of proof and materiality to the charges. A further issue, which specifically arises in this case, is the extent to which any trial might consist of bare assertions which could be countered only by unsupported denials a position which, as has been pointed out, might render the position of an innocent defendant "perilous". (See *B. v. DPP* [2006] I.E.S.C., Supreme Court, Hardiman J., 21st December, 2006).

25. There is undoubtedly a very substantial elapse of time in this case. To reiterate: the applicant was aged between eleven and twenty years during the period relevant to the investigation. As has been frequently pointed out a trial after a long period without corroborating or contradicting evidence is in fact a trial of the credibility of the witnesses. Thus the issue of whether there are 'islands of fact' and, or, material items of evidence, becomes the more important, particularly here, in the light of the added complexity of the case in that there are allegations against the applicant's father, his younger brother and, as will be seen, mention of sexual misconduct by a younger brother, J.U.

26. As has been established in the jurisprudence the courts are slow to intervene in cases of this type. Intervention should take place only in exceptional circumstances (*D.C. v. DPP* [2005] 4 I.R. 281).

27. A further issue which arises is as to the status to be imparted to certain documents considered to be relevant to this application, which have emerged in the course of the garda investigation. These documents would not be admissible at any criminal trial. The means by which any material contained in these documents could be introduced in evidence or made known to a jury will be considered in detail later in the judgment.

28. There are also here facts similar to those which arose in *S.B. v. DPP* [2007] I.E.S.C. (Unreported, Supreme Court, 31st January, 2007). There the Supreme Court applied the principles outlined in *H. v. DPP*, a case where a number of specific areas of prejudice were identified, including the loss of roster records in a hospital which would have established whether the applicant had been scheduled to work on particular occasions when charges of indecent assault arose. Additionally in *S.B.*, the complainant alleged that he had made complaints to two nurses and a doctor and all three had died. Giving the unanimous judgment of the court, Hardiman J. held that the records could have been of assistance in tending to show that the applicant was not present in the hospital on some occasions, thus undermining the credibility of the complainant on all charges.

29. Dealing with those deceased witnesses, Hardiman J. held that the deceased doctor could have confirmed that the complainant's allegation of an injection having been given "could not have occurred, at least legitimately"; that the deceased nurses might have confirmed the complainant's allegation of having made a report to them, but if they denied it, "the credibility of the complainant would have suffered a considerable blow". Thus the High Court's order prohibiting the prosecution of the charges relevant to those questions was upheld.

30. An overarching consideration which arises in this case was stated by Denham J. in the Supreme Court in *P.D. v. DPP* [2008] 1 I.R. 701 as follows:

> "It demeans the 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."

31. The applicant contends in this case that he is seriously prejudiced by reason of the lapse of time between the commission of the alleged offences and the making of a complaint. He says he is deprived of both oral and documentary evidence. Apart from general prejudice associated with delay he contends he has suffered specific prejudice because certain evidence which might have been available at an earlier stage for the purposes of his defence is now missing or no longer available. A key part of the applicant's submission is that on an analysis of the items of specific prejudice identified there are no rulings on directions or even any known procedural mechanism in a trial, which could remedy the disadvantages faced by the applicant; and that, at no point, has the Director indicated by what means the disadvantages or prejudice could be procedurally cured were a trial to take place. These are fundamental issues.

Unavailable witnesses

Background

32. The two fundamental tests as to specific prejudice are: (i) whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence; and (ii) whether the evidence can be obtained elsewhere, or can be dealt with by warnings from the trial judge?

33. The offences alleged here are said to have occurred at the family home between 1965 and 1973. At that time there were up to eleven members of the family living there. Four of these people, that is, the three complainants, and another sister, T.U., alleged that the applicant sexually interfered with them. As earlier outlined R.U., the applicant's father, and E.U., the applicant's brother, are charged with raping and sexually interfering with female members of the U. family.

34. The youngest child of the family, K.U. unfortunately died from leukaemia at the age of four and a half years and therefore could have had no evidence to offer.

35. The remaining living sibling, J.U. lived in the family home throughout the entire period relevant to these allegations. He has not made any allegations against any member of his family. He is not a witness in the Book of Evidence and therefore cannot be cross examined. It is said that he was interviewed by gardaí, and stated that he had "heard rumours" that other members of the family had been sexually abused by E.U., or the applicant, but that it was "purely hearsay". He further stated;

> "I saw no incident of sexual abuse in the house and I don't know about any specific incidence." (*sic*)

He indicated to the gardaí that he wished to remain impartial. None of the complainants make any allegation of sexual interference against J.U. in their statements to the gardaí.

The B.U. complaints – an absent witness

36. In this regard, however, a record, apparently obtained from a home run by the Sisters of Charity in Sean McDermott Street has been disclosed. B.U. was placed there in 1977. The record is a diary page in printed form. Originally dated 2nd May, 1971, but also headed in handwriting "1977". Presumably it was unused in 1971, but utilised six years later. It relates to B.U. Part of that entry

records:

> "…was interfered with by brother – boys beating her – is clinically depressed."

But below there are the words:

> "…brothers beating B. up – B. holds *J.* interfered with her sexually…and threw her out of the window…" (emphasis added)

The reference here is to her brother J.U., and not M.U. There is no way of proving this document or its contents.

37. In the context of the complex family circumstances and in particular, the applicant's case that he was out of the family home from 1970 onwards, this is obviously relevant information. The maker of this record is not known, but by inference worked in the home in Sean McDermott Street. She perhaps was a member of the Sister of Charity. The document, if its contents were proved and in evidence, might raise serious questions as to how long before this record was made J.U. had apparently engaged in sexual abuse and assault, assuming he did so. The same document if its contents were proved and in evidence, might raise serious questions as to whether the sexual abuse and assault alleged against the applicant was correct or in error. This arises in the context of the applicant's case that he left the home in 1970. A question would then arise as to whether B.U. has now correctly identified the applicant as opposed to one of his siblings.

38. But given that this material has been adduced by the respondent, an equally fundamental question arises which is whether there exists any procedure whereby a trial judge could, in the interest of fairness ensure that relevant material of this type could lawfully be put before a jury, or be introduced in a way which would not have the effect of either potentially inhibiting the prosecution, or the defence in cross examination, by raising the possibility of other inadmissible or prejudicial evidence being necessary by way of context or background. No concession has been made on behalf of the respondent that the document or its contents are admissible or could be made so. It is not possible to envisage how it could be introduced to a jury.

39. A further unusual factor about this case, which bears on this point, is that every living member of the U. household has either accused another member of the household of sexual interference, or in turn, have themselves been accused of such conduct. In such complex circumstances and with the very significant elapse of time I consider that the impact of lost witnesses or evidence is rendered the more acute.

40. I can only conclude that the absence of any way of proving this document or its content, or identifying its author constitutes specific prejudice. By any standards such material in evidence supported by the maker of the record, would be relevant, would go to the issue of credibility, and be an essential part of any defence. The author of the document is not identified or identifiable. The document contains no mention of the applicant (as opposed to J.U.) as having been engaged in any sexual misconduct with B.U.

Ma.U. - the applicant's mother: Is her absence specific prejudice?

41. The applicant's mother Ma.U. lived in the family home with her family throughout the entire period relevant to the allegations. She did not work outside the family home. She died in 1995. The family home was a small three-bedroom property. The applicant asserts that his mother was fully aware of the physical and sexual abuse that was regularly occurring in the family home. The first complainant also confirms that Ma.U. "…definitely knew what was happening but was powerless to stop it". In an additional statement the second complainant states "I'm sure Ma.U. was aware what was going on in the house but she was helpless to do anything about it as she was physically intimidated by them both." I consider the contents of an email from the third complainant to the gardaí to be hearsay. It is to similar effect in any case.

42. It is important in this context to observe that the applicant has specifically stated on affidavit that he does not doubt that acts of sexual violence were committed on his sisters. However he denies that such acts were committed by him. He asserts that his mother would corroborate his denial in this regard, and that his mother would have been able to provide evidence as to the unlikelihood of the said allegations being correct having regard to her actual observations of the applicant, his brother and his father, her own habits, her own conduct and her presence in the dwelling house. The applicant claims that such testimony would have been integral to his defence.

43. The first question here is in relation to whether the applicant's mother could, as a matter of probability have given relevant evidence. It must be borne in mind that the family home was a relatively small one. There were three bedrooms. There were eleven family members. I bear in mind the particular unfortunate circumstances in this case, that is to say, that each of the family members have either made allegations against another or are the subject matter of such allegations.

44. The second question is as to the onus of proof. The applicant's mother, Ma.U. had a mental illness for a substantial number of years. I think an onus lies on the applicant to establish that the prejudice arises as a result of the elapse of time between the time of the alleged offences and the date of trial. I do not think this is made out on the facts of this case in relation to the applicant's mother. In fact B.U., N.U. and T.U. all say in their statements that the applicant had assaulted his mother on a number of occasions but that she was so oppressed by events that she was powerless to prevent the assaults that were taking place in the home. Whether she could assist the applicant must be dubious.

45. The applicant denies that he was guilty of any misconduct towards his mother. However the onus is on him to "engage with the facts". The 'facts' must be taken as the material set out as providing the context or background. This includes the allegations of the applicant's sisters as to the applicants own misconduct and violence towards his mother. Is it shown that her absence would be prejudicial in these circumstances? For the reasons outlined I am not so persuaded. This must be taken in conjunction with the evidence that Ma.U. suffered from significant mental illness over a period of years. It is not said when this condition began, or how it affected the witnesses perception or memory.

46. In the circumstances the applicant has not crossed the threshold in order to demonstrate specific prejudice on this issue. It is not demonstrated that Ma.U. would have had relevant evidence which would, or even could, have tended to exonerate the applicant. I reject the applicant's case under this heading.

F.U. Deceased

47. It is conceded by the applicant that F.U., the deceased younger brother, would have been a young child aged between one and nine years during the period from which it was alleged the applicant is said to have committed the offences. It is contended that he could only have been relevant in relation to the later allegations of abuse. F.U. died on 12th January 1997. It is perhaps *possible* that he might have been in a position to give evidence as to the circumstances in the family home which pertained at the time when the later allegations arise. But nothing specific is referred to. The evidence goes no further. I do not think such evidence establishes to a

sufficient degree of probability that the absence of F.U. as a witness is sufficient to ground a claim for specific prejudice. The applicant has not discharged the onus of proof here; nor has he established evidence beyond the requisite standard of proof.

The absence of Garda Bob Green

48. In order to understand the claim of prejudice under this heading it is necessary to put matters in context. In the investigation in 2007, the applicant was invited to attend at the relevant garda station. He was not under arrest. He attended there voluntarily on the 26th June, 2007. An interview began at 3.35 p.m. The two interviewing members of An Garda Síochána were Detective Garda Tina Walsh and Detective Garda Niall Mullen. The detectives specifically indicated to the applicant that he could consult with a solicitor if he wished. He did not do so. It must be taken therefore that the applicant was being presented with a series of allegations without any prior warning. It was put to him that he had sexually assaulted B.U. Specific incidents were described. B.U. in her statement describes in considerable detail alleged assaults by the applicant. Were these allegations proved in court they would undoubtedly attract a serious sanction on conviction. However, the task of the Court is to approach these matters on the basis of presuming the applicant's innocence.

49. B.U. describes the applicant, M.U. and his then girlfriend, 'H', visiting her in the home where she had been placed in Sean McDermott Street run by the Sisters of Charity. She said:

> "They took me out to his flat on _____ for the day. M. told me that if I mentioned his name or anything he would kill me. H. was with me all day and nothing happened. M. and H. then brought me back. I was there in the home until I was sixteen and half years of age when I ran away from the home".

50. In the course of interview the applicant was questioned about this visit. He stated:

> "I remember the day we brought her to the zoo. I certainly never lived on _____Road. We brought her to the zoo and then dropped her back.
>
> Q. Do you recall why she was in the home?
>
> A. No. There was no relationship between my parents. My only memory of childhood is being beaten continuously, beaten by my father and others interfering with the kids. No matter how I tried to intercede, I would just be beaten and beaten (*sic*). That girl H. lives in Germany now but I would have no problem finding her and flying her over here.
>
> Q. By saying your father interfered with the kids what do you mean by that?
>
> A. *My sisters used to tell me what would happen to them and I visited the gardaí in _____ (name of garda station given) at the time and made the complaint on their behalf but no action was taken. I also spoke with the social worker in James' Hospital while my mother was a patient there. I had several meetings with her, I think her name was Patricia, regarding this issue and I was concerned about the children that he had with another girl in _____. She said she would contact the Southern Health Board in what she said was 'a discretionary manner'. When I followed up, the Southern Health Board had spoken to the Principal of the school where the children were attending and he had spoken to the children and that there were no untoward reports and there were no untoward reports (sic). I tried my very best to have this matter seen to but I seemed to run into a brick wall everyway I turned*.
>
> Q. Do you recall the name of the garda in _____ station or when this happened?
>
> A. I think *the name was Bob Green* and it was when the station was in _____ Street, but I couldn't tell you the exact year.
>
> Q. You mentioned earlier that your father knew that garda and that's why it didn't go any further?
>
> A. Yes, that was my feeling. Yes." (emphasis added)

51. The evidence here establishes that over two years an unsuccessful but extensive search was undertaken both by the applicant's advisors, and An Garda Síochána, in order to locate Garda Bob Green and/or a statement of complaint made by the applicant to that garda. But it has now been established as a matter of fact, that a Mr. Bob Green was a member of An Garda Síochána, and that he was stationed in the named garda station during the relevant period. Mr. Bob Green is now deceased, and despite an extensive search the respondent has been unable to locate any record of the complaint made by the applicant.

52. There are a number of key factors that arise on these points. First, is the fact that it has not been suggested that the applicant could even possibly have been aware of this specific allegation which was about to be put to him. The evidence does not show that the applicant had to pause before thinking of the garda's name. He identified Mr. Green by name and identified where he was stationed at the relevant time. The question is whether it can be said *in these circumstances* that the absence of the late Garda Green gives rise to specific prejudice.

53. The response made by the applicant is a detailed one. He had no prior warning of what was to be put to him. Thus the facts on this point come into an entirely different category from those relating to the absence of the applicant's late mother and brother. It goes beyond those where it might be thought potential rebuttal or credibility witnesses, now deceased has been identified so as to create a circumstance of potential "prejudice".

54. Were it to be demonstrated that the applicant had made complaints to members of An Garda Síochána on behalf of his sisters; this clearly would have the effect of buttressing his credibility in a case where, again because of the elapse of time, the issues must largely be questions of bare assertion and denial.

55. The applicant's assertion is that the absence of this witness and the associated evidence of his complaint about his father is prejudicial. This is especially so, he says, in circumstances where a contemporaneous account was allegedly given by him to the witness describing the living situation in the family home, and alleging acts of sexual and physical violence against his sisters by other members of his household. Such a written complaint, consistent with the applicant's assertion that it was other members of the U. family who had sexually interfered with the sisters, would to my mind, have been of significant benefit to the applicant in defending the charges he faces. In my view the absence of this witness and record also constitutes specific prejudice in compliance with the tests.

Tom King
56. The applicant also says (but did not say in the interview with the detectives) that in approximately 1966 he also made another complaint to a Garda Tom King describing the physical abuse that he was being subjected to by his father.

57. In the course of the interview, he indicated that at the relevant time to E.U.'s complaints he was maintaining three jobs. One of these was working in the garda station in _____. The applicant says he did maintenance and cleaning work there. In his grounding affidavit he says that in approximately 1966 he made a complaint to then Garda Tom King, describing the physical abuse to which he was being subjected by his father.

58. Mr. Tom King is now a retired Assistant Commissioner of An Garda Síochána. He has been located and has confirmed that he was stationed at this garda station in the years between 1965 and 1970. He has no recollection of a complaint either formal or otherwise being made to him by the applicant. This is unsurprising as it was said to be in 1966, now 43 years ago.

59. I think evidence of this nature is of rather lesser significance than that in relation to the late Garda Bob Green. Here the witness is alive. But there are two points which are of particular importance. The first is as to the location when it is said that the discussion with Mr. King took place. This was said to have been in an identified local garda station. A second point is that it has been demonstrated, again as a matter of objective fact, that the then Garda King was stationed at this station at the time. Again a third aspect is the applicant's age. He was twelve years of age in 1966 and therefore at a stage in life where identified islands of fact are even less likely to be identifiable.

60. Taken in isolation, I would not have concluded that this demonstrated prejudice to a sufficient degree. However in the light of the circumstances, the very substantial elapse of time, and taken in conjunction with the evidence with regard to the late Garda Bob Green, I conclude it constitutes specific prejudice.

Mick Byrne
61. The applicant was a keen cyclist. He has averred that he informed his cycling coach, Mick Byrne about the physical beatings that he suffered at the hands of his father and was referred by him to a local doctor who took notes of his injuries. He has stated that Mick Byrne would have been in a position to testify as to the abrasions and lacerations to his body. Mr. Mick Byrne is unfortunately now deceased. The doctor who treated the applicant is now deceased. This is bare assertion. These facts in themselves do not demonstrate specific prejudice. But the question of Mr. Byrne's absence falls to be dealt with later in another context.

Dates on which the applicant was in the house
62. During the course of his interview the applicant stated that he left the family home when he was sixteen years of age in approximately 1970. At that point the dates or years during which it was alleged he had committed the offences had not been put to him. Over half of the total number of allegations, including all the allegations with regard to the third complainant, V.D.C., are alleged to have occurred after 1970.

63. Such a circumstance is, of course, of particular relevance as to whether the applicant had the opportunity to commit the alleged offences. In this connection a demonstration of the impossibility of even one, or a significant number of the alleged offences, could be a significant undermining of the prosecution case as a whole. It might suggest an over readiness on the part of the complainants to make allegations, or a tendency to be definite about things in relation to which, perhaps it is simply not possible to be so definite (see the judgment of Hardiman J. in *S.B. v. D.P.P.*).

Ruling on inadmissible evidence
64. In replying to the applicant's assertion that he did not reside in the family home after 1970, the respondent here has sought to rely on a report compiled by a social worker, employed by the Eastern Health Board which might imply the contrary. The Director seeks to adduce or rely on this as relevant and admissible evidence in these judicial review proceedings. The author of this report is unavailable. Therefore the report would be hearsay. But in fact it contains the hearsay suggestion that the author of the report in turn, was told by an unnamed (and therefore unavailable) third party, that the applicant had left the family home only in 1977. This is double hearsay. In my view it is not admissible as rebuttal evidence for the purposes of this proceeding. I therefore disregard it. It would not of course be admissible either for the purposes of any criminal trial.

Contextual material
65. There is however some evidence adduced by the respondent as to time sequence relevant in the B.U. case but also potentially of a wider significance. Nothing turns on this material itself. It is relevant purely in this context and I think shows the paucity of real evidence as to time sequence.

66. Ms. Anne Hogan was a teacher at a technical college which B.U. attended. She indicates that the first complainant B.U., told her that she was had been sexually assaulted and put particular emphasis on one brother. The applicant says he was out of the family home from 1970. Ms. Hogan states that in 1977, B.U. said to her that she was:-

> "*…being sexually abused in her home by one or more male members of her family*."

Ms. Hogan continued:

> "*I was shocked by this revelation myself. She (B.U.) put particular emphasis on one brother but I cannot remember his name. To the best of my memory I formed the opinion that she was being raped and I think she mentioned the living room on a couch or something. I don't remember any more details at this point. I formed the impression that this was a very serious situation. I asked her about her mother's role and she informed me that her mother could not cope. I made immediate arrangements to have B. removed to a place of safety which turned out to be a hostel in Sean McDermott Street. I made contact with all the relevant agencies, such as the gardaí, health board, social services and my colleagues in school….*"

67. It will be noted this complaint relates approximately to the year 1977. In time sequence, the latest charge which the applicant faces relates to matters alleged to have occurred five or six years earlier in 1971. This is to be taken in conjunction with the record by the unidentified member of the Sisters of Charity, which seemingly identified, not the applicant but his younger brother J.U., as the complainant's abuser. It will be recollected that no allegation is now made against J.U. The author of this report is unavailable or unidentifiable. This statement is not itself probative but it raises a question but no more as to who was allegedly engaging in sexual interference of the complainant.

68. In this application the Director relies on a memo of interview of E.U., wherein E.U., (an accused), indicates that B.U., the first

complainant went into care as a result of a physical assault on her by the applicant. It is implied on foot of this that the applicant must have been in the family home in 1977 as this was the year in which the first complainant was taken from there.

69. In relying on this answer however, the respondent does not refer to other answers given by E.U. in the same interview. In relation to who was residing in the family home when he was aged eighteen, four years earlier in 1973, E.U. answered that "J.U., F.U., two brothers and two sisters or three sisters, I'm not sure. I think it was B. (*the first complainant*), N. (*the second complainant*) and T." One reasonable inference which can be drawn from this answer is that in fact, even on E.U.'s account the applicant was not residing in the family home in 1973. The latter were relevant answers given by a co-accused in interview, and are as relevant as the former.

Efforts to obtain other evidence
70. The applicant and his solicitors have engaged in an extensive search in an attempt to procure witnesses and/or documentary evidence to prove he was not residing in the family home from 1970 onwards. He procured a life insurance payment book, opened in April 1974 which cites another address. The applicant says that prior to living at this address he lived at another Dublin address in the South Circular Road. The applicant has stated in an affidavit that in 1970 he was given a job in BSS Ireland on the recommendation of his cycling coach, Mick Byrne, who drove a truck for the same company. He states that Mick Byrne regularly dropped him back to his flat in South Circular Road at that time. BSS Ireland has confirmed that the applicant was an employee of the company in the early 1970s, but that records for that period have not been retained. The applicant has sought but not obtained bank records from Allied Irish Bank which would have confirmed the address that he would have lived in at this relevant period.

The absence of Mick Byrne as corroboration of the applicant's evidence as to where he lived
71. I have already ruled that the absence of Mick Byrne, *simpliciter*, does not give rise to a finding of prejudice. However the evidence of Mick Byrne as to where the applicant lived now emerges into a different category. It appears uncontested that such evidence could have borne out the applicant's account that he was not living at home at the time when at least some of the complaints were made. This, clearly would have been of considerable significance to the applicant's case. The absence of records due to the elapse of time speaks for itself. I consider in this context the absence of the testimony of Mick Byrne therefore constitutes specific prejudice in this context.

The applicant's medical condition
72. The applicant asserts that when he was eleven years of age he was diagnosed with a medical condition of Cryptorchidism. He says that as a result of this condition he was unable to achieve an erection, and therefore incapable of committing the acts of sexual abuse as alleged by the complainants. He states that he attended St. Vincent's Hospital as an adult for surgical procedures to repair the damage caused by this condition.

73. The applicant and his solicitors have made unsuccessful attempts to locate the various doctors who would have examined or operated on the applicant. They have tried to obtain any medical records in relation to his initial diagnosis as a child, and the operations which took place to correct his medical condition.

74. There is now, however, medical evidence which confirms that, at some stage, the applicant underwent an operation to correct this condition. The applicant was examined by his general practitioner, a Dr. McDonald, in October 2009; and a consultant urologist, Mr. Ted McDermott in February 2010. Both have concluded that the applicant has scarring consistent with such surgical intervention. However, critically from the applicant's point of view, neither medical professional is in a position to say when such corrective procedure took place. In response the Director has procured further statements from each of the accusers which assert their contention that the applicant was capable of achieving and maintaining an erection.

75. This area clearly comes within the category of "assertion and denial" where owing to the elapse of time independent verifiable evidence does not now exist to support the applicant's assertions. In the overall circumstances of this case and bearing in mind the dearth of factual material constituting islands of fact I must conclude that absence of this medical material as to the applicants condition or capacity constitutes a specific prejudice.

The absence of medical social work or clinical notes
76. B.U. stated to the gardaí that when she was "in first year" in the technical college she met Anne Hogan. She stated that as a result of conversations with that teacher she spoke to a social worker and was subsequently sent to a doctor. Her statement suggested that she was physically examined by a doctor who concluded that she "must have been sexually active". The first complainant also attended her local G.P., also a counsellor, St. Michael's Hospital and at St. Vincent's Hospital.

77. Unfortunately, however, the records of the social worker who is said to have consulted with B.U.; of the doctor who physically examined her; and of those in the hospital which related to the first complainant can not now be located and may well have been destroyed. In itself this would be insufficiently connected to the evidence or charges.

78. B.U. is unable to identify the social worker or the doctor, as she cannot remember either their names or address or any other personal information.

79. It will be recollected that Ms. Hogan stated that in 1977 B.U. told her she was *being sexually abused*. Ms. Hogan states that she reported this to the gardaí, the health board, social services and other teachers at the school. There exists no documentary record in relation to the complaint made to the gardaí. It is the Director's contention that all medical notes relating to the second and third complainants have been procured by the gardaí and disclosed to the applicant.

80. However, in context, these notes must be now seen in the light of the material referred to earlier relating to the record disclosed by the sisters of Our Lady of Charity and apparently written in 1977 which contain the statement that J.U. interfered with her sexually and threw her out a window. There is no reference in this document to the applicant as being an abuser. The 1977 document in question refers to her abuser as being J.U., who was not previously the subject of any allegation and who, moreover, was portrayed elsewhere as being a protector of the complainants by the deponent on behalf of An Garda Síochána, Detective Garda Hall. The absence of the social work notes and doctors records therefore *in the totality of those circumstances* constitutes specific prejudice.

The garden shed
81. The first complainant states in the Book of Evidence that the applicant regularly took her to a shed in the garden of the family home and that this was the location where most of the sexual abuse took place. In the Book of Evidence there is also a statement from the second complainant which alleges that the shed was one of the places where she was indecently assaulted by the applicant. In the disclosure materials there is a statement from the second complainant which alleges that her father, R.U. abused her in the same shed. The first complainant has also made allegations of sexual abuse against her father, R.U. and her brother, E.U.

82. The applicant has denied these allegations. He asserts that during the relevant period the structure was always locked by his father. It is said that his father was an active member of Sinn Féin and the I.R.A. and that the shed was used to store weapons and stolen property.

83. The applicant asserts he did not have access to the shed. He averts that it is possible that the first complainant was abused in this structure but that he was not the perpetrator.

84. B.U. states that there was no lock on the outside of the shed but there was definitely a bolt on the inside of the shed. This assertion is, on its face, at variance with her original statement where she asserts that the shed was a place where she would be locked up in if she missed school.

85. In stark contrast, in her second statement, the second complainant, N.V. states that the shed was always open and that she does not remember a lock on the outside or a bolt on the inside of the structure.

86. The shed has now been removed from the garden in question. It is not now available to be examined.

87. It is now well established that cases such as *P.O.C. v. Director of Public Prosecutions* [2000]3 I.R. 578 and *P.L. v. Judge Buttimer and Another* [2004] 4 I.R. 494 identify principles which even after the *H.* decision are relevant with regard to the question of prejudice. In *P.O.C.* the applicant was charged with sexual offences alleged to have occurred in a locked music room. No witnesses could be located to give evidence as to when a lock had been fitted to the room in question nor could any other evidence or documentary evidence be found on the topic. The trial was prohibited on this ground.

88. In my opinion the facts here are sufficiently analogous to those in *P.O.C.* to give rise to a finding of specific prejudice. In relation to the complaints of the first and second complainant which are generalised as to time and location, various apparently inconsistent accounts, have been given with regard to the shed, and as to whether it could be locked on the outside, on the inside, both, or any of those possibilities.

89. In such circumstance this question comes within the category of "islands of fact" in a case in which 34 years have elapsed between the time of the latest alleged offence and the time that the applicant was charged. These are issues which in the context of a case such as this could go to the credibility of at least two complainants. The importance of this issue is magnified in the context of the very substantial elapse of time. It seems to me therefore this constitutes specific prejudice. The point is magnified also in this case by virtue of the fact that allegations have been made not only against the applicant but against his father and his brother in relation to the same location.

Exceptional circumstances
90. In *M.G. v. DPP* (Unreported, Supreme Court, 31st January 2007) that court unanimously held that where a complainant had delayed making a criminal complaint as part of a process of threats for financial gain that this amounted to "wholly exceptional circumstances" which required the grant of prohibition.

91. In *M.G.* the complainant had made allegations of anal rape in 1977 and indecent assault in 1987. The 1977 incident was not mentioned until 1996 when the complainant said in a letter indicating he was willing to settle. The thrust of the letter was to put pressure on the applicant. In 1987 the complainant reported the indecent assault to the gardaí but later offered to drop the allegations for £3,000. The complainant did not deny that he had repeatedly demanded money from the applicant. In 1999 the applicant admitted making sexual advances to the complainant in 1977 and 1987 but denied the rape allegation. Fennelly J. observed:

> "There is however a singular distinguishing feature in the present case. It consists in the fact that the complainant persistently and repeatedly resorted to threats combined with demands for money, of exposure of the appellant's sexual proclivities. He ultimately resorted to a physical attack on the appellant's property. These threats were combined with offers to withdraw charges in consideration of money payments …"

He continued:

> "This situation is unique in the annals of the many cases of prosecution for sexual offences that had come before the courts in recent years. It constitutes a completely exceptional set of circumstances. The complainant wishes to use the courts at his own option as a means of extracting money from a person accused. The criminal courts are to be used as the instrument for the complainant's greed."

The judge added:

> "This is an unprecedented situation. If the appellant's case were to be considered as one based in delay alone, or on prosecutorial behaviour alone it would not succeed. However I am of the opinion that this court should be slow to permit the criminal courts to be used as an instrument of blackmail. This is a matter of public policy. In most cases, improper demands by a witness would not provide a basis for halting a prosecution. However the sole witness in respect of each alleged offence has consistently sought to use the threat of exposure to criminal prosecution and thus the courts themselves as a means of extracting private pecuniary benefit."

Fennelly J. concluded:

> "I believe that this exceptional element means that it would be wrong and unjust to put the appellant on trial of any of the charges."

92. In this case the applicant has averred that over the last 35 years the second named complainant, N.V. has called on him on a regular basis and put pressure on him to give her money so as to pay off her debts. The statement is supported by other evidence. It is not even totally denied by N.V.

93. The applicant asserts that in 2004 he finally refused to pay her debts any further. In response, N.V. the second named complainant threatened to make allegations of a sexual nature against him and have him "plastered all over the front of the Evening Herald like those paedophile priests."

94. The applicant asserts that the second complainant's son, S.V., threatened to kill him shortly after his refusal to pay off the second complainant's debts.

95. The applicant also says that in February 2008 (at a time subsequent to the complaint grounding the criminal investigation having been made to the gardaí) he received a "private number" phone call from a woman. The caller stated she was a friend of the second complainant who informed him that if he cleared the second complainant's overdue phone bill that she would "sort things out" in respect of the criminal charges. The applicant has procured a record of a judgment recovered against the complainant by Eircom Ltd. which, I think is consistent with the assertion as to the phone call.

96. N.V. has admitted actually asking the applicant to clear her debts and lend her money to pay her rent over the years. She denies threatening to have him "plastered" all over the Evening Herald. She admits that her son called the applicant to remonstrate with him but denies that he threatened to kill him. She denies making the allegations of sexual abuse against the applicant in order to extort money from him.

97. The applicant avers that N.V. made no mention of any aspect of the allegations until after he refused to clear her debts with Dunlaoghaire Rathdown County Council in 2004, and furthermore, asserts that the second complainant delayed making her complaint until such time as she realised that she was unable to extract any more money from him. I find that at minimum the above constitutes evidence of blackmail or at minimum extreme financial pressure.

98. In my view the evidence comes within the category of an exceptional circumstance identified by Fennelly J. and would constitute grounds for prohibiting the N.V. complaints.

The applicants age at the time of the allegations
99. In many instances of "sex delay cases" the accused was, even at the time of the allegations, an adult, whether it be a teacher or priest. Such persons are in a more advantageous position to be able to identify details, facts, or produce records about their life in order to contradict a wide range of assertions. In contrast, in the present case the majority of offences with which the applicant has been charged are said to have occurred when the applicant was a child. In fact the applicant was eleven years of age when it was contended he committed the first offence. The complaints were not made to gardaí investigating this case until over 42 years had passed from the date when the alleged offences are said to have commenced. No matter what the seriousness of the allegations there comes a point in cases of this category where the issue of elapse of time becomes more important and magnifies the effect of any prejudice. It is so in this case both for the reasons of the applicant's youth at the time of the alleged perpetration of many of the offences and also the consequences of such a lapse of time. These consequences arise in two ways; First, the relative unavailability of records to document details of his life during the period prior to his leaving the home; and second, the risks to memory over such a long period of time.

Outcome of the case
100. I find the following:

> (a) That in the context of the second named complainant N.V., the exceptional circumstance of financial pressure would be sufficient in order to grant prohibition in itself.
>
> (b) With regard to all three of the complainants the items which have been identified as specific prejudice in the course of this judgment are sufficient to warrant an order of prohibition or injunction. While some specifically relate to B.U. others are applicable to B.U., N.V. and V.D.C. in particular the absence of Mr. Green or any complaint made to him, the absence of complaints made to Mr. Tom King and specifically with regard to the third complainant the absence of evidence with regard to when the applicant lived at his family home.

101. Much of the prosecution's case is interlinked as to time and circumstance. I would therefore add that the combination of factors identified seem to me to bring this case within the category identified in *J.D. v. DPP* [2009] I.E.H.C. 48 where each of the circumstances taken together, and then cumulatively, are such as would warrant a grant of prohibition.

In the course of that judgment I observed:

> "An accused person is entitled to a fair trial on the charge which is before the court. That fair trial involves the accused standing before a judge and jury entitled to the presumption of innocence and to have evidence tested *in its context*."

102. It seems to me that the real difficulty which arises in this case is that the prosecution *and the defence* would be reliant on inadmissible evidence in order to either prove or disprove their cases. No means has even been suggested as to how this could be remedied. Even, if by some unthought of process, a trial judge were to embark on such a course of action, there would inevitably be a significant risk of possibly prejudicial and untestable material becoming part of the factual backdrop to any trial and therefore, a fundamental risk of unfairness by reliance on untested, and untestable material. I cannot conceive how such process would be lawful.

103. I will therefore grant judicial review by way of prohibition on the grounds identified in relation to all three sets of complaints.