Neutral Citation: [2015] IEHC 553

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 236 J.R.]

BETWEEN

MICHAEL BURNS

APPLICANT

AND

DISTRICT JUDGE JOHN O'NEILL, THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 18th day of August, 2015.

Introduction

1. This is an application for *certiorari* and declaratory relief in respect of a decision made by the first-named respondent on foot of an application by the second-named respondent ("the Minister") pursuant to s. 63 of the Criminal Justice (Mutual Assistance) Act 2008 ("the Act"). The decision was to direct the provision of certain of the applicant's medical records to the Minister for transmission to the Police Service of Northern Ireland ("the PSNI").

2. The applicant argues that release of his records would amount to a breach of his rights under the Constitution and under the European Convention on Human Rights ("the ECHR"). He also submits that the decision was made in breach of his right to fair procedures, in that his legal representative was refused an adjournment sought for the purpose of making submissions on these issues.

Background facts

3. On 12th April, 2013, the applicant was charged in Northern Ireland with the attempted murder of a prison officer on 28th June, 1977, and with the possession of a firearm and ammunition with intent to endanger life on the same date.

4. That prosecution has been the subject of three sets of judicial review proceedings in Northern Ireland. This Court was informed that two cases have been determined against the applicant. The first related to a claim by the applicant that his prosecution was unlawful in the light of certain assurances the applicant claims were given to him in 2003. The second concerned a separate claim that medical records, relating to his medical condition when arrested by the PSNI in April, 2013, were confidential and protected by Article 8 of the ECHR. This latter application was initiated in May, 2013. The third relates to the legal aid facilities available to the applicant.

5. Between November, 1977 and February, 1987 the applicant was serving a sentence in prison in this jurisdiction.

6. On 10th December, 2013, the Public Prosecution Service of Northern Ireland issued a request to the Minister seeking, *inter alia*, the release to the PSNI of the following records held by the Prison Service of this jurisdiction:

> *"all medical and other records which show or tend to show that, prior to his admission to prison in the Republic of Ireland in 1977, Michael Burns had suffered a gunshot wound or other injury to either of his hands."*

7. The reason given for seeking this documentation was to assist the PSNI in the investigation of the offences referred to above. (There appears to be another investigation in train in respect of the applicant's suspected involvement in another offence but the medical records do not seem to be relevant to that matter.) It was stated in the letter of request that, in the course of the attempted murder, the intended victim fired a revolver and wounded one of his attackers. Medical records obtained by the PSNI in Northern Ireland showed that at some time prior to his arrest in July, 2013 the applicant had suffered a gunshot wound to his hand.

8. The letter finished with assurances that:

- The assistance requested could be obtained under the law of Northern Ireland;

- Any evidence furnished in response to the request would not, without the consent of the Minister, the nominated judge or the witness, be used for any purpose other than that specified in the request and would be returned when no longer required for that purpose; and

- that any suspect in the case would be able to challenge any evidence provided by the Irish authorities if the material was used at trial.

9. The Minister then requested the President of the District Court to nominate a judge of that Court to receive the evidence in question.

10. The applicant was notified by the Chief State Solicitor's Office of the request by letter dated 18th March, 2014. His solicitors had been written to four days earlier. He was also informed that the application under the Act was listed for hearing on 1stApril, 2014. The applicant then gave instructions to his solicitors in Northern Ireland to oppose the application, and sought an extension of his legal aid in the Northern Ireland proceedings to cover representation in the District Court for the purposes of the hearing.

11. A Dublin-based solicitor, Mr. Finucane, was then instructed to attend in the District Court to apply on behalf of the applicant for an adjournment, on the basis that the legal aid application was pending and that it was necessary to prepare submissions on the applicant's rights under the Constitution and under the ECHR.

The District Court hearing

12. A transcript of the hearing on 1stApril, 2014, has been exhibited in the papers furnished to this Court.

13. Mr. Finucane applied for an adjournment, stating that he had only received *"detailed instructions"* on the previous day. He said that a number of questions arose from those instructions which, he considered, might merit the attention of counsel. The application for the extension of legal aid was still pending.

14. Mr. Finucane drew the Court's attention to s. 3 of the Act and in particular to s. 3(1)(b)(ii)(II), which deals with the refusal of assistance under the Act where the provision of such assistance might result in a contravention of the ECHR. He submitted that there was at least *prima facie* evidence that the applicant was at risk of a violation of his Article 6 ("fair trial") rights by reason of delay.

15. The application for an adjournment was opposed by counsel for the Minister. She pointed out that the applicant's solicitors had been written to on 14th March, 2014. She submitted that for the applicant to come into court at the last minute, without any notice to her side, when the Deputy Governor of Portlaoise Prison was present with the requested material, was in itself grounds for refusing an adjournment.

16. It was further submitted that the application before the Court related to evidence. The Northern Ireland authorities had given an undertaking that the applicant would have the opportunity of challenging that evidence, on the basis of abuse of process or any other argument of that nature, in the court of trial. In this regard counsel referred to the decision of Peart J. in *Agrama v. Minister for Justice & Ors* [2013] IEHC 15 as establishing that that was the proper venue for such arguments.

17. Counsel further submitted that normally there was no notification given of applications under the Act for material evidence to be handed over to another jurisdiction. However, because the instant application involved medical records, and having regard to the judgments of the Supreme Court in *Brady v. Haughton* [2006] 1 I.R. 1, notification had been given to the applicant. Any issue arising, therefore, related to Article 8 and not Article 6. She submitted that the judge was going to have to conduct a balancing exercise and consider whether the applicant's right to privacy and his Article 8 rights under the ECHR were outweighed by the necessity to disclose the material in the interests of justice. However, it was ultimately a matter for the first-named respondent whether he wished to proceed or to adjourn.

18. The first-named respondent then inquired of counsel as to whether she would, on an adjourned hearing, still make the same argument – that the court of trial was the proper venue for the issues to be argued. She confirmed that she would.

19. Mr. Finucane responded that if a balancing exercise was to be carried out, both sides ought to be fully and properly heard. He submitted that while prison records might be within the discretion of the authorities to release if they felt that it was in the interests of justice so to do, medical records could not be released without the consent of the individual, unless that person's capacity was challenged, or there was an order of the court.

20. The adjournment application was refused by the first-named respondent on the basis that *"Mr Burns may challenge any evidence provided by the Irish authorities if this material is to be used at his trial in the UK".*

21. The first-named respondent then heard evidence from the Deputy Governor of Portlaoise Prison. He said he had conducted a search of archived material held in the prison. There was no medical file as such in relation to the applicant but there were medical records pertaining to him on his general file. He produced and described 38 documents extracted from that file.

22. The documents have not been exhibited in this Court but it appears from the transcript that they come from different sources. Some are the reports of prison officers as to the compliance or non-compliance of the applicant with efforts to bring him to hospital for x-rays of his hand. Others are records written by medical personnel setting out details of appointments, clinical observations and/or the history given by the applicant in relation to his hand. One is a letter written by the applicant to the Governor on 20th November, 1979, in which he sought temporary release for the purpose of medical treatment. He stated in the letter that he was suffering from a serious injury to his hand and that several small pieces of metal were lodged in it.

23. At the conclusion of the evidence Mr. Finucane pointed out that one of the documents concerned an entirely unrelated condition and it was conceded by counsel for the State that this report need not be transmitted.

24. Mr. Finucane again submitted that s. 3(b)(ii)(II) of the Act contained explicit provisions prohibiting the provision of assistance where there were reasonable grounds for believing that it might result in a contravention of the ECHR. He relied on Article 6 of the ECHR, on the basis that the offences alleged against the applicant dated back to the 1970s and there was *"very much a fair trial issue".* The documents were between 33 and 37 years old.

25. The first-named respondent said that all he was focussing on was the medical records. Mr. Finucane replied that they were being asked for in the context of a criminal investigation relating to offences from the 1970s. It was abundantly clear from the case-law of the European Court of Human Rights that prejudice caused by the passage of time raised concerns about Article 6 rights.

26. The first-named respondent took the view that the only matter before the Court was the letter of request and indicated that the issues raised by Mr. Finucane could be raised *"in another forum"*. He directed that the documents be handed over to the relevant department officials.

27. On 14thApril, 2014, the applicant was granted leave to seek relief by way of judicial review.

The statutory context

28. Section 63 of the Act provides, insofar as is relevant to these proceedings, as follows:

> *"(1) This section applies… in relation to a request for assistance in obtaining evidence in the State from a person (in this section referred to as a "witness") for the purpose of criminal proceedings, or a criminal investigation, in a designated state.*

(2) On receipt of such a request the Minister, if of opinion that this section applies in relation to it, may, subject to subsection (3) –

(a) request the President of the District Court to nominate a judge of that Court to receive the evidence to which the request relates, and

(b) send the judge a copy of the request and any accompanying or related documents.

(3) The Minister shall not exercise the power conferred by subsection (2) unless an assurance is given by the requesting authority that any evidence that may be supplied in response to the request will not, without the consent of the nominated judge or the witness, be used for any purpose other than that permitted by the relevant international instrument or specified in the letter of request".

29. Section 63(4) deals with the powers of the nominated judge in relation to such matters as securing the attendance of witnesses and the production of documents.

30. Section 2(5) of the Act provides that a court interpreting any provision thereof may consider the "relevant international instrument" and any explanatory documents issued with it, and give to such instrument and such documents such weight as is appropriate in the circumstances. The *"relevant international instrument"* in this case is the 1959 European Convention on Mutual Assistance in Criminal Matters, and the additional Protocols thereto. Article 1 of the Convention (as inserted by Art. 1 of the Second Protocol) reads as follows:

"The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the requesting Party."

31. Section 3 of the Act provides that assistance *"shall be refused":*

"(a) if the Minister considers that providing assistance would be likely to prejudice the sovereignty, security or other essential interests of the State or would be contrary to public policy (ordre public),

(b) if there are reasonable grounds for believing-

(i) that the request concerned was made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation,

(ii) that providing assistance-

(I) may prejudice a person's position for any of those reasons, or

(II) may result in the person being subjected to torture or to any other contravention of the European Convention on Human Rights,

(c) if the request is not in accordance with the relevant international instrument, or

(d) if, and for as long as, the provision of assistance would prejudice a criminal investigation, or criminal proceedings, in the State,

and may be refused on any other ground of refusal of assistance specified in the relevant international instrument."

The applicant's case

32. The applicant has sought the following reliefs:

(i) an order of *certiorari* quashing the order/direction of the first-named respondent;

(ii) a declaration that the refusal to adjourn the application was unreasonable and in breach of fair procedures;

(iii) a declaration that release of the medical records would breach the applicant's constitutional rights to a fair trial;

(iv) a declaration that release of the medical records would be in breach of the applicant's right to a fair trial under Article 6 of the ECHR; and

(v) if necessary, prohibition.

33. In the Statement of Grounds it is pleaded that the date of the offences for which the applicant is being prosecuted gives rise, *prima facie,* to a breach of the right under Article 6 to a fair and public hearing within a reasonable time. In those circumstances the assistance sought was unlawful and in breach of the Constitution and the ECHR. The first-named respondent had failed to take this into consideration. His order was not in accordance with law and did not comply with the provisions of s. 3(b)(ii)(II). He unlawfully abrogated his responsibility to the courts of another jurisdiction.

34. It is further pleaded that the applicant had been the subject of extradition proceedings at some unspecified time in the 1980s and that the extradition was refused.

35. On behalf of the applicant it is submitted by Ms. Ní Chúlacháin BL that the combination of the complexity of the issues involved in material assistance applications and the gravity of the charges faced by the applicant rendered it unreasonable, and a breach of the principles of equality of arms and *audi alteram partem*, to refuse an adjournment.

36. It is submitted that the applicant was entitled to be put on notice, having regard to the decision of the Supreme Court in *Brady v.*

Haughton. Having been put on notice, he was entitled to be heard, and the entitlement to be heard must include a right to time to prepare the case. The refusal of the adjournment deprived the applicant of this right.

37. It is contended that, in circumstances where counsel for the State was acknowledging that Article 8 rights were engaged, the reasons for opposing the application to adjourn were insufficient. The fact that the State had not been put on notice that an adjournment would be sought was not significant, since it would have suffered no prejudice. The presence of the witness was not conclusive either, since the witness summons on foot of which he appeared expressly referred to the possibility that the matter might be adjourned. In any event, his evidence could have been heard on that date de bene esse.

38. Reliance is placed on a number of authorities, referred to further below, which support the proposition that a refusal to adjourn gives rise to relief by way of judicial review in appropriate circumstances.

39. With reference to the decision of the Supreme Court in *Carmody v. Minister for Justice* [2010] 1 I.R. 635, it is argued that the applicant was entitled to be represented on an equal footing with the State. In the circumstances, that meant an entitlement not to be procedurally disadvantaged. The applicant's solicitor had made it clear that he was not in a position to make proper representations. He had said enough to put the Court on notice that Article 6 was engaged, while counsel for the State had accepted that there was an Article 8 issue.

40. Ms. Ní Chúlacháin also refers to *O'Brien v. Personal Injuries Assessment Board* [2009] 3 I.R. 243 and to the following passage from the judgment of Macken J. at p. 283:

> *"…it seems to me that the principle of 'equality of arms' is but one representation or example of the umbrella of rights which are now recognised as applying to all types of proceedings. As was stated by O Dalaigh C.J. in the case of In Re Haughey [1971] I.R. 217:-*
>
> > *'…in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either through its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.'"*

41. In relation to the provisions of s. 3, it is submitted that para. (a) relates to the Minister and reserves for his or her consideration matters relating to sovereignty, security or other essential interests of the State. However, it is submitted that para. (b) is addressed to other parties engaged in the process and in particular to the Judge. The subsection must be read literally, and it is couched in mandatory terms. Assistance must be refused where there are reasonable grounds for believing that a breach of the applicant's rights might result.

42. It is submitted that the first-named respondent applied the wrong test in this instance. The question was not whether the applicant could challenge the evidence in the Northern Ireland courts. The proper test for the Court was:

> *"whether the issue before it was complex and whether it would have any serious consequences for the applicant. In considering that and weighing matters in the balance, the District Judge ought to have given consideration to the issues aired by the applicant's solicitor. The Judge ought to have considered whether Article 6 was engaged and if satisfied that it was, he ought to have granted, at the very least, an adjournment for the purposes of preparing a submission in relation to same."*

43. Reliance is placed on the judgment of Peart J. in Minister for Justice v. Gorman [2010] 3 I.R. 583. In that case the Court refused to surrender the respondent under the provisions of the European Arrest Warrant Act 2003, on the basis that it would, having regard to a number of factors, constitute an unnecessary and disproportionate interference with his family rights. The applicant contends that his case is even stronger than that in Gorman, in that the European Arrest Warrant contains a statutory presumption that the requesting State would comply with the requirements of the Framework Decision. There is no such presumption in the Act of 2008.

Submissions on behalf of the respondents

44. Ms. Leader BL submits that all of the authorities on adjournments arose in cases where there was a possibility that the substantive decision could have been different had an adjournment been granted. On the basis of s. 3 of the Act, no other decision could have been made by the first-named respondent and he was correct in considering that its provisions did not require him to grant an adjournment.

45. It is submitted that in applying the section, the focus should be on what happens in this jurisdiction, since it is established by the evidence that there will be no contravention of the applicant's rights in Northern Ireland. He will have the right to challenge evidence should he be brought to trial, and will have the availability of judicial review as a safeguard. On the authorities, the proper approach is to ask, firstly, whether what is happening in this jurisdiction may potentially result in the breach of the individual's rights and, secondly, whether what might happen in the requesting jurisdiction would be so egregious that assistance should be refused.

46. Ms. Leader refers to s. 37 of the European Arrest Warrant Act 2003 (which provides for the refusal of surrender on the basis of, *inter alia,* reasonable grounds for believing that it would be incompatible with the State's obligation under the Convention and Protocols). It is submitted that the same safeguards apply under the Act of 2008. In this regard particular reliance is placed on *Minister for Justice v. Brennan* [2007] 3 I.R. 732 and *Minister for Justice v. Stapleton* [2008] 1 I.R. 669.

47. In *Brennan*, the Supreme Court made it clear that extradition could not be refused simply on the basis that that the trial or sentencing procedures in the requesting State did not conform to the requirements of the Constitution for a trial or sentence in this jurisdiction. The exception to this general principle was expressed as follows in the final paragraph of the Court's judgment at p. 744:

> *"That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights."*

48. In *Stapleton*, the respondent had argued that his surrender to the United Kingdom would, by reason of a lapse of time of 24 to 29 years, amount to an infringement of his constitutional rights.

49. Giving the judgment of the Supreme Court, Fennelly J. identified as the central issue in the appeal at p. 681:

> *"the extent to which our courts, in dealing with surrender requests under the procedures for the European arrest warrant, should seek to incorporate Irish case law with regard to lapse of time or delay in criminal proceedings by grafting it on to surrender requests."*

50. Having considered the principles of mutual recognition and judicial cooperation, Fennelly J. considered at p. 689 that:

> *"the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, 'respect…human rights and fundamental freedoms'. Article 6.2 provides that the Union is itself to 'respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms…and as they result from the constitutional traditions common to the member states, as general principles of community law."*

51. On the evidence in that case, there was available to the respondent a procedure in the United Kingdom for seeking a remedy based on lapse of time.

52. Ms. Leader submits that the event taking place in this jurisdiction is that medical records are being handed over. That is not something that affects the applicant's fair trial rights. It may engage Article 8 rights – that is why he was put on notice of the hearing.

53. It is submitted the first-named respondent did everything in accordance with procedural fairness, in that he considered the application and gave a reasoned decision based on what he heard in refusing to allow the adjournment application and that the decision was not unreasonable.

The authorities

Adjournments

54. The applicant has referred to *Byrne v. Judge McDonnell* [1997] 1 I.R. 392 (refusal of a District Judge to adjourn a sentence hearing so that a witness could be called); *Lawlor v. Geraghty* [2010] IEHC 168 (refusal by a coroner to adjourn an inquest for the purpose of seeking hospital records); *Flynn v. District Justice Ruane* [1989] I.L.R.M. 690 (refusal of a District Judge to adjourn to facilitate the applicant in obtaining legal representation and securing the attendance of a witness); and *G. v. The Appeal Commissioners* [2005] IEHC 121 (refusal to adjourn a tax appeal pending the determination of criminal proceedings, where it was claimed that to proceed with the appeal would give rise to self-incrimination issues) as examples of cases where certiorari was granted because of an improper refusal of an adjournment application.

55. In *O'Callaghan v. District Judge Clifford* [1993] 3 I.R. 603, the respondent had refused to adjourn until later on the same day so that counsel could take instructions in a tax prosecution. The prosecution had said that it would have witness difficulties.

56. In quashing the conviction, the Supreme Court noted that the question of an adjournment was a matter for the discretion of the District Judge. However, in giving the judgment of the Court, Denham J. said at pp. 612-613 that the discretion must be exercised as a judicial discretion within constitutional parameters:

> *"[o]nce the issue of the request for an adjournment had been raised in the District Court and the court was put on notice of the wish of the applicant to be present for his trial which involved the proof of the offence by certificate it is necessary to for the District Court in the circumstances of this case to exercise its discretion to proceed with an extra degree of caution."*

57. The important factors in the case included the fact that this was a criminal trial with the possible consequence of imprisonment; it was the first time it had been listed; counsel did not have instructions on matters that might arise during a trial and there would not in fact have been any difficulty with the State's witnesses.

Mutual assistance

58. *Brady v. Haughton* was concerned with the provisions of s. 51 of the Criminal Justice Act 1994, which was repealed by the Act of 2008 and which differed in certain respects from the wording of s. 63. Section 51 read as follows:

> *"(1) This section shall have effect where the Minister receives –*
>
> *(a) from a court or a tribunal exercising criminal jurisdiction in a country or territory outside the State or a prosecuting authority in such a country or territory, or*
>
> *(b) from any other authority in such a country which appears to him to have the function of making requests of the kind to which this section applies,*
>
> *a request for assistance in obtaining evidence in the State in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory.*
>
> *(2) If the Minister is satisfied –*
>
> *(a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and*
>
> *(b) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there,he may, if he thinks fit, by a notice in writing nominate a judge of the District Court to receive such of the evidence to which the request relates as may appear to the judge to be appropriate for the purpose of giving effect to the request."*

59. In *Brady*, a request had been made for permission for the police in England to carry out inquiries in relation to a list of different matters. One item related to mobile telephone subscriber and billing records. The list also included potential actions to be taken

which, it was accepted in the letter of request, could only be carried out with the co-operation of the applicant. One such requested action was to have him medically examined for any injuries he might have sustained in the incident under investigation. On the basis that he would have to be invited to co-operate, the letter of request stated that it was:

> *"…accepted and desired that he should be given the opportunity of seeking legal advice from a lawyer of his choice who can advise him on the position in both English and Irish criminal jurisdictions insofar as they are applicable."*

60. Since many of the matters listed in the letter did not require, or did not come under, the application of the statutory procedures, the hearing in the District Court proceeded on the basis that there were requests in respect of six items:

a) results of a medical examination of the applicant for any apparent injuries;

b) a photograph of the applicant;

c) a set of his fingerprints;

d) clothing belonging to him;

e) subscriber, registration and billing details relating to his phone; and

f) evidence from his sister and her husband.

61. It is recorded in the judgments that the State treated item (a) as if it were a request for the medical records of the applicant held by the prison authorities in this jurisdiction. Accordingly, the applicant was not asked to consent to an examination and was not put on notice of the hearing. It appears that a medical doctor who was in possession of the prison records was called and gave evidence pertaining to them.

62. The respondent District Judge directed that the items requested should be transmitted and further ordered the handing over of a mobile telephone which, he was informed, was in the possession of the Gardaí. This direction was recorded in the form of what purported to be an *"order"* of the District Court.

63. On appeal from the High Court in judicial review proceedings, it was argued by the applicant that in exercising his functions under s. 51 the District Judge had been engaged in the administration of justice, and that he was therefore entitled to be a party to the hearing. This contention was unanimously rejected by the Supreme Court, which did however point out that matters had become confused by the fact that the hearing had been held in such a manner as to appear to be a court hearing, and court forms had been inappropriately used.

64. Murray C.J. described the functions of the judge as follows at p. 23:

> *"The designated judge simply engages in a process of identifying what evidence before him has been sought in the request and furnishing it to [the Minister].*
>
> *It is perhaps trite at this stage to state that the designated judge makes no finding or determination concerning guilt or innocence. Section 51 is, in a sense, no more than a procedural conduit for the purpose of enabling [the Minister] to transmit evidence in accordance with the obligations of the State under the Convention.*
>
> *The judge's task therefore is purely administrative. He conducts no inquiry or investigation and makes no findings or conclusions concerning the conduct of any person. He has no function in evaluating the weight or credibility of any evidence tendered before him. His only function is to marry so to speak the evidence tendered with that sought in the request….*
>
> *…The District Court, as a court, has no role or function in the matter. He does not act as a judge of that court but as a persona designata pursuant to s. 51…*
>
> *There are no doubt very good reasons why the task of receiving that evidence is given to a judicial personage, if only as a persona designata. Letters rogatory, which is the term used in article 3 of the Convention, is traditionally a request from judicial authority (however that is defined by an applicable convention or treaty) to judicial authority transmitted via the respective departments of foreign affairs or justice in the states concerned. Moreover, the fact that the evidence was received in the first instance by a judge adds a stamp of authenticity and therefore reliability as to the source of the evidential material…"*

65. Denham J. noted at pp. 49-50 that the process under s. 51 was a limited one.

> *"It is not a wide-ranging investigative role. The designated person is not an investigating judge. Within the terms of the request, and the items referred to, the delegated person…is required to receive such of the evidence to which the request relates as may appear to him to be appropriate for the purpose of giving effect to the request. Thus the s. 51 procedure is a statutory procedure, not a trial. It is a process consistent with international principles as to mutual assistance."*

66. Hardiman J. observed at p. 72 that the status of judge was *"merely a condition of eligibility for nomination".*

67. Geoghegan J. was of the same view although he added that there was no doubt but that the designated judge had to act judicially in relation to the particular decisions to be made as to the appropriateness of transferring the property.

68. An argument was also made on behalf of the applicant to the effect that he should have been entitled to notice and participation on the basis that, firstly, the hearing concerned a criminal investigation and could ultimately affect a trial in which he was the accused and, secondly, it was possible that the record of the evidence received by the District Court might, without more, be admissible in a trial in the United Kingdom.

69. On the first limb of this argument, the majority of the Supreme Court held that the procedure before the District Judge could be compared with steps in an investigation in this jurisdiction which require a judge's authority, such as the issue of a search warrant or

the seizure of goods. The person who is the subject of the investigation in those circumstances has no right to be notified of the fact that an application is being made to the court. Subject to exceptional circumstances it was considered that there was, similarly, no right to be notified of an application for mutual assistance.

70. The second limb depended on the interpretation of relevant United Kingdom legislation. The majority of the Supreme Court accepted that the transmission of the evidence in question could not be utilised in the fashion contended for, and could not be used for a trial at all without the consent of the Minister.

71. An undertaking was given in the course of the Supreme Court hearing that the medical records would not be transmitted. This course of action appears to have been based on an acceptance that they were outside the terms of the letter of request. It should be noted that, nonetheless, members of the Supreme Court expressed concerns on the issue. It was observed that the records related to treatment of the applicant while he was in custody and therefore arose out of the doctor/patient relationship.

72. Murray C.J. held at p. 21 in this regard:

> *"Where a prisoner is medically examined on admission to custody in a prison for the purpose of recording his physical condition, including any evidence of apparent injury, it may well be argued that this does not constitute medical treatment or otherwise does not derive from a doctor/patient relationship. However, that is not the situation in this case because we are concerned with his prison medical records created in connection with his treatment there. Moreover, the fact that the doctor in question was summoned to give evidence of the medical records by means of a summons which purported to be issued by a court, the District Court may have had an overriding influence on any ethical qualms he may have had about disclosing the medical records."*

73. Denham J. said at pp. 54-55:

> *"…there was confusion in response to this request. First, on the documents, with their court trappings, it would be reasonable for a doctor to have assumed that he was giving evidence in court. The nature of the application was not explained to him. The issue as to the duty of the doctor to his patient in such an application was not analysed or a decision made. The privilege of the patient in general or specifically under s. 51(6) was not addressed adequately either.*
>
> *In this case there was a request initially for medical records. In general, the designated person may receive such of the evidence to which the request relates as may appear to him to be appropriate for the purpose of giving effect to the request. First, the designated person should address that which is requested. Then, within the ambit of the terms of the request, he may receive that which appears appropriate to give effect to the request…He is limited to the terms of the request, which includes the precise terms appropriate to give effect to the request."*

74. Geoghegan J. said that, having regard to the undertaking not to transmit the records, he would prefer to leave over to another case the question of what, if any, protection a person in the applicant's position should have in relation to the proposed transfer to another jurisdiction of his medical records. He noted that no legal privilege arose in the doctor/patient relationship but continued at p. 87:

> *"Even in the case of a relationship which does not give rise to a legal privilege in the strict sense, a court may have regard to the confidentiality rights of a party in considering whether it is absolutely necessary that such evidence be given. These are all difficult questions and in the view of the third respondent's undertaking, I think it would be unwise to embark on an attempted resolution of them."*

Discussion and conclusions

75. The applicant has sought declarations that release of the records would breach his fair trial rights under the Constitution and under the ECHR. However, it will be apparent from the foregoing that the applicant has put no evidence before the Court as to any matter touching on the fairness of any trial he may receive. It is not sufficient to simply assert that the alleged offences date from many years ago, that prejudice may be inferred from that fact and that the provision of assistance under the Act is therefore unlawful. No foundation has been laid upon which the Court could make either of the declarations sought.

76. The applicant has also chosen not to address, in evidence or submissions, any potential privacy issue arising under either the Constitution or Article 8 of the ECHR.

77. In reality, the applicant's case is about the adjournment application. The question then is whether the first-named respondent exercised his undoubted discretion in this respect in a manner that was unreasonable and amounted to a breach of the applicant's rights.

78. This is a question that must always be considered in context. There is no general principle that a party in any type of hearing will always be entitled to an adjournment on application.

79. The context here is one of an administrative process, being carried out by a person designated under the Act to receive the evidence specified in the letter of request. It is clear from the decision in *Brady v. Haughton* that the process is one which in normal circumstances will be carried out without reference to the individual being investigated, in the same way that a search warrant can be issued, or other investigative steps taken, without notice. The reason for putting the applicant on notice in this case was the concern raised by the members of the Supreme Court in *Brady* about the treatment of the medical evidence in that case.

80. It will be seen from the passages from *Brady*, quoted above, that those concerns arose primarily from the possibility that the doctor who gave evidence may have been under the impression that he was appearing before a court, and therefore believed that his normal obligations in relation to patient confidentiality had been lawfully overridden. In the event, the question whether the designated judge would, under the Act, have power to transmit a doctor's reports against an objection by the patient did not arise for determination in the case.

81. In the instant case, the applicant's solicitor told the respondent that an adjournment was required in order to make representations in relation to fair trial rights under the Article 6 of the Convention, arising from the lapse of time in bringing the prosecution against his client. The respondent decided that this was not a matter for him and in my view, having regard to the judgments in *Brady*, he was entirely correct in that.

82. It is true that the statutory provisions applicable in this case are not identical to those under consideration in *Brady*. However, I do not consider that the nature of the process has been fundamentally changed. It remains the case that the designated judge is not engaged in either the administration of justice or an investigative role, and that his or her function is to receive the evidence and forward it to the Minister.

83. I think that I should perhaps say that I am not convinced that the Minister is concerned only with para. (a) of subs. (3), and that para. (b) is addressed to the designated judge. It seems to me that the request for assistance having been addressed to the Minister, it is his or her decision whether or not it should be refused. The designated judge does not have that role.

84. However, the case has not been argued on that basis. In any event, the designated judge would certainly have an obligation not to breach the rights of the individual concerned within the parameters of the role conferred on him or her by the Act. In that regard, I consider that the respondents are correct in arguing that this entails consideration of the question whether or not *"the receipt of the evidence"* in this jurisdiction involves a breach of the individual's rights. It is not the role of the designated judge to decide whether or not it is unfair to prosecute the applicant in the requesting state. While exceptional circumstances may arise, it is difficult to see how, in the normal course of events, submissions on this issue will be relevant to the judge's task. Where, exceptionally, they do arise, the principles set out by the Supreme Court in *Brennan and Stapleton* are apposite.

85. The applicant's solicitor did not engage with the suggestion that he could make submissions on Article 8 privacy rights in relation to medical reports, other than to say that his client was entitled to be heard in the carrying out of any balancing exercise. That was correct, having regard to the fact that he had been put on notice for that reason, but there is no explanation as to why he was not in a position to deal with it at the time. He may perhaps have been personally taken unawares on this point, but it is certainly a matter of which the applicant and his Northern Ireland legal advisors were fully aware. They had already commenced judicial review proceedings in that jurisdiction on precisely the issue of confidentiality of medical information arising in a custodial context.

86. There is also the consideration that at least some of the documents in question could not, on any interpretation, come within the protection of doctor/patient confidentiality. In particular, this applies to the reports by the prison officers and to the letter written by the applicant seeking temporary release.

87. In making the case that an adjournment should have been granted to enable the applicant's representative to prepare submissions, I do not think it unreasonable to expect that this Court should be told, at this stage, what those submissions would or even might have been. However, no substantive case has been made in this Court in relation to Article 6, and none at all in relation to Article 8.

88. In the circumstances I refuse the reliefs sought.