
IRELAND / JUDGMENT

McFarlane -v- DPP McFarlane -v- DPP [2008] IESC 7 (05 March 2008)

[2008] IESC 7

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Judgment Title:

McFarlane -v- DPP

Neutral Citation:

IESC No. 7

Supreme Court Record Number:

60/07

High Court Record Number

:

2006 542 JR

Date of Delivery:

05 March 2008

Court:

Supreme Court

Composition of Court:

Hardiman J., Geoghegan J., Fennelly J., Kearns J., Macken J.

Judgment by:

Kearns J.

Status of Judgment:

Approved

Judgments by

Result

Concurring

Geoghegan J.

Appeal dismissed - affirm High Court Order

Fennelly J.

Appeal dismissed - affirm High Court Order

Hardiman J.

Kearns J.

Appeal dismissed - affirm High Court Order

Hardiman J., Macken J.

Outcome:

Dismiss

THE SUPREME COURT

Hardiman J.

Geoghegan J.

Fennelly J.

Kearns J.

Macken J.

[SC. No. 60 of 2006]

BETWEEN

BRENDAN McFARLANE

APPLICANT/APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

THE MEMBERS OF THE SPECIAL CRIMINAL COURT

NOTICE PARTIES

JUDGMENT of Mr. Justice Kearns delivered the 5th day of March, 2008

This appeal raises serious issues about the effects of delay on the entitlement of the State to prosecute criminal offences. It is an issue which has given rise to much anxious consideration by this Court in recent years, particularly in the context of offences relating to the sexual abuse of children. Evaluating reasons for delay and attributing blame for delay in reporting abuse (complainant delay or pre-charge delay) came to be seen as a far from simple exercise in those cases. Because of the often hidden nature of those particular types of crime, there were many instances where criminal prosecutions only became possible many years after the incidents themselves when the victim or complainant finally reported abuse to the authorities. The courts were repeatedly called upon from the mid 1990s onwards to adjudicate between the community's right to see serious crimes prosecuted whilst defending an accused person's right not to be subjected to an unfair trial. The prejudicial effects of long delay were frequently invoked and relied upon by applicants to argue that no trial should take place. The right to a trial in due process of law is a right guaranteed by Article 38.1 of the Constitution and thus where it is established that there is a real risk of an unfair trial, a risk which can not be overcome by rulings or directions from the trial court, the courts in this jurisdiction will prohibit such a trial from taking place.

That was one form of delay. Delay can also arise from the tardiness of the police, either in investigating an alleged crime after it has been reported, or on the part of the prosecuting authorities in bringing an alleged perpetrator before the courts and in taking the necessary steps to prepare a case for trial. The jurisprudence makes clear that this form of delay, called 'prosecutorial delay', may also entitle an applicant to relief in the form of prohibition in certain circumstances. This will arise because an applicant is also entitled to a trial with reasonable

expedition as part of his constitutional rights under Article 38.1.

Delay may also arise when the State, by its failure to provide adequate resources or facilities for the disposal of litigation, has itself contributed to delay. ‘Systemic delay’ of this nature may overlap to some degree with prosecutorial delay and run hand in hand with it. There may be prosecutorial delay within systemic delay. Equally there may be no blameworthy delay by the prosecution but there may yet be delays within the system to which an applicant has in no way contributed. There may also be judicial delay where the court fails to deliver its judgment or decision within an appropriate time frame. Where systemic delay is established it may amount to an infringement of a citizen’s constitutional right to a trial with reasonable expedition. Such forms of delay may also amount to an omission or failure on the part of the State to comply with its obligations under the European Convention on Human Rights, in particular article 6 thereof which provides:-

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

In the present case it is claimed that there was both prosecutorial delay and delays within the system which prevented an earlier set of judicial review proceedings being disposed of within a reasonable time. There is no suggestion that there was any form of judicial delay contributing to that alleged delay. The Court must thus consider the circumstances in which delay of the sort complained of, particularly when superimposed upon an already lengthy interval of time between the offence and the completion of pre-trial court procedures, may entitle an applicant to obtain prohibition of his trial.

BACKGROUND

The factual background surrounding the alleged offences in this case is elaborated in greater detail in the first set of judicial review proceedings in this matter and need only be summarised briefly. On 24th November, 1983, Mr. Don Tidey, one of Ireland’s best known businessmen, was abducted and held at a primitive hideout in a wooded area of County Leitrim where he remained until the 16th December, 1983. On that date Mr. Tidey was rescued from his dire predicament by the garda. During a shoot-out which occurred in the course of his rescue a garda recruit, Gary Sheehan, and an army private, Patrick Kelly, were shot dead. The kidnappers made good their escape, but amongst a number of items left behind at the scene were a milk container, a plastic container and a cooking pot. It is part of the State’s case that the applicant’s fingerprints were found on these items. The applicant was thus a prime suspect in the garda investigation which followed.

Certain things were known about the applicant. He had been imprisoned in Northern Ireland since 1975, serving a long sentence of imprisonment for his part in the I. R. A. bombing of a bar on the Shankill Road in Belfast in which five people were killed. On 25th September, 1983, the applicant, along with other prisoners, managed to escape from the Maze Prison. The kidnapping

of Mr. Tidey occurred not long afterwards in November, 1983. The applicant was arrested in The Netherlands in January, 1986 at which point he was found to be in possession of a stolen or forged Irish passport. On 3rd December, 1986, he was extradited from the Netherlands back to Northern Ireland. From that time until some time shortly prior to his arrest, he was serving his sentence in Northern Ireland, a fact that was known to the garda. The garda did not seek to interview the applicant in relation to the Tidey abduction while serving his sentence in Northern Ireland because it was believed he would not co-operate in any such venture and would be entitled to refuse to see any garda that sought to interview him whilst in prison in Northern Ireland. The applicant was on parole in this jurisdiction at the time of his eventual arrest on 5th January, 1998.

The statements of the garda witnesses make clear that, following arrest, the applicant for the most part declined to answer questions and simply stared at the wall. It is alleged, however, that he did make certain admissions while being questioned. Specifically, it is alleged when asked about his involvement “

in Drumcroman Woods

” he said:-

“On the advice of my solicitor I will not discuss it. I was there you can prove that but I will not talk about it.”

He was also questioned as follows:-

“Q. What do you expect will happen to you? A. I am prepared for the big one. I have already talked to her [his girlfriend who had been to see him] about our future and house.

Q. Do you mean murder? A. I am prepared for the worst.”

These alleged admissions, together with the fingerprints, constitute the case against the applicant. Neither in the course of previous proceedings, nor in the present proceedings, has the applicant disputed the admissibility or accuracy of the evidence in relation to these alleged admissions. However, in the years following the events at Drumcroman Woods, the various items upon which it was alleged the applicant had left his fingerprints became lost in Garda Headquarters in the Phoenix Park in Dublin where they had been stored. From evidence given in the first judicial review proceedings, described in the next paragraph hereunder, it appears that these items were preserved in a specific room in Garda Headquarters in 1983. The room in question was subsequently changed in use from storeroom to a library and conference room and the items in question could not thereafter be traced or located. However, photographs of the fingerprints on the items had been taken and the same were preserved and are available for use at any trial of the applicant. Their loss, however, featured prominently in the first set of judicial review proceedings brought herein.

Before describing those proceedings it is perhaps useful at this point to set out a chronology of the relevant dates which relate to the various steps taken by the parties in this litigation to date:-

- 1) 5 January, 1998: The applicant is arrested and subsequently charged with offences arising from the abduction of Mr. Tidey
- 2) 14th July, 1998: The applicant is served with the Book of Evidence containing statements of the evidence proposed to be given at trial.
- 3) 1st November, 1999: The applicant seeks and obtains leave to bring judicial review proceedings, in which he seeks to prohibit his trial both on the basis of prejudice arising from the loss of the items on which his fingerprints were allegedly found and, also on the basis of prejudice arising from delay. As part of the relief on the granting of this application, the applicant obtains a stay on his prosecution.
- 4) 9th November, 1999: A trial date which had been fixed for the appellant's trial is vacated having regard to the applicant's ongoing judicial review proceedings.
- 5) 5th April, 2000: The respondent files opposition papers to the applicant's judicial review application.
- 6) 15th May, 2000: The applicant makes request for voluntary discovery. The respondents decline to make voluntary discovery.
- 7) 13th October, 2000: Return date for applicant's Motion for Discovery before the Master of the High Court.
- 8) 12th January, 2001: Discovery motion is struck out as both parties make an error about the correct date of the hearing.
- 9) 29th May, 2001: The applicant's solicitor writes to Chief Prosecution Solicitor seeking to have the motion re-entered.
- 10) 2nd October, 2001: The applicant brings a fresh Motion for Discovery.
- 11) 16th November, 2001: Return date for the fresh Motion of Discovery before the Master of the High Court.
- 12) 8th February, 2002: An Affidavit of Discovery is filed on behalf of the respondent listing 93 documents in its schedule.
- 13) 1st March, 2002: The Motion for Discovery is struck out by consent of the parties.
- 14) 14th May, 2002: Return date for the applicant's Motion for Further and Better Discovery.
- 15) 11th June, 2002: The Master of the High Court refuses the applicant's Motion for Further and Better Discovery.
- 16) 22nd July, 2002: The High Court refuses the applicant's appeal from the Master's Order refusing the applicant's Motion for Further and Better Discovery.

- 17) 14th March, 2003: The substantive judicial review is listed for hearing but does not proceed on the date allocated due to unavailability of judges.
- 18) 11th July, 2003: The substantive judicial review is heard by the High Court (O’Caoimh J.) (The first judicial review proceedings)
- 19) 18th July, 2003: Judgment is delivered by O’Caoimh J in which he prohibits the trial, holding in favour of the applicant only in respect of missing evidence but rejecting applicant’s case about delay.
- 20) 19th August, 2003: The respondent lodges Notice of Appeal to the Supreme Court.
- 21) October, 2004: A signed transcript of the High Court Judgment is obtained.
- 22) 25th January, 2005: The Certificate of Readiness is lodged in the Supreme Court Office.
- 23) 2nd February, 2006: The applicant applies for and is given leave to bring a Cross -Appeal on the delay issue.
- 24) 16th February, 2006: The Supreme Court hears the appeal.
- 25) 7th March, 2006: The Supreme Court delivers judgment allowing, by a majority, the appeal on missing evidence point but upholding unanimously the finding of the High Court in relation to delay.
- 26) 4th April, 2006: The Special Criminal Court assigns 3rd October, 2006, as the date of the applicant’s trial.
- 27) 15th May, 2006: The applicant seeks and obtains leave to bring the present proceedings (i.e. the second judicial review proceedings).
- 28) 8th November, 2006: Judgment is delivered by the High Court refusing the applicant relief.
- 29) 24th January, 2008: The Supreme Court hears the appeal in present proceedings.
- 30) 5th March, 2008: The Supreme Court delivers judgment in present proceedings.

FIRST JUDICIAL REVIEW PROCEEDINGS

As noted above, the High Court made an order prohibiting the trial of the applicant on the ground that the failure on the part of garda authorities to retain the items which had been lost and which were said to contain the applicant’s fingerprints resulted in there being a real or serious risk of an unfair trial. However, the High Court rejected the applicant’s claim based on the issue of delay, distinguishing between delay prior to charge and delay subsequent to charge. In that application the High Court was concerned with pre-charge delay only.

The Director of Public Prosecutions appealed that part of the judgment and order of the High Court which prohibited the trial of the applicant. The applicant, for his part, cross-appealed the order of the High Court in so far as the same dismissed his application for prohibition on the grounds of delay. This cross-appeal was lodged at a very late stage shortly before the hearing before this Court.

This Court, by a majority, held that, as there had been a forensic examination of the missing items prior to their disappearance, and given that the results of the forensic analysis had been preserved, the applicant had not been deprived of the reasonable possibility of rebutting the evidence proffered against him and thus had not discharged the onus of proof that there was a real risk that he could not have obtained a fair trial.

On the issue of delay, all five judges of this Court were in agreement in that the lapse of time or delay was not such as should give rise to an order prohibiting the trial of the applicant. This Court held that the garda were entitled to adopt the position that they would conduct questioning of the applicant following his arrest under s.30 of the Offences against the State Act 1939, as amended, in this jurisdiction when the applicant would have been obliged to listen to the questions, if not to answer them, and when (subject to the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations Regulations, 1987 (S. I. No. 119 of 1987)), the structure and duration of the questioning would have been in the control of the garda and not that of other authorities or that of the applicant himself. Further, and given that the garda did not have available to them the evidence relating to the admissions until the arrest of the applicant in this jurisdiction, there were no proper grounds for charging the applicant with an offence at any earlier time. Thus, their failure to do so and the lapse of time before they were in a position to do so could not give the applicant the right to prohibit a trial on the basis of the defeat of his constitutional right to an expeditious trial. Accordingly, all complaints of delay were dismissed by this Court.

No complaint of prosecutorial or systemic delay was at any time raised by the applicant in the first judicial review proceedings. Furthermore, when the applicant belatedly filed his own Notice of Cross -Appeal on the delay issue he failed to make out on affidavit or otherwise any complaint of systemic delay, or even to suggest that there had been systemic delay, although this was an option available to him both then and in the High Court. Counsel for the applicant has not seriously quarrelled with the proposition that he could, without difficulty, have obtained an amendment of the pleadings in the first judicial review case for the purpose of arguing the issue of systemic delay up to the time of the hearing before O’Caoimh J. in those first proceedings.

THE PRESENT PROCEEDINGS

In the present proceedings the applicant claims:-

- (1) A Declaration that the delay in the hearing and determination of proceedings relating to the criminal prosecution of the applicant with the offences said to have occurred between 25 November, 1983 and 16 December, 1983 which are presently pending before the Special Criminal Court constitute a breach of the constitutional entitlement to a fair trial in due course of law and a fair trial in accordance with Article 38.1 of the Constitution
- (2) A Declaration, in the alternative, that the said delay constitutes a breach of article 6(1) of the European Convention on Human Rights and Fundamental Freedoms
- (3) An Order granting to the applicant leave to apply for an order prohibiting the respondent from taking any further steps in the prosecution of the Applicant.

Leave was granted by the High Court (Peart J.) on 15th May, 2006 to bring the said proceedings. A Statement of Opposition was filed on 13th July, 2006. Various affidavits were sworn and filed by both sides and the matter came on for hearing before the High Court (Quirke J.) who gave judgment on the 8th November, 2006 (

McFarlane v D. P. P

.

[2006] IEHC 389

). No complaint is advanced that the present judicial review proceedings were affected by either prosecutorial or systemic delay. On the contrary, the applicant points to the present proceedings as an example of how the system should work and invites the Court to contrast the time taken in the present case with that taken to complete the first judicial review proceedings.

In the course of his judgment Quirke J held that no evidence had been adduced on behalf of the applicant suggesting that anything which had occurred since November, 1999 had prejudiced the applicant's capacity to defend himself in respect of the charges preferred against him. Quirke J. furthermore stated:-

“At its highest point the evidence adduced on behalf of the applicant has established two, or perhaps three periods of unnecessary delay on the part of the prosecuting authorities in dealing with the applicant's judicial review proceedings and in particular the State's appeal against the decision of the High Court in those proceedings.

No evidence has been adduced indicating that any consequence flowed from those delays which has interfered with any interest which the applicant's right to an expeditious trial was intended to protect”

The periods identified by Quirke J. as being unnecessary periods of delay were as follows:-

- (a) The 13 month period between 12 January, 2001 and 8 February, 2002 – this was the period between the date when the applicant’s Motion for Discovery was struck out and the date when an Affidavit of Discovery was delivered on behalf of the D. P. P. In holding such period to be excessive, Quirke J. attributed the delay to both parties.
- (b) The period of approximately 18 months between 19 August, 2003 and 27 January, 2005 – this was the period between the lodgement of a Notice of Appeal by the respondent in the Supreme Court and the filing by him of a Certificate of Readiness to Proceed. Quirke J. found this delay had not been adequately explained by the respondent and was excessive
- (c) The period of 14 months between 27 January, 2005 and 7 March, 2006 – the latter date being that on which this Court gave judgment – Quirke J pointed to an absence of evidence which would enable him find whether such delay was excessive in this or other jurisdictions.

Having then conducted a careful review of the relevant case law, including the decisions of this Court in

P. M. v Malone

[2002] 2 IR 560

,

P. M. v D. P. P

.

[2006] 3 IR 172

,

T. H. v D. P. P

.

[2006] 3 IR 520

and the decision of the European Court of Human Rights in

Barry v Ireland

[2005] ECHR 865

(15 December 2005), Quirke J. concluded that while the applicant had asserted increased stress and anxiety caused to him by delay, the same was not such as would outweigh the community’s “very considerable interest in having offences of the gravity of those which are the subject of these proceedings prosecuted to a conclusion.”

Having conducted a balancing exercise in this manner, Quirke J. refused to prohibit the trial and it is from such refusal that this appeal is brought.

CONSEQUENCES OF FAILURE TO RAISE ISSUE OF SYSTEMIC DELAY IN FIRST JUDICIAL REVIEW PROCEEDINGS

Counsel for the respondent raised a preliminary issue before this Court which he said arose from the failure of the applicant to argue systemic delay before O’Caoimh J. in the High Court in the original judicial review proceedings. He submits that the applicant is not as a result entitled to argue any issue of systemic delay in these proceedings by reason of the rule in

Henderson v. Henderson

(1843) 3 Hare 100

. The rule or principle was formulated in the judgment of Wigram V. C. as follows at pp 114 and 115:-

“.. I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of

res judicata

applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

The underlying reason for the rule in

Henderson v. Henderson

is a simple one. Public policy dictates that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do. In

Woodhouse v. Consigna

[2002] 1 WLR 2558

, Brooke L. J. characterised the public interest requirement in the following manner at p.2575:-

“... at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v. Henderson

(1843) 3 Hare 100

that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever, and that a defendant should not be oppressed by successive suits where one would do”

The courts in this jurisdiction, not least in the interests of reducing delay, have followed this line of authority for many years in cases such as

Russell v. Waterford and Limerick Railway Company

(1885) 16 L. R. Ir. 314;

Cox v. Dublin City Distillery

(No.2) [1915] 1 I. R. 345;

Carroll v. Ryan

[2003] 1 IR 309

,

A. A. v. The Medical Council

[2003] 4 IR 302

;

Akram v. Minister for Justice and others

[2004] 1 IR 452

and

Law Society of Ireland v. Malocco

[2005] IESC 5

.

However, the courts have repeatedly made clear that the rule in Henderson v. Henderson should not be blindly or invariably applied, particularly if there are special circumstances in the case which would suggest that the imposition of the limitation would be either unfair, excessive or disproportionate. As Hardiman J. stated in

A. A. v. The Medical Council and the Attorney General

[2003] 4 IR 302

at p.317:-

"Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities. This point has a particular resonance in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms 1950. In Ashingdane v. United Kingdom

(1985) 7 EHRR 528

at p. 546, the European Court of Human Rights said:-

'the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals'."

In the context of the present application, I am of the view that the rule in *Henderson v. Henderson* should not be rigidly applied. My main reason for so holding is that its application would do no more than provide a partial defence to the respondents herein, because only such systemic delay which had occurred up to the date of the hearing before O'Caoimh J. in the High Court in the first judicial review proceedings could have been invoked before that court in July, 2003. In the present case the applicant complains that the relevant period of systemic delay runs from the commencement of the first set of judicial review proceedings until the disposal of same by judgment of this Court delivered on 7th March, 2006. Indeed, his principal complaint relates to the period of delay in processing the appeal from the High Court to this Court. Thus the main period of allegedly blameworthy systemic delay falls outside any period of time which the High Court had to consider. While counsel for the respondent has argued that no reference to any alleged systemic delay was made when the application was brought to lodge a late Notice of Cross-Appeal in the first judicial review proceedings, I think that complaint also runs up against the same difficulty, that it was not the subject matter of any adjudication in the High Court or in this Court either.

As part of the same argument counsel on behalf of the respondent also argues that the present proceedings are an abuse of process and nothing more than a collateral attack on the earlier judgment of this Court which refused to grant relief on grounds of delay. Counsel suggested that the present proceedings amount to no more than an invitation to the Court to repeat the exercise conducted by both the High Court and Supreme Court in the first set of proceedings and in support invoked the dramatic terminology of Halsbury L. C. who stated in

Reichel v. McGrath

[1889] 14 AC 665

(at p.668):-

“...it would be a scandal to the administration of justice if, the same question having (been) disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.”

I have with some reservations concluded that the complaint of abuse of process cannot be sustained. Firstly, the present application relates mainly to systemic delay which is an issue the subject matter of newly emerging jurisprudence in this jurisdiction. Secondly, the main element of alleged systemic delay relates to a period subsequent to the hearing of the first judicial review proceedings and thus the issue could not sensibly have been either fully or comprehensively dealt with by O’Caoimh J in the High Court. While on one view the present application may be seen as a ‘last ditch’ effort to stop a trial from proceeding, I believe the applicant has gone far enough to demonstrate that a new point has now arisen which requires the adjudication of this Court. Had it been a pure stalling exercise by the applicant this objection would have to be upheld because quite clearly delay occasioned, or still worse, engineered by an applicant can not be invoked by him in support of an application for prohibition nor can it be laid at the door of the State under any guise.

While in no way forsaking the valuable jurisprudence represented by the rule in

Henderson v Henderson

or that which relates to abuse of process, I would prefer to resolve this case by reference to the wider principles concerning the effects of delay.

SUBMISSIONS OF THE PARTIES IN THE CURRENT APPEAL

In the course of arguing the applicant’s case before this Court, Mr. Hugh Hartnett, Senior Counsel, adopted the position that the systemic delay which followed the inception of the first judicial review proceedings in 1999 until their conclusion in March, 2006, was both excessive and blameworthy and infringed the applicant’s constitutional right to a trial with reasonable expedition within Article 38.1 of the Constitution and article 6 of the European Convention on Human Rights. He argued that there had been a failure in the court system for which the State must accept responsibility. There was a particular onus on the State in this case to ensure that the system disposed expeditiously of the first judicial review proceedings having regard to the long delay which preceded the commencement of those proceedings in 1999.

In response, counsel for the respondent argued, firstly, that there had been no systemic delay in so far as the first judicial review proceedings were concerned. He accepted that some untoward delay occurred when difficulties arose in taking up the transcript of the hearing in the High Court and in certifying the case as ready for hearing in the Supreme Court. Any delay thereafter had to be seen in the context that the Supreme Court had a substantial case load and that the present

application had to take its place among other important and urgent cases awaiting a hearing before this Court. No application had been made by or on behalf of the applicant to either strike out the appeal or to seek an early date for hearing from the Supreme Court. The applicant had not asserted the right to an early trial, a factor which, as indicated by the U. S. Supreme Court in

Barker v Wingo

407 U. S. 514 (1972) was always of relevance in this context. Counsel further submitted that the applicant had not pointed to any period of pre-trial incarceration, nor had he led any medical evidence to support a mere assertion of increased stress and anxiety, nor had he put in the balance any other factor of the type identified by this Court in

P. M. v. D. P. P

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[2006] 3 IR 172

such as might entitle him to an Order of Prohibition in respect of prosecutorial delay or systemic delay.

PROSECUTORIAL DELAY

Article 38.1 of the Constitution provides:-

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

It is well established in Irish law that the right thus guaranteed includes a right to a trial with reasonable expedition.

As Finlay C. J. stated in

DPP v. Byrne

[1994] 2 I. R.236 (at p.244):-

“In some constitutional structures the right to a speedy trial or to a trial with reasonable expedition is separately provided for from the right to a trial in due course of law or by due process of law. The most obvious and well known example of that is the existence in the Constitution of the United States of America of the Sixth Amendment and Fourteenth Amendment. The Sixth Amendment provides the right ‘to a speedy and public trial, by an impartial jury’ and the Fourteenth Amendment provides ‘nor shall any State deprive any person of life, liberty or property without due process of law’. As is clearly implied in The State (Healy) v. Donoghue [1976] I. R. 325 by this Court as well as by the High Court, the importance of the protection of the right to a trial with reasonable expedition is not in any way lessened by the fact that the constitutional origin of it in our law arose from the general provision for a trial in due course of law rather than from a separate express provision of a right to a speedy trial.”

Finlay C. J. went on to consider two circumstances in which a lengthy lapse of time could create a real or probable risk that an accused would be the subject of an unfair trial. In one instance an applicant might be in a position to establish on facts the real risk of a particular prejudice which would render the trial unfair. In the second instance, the excessive or inordinate length of time might

of itself

raise an inference that the risk of an unfair trial arose as a reality.

Finlay C. J. was careful to acknowledge that the type of delay which may be involved in this particular form of constitutional right cannot be assessed with any measure of certainty or precision. In this context he identified by way of example that the delay which could be tolerated for an ordinary street crime would be considerably less than for a serious and complex conspiracy charge. Further, a delay which was indicative of an improper motive or gross carelessness on the part of the prosecuting authorities might be seen as qualitatively different from the mere failure to render to a person a constitutional right to a trial with reasonable expedition. As he stated, however, at p.246:-

“The reasonableness or unreasonableness of a delay which by itself and without any other consequence is an infringement of a constitutional right is much more difficult of definition.”

Significantly in that case, where there had been an unexplained delay in prosecuting the offence, Finlay C. J. did not distinguish between the activity of the members of the Garda Síochána, as the agent of the prosecuting authority, on the one hand and the activities of other State servants engaged in the administration of the court service on the other in circumstances where the combined effect of those activities or the effect of one or other of them constituted an infringement of the accused's constitutional rights. It should be noted that, while Finlay C. J. was in a minority as to the result in that case, his statement of principle was expressly approved of by Blayney J. in speaking for the majority of this Court.

The underlying reasons for upholding the right to a trial with reasonable expedition were discussed by

Keane C. J. in *P. M. v. Malone*

[2002] 2 I. R.560. At p.572 he stated:-

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

That such consequences may flow from a failure, however caused, to bring the accused promptly to trial is obvious. But it does not follow that impairment of his ability to defend himself is a necessary precondition to the successful invocation by him of the discrete constitutional right to a speedy trial. Where there has been significant and culpable delay to which he has not contributed in any way, the result may be either actual prejudice (the loss of otherwise available evidence) or presumptive prejudice (the difficulties necessarily inherent in giving evidence after a lengthy period) which may affect his ability to defend himself and, hence, fatally compromise the fairness of the trial. That, however, may not be the only consequence for the accused of significant and culpable delay to which he has not contributed.

The first major consequence may be the loss of his liberty while the trial is pending. That does not arise in this case and, where it does arise, is capable of remedy through the machinery of bail and habeas corpus . The second major consequence is the anxiety and concern of the accused resulting from a significant delay in his being brought to trial.

There are thus three interests of defendants which the right to a speedy trial is intended to protect, the third being the possibility that the defence will be impaired. These were identified by Powell J. in his opinion in the United States Supreme Court decision of *Barker v. Wingo* (1972) 407 U. S. 514 in a passage which was approved of in this court in *Director of Public Prosecutions v. Byrne* [1994] 2 I. R. 236, having previously been endorsed by the Judicial Committee of the Privy Council in *Bell v. D. P. P.*

[1985] AC 937

and by Murphy J. in *The State (O'Connell) v. Fawsitt* [1986] I. R. 362.

This judgment was delivered subsequent to a decision of the High Court (Geoghegan J.) in *P. P. v. DPP*

[2000] 1 I. R.403, a case in which Geoghegan J. found (at p.410) that a garda investigation had been conducted

“in a lackadaisical and slovenly fashion”

and held that the trial should be prohibited. However, in

P. M. v. D. P. P

. [2006] 3 I. R.172, Geoghegan J. made clear that his judgment was not to be taken as meaning that once some blameworthy prosecutorial delay on the part of the prosecution had been demonstrated it gave rise to an automatic right to an injunction prohibiting a trial where no prejudice of any kind had been established. He also stated, prophetically as it later transpired, that when considering stress and anxiety in the context of the balancing exercise referred to by Keane C. J., he

“did not think that the courts should normally concern themselves with the degree of anxiety in a quantitative sense requiring proof thereof.”

(at p. 176)

The unanimous decision of this Court in

P. M. v. D. P. P

. [2006] 3 I. R.172 was to reiterate, as this Court had held in

P. M. v Malone

[2002] 2 IR 560

, that a balancing exercise must be adopted by the court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. The jurisdiction in this respect is triggered by the fact, if it can be established, that there has been blameworthy prosecutorial delay. At p.185 of the judgment (with which Murray C. J., Denham J., Hardiman J. and Geoghegan J. agreed) I stated:-

“I believe that the balancing exercise referred to by Keane C. J. in P. M. v Malone

[2002] 2 IR 560

is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial.”

Under the current state of Irish law therefore, the following principles appear to have been established in relation to prosecutorial delay:-

- (a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant’s constitutional entitlement to a trial with reasonable expedition
- (b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition

- (c) Where there is a period of significant (as distinct from minor) blameworthy prosecutorial delay less than that envisaged at (b), is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in

P. M. v Malone

[2002] 2 IR 560

and

P. M. v D. P. P

.

[2006] 3 IR 172

are demonstrated.

- (d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.

In laying down principles in the various Irish cases on this issue the courts in this jurisdiction have all borrowed heavily from the seminal decision on prosecutorial delay delivered by the U. S. Supreme Court in

Barker v Wingo

407 U. S. 514 (1972). Those principles were laid down by the U. S. Supreme Court against a constitutional guarantee of a

'speedy'

trial which I do not see as being materially different from the guarantee contained at Article 38.1 of our own Constitution. The decision in

Barker v Wingo

has been cited with approval by Irish courts in virtually every case on this topic. The great value of this case is its simplicity and the schematic approach which it offers when cases relating to prosecutorial delay are assessed. I believe it can be seen as the paradigm model for assessing individual cases while applying the same principles as are applied to cases under Irish law.

In

Barker v Wingo

the U. S. Supreme Court emphasised that in considering the right to a speedy trial there could be no inflexible rule and that every case must be met on an

ad hoc

basis in which the conduct of the prosecution and that of the defendant are weighed. An inquiry is triggered when the delay is *prima facie* excessive. The court in that case identified four factors which should be assessed in determining whether a particular defendant has been deprived of his constitutional right to a speedy trial guaranteed by the Sixth Amendment to the U. S. Constitution. They are:-

(a) The length of the delay

Until there is a delay which is presumptively prejudicial, there is no necessity for an inquiry into the other factors that go into the balance. The length of delay which will demand an inquiry is necessarily dependent upon the peculiar circumstances of the case. Thus the delay which can be tolerated for an ordinary street crime is considerably less than for a complex conspiracy case

(a) Reasons for delay

Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or overcrowded courtrooms might weigh less heavily but must nonetheless be considered, given that the ultimate responsibility for such circumstances rests with the State rather than the defendant. A valid reason, such as a missing witness, might serve to justify delay.

(c) Role of the applicant

An applicant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether he is being deprived of his constitutional right; a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial. In this context the court noted that delay may sometimes operate to the advantage of a defendant.

(c) Prejudice

The Court identified three interests of defendants which the speedy trial right was designed to protect: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused and (iii) most importantly, the limitation of the possibility that the defence will be impaired.

This template or framework is to my mind one which judges can comfortably operate. It focuses at the outset on the question as to whether a particular period of delay is such as to give rise to an inference that it is excessive having regard to the nature and gravity of the proceedings in question. If so, the court will proceed to inquire as to the reasons for delay and the respective contributions of the parties thereto with a view to establishing if any of the applicant's rights which the constitutional guarantee is designed to protect have been impaired. This approach reflects the approach adopted by the European Court of Human Rights in two cases to which I will later refer.

The task of assessing cases on the topic of prosecutorial delay since

P. M. v Malone

[2002] 2 IR 560

and

P. M. v D. P. P

.

[2006] 2 ILRM 361

without such a template or framework for doing so has in my view led on occasions to disproportionate emphasis being placed on some of the lesser factors which go in to the balancing exercise, notably with regard to the issue of ‘stress and anxiety’ and how the same should be measured or assessed. In at least one case,

O’H v D. P. P

.

[2007] IESC 12

, different views were expressed by members of this Court as to whether there should be medical evidence in support of assertions of increased stress and anxiety by an applicant or could same be inferred from the particular facts of the case. As the observations of Geoghegan J. on this topic make clear, there is something inherently unsatisfactory in an approach to these cases whereby so much attention is focused on supposed distinctions between quantitative and qualitative anxiety. I am not saying stress and anxiety may not be a matter of importance in some cases but surely wider issues should predominate any debate about prosecutorial delay. It suggests to me that the approach to these cases has become somewhat skewed because of the absence of an appropriate framework for evaluating the issues. I believe the template offered by

Barker v Wingo

is highly suitable for determining issues about prosecutorial delay and should be adopted directly rather than inferentially as has been the case to date. I do not believe that this would involve the abandonment or dilution of any of the principles which have evolved on this topic since

D. P. P. v Byrne

[1994] 2 I. R. 236.

SYSTEMIC DELAY

Should systemic delay be seen as qualitatively different from prosecutorial delay? From an applicant's point of view, assuming he has not occasioned or contributed to the delay arising since the inception of the criminal process, I believe that the distinction is one without a difference. I believe that systemic delay is to be governed by the same principles which govern prosecutorial delay, not least because both forms of delay affect an accused in the same way. Such a view is consistent with that taken in *Barker v Wingo* and in this jurisdiction by Finlay C. J. in

DPP v. Byrne

[1994] 2 I. R. 236.

Systemic delay caused by failures of the criminal justice system may take various forms. There may be a failure by the State to provide an adequate number of judges, back-up staff, court room facilities or the other assistance which is required to enable the criminal process move forward with reasonable expedition. There may be failures by judges to give decisions or judgments within an appropriate time. The decisions of the European Court of Human Rights make it clear that a State is obliged to organise its legal system so as to allow its courts to comply with the reasonable time requirement of article 6, a requirement and obligation which does not cease to exist simply because domestic law requires the parties themselves to take initiatives or steps to progress proceedings.

While there was no discussion about the point in this appeal, it also strikes me that, where systemic delay other than prosecutorial delay is alleged by an applicant, the State should be afforded an opportunity of being heard given that the Director of Public Prosecutions has no hand, act or part in the provision of judges, courtroom facilities or back up staff and thus may not be in a position in a given case to explain or justify a breakdown or failure in one or more of these areas. A failure of a court to sit or the absence of facilities at a particular location or at a particular time may however be amenable to an explanation which would strongly suggest that prohibition should not be ordered. Thus any party, be it the State or some emanation thereof, accused of blameworthy delay such as might warrant stopping a trial, is entitled to be heard on any such application. Basic requirements of fairness and the rights of the community in the prosecution of criminal offences demand no less.

APPLYING THE TEST

The Court must apply the test while keeping certain considerations in mind. On the one hand, the Court must remember that degrees of dilatoriness which may have been acceptable in the past may no longer be tolerated since the European Convention on Human Rights Act, 2003 gave effect in this jurisdiction to the provisions of the Convention. This is a theme more fully adumbrated upon by Hardiman J. with regard to civil litigation in

Gilroy v Flynn

[2005] 1 ILRM 290

and more recently by this Court in the context of criminal litigation in

Noonan (aka Hoban) v D. P. P

.

[2007] IESC 34

. Both the Constitutional right under Article 38.1 and the rights derived under Article 6 of the Convention to a trial with reasonable expedition must be vindicated by being given real effect.

In the context of prohibition this is not to say that an Irish court must more readily resort to prohibition, whatever about other remedies, than it has done already when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J in

DC v D. P. P.

[2006] 1 ILRM 348

, prohibition must always be seen as a remedy to be granted only in exceptional circumstances. Any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence charged when exercising this jurisdiction. It is all too easy to lose sight of the fact that there are victims of crime whose interests must not be swept aside in this exercise. The court must therefore analyse the causes of delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. Delays in the court system, to which an applicant has not contributed, may not be seen as delays which have no impact on the capacity of the prosecution to maintain a prosecution.

Prohibition is nonetheless to my mind a remedy which, in the absence of actual prejudice, should only be granted where a serious breach of either the applicant's rights under Article 38.1 of the Constitution or article 6(1) of the European Convention on Human Rights is established. I would accept that a distinction may require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages. However, any entitlement to a remedy in damages for breach of a constitutional right to an expeditious trial is a matter that will require very full and careful consideration in an appropriate case. This is not such a case. The Court is here concerned only with a claim for prohibition.

Before an entitlement to prohibition arises it seems to me that a number of requirements must be met. Firstly, an applicant must go further than merely point to a lengthy lapse of time from the inception of criminal proceedings until the date when prohibition is sought. He must demonstrate that the prosecutorial and/or systemic delay complained of is well outside the norm for the particular proceedings and procedures involved. Not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an inquiry by the court under *P. M. v D. P. P.* or *Barker v Wingo*. In my view an applicant should

adduce and place before the court some evidence of what the norm is in terms of time taken for the particular process. This is not to impose an unrealistic obstacle in the way of an applicant. Information as to the average length of time it takes for various forms of proceedings to get on for hearing both in the High Court and in this Court is readily available from the Courts Service.

Where the complaint is of delay in processing judicial review proceedings, some further important considerations arise. An applicant who seeks leave to bring judicial review need do no more than establish he has an arguable case. An applicant meeting this low threshold test will invariably also obtain an injunction restraining his trial until the proceedings are disposed of. This is of considerable benefit to an applicant because it denies pro tem the community's right to a trial. The State case may also suffer in a variety of ways from the attendant delay in completing the judicial review. The stay on trial may also be seen as the equivalent of an interlocutory injunction in civil proceedings though shorn in the prohibition context of any requirement to give an undertaking as to damages. It is a brake, full stop. It follows from these considerations that an applicant must prosecute his judicial review application with all possible expedition and ensure that any delay arising is not due to default or inaction on his part.

Even in those cases where an application is grounded upon a simple failure of the criminal process to move in a sufficiently expeditious manner, it would be wrong in my view to invariably place the entire responsibility on the prosecution. While the primary responsibility rests with the prosecution there may well be steps which the applicant himself may take and a failure to do so should be a factor which the court can also take into account. Further, where an applicant has made admissions in the course of an investigation the court should be entitled to have regard to that fact. That is not to say that the admissions may not be contested or ruled out at trial, but in the context of a quite different application on the civil side an uncontested admission is a factor which must go in to the balancing exercise. This point was well made by Denham J. in

B. V. D. P. P

. [1997] 3 I. R. 140 and, as has been pointed out in another judgment of this Court in

S. A. v. D. P. P

.

[2007] IESC 43

, it would be “

extraordinary

” to prohibit a trial in circumstances where the defendant admits to behaviour of a criminal nature.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Two decisions of the European Court of Human Rights are of particular relevance in the consideration of the present application, being, respectively

McMullen v. Ireland

[2004] E/C. H. R. 404 (29 July, 2004]and

Barry v. Ireland

[2005] ECHR 865

(15 December, 2005)

While the case of

McMullen

involved negligence proceedings and not criminal proceedings there is a statement of relevance at par. 33 of the judgment where the court stated:-

“The Court reiterates that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see among other authorities, Comingersoll v. Portugal [GC], no. 35382/97, §19, ECHR 2000-IV, and Horvat v. Croatia, no. 51585/99, §52, ECHR 2001-VIII).”

Having considered the conduct of the applicant in that case and having concluded that the conduct of the applicant contributed in no small part to the delay in the proceedings, the court held that such delay did not explain the overall length of the proceedings and proceeded to examine the conduct of the authorities. In that regard the court found as follows:-

“38. The Court recalls that a State is obliged to organise its legal system so as to allow its courts to comply with the reasonable time requirement of Article 6 (Sü

ßmann v. Germany, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p.1174, §55). It has held on a numbe

r of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time (for example Mitchell and Holloway v. the United Kingdom, no. 44808/98, §56, 17 December 2002). If a State lets proceedings continue beyond the “reasonable time” prescribed by Article 6 of the Convention without doing anything to advance them, it will be considered responsible for the resultant delay (for example, Price and Lowe v. the United Kingdom, nos. 43185/98 and 43186/98, §23, 29 July 2003).

39. In this regard, the Court observes that a number of specific and lengthy delays in the proceedings are attributable to the domestic authorities: a period of more than one year between the last day of the High Court hearings and the delivery of its judgment (23 June 1992 - 13 July 1993); a period of almost two years between the applicant's confirmation that all appeal documents had been filed and the first hearing date for the appeal (25 July 1995 - 21 March 1997); and a period of six months for the Supreme Court to reconstitute and fix a hearing date for the relevant appeal (11 June - 16 September 1997). No explanation for these specific delays has been offered by the Government.
40. In such circumstances, and having regard to the criteria laid down in its case-law, the court finds that the proceedings in the present case were not dealt with within a "reasonable time" as required by Article 6 § 1 of the Convention and that there has, therefore, been a violation of that provision."

In that particular case the court, by way of remedy, directed the State to pay to the applicant a sum in damages. The case however demonstrates that the method adopted by the Court to assess delay, notwithstanding its particular concentration of the role of the State in cases of prosecutorial or systemic delay, is similar to that indicated in

Barker v Wingo

407 U. S. 514 (1972).

Perhaps more directly in point was the decision of the court in

Barry v. Ireland

, a case in which the applicant was arrested in October, 1997 in respect of an alleged sexual assault of a former patient on a date between October, 1992 and November, 1992. A list of charges concerning 43 complainants was read to him later in the police station where he was formally charged with 237 offences of a sexual nature. He was granted bail, though his passport was impounded. In November, 1997 the applicant unsuccessfully applied for a copy of the statement grounding the application for his arrest warrant. In the same month he was given leave to apply for judicial review for an order prohibiting his prosecution on three grounds, including "

gross and inexcusable delay

". A stay on prosecution was granted pending the determination of the judicial review proceedings. In February, 2003 the High Court delivered judgment refusing to grant prohibition of the prosecution, finding that both parties were at fault for the delay. While finding that the respondents had been entirely to blame for an adjournment of the proceedings in February, 2000, the court was satisfied that the default had not caused any significant delay because the proceedings had to be adjourned in any event to await the judgment in a related case. The applicant appealed, and in October, 2003 the Supreme Court heard the appeal and rejected same.

The European Court of Human Rights concluded there were several periods of excessive delay which were partially or completely attributable to the authorities. In particular the court found (at para. 44) that the period of fourteen months between reserving and delivering the judgment of the High Court was

“clearly unreasonably long”

having regard to the fact that the case had already been substantially delayed, nor was there justification for the thirteen month period between the final Supreme Court decision and the reopening of the prosecution.

In holding there had been a violation of Article 6(1) of the Convention, the court further held there had been a violation of article 13 of the Convention (which guarantees an effective remedy before a national authority for an alleged breach of the requirement under article 6 to hear a case within a reasonable time) and awarded to the applicant a sum of €8,000 in respect of non-pecuniary damage.

At para. 36 of the judgment the court stated:-

“The court reiterates that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, Pelissier and Sassi v France [GC], no. 25444/94, ECHR 1999-11). On the latter point, what is at stake for the applicant in the litigation has to be taken into account (Pailot v. France, judgment of 22 April, 1998, Reports of Judgments and Decisions 1998 – 11, / 61)”

This decision conveys how the court approaches the issue of delay in the context of criminal proceedings. It is an approach similar to that in civil cases. It is perhaps less helpful in determining how ‘reasonableness’ in the context of delay is to be measured. Is it simply a matter of looking at the period of time involved and weighing up the explanations and excuses offered by both sides? Greater assistance may be derived from an evaluation of time which is related to and contrasted with the normal timeframe for the particular type of proceedings either generally in Convention States or in the State concerned. Counsel for the applicant has not suggested that the time required to process a complaint from inception to date of hearing before the European Court of Human Rights itself provides any useful illustration or example in this regard.

However, taking on board everything said by the court in these two cases, the fact remains, as noted by Fennelly J. in

T. H. v. D. P. P

. [2006] 3 I. R.520, that nothing in the Barry decision of the European Court of Human Rights should be taken as holding that a prosecution must be stopped in circumstances where the breach of a right to an expeditious trial is established. As Fennelly J. stated (at p. 540 of his judgment) in T. H. :-

“It is important to clear up any misunderstanding concerning the import of such decisions of the Court of Human Rights. The court does not and did not, in that case (i.e. the Barry case), hold that the prosecution had to be stopped. It would be most surprising if a judgment of that court holding that the prosecuting authorities were ‘partially or completely responsible’ for certain periods of delay had the automatic consequence that a prosecution had to be halted. Such a conclusion would, in any legal system, call for some consideration of the public interest in the prosecution of crime. We know, of course, from other parts of the caselaw of the court that it does recognise the public interest in prosecuting crime (see Kostovski v. Netherlands

(1989) 12 EHRR 434

and Doorsen v. Netherlands

(1996) 22 EHRR 330

). Thus, the decision of the court leads to a monetary award. It has no consequence for the pending prosecution. In brief, the decision in Barry v. Ireland (App No. 18273/04) (Unreported, European Court of Human Rights, 15th December, 2005) adds nothing to the applicant's claim to have his trial stopped. The applicant has not, at any stage, advanced a claim for damages as part of the relief sought in these proceedings. As in almost all such cases, the principal objective has been to seek to prevent his trial from proceeding.”

I entirely agree with these views and can not usefully add anything further to them other than to record that the European Court of Human Rights took special circumstances very much into account in the Barry case, including the fact that the applicant was in his eighties and had to bear the weight of the charges for a period of ten years during which he was debarred from carrying on his profession as a medical practitioner.

PREJUDICE

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

In the first judicial review proceedings herein,

McFarlane v. D. P. P

. [2007] 1 I. R.134, Hardiman J. addressed the topic of prejudice where he stated the following (at p.p.142/143):-

“The applicant further contends that the delay, or events happening during the period of delay, have caused him irreparable prejudice in his ability to defend himself, so that there is a real and serious of an unfair trial. In part this is put forward as a general proposition and in part more specifically. Heavy reliance is placed on the fact that the three items on which fingerprints were allegedly found are no longer in possession of the garda.

In so far as this ground is urged on the basis of general prejudice, I am unimpressed by it. The whole of the case in this regard is based on a single sentence from the grounding affidavit of Mr. McGuill, solicitor for the applicant, which is quoted above. That is no more than a general statement of the effect of a lapse of time. It makes no attempt whatever to engage with the actual circumstances of the applicant himself at the relevant time. On 25th September, 1983 he had undoubtedly escaped from lawful custody in Northern Ireland. The next uncontroversial statement that can be made about his whereabouts is that he was in the Netherlands in January, 1986 in possession of a stolen or forged Irish passport. The applicant has said nothing about his whereabouts during any part of that time and, vitally, has not asserted, or caused his solicitor to assert, either how he spent the time, or that he cannot recall where he was, during the period of Mr. Tidey’s captivity in late November and up to the 16th December, 1983. A remote, fanciful or purely theoretical form of prejudice is plainly not sufficient to entitle him to relief. An applicant in this position must address if it is possible the actual specific facts of his case and this present applicant has singularly failed to do (sic).”

With these various considerations in mind, I now turn to a consideration of the elements of delay alleged to have occurred in the first judicial review proceedings herein.

ANALYSIS OF TIME ELEMENT IN FIRST JUDICIAL REVIEW PROCEEDINGS

As appears from the affidavit sworn by James McGuill, the solicitor for the applicant herein, leave to bring the present judicial review proceedings was granted on 1st November, 1999. At all relevant times, the applicant had bail, but was obliged to sign on once a month at Dundalk garda station, a distance of 160 km. from his home in Belfast. Mr McGuill deposes that the applicant has been required to attend on each occasion that his case was listed in the Special Criminal Court. His first appearance was on 7th January, 1998. Since then he appeared on upwards of forty occasions for the mention of his case. This involved the applicant in a 320 km. round trip from his home in Belfast to the Special Criminal Court sitting in Green Street in Dublin. Needless to remark, none of these inconveniences from late 1999 onwards would have arisen but for the fact that the applicant himself secured a stay of his trial.

Following the granting of leave, the usual Notice of Motion thereafter issued and was made returnable to the 29th November, 1999. On the return date the respondents sought time and the case was again listed for mention in December, 1999, January, 2000, February, 2000 and March, 2000. Thereafter a Statement of Opposition was delivered on 5th April, 2000. This was accompanied by three affidavits, namely those of Dermot Jennings, Maurice Boyle and John McElliott. In the light of the contents of the Statement of Opposition and affidavits, the applicant sought voluntary discovery from the respondents by letter of 15th May, 2000. The respondents

did not consent to make voluntary discovery and thus a motion for that purpose was brought before the Master of the High Court returnable for the 13th October, 2000. This motion was adjourned by consent until January of the following year when, due to a mutual misunderstanding between the parties, there was no appearance by either party in court and the Motion for Discovery was struck out. A fresh motion was issued on behalf of the applicant and made returnable before the Master on 16th November, 2001. At the request of the respondents, this application was adjourned until 1st March, 2002, but on 8th February, 2002 an Affidavit of Discovery was delivered sworn by Mr. Angus Dwane, a solicitor in the respondent's office. The motion for discovery, which had been adjourned to 1st March, 2002, was thus struck out by consent. The respondent then applied to the High Court on 11th March, 2002 for an order re-entering the judicial review proceedings with a view to securing a place on the list to fix dates.

In the meantime, the applicant's advisors took the view that the discovery made in February, 2002 was inadequate and that further discovery was necessary. A further motion, seeking additional discovery, was brought returnable for 14th May, 2002. The Master of the High Court refused the relief sought in that motion, whereupon the applicant appealed the Master's refusal to the High Court which determined the appeal on 22nd July, 2002. The appeal was unsuccessful. Thereafter, the judicial review application was assigned a hearing date of 14th March, 2003. Due to the unavailability of a court on that day the case was put back into the list to fix dates with priority. The application was then heard on 11th July, 2003 and judgment was promptly delivered by O'Caoimh J. on 18th July, 2003.

I am satisfied that no blameworthy delay, either in the sense of prosecutorial delay or systemic delay, can be attributed to the respondents, or indeed to the State, in respect of this period. Insofar as it is suggested that there was delay in discovery, one must begin by saying that discovery invariably takes time if it is to be done properly. It is not a relief which the courts invariably grant in judicial review and the respondent, who is in any event required to make disclosure of all relevant documents, need not further make discovery unless so directed by the court. Further, as Quirke J. found, there was fault of some degree on both sides in this regard. While the affidavit of Mr. McGuill places a great deal of emphasis on the delay of one year and nine months from 15th May, 2000 (when a request for voluntary discovery was first made) and 8th February, 2002 (when an Affidavit of Discovery was filed), it appears to be the case that the applicant's discovery motion was struck out in January, 2001 as both parties were confused about the date. The applicant did nothing about re-entering the motion for four months and a fresh motion was not brought for some eight months after the first discovery motion had been struck out. The affidavit ultimately sworn by Mr. Angus Dwane in February, 2002, listed some 93 documents in the schedule and was clearly the result of considerable effort on the part of the respondent. The further delays in 2002, if they can be so characterised, arose because the applicant's advisors challenged the adequacy of the discovery made, appealed the Master's refusal to the High Court, where the same was determined in the respondent's favour on 22nd July, 2002. The preponderance of delay during this period must, in my view, be laid at the door of the applicant who had carriage of the proceedings and the primary responsibility for progressing matters.

Despite allegations of systemic delay, no evidence of what might be an appropriate period for this process was led by the applicant. In those circumstances both counsel for the respondent and the Court have had to do the best they can to determine if the system was in any way at fault for delay. This evidential shortfall was commented upon by Quirke J. in the judgment he delivered in the High Court. I can only base my opinion therefore on my own personal experience as a High Court judge who dealt with judicial review matters from time to time. I do not regard the listing period or the one adjournment in March, 2003, due to the unavailability of a judge or court on that day, as proof of systemic delay. Quite obviously, very different considerations might arise if this, or any other case, were adjourned on multiple occasions due to non-availability of judges. Ultimately, the only basis for alleging there was any form of blameworthy delay rests on a contrast between the length of time taken by the first judicial review proceedings and the present application. To this totally unscientific argument it may simply be said that the present application did not involve discovery which clearly emerges as the major contributor to delay in the first proceedings.

Perhaps the most important period of time is that which ensued following the hearing in the High Court. The requisite Notice of Appeal was lodged on 19th August, 2003. It is clear, and is conceded by Mr. Padraic Taylor, solicitor of the Office of the Chief Prosecution Solicitor, that there were difficulties in obtaining an approved transcript of the judgment of Mr. Justice O'Caoimh in order to complete the Books of Appeal. He deposes in his affidavit to e-mails passing between his office and that of the Chief Registrar of the High Court referring to the fact that the transcript had not been approved. Ultimately the transcript of the judgment was approved in September or October, 2004. The Certificate of Readiness was ultimately furnished on behalf of the respondent on 27th January, 2005. It is frankly conceded on behalf of the respondent that nothing on his file can be identified which would explain the delay from the time the Books of Appeal were lodged and the time the Certificate of Readiness was lodged.

No evidence of any sort was led as to reasonableness or otherwise of the period of time which elapsed from that point until the appeal was heard by this Court. The State was not a party to these proceedings and had no opportunity of being heard on the only real portion of delay attributed to it. Counsel for the applicant has, without more, simply acknowledged the huge workload which attends this Court and asserted that the State was in default. I do not believe any kind of claim has been made out, notably when one factors in the role of the applicant in this context. Significantly, and as deposed to by Mr. Taylor in his affidavit sworn on 13th July, 2006, the applicant did not at any stage during the judicial review proceedings either in the High Court or Supreme Court make any application for priority. Nor did he, at any stage, apply to the Supreme Court to strike out the appeal of the respondent on grounds of any suggested failure to prosecute same expeditiously. The applicant did not apply to the Supreme Court for leave to bring a Cross Appeal until 2nd February, 2006, some two weeks before the scheduled hearing came before the Supreme Court.

CONCLUSION

Delay may be seen as the enemy of justice, both from the point of view of the community whose interest in having serious crimes prosecuted is put in jeopardy by prosecutorial or systemic delay and, perhaps more particularly, from the point of view of an accused person.

This is an unusual case with an unusual history, even if most of the issues arising on delay are familiar to the Court. However, what at first glance in this case seems to be an enormous delay, whether calculated either from the date of the original alleged offences or from the inception of criminal proceedings, transpires on closer examination to be amenable to a variety of very simple explanations for its different component parts. What is beyond dispute is the fact that, in the aftermath of the applicant's arrest and interrogation in January, 1998, this case was ready for trial the following year and that trial would have then proceeded but for the fact that the applicant brought eleventh hour judicial review proceedings. This Court has already held that all complaints by the applicant of pre-charge delay are groundless (

McFarlane v. D. P. P

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[2007] 1 IR 134

). I am satisfied that the only blameworthy delay arising in this case in 1998 and 1999 is that of the applicant who failed to move promptly with his judicial review application.

As for the first judicial review proceedings I have already made clear my view that no blameworthy delay can be said to arise from their inception until the judgment of the High Court was delivered. The sole period of delay giving rise to any difficulty in my view is that which followed delivery of the judgment of the High Court. The fact that delay was encountered in taking up the transcript explains only part of that delay. The delay may not have been the fault of the respondent's office: it may have been a problem with the service provided by stenographers to the Courts Service. It certainly was not any fault of the applicant. While it is true that this Court does have a significant workload of cases awaiting hearing, I do agree with the learned High Court judge that there was some prosecutorial delay, and arguably systemic delay also, in progressing the appeal before this Court. Was this blameworthy in the sense of being significant delay as distinct from minor delay only? I strongly suspect that the time taken is not outside the norm in this jurisdiction for such proceedings. I simply do not know though I would stress again that such information is readily obtainable from the Courts Service. Judges should not substitute their own subjective feelings about the reasonableness or otherwise of periods of alleged systemic delay without having evidence of the normal period of time taken by the particular type of proceedings or procedures within them. It is only against such norms that deviations from what is appropriate can be measured and assessed. I find that, in the absence of evidence as to the norm for this part of the process, it is impossible to find that there was a significant or blameworthy delay of such a degree which would enable me to conclude that this case even lends itself to the application of the principles in

P. M. v D. P. P

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[2006] 3 IR 172

or

Barker v Wingo

407 U. S. 514 (1972) in the sense that any supposed delay is such as to trigger an inquiry and the application of a balancing test thereunder.

Further, in so far as the prosecution of the appeal is concerned, I am satisfied that there was applicant delay also. It is accepted that the applicant made no application either to strike out the appeal for lack of prosecution, nor did he make any application to this Court for an early hearing date of his appeal. These facts would also have had to go into and form part of any balancing exercise had it been necessary to conduct one.

Even allowing for the fact that the overall length of time since the time of the original alleged offence required a heightened degree of urgency in advancing this prosecution, I do not feel ultimately that the applicant has established that blameworthy prosecutorial or systemic delay has arisen in this case. Even if I had taken the view that there was blameworthy prosecutorial or systemic delay in this case, I am also satisfied, as was the High Court, that no actual prejudice to the applicant has been demonstrated nor has there been any impairment of his other rights such as are guaranteed by the constitutional right to a trial in due course of law.

I would, therefore, dismiss the appeal and affirm the order of the learned High Court Judge.

Judgment delivered the 5th day of March 2008 by Fennelly J

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Brief introduction and summary

1. The appellant stands charged with three offences alleged to have been committed by him between specified dates in November or December 1983. Most notable among them is a charge of the false imprisonment of one Donald Tidey at a location in County Leitrim. The other charges relate to possession of a firearm. These charges were preferred in January 1998.
2. The present proceedings are the appellant's second application for orders prohibiting his trial. They come before this Court by way of appeal from the judgment and order of Quirke J in the High Court, dismissing his application
3. The first judicial review proceedings were commenced in November 1999. The appellant relied on two grounds: firstly, delay in the institution of the prosecution against him; secondly, the admitted loss by the gardaí of three items of physical evidence, upon which the

prosecution alleged that the appellant's fingerprints had been found. The appellant failed on the delay ground in both the High Court and this Court. He succeeded on the second ground in the High Court, but the Director of Public Prosecutions appealed to this Court, which allowed the appeal and dismissed the application for prohibition of his trial. The first set of judicial review proceedings ended on 7th March 2006 with the judgment of this Court. When initiating those proceedings, the appellant had secured an order from the Court restraining the DPP from continuing with the prosecution while the proceedings were pending.

4. On 15th May 2006, the appellant commenced the present judicial review proceedings, when the order granting leave was made. The first relief sought is a declaration that the delay in the hearing and determination of the first judicial review proceedings constituted a breach of the appellant's constitutional right to a fair trial in due course of law in accordance with Article 38.1 of the Constitution or alternatively a breach of the appellant's rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms. The appellant, consequently, seeks orders by way of prohibition and injunction. The essence of the complaint is that the entire process leading to the determination of the first judicial review proceedings, a total period of six years and four months, constituted a breach of the appellant's rights and that, consequently, the Respondent (whom I will refer to as the DPP) should be prevented from continuing with his prosecution.

The facts: 1983 to 1998

5. At one level, the appellant's complaint regarding delay should be confined strictly to an examination of the period it took to dispose of the first judicial review proceedings. However, the appellant has by no means abandoned his claim to rely on the undoubtedly long period which elapsed between the dates at the end of 1983, to which the charges relate and the commencement of the criminal prosecution at present pending against him. Counsel repeatedly described the case, at the hearing of the appeal, as being "old" or "ancient," submitting that this placed an additional onus on the prosecution to expedite it. The appellant's written submissions contain extensive reference to case-law on the right to an expeditious trial and emphasise that "

the time factor, so often a complicating and confusing factor in a criminal trial is an extremely important feature in this case." It is claimed that "the strength of the testimony that may be given viva voce by any witness on behalf of the prosecution may be weakened in strength and detail by reason of the lapse of time between the

alleged offences and their future prosecution.

”

Thus, the appellant includes, as part of the period of lapse of time the period of some sixteen years between the dates of the alleged offences and the commencement of the prosecution.

6. The essential facts relating to the period from 1983 to 1998 appear from the judgment of Hardiman J, speaking for the majority of the Court, dated 7th March 2006 concluding the first judicial review proceedings. They are as follows.
7. The appellant had been imprisoned in Northern Ireland since 1975. He was serving a long sentence of imprisonment for his part in the IRA bombing of a bar on the Shankill Road, Belfast, in which five people were killed. On 25th September, 1983, he escaped from the Maze Prison together with other prisoners. The offences with which he is now charged are alleged to have been committed in November or December of that year. In the aftermath of the rescue of Mr. Tidey the appellant was suspected by the gardaí of involvement in his kidnapping and false imprisonment.
8. In January, 1986, the appellant was arrested in the Netherlands and was found to be in possession of a stolen or forged Irish passport. On the 3rd December, 1986, he was extradited from the Netherlands to Northern Ireland. From that time until immediately prior to his arrest he was serving his sentence in Northern Ireland and this fact was known to the Gardaí. He was arrested in relation to the offences with which he is at present charged on 5th January 1998. This occurred upon his release after service of a period of some fifteen years in prison in Northern Ireland.
9. The appellant was detained by An Garda Síochána pursuant to s. 30 of the Offences against the State Act, 1939 as amended. In the course of being questioned, it is alleged that the appellant gave certain answers, which are material to the alleged offences. Hardiman J dealt with that issue in his judgment.
10. The result of the judgment of this Court of 7th March 2006 was that the evidence which the prosecution authorities considered necessary to establish a sufficient case to bring a charge against the appellant was not available until he had been questioned while detained. That was shortly before he was in fact charged. That, in the view of the majority of this Court, was fatal both to the contention, advanced on his behalf in that case, that he might have been proceeded against in Northern Ireland, pursuant to the Criminal Law (Jurisdiction) Act, 1976 or that his extradition might have been sought from Northern Ireland. Hardiman J concluded as follows:

“On the evidence before the Court in this case there was simply no sufficient case against him on the present charges at any time while he was in custody in Northern Ireland. Accordingly, to attempt to proceed against him in either of the ways mentioned would not merely have been pointless, but would have been an abuse of the respective procedures.”

11. Hardiman J also rejected, as unrealistic, the suggestion that the gardaí might have sought to question the appellant about the present charges, while he was in custody in Northern Ireland. On this issue, the learned judge observed:

“The applicant was a hardened criminal, serving a sentence for a very serious offence and suspected with reasonable grounds of involvement in another such offence. Nor could it be said that there was nothing to be lost by trying to interview him in respect of the present offences: any such attempt would have put him on notice of the Garda interest in him in that connection and might thereby render less effective any questioning of him when he eventually became available for arrest by the Gardaí

.”

12. In the result, there was no basis for the applicant to complain about that delay, more properly called a lapse of time, between the date of the alleged offences and his being charged with them some fifteen years later. Apart from the point about the evidence, the appellant was either in prison in Northern Ireland, serving a sentence for a serious crime or unlawfully at large, having escaped from prison.
13. I have no doubt, therefore, that the appellant is entirely disentitled from complaining, in the present proceedings, about any delay by the prosecuting authorities. Nothing done or omitted by those authorities constituted an infringement of his rights.

The facts: time taken for the first judicial review proceedings

14. The following is a history of the period of over six years taken to dispose of the first judicial review proceedings.
 1. On 1st November, 1999, the High Court (McGuinness J.) made the order granting leave to seek judicial review so as to restrain the DPP continuing with the prosecution of the appellant in respect of the charges preferred against him on the two grounds already discussed;
 2. The High Court granted an order, pending the determination of the proceedings, restraining the DPP from continuing with the prosecution; accordingly, the date, in November 1999, which the Special Criminal Court had fixed for the trial was vacated;
 3. The appellant issued the Notice of Motion required by the High Court order, returnable for 29th November 1999; the case was adjourned at the request of the DPP and was successively adjourned on a number of other dates;
 4. The DPP delivered his Statement of Opposition on the 5th April, 2000;
 5. By a letter of 15th May 2000, the appellant’s solicitors wrote asking the DPP to agree to make voluntary discovery of documents; the DPP declined to do so;
 6. The appellant issued a Notice of Motion returnable before the Master of the High Court for 13th October 2000 seeking an order for discovery; that motion was adjourned by consent of the parties, but at the request of the DPP, and was due to be heard on 12th January 2001;
 7. On that date (12th January 2001), due to a misunderstanding of both parties, there was no appearance before the Master, who struck out the motion;

8. On 29th May 2001, the appellant's solicitors wrote to the Chief State Solicitor, seeking consent to have the matter re-listed; the Chief State Solicitor did not reply; a fresh motion was issued on 2nd October, 2001, returnable before the Master on 16th November, 2001; the motion was adjourned, at the request of the DPP, until 7th November and then to 1st February 2002;
9. On 8th February, 2002 an Affidavit of Discovery was delivered on behalf of the DPP;
10. On 11th March 2002, the DPP applied to the High Court for an order re-entering the judicial review proceedings, with a view to securing a place in the list to fix dates;
11. However, the appellant's solicitors, on review of the discovered material, concluded that the discovery was inadequate and applied, by Notice of Motion returnable before the Master on 14th May 2002, for an order for further and better discovery; the Master refused that order; the appellant appealed to the High Court; the affidavit sworn on behalf of the appellant says that the appeal was determined on 22nd July 2002; it appears that the appeal was refused;
12. The proceedings were re-entered in the Judicial Review List where they were listed to be heard in the High Court on 14th March, 2003; on that date, the proceedings were adjourned due to the unavailability of a judge to hear the case; they were relisted and heard in the High Court, (Ó Caoimh J.), on 11th July, 2003. Judgment was delivered on 18th July, 2003.
13. The Court made an order restraining the trial of the appellant in respect of the charges preferred against him on the grounds that the failure by the prosecuting authorities to preserve the items of evidence, already mentioned, inhibited his ability to defend himself against the charges;
14. On 19th August, 2003, the DPP gave notice of appeal to the Supreme Court; there was difficulty and delay in obtaining the signed and approved transcript of the judgment of the High Court, which did not become available until September or October 2004;
15. Books of Appeal were lodged on behalf of the DPP on 15th November, 2004, and on 27th January, 2005, the D. P. P. certified the case as ready to proceed in the Supreme Court.
16. On 2nd February, 2006, the appellant applied for and obtained leave to bring a cross-appeal against that part of the High Court judgment which refused him relief in respect of alleged delay and to have it heard concurrently with the appeal on behalf of the DPP;
17. The appeal was heard by the Supreme Court on 16th February, 2006. On 7th March, 2006, the Court delivered its judgment allowing the appeal on behalf of the DPP and refusing the cross-appeal of the applicant;
18. On 4th April 2006, the Special Criminal Court assigned 3rd October 2006 as the date of the appellant's trial;
19. On 15th May 2006, the appellant applied for leave to bring the present proceedings.

Issues in the case

15. The appellant accepts that he cannot, in these proceedings, complain about any delay by the prosecution in bringing him before the courts, which predates the first judicial review proceedings. Those issues were determined finally and conclusively against him in those proceedings and cannot be reopened. He claims the right, nonetheless, to refer to the fact that the DPP proposes to put him on trial in respect of events alleged to have occurred a very long time ago, in fact, approaching twenty five years.

He claims, in essence, that the six year period which it took to dispose of the first judicial review proceedings was excessive. He refers to “systemic delay.”

Quirke J characterised the nature of the application as follows:

“

He [counsel] says that the applicant is now entitled to relief by reason of the combination of delay on the part of the prosecution authorities in bringing the applicant before the court and delay within the court process itself. He categorises the overall delay as “culpable” or “blameworthy” delay. He says that it has subjected the applicant to presumptive prejudice and to physical and emotional hardship, distress and inconvenience so grave that it is sufficient to require that his trial in respect of the alleged offences should be prohibited.”

16. It is important to note that the only substantive relief sought by the appellant is the prevention of his trial, based on the declaration mentioned. Although the statement of grounds mentions “a

ny further and/or other relief as this Honourable Court deems meet and just,”

the appellant has not identified any other relief and, in particular, has not suggested that he is entitled to damages for any of the alleged infringements of his rights.

17. The appellant accepts that the essence of his case on delay is captured in the passage from the judgment of Quirke J quoted above, read with a paragraph from the grounding affidavit, sworn on his behalf by Mr James McGuill, Solicitor. Having stated that the appellant had, during the period from 5th January 1998 (the date of his arrest) to 7th March 2006 (the date of the judgment of this Court) been “

under the considerable pressure of being prosecuted with serious criminal offences

,” and that after the passage of a period of fourteen years, “

it was understandable that the

[appellant]

would seek an adjudication as to whether or not he had been prejudiced by virtue of the delay prior to 1998,”

he then proceeds:

“The delay from the granting of leave on 1st November 1999 to the ultimate disposal of the case on 7th March 2006, was not due to delays on the part of the [appellant] but rather was due to delays inherent in the court processes themselves. In particular there was a delay of one year and nine months between the respondents being requested to make Voluntary Discovery and their delivery of the necessary Affidavit. Furthermore the delay between the finding of the High Court in his favour and the ultimate disposal of the case in the Supreme Court a period of over 2 years and 7 months is not in any way due to the [appellant] and is due instead to a combination of the failure of the Respondent to certify the appeal as ready to proceed at an earlier date, and the delays inherent in the court system.”

18. In addition, counsel for the appellant has made reference to the period of four months between the date in March 2003, when no judge was available to hear the case and to the period of some fourteen months between the date of certification of readiness of the appeal and ultimate disposal by this Court.
19. The appellant also makes reference to a number of personal issues. He says that, since his arrest in January 1998, he has sought to get on with his life. He has married and become a father of three children. His youngest daughter (born 14th February 2003) has special needs. The family are dependent on him. He also cares for his mother, who is 86.
20. The appellant says he has complied with all his bail conditions. He has to sign on regularly at Dundalk Garda Station. This requires him to travel a distance of 160 km from his home in Belfast on the second Sunday in each month. He has also had to attend on at least forty occasions at the Special Criminal Court (a round trip of 320 km) for the mention of his case.
21. The appellant submits that the learned trial judge attached insufficient weight to the levels of stress, anxiety and inconvenience allegedly suffered by the appellant. Quirke J addressed this matter as follows:

“It is to be inferred that the applicant suffered an increase in the level of his anxiety, stress and inconvenience as a result of the additional delays attributed to the State during particular periods of time throughout the conduct of the judicial review proceedings. However, any increased levels of stress, anxiety and inconvenience cannot be said to outweigh the community’s very considerable interest in having offences of the gravity of those which are the subject of these proceedings prosecuted to a conclusion. Furthermore if there has been a culpable or blameworthy delay on the part of the prosecuting authorities in and about the manner in which they sought to conduct the judicial review proceedings that delay was not of a kind which would warrant prohibition of the applicant’s trial.”

22. The DPP, in response to the submissions of the appellant, raises, as a preliminary point a submission that the appellant is disentitled from any relief by reference to the alleged delay in first judicial review proceedings. This is an attempt to re-litigate issues already argued and determined. He refers to the rule in

Henderson v Henderson

(1843) 3 Hare 100

, A.

A. v The Medical Council

[2003] 1 I. R 308 and

Law Society v Malocco

(unreported 15th February 2005). The appellant should have applied for amendment his grounds in those proceedings, as was done in

T. H. v DPP

[2006] 3 IR 520

. Alternatively, for the same reason, the DPP submits that the present proceedings are an abuse of the process of the courts. Thus, the question is raised as to whether the appellant should be permitted to argue the merits of his claim at all given that he has already pursued to finality a set of judicial review proceedings in which it was open to him to raise the issue of process delay, if necessary by applying for leave to amend his pleadings.

23. On the substance, the DPP submits that the only basis upon which a party such as the appellant can succeed in obtaining prohibition of his trial by reference to delayed prosecution is by pointing to some judicially cognisable prejudice affecting the fairness of that trial. He cites the following passage from the judgment of Quirke J:

“It is of considerable significance that no evidence has been adduced on behalf of the applicant suggesting that anything has occurred since November, 1999, which has prejudiced the applicant’s capacity to defend himself in respect of the charges preferred against him. Nor has evidence been adduced indicating that he has suffered any additional presumptive prejudice by reason of the additional passage of time. At its highest point the evidence adduced on behalf of the applicant has established two, or perhaps three periods of unnecessary delay on the part of the prosecuting authorities in dealing with the applicant’s judicial review proceedings and in particular the State’s appeal against the decision of the High Court in those proceedings. No evidence has been adduced indicating that any consequence flowed from those delays which has interfered with any interest which the applicant’s right to an expeditious trial was intended to protect.”

24. The DPP also submits that, insofar as the Court makes any finding of delay, it is required to balance any prejudice allegedly suffered by the appellant against the public interest in the prosecution of serious crime.
25. It will, of course, be necessary to consider the facts and arguments in more detail. In particular, I will consider the preliminary objections of the DPP.

26. However, there are two principal aspects of the substance of the case. The great bulk of the period of time which has elapsed since the alleged commission of the offences in 1983, passed before the appellant was charged in 1998. During all of that time, the appellant was either in prison in Northern Ireland or “on the run.” He was certainly unavailable to the prosecuting authorities here. Since 1998, almost the entire time which has elapsed has been taken up with either first or the present judicial review proceedings. The prosecution has, during virtually all of that time, been prevented by orders secured at the behest of the appellant from proceeding with his trial. Furthermore, the appellant, having failed in his first judicial review proceedings, cannot point to any prejudice to the fairness of his trial. The appellant points, of course, to periods of delay on the part of the DPP in the conduct of the first judicial review proceedings. Presuming in his favour that there was some such delay and that it was culpable, certain questions naturally arise.
27. Firstly, may a person facing a criminal trial, after the lapse of a large number of years, establish breach of his constitutional or Convention rights, when that lapse is predominantly the result of his own actions? Secondly, assuming there have to have been fault causing delay by the prosecution authorities or the judicial system, does that fact lead to the right to have the trial prohibited, in the absence of any demonstrated prejudice to the fairness of the trial?

The preliminary point: abuse of process

28. I will first address the argument of the DPP that the appellant is estopped or prevented from maintaining the present proceedings by his failure, in the first judicial review proceedings, to advance to issue of delay. The delay now alleged consists, at least potentially, of the entire period of more than six years occupied by those proceedings. Hence, the grounds arose only during their currency and could not have formed part of the original judicial review grounds. It is said that, by the time of the hearing before O’Caoimh J in July 2003, some three and a half years had expired. That period included one of the two principal periods, involving discovery procedures, said to constitute culpable delay. It also included the period from March to July 2003, during which the matter had been adjourned due to the unavailability of a judge. The other principal period of complaint occurred after the High Court had given its decision.

29. Counsel for the DPP refers to the case of

T. H. v Director of Public Prosecutions

[2006] 3 IR 520

, where such an amendment of grounds was permitted. In that case, the High Court decided in favour of the applicant on his complaint of delay, so introduced, while dismissing the application based on the original ground. The High Court decision was reversed by this Court, but it was not doubted that the High Court had power to permit an amendment of the grounds.

30. Counsel for the appellant said that the point regarding delay could not have been anticipated at the time of the original application for leave and could not, insofar as it concerned delay in prosecuting the appeal) have been taken for the first time in the Supreme Court.

31. The rule, known as the rule in

Henderson v Henderson

has been considered in several recent cases: Carroll v. Ryan

[2003] 1 IR 309

;

A. A. v The Medical Council

[2003] 4 IR 302

;

Law Society v Malocco; Mitchell v Ireland, Attorney General and another

(unreported 28th March 2007).

32. The rule is aimed to prevent abuse of the courts' process and to protect parties from being subjected to harassment by successive proceedings dealing with the same subject-matter. In essence, it discourages parties from keeping points over from one legal proceeding to another. If a point could have been raised in a first action (either by way of claim or defence), a party may not be permitted to raise it in a second. Wigram V. C. outlined the rule as follows in

Henderson v Henderson

:

"I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

33. It is not a fixed or set rule. In a passage cited with approval by Hardiman J in his judgment in

A. A. v The Medical Council

, Lord Bingham expressed the following view in

Johnson v. Gore Wood & Co

.

[2002] 2 AC 1

at page 31:

“It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

34. In similar vein, Hardiman J, at page 317 of the same judgment stated:

“Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities.”

35. In

A. A. v The Medical Council

, this Court held that the rule applied. A medical practitioner had sought judicial review in respect of impending disciplinary proceedings; he alleged exposure to double jeopardy: he had been acquitted of criminal charges concerning the same subject matter. He failed in his application to prohibit the inquiry, but brought new proceedings in which he claimed that the Medical Council was acting in breach of natural justice, and infringement of his constitutional rights by reason of what he alleged to be the failure to provide legal aid. Hardiman J, at page 318 of the report, considered it to be

“a very material fact that no tenable explanation whatever has been advanced, in pleadings, affidavit or oral argument, for the failure to raise the points now taken in relation to legal aid or funded legal representation when those proceedings were instituted and when the first order restraining the holding of an inquiry was obtained.”

The fact that this failure was unexplained was held to be the determining feature of the proceedings.

36. In the more recent judgment of this Court in *Mitchell v Ireland, Attorney General and another*, Kearns J emphasised that the rule must not be “applied in a rigid or mechanical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case . He treated the judgment of Hardiman J in *A. A. v The Medical Council* as requiring “a degree of flexibility .”
37. I do not regard the present case as an appropriate one for application of the rule. One must look at the entire context of the case, before concluding that the proceedings amount to an abuse of process. The delay alleged (at least not all of it) did not exist at the date of the application (on 1st November 1999) for leave. Hence, the ground of delay could not have been included, without obtaining further leave. The main period of alleged delay prior to July 2003 is the period between 15th May 2000 and 8th February 2002, when the application for discovery was being processed. I anticipate my conclusion on this issue by stating that, on any view, including, I believe, the appellant’s that delay was one for which the appellant must bear some of the responsibility. I cannot see, however, that it was an abuse of process not to apply for leave to amend so as to include that ground. Nor do I see how the appellant can be blamed for not taking that step in respect of the four month delay caused by the unavailability of a judge. That period immediately pre-dated the hearing before O’Caoimh. In order to include the entire period, the application would have had to be made at the commencement of that hearing. The DPP would clearly have been entitled to time to respond, which might even have delayed the hearing further.
38. I do not see, in the present case, any sufficient evidence of abuse of process to warrant excluding the appellant from the right to pursue this second set of judicial review proceedings. Thus, I propose to consider the appeal on its merits.

Breach of constitutional rights

39. The appellant invokes both the Constitution and the European Convention on Human Rights. He claims that the delay in disposing of the first judicial review proceedings violated his right to a trial in due course of law protected by Article 38.1 of the Constitution and his right to a hearing within a reasonable time in breach of Article 6 of the Convention.

40. The appellant asks the Court to prohibit his trial. He has not, at any stage, sought any other remedy.
41. The principles upon which this Court acts when deciding whether to prohibit a criminal trial, by reason of breach of the constitutional right to a trial in due course of law, are so well known as scarcely to need explanation. The jurisprudence has two aspects. The first concerns infringement of the right to a fair trial. The second concerns the right to a trial with due expedition, where different interests are protected.
42. Although this Court has been compelled to consider and refine its jurisprudence in its application to long-delayed trials for sexual abuse of children in a very large number of cases, there a single consistent thread has run through these cases since the early 1990's. It is, as was stated by Finlay C. J. in

Z v Director of Public Prosecutions

[1994] 2 I. R. 476 at 506, that:

“the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial.”

43. That passage has survived the passage of an enormous volume of litigation in this category and was cited by Hardiman J in his judgment for the majority of this Court in the first judicial review proceedings, where he added:

“This is not a burdensome onus of proof: 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.”

44. Finlay C. J. had added (see page 507 of the judgment) that:

“where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial.”

45. There cannot be any question of the appellant satisfying that standard in the present case. He failed in the first judicial review proceedings, where he claimed that the loss of items of physical evidence would have prejudiced the fairness of his trial. As I have already stated, he is not entitled to rely, in these proceedings, on the effect of delay, taken on its own, between 1983 and 1998, which was entirely his own responsibility. I will comment shortly on the extent to which it avails him under the second heading. He is left, therefore, with an entirely unspecific suggestion that the delay in the disposal of the first judicial review proceedings will render his trial unfair. Hence, the appellant cannot credibly ask the Court to prohibit his trial on the ground of “

a real risk of an unfair trial

.”

46. The courts have, however, also recognised the possibility that a trial should be prohibited for the quite distinct reason that there has been a breach of the right of an accused person to a trial with what Gannon J, in *State(*

Healy) v Donoghue

[1976] I. R. 325 at 334, described as “

reasonable expedition

...”. The dicta of Gannon J in that case have been repeatedly approved in later cases. Finlay C. J., in his judgment in

Director of Public Prosecutions v Byrne

[1994] 2 I. R. 236 cited it when holding the right in question to be one protected by Article 38.1 of the Constitution. In that case, the learned Chief Justice expressed the view, at page 245, that:

“The right to reasonable expedition in the trial of a criminal charge would appear clearly to precede, as a natural right, not only the Constitution of Ireland, but the Constitution of the United States as well, and from an historical point of view would appear to derive directly from the Magna Carta and to be part of the common law.”

47. He also cited a now celebrated passage from the Opinion of Powell J in

Barker v. Wingo

(1972) 407 U. S. 514, a decision of the Supreme Court of the United States, dealing with the prejudice which may flow from a breach of that right:

“Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired.”

48. The same learned judge then said:

“A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant

.”

49. Commenting on the penultimate of these factors, he continued:

“Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”

50. Although the judgment of Powell J in

Barker v Wingo

has been influential in the development of our case-law on the right to reasonable expedition and the consequences of its breach, we have now established a consistent approach, particularly in some recent cases.

51. In

P. M. v Malone

[2002] 2 IR 560

Keane C. J. reviewed the cases. He noted that an accused person, when invoking the discrete right to a fair trial was not confined to demonstrating that his ability to defend himself had been impaired. He also identified pre-trial loss of liberty and “

anxiety and concern of the accused resulting from a significant delay in his being brought to trial.”

He discussed at length the question of whether pre-complaint delay could be taken into account when assessing delay. He cited the judgment of Lamer J in

Mills v The Queen

91986) 29 D. L. R. 161 and that of Gannon J in

O’Flynn v District Justice Clifford

[1988] 1 I. R. 740. While these were authorities suggested that pre-complaint delay or lapse of time did not confer any rights on an accused person, he concluded at page 579:

“I am accordingly, satisfied that in determining whether the concern and anxiety caused to an accused person is such as to justify the prohibition of his trial on the ground that his constitutional right to a reasonably expeditious trial has been violated, the court, depending entirely on the circumstances of the particular case, may be entitled to take into account, not merely delay subsequent to his being charged and brought to trial, but also delay prior to the formal charge. It is to be remembered that, in upholding the applicant's rights in such a case, the court is not merely vindicating and protecting the rights of all persons coming before the courts to the dispatch of criminal proceedings against them with

reasonable expedition. It is also upholding the general public interest in the speedy prosecution of crime.”

52. At a later point in his judgment (page 581) the learned Chief Justice identified as the essential issue for resolution the question whether, assuming a breach of the constitutional right to a reasonably expeditious trial, the prohibition of the trial was justified. He answered that question as follows:

“Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay.”

53. This Court has reiterated that approach in

P. M. v Director of Public Prosecutions

[2006] 3 IR 172

. Kearns J, speaking for a unanimous court, cited the above judgment of Keane C. J. Having done so, he continued:

“I believe that the balancing exercise referred to by Keane C. J..... is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial.”

54. Based on the foregoing authorities, it is necessary to consider, firstly, whether the period that it took to dispose of the first judicial review proceedings constituted a violation of the appellant's right to a trial with due expedition and, assuming an affirmative answer to that question, whether, having regard to all the circumstances, the Court should make an order prohibiting the DPP from continuing with his prosecution.
55. The first question requires close examination of the periods of time taken to conclude the first judicial review proceedings.
56. The appellant complains, firstly, of the period taken to deal with the issue of discovery of documents. The total period was from 15th May 2000, when the appellant's solicitors asked the DPP to agree to make voluntary discovery to 8th February 2002, when an affidavit of discovery was sworn. Although the DPP declined to make voluntary discovery, the appellant

did not serve a Notice of Motion until July, which was returnable for 13th October. No particular complaint is made about the subsequent adjournments until 12th January, when neither party appeared in the Master's court. Fault for that would have to be equally apportioned, but the appellant had carriage of the judicial review proceedings and of the discovery motion, in particular. He did not write to the DPP for another four and a half months. He did not then succeed in having a fresh Notice of Motion issued until 2nd October. It was returnable for 16th November 2001. Again, no particular complaint is made about adjournments until the month of February 2002, when the affidavit was sworn.

57. I am very far from saying that it should have taken a period of one and three quarter years to dispose of a quite ordinary application for discovery. In my judgment in

T. H. v Director of Public Prosecutions

[2006] 3 IR 520

, dealing with a comparable situation, I doubted whether it was correct “

to scrutinise

the various steps taken in the litigation with a view to assigning blame when a party unsuccessfully but bona fide takes or opposes a step in the procedure.”

In the present case, a very substantial part of the delay in completing the discovery process must be laid at the door of the appellant. Apart from having carriage of the proceedings, he had secured an order restraining his continued prosecution. There is no evidence that he treated the discovery application as involving any particular urgency. Indeed, even at its conclusion, he agitated the matter further by pursuing an unsuccessful application for further discovery, including an application to the High Court. This carried the matter up to the end of July 2002. Looking at this period in the round, I cannot conclude that the appellant has established a breach of his constitutional right to a fair trial.

58. I would also reject the suggestion that the adjournment of the hearing of the case from March to July 2003, due to the unavailability of a judge amounted to such a breach. That type of event will occasionally occur in a busy court system, even when and perhaps especially when the courts are endeavouring to dispose of a large volume of business. In any event, the appellant had judgment on his application on 18th July. He could scarcely have complained if he had secured a hearing in March and a reserved judgment had been delivered in July.
59. The appellant's strongest point undoubtedly relates to the lapse of a period of more than one year from the filing of a notice of appeal by the DPP and the date when the approved transcript of the judgment of the High Court, became available. The delay does not appear to be attributable to the DPP, but that does not deprive the appellant of the right to complain about it. The DPP lodged the books of appeal in reasonable time and certified the case as ready in January 2005. I certainly do not see any basis for complaint about the fact that it took a period of one year for the case to be reached in the Supreme Court's list. Judgment

was delivered promptly.

60. In respect of the period of more than a year which it took to have the transcript produced and the case certified, I accept that the appellant might have legitimate ground for complaint. However, he took no steps whatever to expedite the appeal. He could have issued a Notice of Motion, as is done by respondents as a matter of common routine, asking the Court to dismiss the appeal or, alternatively, to order the DPP to take steps to expedite the appeal. It seems as if, having secured an order of prohibition in the High Court, he had no pressing need to get the appeal on.
61. In the result, I accept that there was significant delay on the part of the DPP in prosecuting his appeal in the first judicial review proceedings. However, in the entire context of the case, it was not such as to amount to a breach of the appellant's constitutional right to an expeditious hearing of the criminal charges against him.
62. In spite of that conclusion, I will address the issue on the assumption that there was delay amounting to a breach of the constitutional right of the appellant to such an expeditious hearing. I must apply the balancing test required by the authorities.
63. Recalling the words of Kearns J in

P. M. v Director of Public Prosecutions

, it is necessary to see what the appellant has put into the balance. He says that, from 5th January 1998 he was “

under the considerable pressure of being prosecuted with serious criminal offences

He also refers to his family circumstances and to the fact of being required to sign on once a month at a garda station and to appear at the Special Criminal Court for mention of the case.

64. Firstly, I do not consider that, taken in its entirety the delay in the conduct of the first judicial review proceedings contributed significantly to the overall length of the criminal proceedings. At most a period of between one and two years is involved. Set against the backdrop of a trial for offences alleged to have been committed in 1983, I do not find that period to be particularly significant. Secondly, the appellant was, at all material times, the beneficiary of an order of the High Court restraining the further conduct of the criminal proceedings. He was the initiator of and had carriage of the proceedings. He could have taken steps to accelerate them. It does not appear that he ever did so. I here recall the dictum of Powell J, quoted above that “

failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

” Thirdly, there is the crucially important point that the Court must have due regard to the public interest in the prosecution of serious crime. The Court must have regard to the seriousness of the offences. Keane C. J. examined the nature of the criminal offending in

P. M. v Malone

. He emphasised the unusual features of the case: the sexual offending alleged “

began as a form of sexual experimentation between two children under the age of ten and continued for a relatively short time after the applicant had reached the stage at which, in the eyes of the law, his actions attracted the same degree of criminal responsibility as adults.”

He was “

satisfied that

.....

the nature of the offences with which the applicant is now charged, coupled with the inordinate and wholly unjustifiable delay in bringing them to trial, renders this a case in which the constitutional right of the applicant to a reasonably expeditious trial outweighs any conceivable public interest there might be in the prosecution of the alleged offences.”

65. Nothing of the sort could be said in this case. The appellant accepts, indeed emphasises, that the offences with which he is charged are serious ones. They involve allegations of a kidnapping together with the use of firearms.

66. I do not accept that the type of anxiety about being charged with criminal offences or being required to sign on or to attend at Court could possibly justify an order preventing the appellant’s trial. These disadvantages are inherent in the criminal process. They commenced, as the appellant says, on 5th January 1998. The appellant is entitled to complain about the extent to which they were exacerbated or prolonged by the breach of his right to an expeditious trial. He did not apply for leave to apply for judicial review until 1st November 1999. Thus, it is only from that date that he may legitimately advance this complaint. Once the appellant chose to apply for judicial review, some further delay in his trial was inevitable. It is a question of degree. On any view, disposal of the proceedings (including an appeal to this Court) was bound to take a minimum period of two to three years. I have suggested that the proceedings were lengthened by a period of one to two years. An exacerbation of the complaint of pressure from facing criminal charges (including having to sign on and attend at court) for that additional period could not possibly, on the facts of the present case counter-balance the right the public interest in having the appellant put on trial for the indisputably serious offences involved.

67. I agree with the conclusion of Quirke J that there were at most two or three periods of unnecessary delay and that nothing in the evidence indicated that “

any consequence flowed from those delays which has interfered with any interest which the applicant’s right to an expeditious trial was intended to protect.”

Thus, I would dismiss the appeal.

European Convention on Human Rights

68. Having thus disposed of the appeal, I, nonetheless, wish to address the appellant's reliance on Article 6 of the Convention. The Convention is not directly effective in Irish Law. Article 29.6 of the Constitution provides:

"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

69. (See

In re Ó Laighléis

[1960] I. R. 93;

Kavanagh v Governor of Mountjoy Prison

[2002] 3 IR 97

.)

70. The European Convention on Human Rights Act, 2003 came into effect on 1st January 2004. That Act gives defined effect to the provisions of the Convention. The Act has not been relied upon in the present case, probably because most of the events of which complaint is made had occurred prior to its entry into force.

71. Nonetheless, the courts can and do draw inspiration and assistance from the Convention and from decisions of the European Court of Human Rights, when interpreting analogous provisions of the Constitution. The first sentence of Article 6.1 of the Convention provides:

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

72. The right to a trial within "

a reasonable time

" and a trial "

with reasonable expedition" are indistinguishable

. The difference is in the remedy. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

73. Thus a successful applicant before the Court of Human Rights may, in addition to having a finding made in his favour, be awarded a monetary sum. But the decision, both as to finding and the award of

just satisfaction

are made against the Member State and are binding in international law. The Court does not make any decision adverse to or binding on the courts or the prosecuting authorities. In particular, the Court of Human Rights has no power to and does not purport to make any orders affecting national proceedings. It does not order them to be stopped and does not even express any view as to whether they should be stopped. This was clearly explained by Keane C. J. in his judgment

in *Barry v Director of Public Prosecutions*

[2003] IESC 63

(17 December 2003):

“The decision of the majority of the court [of Human Rights] in

Doran –v- Ireland

is authority for the proposition that unreasonable delay in the determination of proceedings resulting from the procedures ordained in legislation or otherwise by the member state may result in an award of damages payable by the state to the injured party but does not have the effect of entitling a party in the domestic courts to relief which would otherwise not be available to him.”

74. I made a similar observation in my own judgment in

T. H. v Director of Public Prosecutions

, cited above.

These observations are relevant to the interpretation of the judgments of the Court of Human Rights. That court does not engage in the balancing exercise described in the Opinion of Powell J in

Barker v Wingo

and in the decisions of this Court (such as

P. M. v Malone and *P. M. v Director of Public Prosecutions*).

That exercise is neither necessary nor relevant to the decision as to whether to award just satisfaction. Consequently, the decisions of the Court of Human Rights provide useful guidance on the question of whether there has been a breach of the right of an accused person to a trial within a reasonable time or with reasonable expedition. For example, in its judgment in the case of

Barry v Ireland

(Application No. 18273/04) on 15th December 2005, the Court restated its consistent approach to the assessment of a reasonable time as follows (paragraph 36 of the judgment; citations omitted):

“The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities..... On the latter point, what is at stake for the applicant in the litigation has to be taken into account.

75. A further passage from the judgment of the Court also calls for observation. It appears that the representatives of Ireland had submitted to the Court that judicial review, which was available to the applicant in that case, provided an effective remedy in domestic law and that

“

damages might have been available as a remedy in the judicial review proceedings, if the applicant had sought them

.” The Court’s response to that argument (at paragraph 43) was:

“There is no evidence that such proceedings would have been capable of providing damages and the Government accepted that there was no domestic legal provision for an award of damages in following proceedings. Although the Government argued that the common law might be flexible enough to provide such a remedy, they did not refer to one precedent even tending to support this argument. Moreover, the judgment of the Supreme Court made it clear that Convention case-law would not cause the domestic courts to fashion any remedies that would not otherwise have been available (see paragraph 23 above).”

76. I would remark that, in that case, as in the present case, no claim for damages had been made. Nor, so far as I am aware, has any such claim ever been made in such a case. In every such case, the accused person, in practice, seeks the remedy of prohibition of his trial. It is clearly not possible for this Court, having an appellate function only, to pronounce in the abstract on whether damages would be available as a remedy, they it were claimed. Any such claim would have to be made in the High Court in the first instance. The Act of 2003 might be relevant.
77. I would also add that the Court may have somewhat misapprehended the remarks of Keane C. J. in the passage of his judgment in

Barry v Director of Public Prosecutions

, which I have cited and which it also quoted. Keane C. J. was merely saying that a particular judgment of the Court of Human Rights did not have effect in domestic law. Whether these courts would “

fashion remedies

” in the light of the case-law of that Court is a quite different matter and would have to await an appropriate case. Again the Act of 2003 may or may not be relevant.

78. The result of this excursus into the case law from the Court of Human Rights is that it does not affect the conclusion I have already reached, namely that the appellant has not established that he has a right to have his trial prohibited.

JUDGMENT of Mr. Justice Geoghegan delivered the 5th day of March 2008

I have had the benefit of reading the judgments to be delivered in this appeal by Fennelly J. and Kearns J. I am in broad agreement with them and, in particular, I am in complete agreement with their view that the appeal should be dismissed.

There are small nuances of difference, mainly differences of emphasis in the two judgments which to some extent impinge on aspects of the case which I myself would like to emphasize. For that reason, I have prepared this short judgment with observations of my own.

The aspect of the appeal on which I particularly want to concentrate is the relatively new concept of systemic delay. First of all, I am not entirely clear what exactly the concept means and to what extent it can be relevant in relation to justiciable delay. Various alternatives come to mind. I would suggest, for instance, the following and there may indeed be more.

1. Any delay thought to have been unnecessary and for which the accused was not responsible in the procedures of bringing him to trial and completing the trial.
2. The same definition but confined to situations where the delay was caused by blameworthiness on the part of the authorities.
3. The same definition but confining the concept of “

unnecessary delay

” to delay within the existing system as it stood. In other words no cognisance would be taken of, for instance, a failure on the part of the state to appoint an adequate number of judges or to provide an adequate number of courtrooms etc.

4. The same definition but account would only be taken of delay caused within the office of the Director of Public Prosecutions or the Garda Síochána but not within the courts. It must be remembered in this connection that unlike in the case of the U. K. the courts are excluded from the definition of

“organ of the State”

in the European Convention on Human Rights Act, 2003. If the courts have been expressly excluded from that Act, as they have been, it might seem wrong on one view to introduce them by a back door unless of course the Constitution brought them in, a matter to which I will refer again later.

As I do not think that any important issue of systemic delay arises in this case, I would like to postpone expressing any view on its nature and relevance until a case in which it properly arises. Whilst I agree with Kearns J. that prosecutorial delay in the sense that the Irish courts have understood it, could be considered to be a form of systemic delay, I do not agree that systemic delay and prosecutorial delay are the same thing. At most, prosecutorial delay is one form of systemic delay and then only if systemic delay means not just delay due to a bad system but delay due to a perfectly good system not being properly applied. Furthermore in the Irish jurisprudence, it imports gross blameworthiness.

I do not know of any case where as a consequence of an inadequate structure due to a lack of staff or lack of suitable staff, justiciable delay resulted. Contrary to the view of Kearns J., I would have considerable doubt that in enunciating the principle that delay of itself and by itself might in exceptional circumstances be a ground for prohibiting a trial, Finlay C. J. in

DPP v. Byrne

[1994] 2 I. R. 236 had in mind “

systemic delay

”. I would rather suspect that the former Chief Justice was entirely viewing the matter from the point of view of the constitutional rights of an accused and was opining that there could be circumstances where a particular situation of the accused rendered it unfair to put him or her on trial having regard to a long lapse of time however caused. Conceivably that long lapse of time might in fact have been contributed to by the judiciary.

In this particular case, as Fennelly J. has pointed out, the only conceivably relevant justiciable delay was the delay between the serving and filing of the notice of appeal by the Director of Public Prosecutions on the 19th August, 2003 and the lodging of the books of appeal on the 15th November, 2004. The explanation for this delay was apparently a difficulty in obtaining a signed and approved transcript of the judgment of the High Court. We do not know what exactly led to that delay. It might have been simply an oversight on the part of a conscientious and hardworking judge as the particular judge was in this case or there might have been some reason why he was delaying approving it or indeed it may not have been adequately placed before him for approval. It could be a number of reasons. There is a system which normally works perfectly well whereby a judge who gives an

ex tempore

judgment is asked to sign and approve it. As to whether he gives priority to that job of work may depend on whether he is being given proper information as to the urgency with which it is required. I find it unnecessary to consider whether this particular lapse of time should be taken into account in considering whether a trial should be prohibited because I am quite satisfied that prohibition would not be appropriate in this case at any rate.

Having regard to the view which Fennelly J., Kearns J. and I myself have taken, I do not think that a detailed consideration of the concept of systemic delay is necessary and I would like to reserve my consideration of it until a case where it seriously arises.

I have already indicated that although I am in full agreement, as is Kearns J., with the principles of Finlay C. J. laid down by him in

DPP v. Byrne

cited above, I do not think for the reasons I have given that the former Chief Justice was referring to

“systemic delay”

. In relation to the wider meaning of that expression, the fact that at any given time the Oireachtas had provided for an inadequate number of judges would, if anything, be a reason under our domestic law for extending the period which might be thought of as a reasonable time within which a case should be heard. I fully acknowledge that that view might not accord with the Convention. It is for that reason that I believe the issue of systemic delay is a brand new one and is dependent on the application of the Convention within the limits of its applicability under the 2003 Act.

The case law of the European Court of Human Rights including the

McMullen

case and the

Barry

case, makes it clear that in any situation in which redress is being sought on the grounds of delay all the circumstances have to be considered and systemic delay may be one of those circumstances. I rather doubt there is enough case law yet to form a firm view as to what the precisely correct approach to systemic delay is under the Convention. For instance, to what extent, if at all, is blameworthiness relevant to systemic delay. If so, how is that blameworthiness assessed? A government might in a period of recession (to take an obvious example) have limited resources. Ideally, two new judges are needed and ideally a new hospital is needed but both cannot be afforded. Is it necessarily to be said that an accused can get some kind of remedy (whatever it might be) for delay resulting from this failure in what might be argued to be necessary expenditure. In the absence of a firm ruling to the contrary by the European Court of Human Rights, I think that the concept should be kept within tight limits and should be more or

less confined to a situation where there is a positively negligent system or negligent failure of system within the resources that exist of administering criminal justice. But all these matters can be argued out in an appropriate case which this is not.

Returning to this particular case in the High Court, counsel for the appellant referred to four periods of what he considered to be unnecessary delay and relevant to the overall calculation. Quirke J. rejected one of the suggested periods outright. In relation to the other three, he considered that the delay as to the discovery matter was the fault of both parties. In relation to the so called fourteen month waiting period in connection with the appeal to the Supreme Court no evidence had been put forward that this was excessive. From my own ordinary knowledge of the court, I am quite satisfied it was not. Only one of the suggested periods was considered by Quirke J. to be the fault of the Director of Public Prosecutions and that related to the delay in lodging the certificate of readiness in respect of the appeal to the Supreme Court. I have already referred to the explanation given for this.

The suggested period of four months which was rejected by the learned trial judge arose because on the date of hearing of the original judicial review proceeding a judge was not available and the case was heard four months later. For some years, as a judge of the High Court, I was in charge of the judicial review list and I am well aware that this can happen. For it to happen once is normally not the fault of anybody. Questions of systemic failure could arise if it was established that an applicant for judicial review through no fault of his own failed a second or third time to get a hearing due to a shortage of judges. This could be an indication of relevant systemic failure. A case not reached should be given priority and the powers that be should ensure that a judge is available to hear it on the next occasion just as that should happen in relation to any case that is specially fixed but unfortunately, it does not always happen. This is where I can understand that the concept of systemic delay might be relevant but I am satisfied that it does not arise in this case and I agree that the appeal should be dismissed.

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