THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 48
[Record No. 2018/1065 JR]
[Record No. 2019/182 JR]

BETWEEN

BK

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 26th day of January, 2021

Issues

1. The above mentioned judicial review applications for prohibition of pending criminal trials of the applicant, who is charged with historical sexual abuse crimes against minors, were heard together before this Court. In the 2018 judicial review application the applicant is seeking to prohibit the trial in respect of Bill WDPP0031/2018 (hereinafter Bill 2018) and in the 2019 judicial review application the applicant is seeking to prohibit the further prosecution of Bill WDPP0010/2019 (hereinafter Bill 2019).

2. Bill 2018 refers to three complainants and involves 99 charges spanning from 1983 to 1993. Bill 2019 involves three complainants with 171 charges spanning from 1978 to 1988. Accordingly, the within matters concern a total of six complainants and 270 charges in respect of the period December 1978 to March 1993.

3. There are three affidavits of Matthew Byrne Solicitor filed in support of the applications respectively dated 14 December 2018, in respect of the 2018 judicial review, 29 March 2019, in respect of the 2019 judicial review and 19 December 2019, in respect of both judicial reviews. The applicant has filed brief affidavits of verification in respect of both judicial reviews respectively dated 20 December 2018 and 8 April 2019.

4. Although initially the respondent raised an issue under O.84 of the Rules of the Superior Courts in respect of the delay in instituting the 2018 judicial review this was not pursued at the hearing and insofar as necessary a ruling was made during the course of the hearing to the effect that time would be extended.

5. Save for the circumstances in respect of each of the complainants the grounds for seeking prohibition of both Bill 2018 and Bill 2019 are similar and the affidavits of Mr. Byrne aforesaid raised the following:

   (1) The applicant was previously prosecuted, pleaded guilty and is serving a 14-year prison term. In these events, the relevant bills comprise the second and third prosecutions respectively of the applicant.

   (2) There has been both complainant and prosecutorial delay. The delay on the part of the complainants relates to the fact that they had made disclosures well in advance of the formal complaints to An Garda Síochána. The prosecutorial delay is said to

arise because there was an investigation in 1979, 1987 and 1997 and if the investigation, or any of them, had been properly conducted the current prosecutions might have been brought forward at a much earlier time, and the delay has caused specific and irreparable prejudice to the applicant. The delay on the part of the complainants and the prosecution is said to be inordinate, egregious and culpable.

(3) Because of the delay and the passage of time it is impossible for the applicant to establish islands of fact in order to defend himself, therefore it will be a matter of assertion and denial only.

(4) The alleged offences are not time, date or location specific to enable the applicant to defend himself.

(5) Several witnesses are now deceased, or in respect of one potential witness suffers from dementia thereby occasioning prejudice to the applicant.

(6) There has been a loss of evidence.

(7) Although the applicant previously pleaded guilty in respect of some charges, the applicant denies offending from 1987, and accordingly the interactions involving the Gardai and others, which occurred in 1987 are fundamental to the within prosecutions.

(8) There is a possibility of further prosecutions by virtue of the information disclosed from the respondent to date.

(9) There has been significant prejudicial publicity in respect of the applicant following the applicant's earlier trial and a commission of investigation has also been set up which has added to the adverse publicity. In this regard the RTÉ Primetime programme of 4 May 2016, which involved photographs and details in respect of the applicant's prior prosecution was identified, as well as the Dáil debates of 14 June 2018.

(10) Because of the historic nature of the complaints it is argued that there is less public interest in the prosecution of the complaints.

(11) The passage of time has resulted in a faded memory of the applicant and the fact that he has numerical ability does not equate to perfect coherent or cogent memory in order to enable him to disprove the allegations.

(12) Because of prior prosecution there is the added prejudice of fabrication and cross-contamination of complainants.

(13) A transfer of the proceedings to Dublin would be insufficient to avoid the exceptional nature of the prejudice arising.

(14) There is conflict between the affidavits on behalf of the respondent in the within proceedings and some of the complaint/witness statements.

(15) By reason of the foregoing irreparable prejudice has been occasioned to the applicant because of the delay, the unavoidable risk of an unfair trial, and the cumulative effects of all of the foregoing make the within matter wholly exceptional to warrant an order of prohibition in respect of both bills.

The complainants

A

6. A was born on 29 June 1971, and of the 270 charges 39 relate to him between the period 1983 to 1988. A is a brother of B. The applicant was a friend of A & B's father and coached basketball. A divulged the details of the complaints to his wife in 2001 and at a family meeting in 2002. He was further invited to make a complaint by An Garda Síochána in 2013 but declined to do so and "was informed of the implications of not making a complaint" (see para. 33 of Inspector Keating's affidavit. See also statement of Sergeant David Butler dated 29 May 2019).

7. The applicant complains that there was deliberate delay on the part of A to make a formal statement to An Garda Síochána and that he only did so following contact with An Garda Síochána on 14 October 2016, following the establishment of the Commission of Inquiry, the applicant's guilty plea in the initial prosecution, and following engagement with JC who was a complainant in the initial prosecution. A's formal statement to An Garda Síochána was made on 25 October 2016.

8. In answer to these complaints by A the applicant in an interview stated that A was over 15 and the complaint activity was consensual. Further, it was not a crime between 1982 and 1991.

B

9. B was born on 8 March 1975 and made a formal complaint to An Garda Síochána on 25 October 2016. 59 counts relate to B between the period 1988 and 1992. The applicant acknowledges that there was some element of truth to the complaint of B but not as a minor. The applicant admits giving him money and further admitted to B's wife the activity complained of by B.

10. B was also involved in the family meeting of 2002 and furthermore made a disclosure to his wife in advance of that meeting. B declined to make a statement to An Garda Síochána until after a meeting with JC aforesaid and various publications in the media. The applicant complains that in the statements of the parents of A and B it is said that a complaint was not made earlier because the boys were not ready, however, A and B in their statements state that their father objected to the making of the complaint.

C

11. C was born on 22 August 1970 and made a complaint on 9 January 2017. One count relates to C for the period in or about June 1985. C alleges he was given money. The applicant denies the complaint. It appears that C went to An Garda Síochána in 1985 to

report the alleged assault and was told to come back with an adult which he did not do as C says he did not wish to make a disclosure to his parents.

12. The applicant argues that An Garda Síochána should have taken a statement when C presented himself notwithstanding that he was a minor at the time, or in the alternative provided him with a Guardian ad Litem. The formal complaint of C followed the applicant's guilty plea, a meeting with JC, and counselling during which the complaint was disclosed. In addition, C told his wife in 1991 and identified the applicant as perpetrator to his wife prior to getting married in 1996. An Garda Síochána were aware of C as a possible complainant in 2006 (see para. 65 of the affidavit of Inspector Siobhán Keating of 14 June 2019).

D

13. D was born on 17 February 1971 and made statements of complaint to An Garda Síochána on 20, 26 and 27 February 2018. 136 counts arise from the complaints of D between the period 1980 to 1988 when he was aged between 9 and 17 years old.

14. In an interview with the applicant the applicant denies any wrongdoing as against D. The applicant did recall D's date of birth and address. D had regular contact with the applicant in his adult life and the applicant suggests that he never did anything wrong to D. Disclosure documents show D's communication with Brother C, the Principal of a relevant school in 1987 and say that D showed Brother C a photograph of a naked boy taken from the applicant's car. Brother C was in contact with An Garda Síochána at this time, however, no investigation ensued. D discussed the matter with A in 2002 and was approached by An Garda Síochána in 2013 but did not make a statement until after the applicant's guilty plea in respect of other complaints and until his financial affairs were in order. D disclosed matters to his brother in or about 2013.

E

15. E made a complaint on 29 May 2018 and four counts between the period 1984 to 1986 arise because of his complaints. E states that he was photographed by the applicant. The applicant denies the allegations made. The applicant admits he knows the date of birth and address of E and that he coached him and gave him lifts and gave him alcohol. E had contact with JC in early 2017 and made a disclosure to him and gives a contradictory description of the applicant's bedroom to that which other complainants have given.

F

16. F was born on 16 December 1966 and made a formal complaint to An Garda Síochána on 27 February 2018. Of the 270 charges 31 relate to F when he was aged between 12 and 15 years between the period 1978 and 1982. F came to the attention of An Garda Síochána in or about 1979 and 1980 during which time he was asked about the applicant but made no disclosure. F complains that photographs were taken of him, however, the applicant denies F's allegations in total.

17. F made a disclosure to his girlfriend in 1990 or 1991 and made a disclosure to his sister in December 2013. The applicant complains that F did not make a statement until post the

applicant's guilty plea aforesaid, discussing the matter with a journalist, and following contact made by him by telephone in May 2013 with An Garda Síochána. The applicant complains that An Garda Síochána were dismissive of the complaints of F as they were of F's sister when she attended An Garda Síochána in January 2014. F's sister did not give F's name to An Garda Síochána.

18. In an affidavit of Detective Sergeant Michael Burke of 10 August 2019, a description of the call from F is given to the effect that it appeared F was intoxicated at the time and he was phoning from the United States. Detective Sergeant Burke suggests that F was told to call to An Garda Síochána when he was next in Ireland in June or July of 2014 to make a formal statement. Both E and F complained of fear of their family finding out which caused or contributed to the delay in making a formal statement.

19. The applicant complains that there is an effective dispute as between An Garda Síochána and F/F's sister as to the circumstances surrounding the attempt by F in 2013 to make a complaint and An Garda Síochána being dismissive to F's sister's interaction. No notice to cross-examine was served in these proceedings.

The respondent's position

20. The respondent filed full statements of opposition in respect of both judicial review applications and in resisting same argues:

    (1) The applicant has in the past courted media attention and given interviews. In addition, any recent media coverage is not extensive nor could it be considered saturated. In any event, the difficulties posed by media coverage would be dealt with by either delaying the trials or moving the trials to Dublin. There is no line of authority to suggest that the trial should be prohibited because of media coverage.

    (2) There are no wholly exceptional circumstances giving rise to a need to prohibit the trial.

    (3) Of the complaints made by the applicant the trial judge is best placed to deal with same by way of directions or otherwise. In this regard the respondent relies on the fact that under the Constitution a criminal trial on indictment is heard by a judge and jury with the jury determining guilt or innocence. Furthermore, as an independent body it is the preserve of the Director of Public Prosecutions to determine whether or not a prosecution should be taken.

    (4) The complaints as to missing witnesses and missing documents amount to speculation only.

    (5) There is no evidence that the within complainants were known to An Garda Síochána in 1987.

    (6) The complainants had extreme difficulty in coming forward to make a formal complaint (see para. 37 of the affidavit of Inspector Keating aforesaid). The difficulties in coming forward and making a formal complaint are well documented

(see for example para. 7 of the affidavit of Inspector Keating and paras. 7, 46, 47, 69 and 70 of the affidavit of Detective Sergeant Donoghue).

(7) A criminal prosecution can only be advanced with a formal statement of complaint (para. 36 of Inspector Keating's affidavit and para. 61 of Detective Sergeant Donoghue's affidavit of 13 August 2019).

(8) In December 2012 JC called to An Garda Síochána and made a formal statement, as a consequence whereof an investigation into the applicant ensued (para. 34 of the affidavit of Inspector Keating).

(9) The applicant was very alert and had a good memory when interviewed (para. 50 of the affidavit of Inspector Keating).

(10) The applicant has admitted a consensual sexual relationship with A and B post-1987 (para. 73 of the affidavit of Inspector Keating). On 13 December 2012 the applicant made admissions following a caution and questioning by Inspector Keating that he molested "a good few – about 20 – in the 14-16 age group" – he had taken photographs of naked boys but had burned them approximately 25 years ago and held a video of B masturbating as collateral against a loan (see paras. 35, 47 and 48 of the affidavit of Inspector Keating). The applicant made an admission in respect of B to B's wife (see para. 49 of the affidavit of Inspector Keating). The applicant admitted something did happen with A and B and he was remorseful (para. 57 of the affidavit of Inspector Keating). The applicant admitted to giving all complainants alcohol (see para. 75 of the affidavit of Detective Sergeant Donoghue).

(11) The Director of Public Prosecutions believes that there is a strong public interest in the prosecution (para. 98 of Inspector Keating's affidavit).

(12) There are 17 witness statements and twelve exhibits in the Book of Evidence furnished (para. 15 of the affidavit of Inspector Keating). In an interview A identified D as a victim of the applicant (see para. 54 of Inspector Keating's affidavit). By reason of the content of the affidavits of Inspector Keating and Detective Sergeant Donoghue aforesaid, and the various witness statements, trials will not involve bare allegation and a bare denial.

(13) The jury will be advised not to conduct their own searches and therefore the affidavit on behalf of the applicant of Ross Donnelly of 28 February 2020 is not relevant.

(14) The issue before the Court is not a question of whether or not the prosecution of the applicant should have happened earlier but rather can it fairly happen now.

(15) No medical report has been furnished in respect of any difficulty in the applicant's memory as asserted.

Jurisprudence

21. The parties accept that the issue before this Court is as to whether or not there is a real or serious risk of an unfair trial, which risk is unavoidable notwithstanding appropriate rulings and directions on the part of the trial judge. The test is to be applied in the light of the circumstances of the case. This test follows the judgment of the Supreme Court in *SH v. DPP* [2006] IESC 55 which judgment marked an end for the need to apportion blame in respect of delay.

22. In PT v. DPP [2007] IESC 39 the Court found that there was no single factor which rendered the case an exception, but rather the cumulative effects of all of the factors brought the matter within the clear exceptional circumstances requirement to prohibit a trial.

23. In *PT v. DPP* [2007] the Supreme Court held that prior cases were of limited value in matters of wholly exceptional circumstances, as it is necessary to look at the individual facts of the given case.

24. In *TC v. DPP* [2017] IEHC 839 White J. granted an order of prohibition on the basis of wholly exceptional circumstances. One of the factors being that a significant portion of the delay could have been avoided if the complaints had been made after a family meeting in 2003, when the behaviour of the relevant applicant was discussed. In that case the applicant was 80 years old and was terminally ill with other additional general health problems, poor hearing and possible memory loss.

25. The applicant relies on the judgment of Sheehan J. in *BS v. DPP* [2017] IECA 342 where the Court overturned the High Court decision and granted an order of prohibition by reason of a deceased witness. The Court was satisfied that credibility was likely to be the deciding factor in that case. Although not mentioned by the applicant it is noted by the Court that Sheehan J. stated in para. 20 that:

> "The facts of the present case differ considerably from those in MS who was facing multiple charges in respect of multiple allegations by different complainants."

26. The Court in that matter concluded that the applicant had engaged with the evidence and his belief that three deceased witnesses could have been of assistance goes beyond mere assertion. The charge as against the applicant in that matter had been one count of rape.

27. In submissions the applicant relies on *DPP v. CC* [2019] IESC 94 where O'Donnell J. stated that the absence of a witness or a piece of evidence does not render a trial unfair, and thereafter went on to identify the vantage point of a trial judge in assessing whether or not a line has been crossed between a just, and an unjust process. On the one hand the issue may merely involve "no more than a missed opportunity", whereas on the other hand it may be that the applicant has "lost the real possibility of an obviously useful line of defence." The Court went on to state:

> "… it is inevitable that many cases will proceed to trial without all the evidence that was potentially available at the time of the alleged offence, but that in itself does

not prevent a trial occurring. There is a point, however, at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed."

28. It is noted by the Court that in that case O'Donnell J. also quoted from *O'C v. DPP* [2000] 3 IR 87 to the effect:

> "Expert evidence in a succession of cases which have come before this Court and the High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in particular complain to the Gardaí until many years later (if at all)."

29. At para. 6, O'Donnell J. noted that except for very clear cut cases where the issue will not be affected by the development of the evidence at trial, issues should be left to the trial judge rather than as tended to be the case during the earlier stages of the development of the jurisprudence, to be decided in proceedings which sought to prohibit the conduct of the criminal trial before its commencement.

30. In that case Clarke C.J. noted a growing tendency by the courts to consider it appropriate to leave the final decision for the trial judge who now has a primary role in decisions of this kind, and judicial review is rarely appropriate.

31. The applicant relies on the Supreme Court decision in *PM v. DPP* [2006] IESC 22 to the effect that blameworthy prosecutorial delay is of significance once it is established, if its existence poses a danger to the accused's rights to an expeditious trial and a fair trial. This is so *inter alia* in respect of old cases, and once the accused's interests have been affected. Interference with the right to an expeditious trial may, for example, result in the possibility that the defence will be impaired. This line of authority is relevant to prosecutorial delay after a formal complaint.

32. In *MC v. DPP* [2011] IEHC 378 Hedigan J. found that the island of fact remaining in that case was extremely limited and only peripherally related to the allegations made. The Court felt that the case came down to an unsupported assertion and a bare denial and the applicant's challenge to the credibility of the complainant had been lost by the passage of time. The Court was of the view that with old cases a trial might take place, however, would require some concrete evidence to back up the evidence of the memories.

33. Similarly, in *J. O'C v. DPP* [2000] IESC 58 Hardiman J. indicated at para. 118 that "The more nearly a serious trial consists of mere assertion countered by bare denial, the less it resembles a forensic inquiry at all."

34. The applicant argues that there has been prejudicial publicity to date in respect of the applicant as identified by Hardiman J. in *Rattigan v. DPP* [2008] IESC 34. Namely, adverse pre-trial publicity prejudicing the right to a fair trial:

    1. suggesting guilt (without evidence); or,

2. repetition of information which adversely hampers or negatively portrays the accused;

3. also publications which are heavily partisan towards the victim.

* * * *

35. I did not understand the respondent to make the suggestion that the applicant's right to fair procedures is superior to the community's right to prosecute.

36. The respondent relies on Charleton J.'s judgment in *K v. Moran* [2010] IEHC 23, where the Court summarised the principles applicable to prohibition, including to the effect that:

(1) The High Court should be slow to interfere with the decision of the Director of Public Prosecutions that a prosecution should be brought.

(2) It is to be presumed that the accused will receive a trial in due course of law and that the trial judge is the primary party to uphold the relevant rights.

(3) The onus of proof is on the accused that there is a real risk of an unfair trial occurring which cannot be avoided by appropriate rulings and directions, and therefore the unfairness of the trial is unavoidable.

(4) The High Court on an application is to bear in mind that the trial judge will warn a jury of the handicap to the accused by the lapse of time, lack of precision, disappearance of evidence and witnesses, and failure of memory.

(5) The burden of proof of the accused is not discharged merely by making general allegations of prejudice but there is a burden on the accused to fully and actively engage with the facts.

(6) Even with ill health, old age and extreme delay, some specific prejudice must be identified.

37. The respondent also relies on the High Court and the Court of Appeal decisions, both in 2015, in the matter of *MS v. DPP* [2015] IEHC 84 and [2015] IECA 309. In that case the applicant sought prohibition on the basis of delay, poor health, prejudicial publicity and unavailability of witnesses causing general prejudice which matters neither individually, nor cumulatively, warranted an order of prohibition.

38. In *PB v. DPP* [2013] IEHC 401, O'Malley J. indicated that the authorities suggest that old allegations are best dealt with in the course of trial where there is power to withdraw the case from the jury where it is not just to proceed. She indicated at para. 59:

> "Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings."

39. In *MS v. DPP* [2015] O'Malley J. stated that to prevent a trial from getting off the ground there is a clear onus on the applicant to demonstrate that the passage of time has caused identifiable prejudice. In the Court of Appeal decision in *MS v. DPP* [2015], para. 67, Hogan J. stated:

> "Experience has shown that, special circumstances aside, the court of trial is generally better placed than the judicial review judge to make an assessment of this matter, particularly having regard to the run of the evidence and the evidence actually tendered."

40. In *MS v. DPP* [2015] one of the complainants had previously brought civil proceedings, a number had attended meetings with other complainants and there was a suggestion of fabrication and cross-contamination of complaints. However, on appeal in respect of the convictions, the Court of Appeal was satisfied that the possibility of contamination in all but the most exceptional cases are matters directed to the weight and the probative value of evidence and therefore an issue for the jury. The appellant's appeal was dismissed.

41. In *O'R v. DPP* [2004] IESC 52 a swimming coach who had already been prosecuted twice, pleaded guilty and was sentenced. The accused attempted to stop his third prosecution, unsuccessfully, on the grounds of excessive delay and publicity. In that matter there was also an independent inquiry with a report laid before the Oireachtas.

42. In *J.(S).T. v. President of the Circuit Court* [2014] IEHC 5, a Christian Brother who had stood trial on six occasions, on similar allegations, and had not been convicted failed to secure prohibition on the basis of exceptional circumstances. The Court was satisfied that effectively to hold with the applicant in that matter would mean that the longer the list of offences with which a person was charged the less likely it would become that he would ever have to stand trial for those later uncovered, and made the subject of further criminal charges. The applicant had advanced age and health problems however the medical evidence did not suggest that he was incapable of participating. The Court was satisfied that even if there had been undue prosecutorial delay there did not exist any exceptional circumstances to prohibit the trial.

43. The respondent points out in the matter of *Rattigan v. DPP* [2008] aforesaid, although the relevant reports were graphic, lewd and sensational and the applicant was constantly in the news and was wrongly termed as a rapist, prohibition was refused.

44. In *O'R v. DPP* [2004] aforesaid the Supreme Court noted that the publicity had been constant and was damaging and prejudicial to the applicant. The Court made reference to the fade factor and also referred to the fact that:

> "An important factor in the present case also is that the publicity of which the applicant complains was engendered by the offences with which he was previously charged and to which he pleaded guilty. Thus he himself must bear at least a degree of responsibility for this publicity."

45. In *DPP v. Wharrie* [2013] IECCA 20 the Court set out a list of factors discernible from the authorities which the trial judge will refer to in situations involving substantive publicity.

46. In *MS v. DPP* [2015] IECA 309 aforesaid, Hogan J. remarked that although at times the allegations against the accused generated saturation coverage there were almost no examples of where coverage of such kind has been held to justify prohibition as distinct from postponement.

Consideration

47. The applicant suggests that by reason of his guilty plea in the prior proceedings, this is an element of exceptional circumstances, nevertheless *O'R v. DPP* [2004] was not successful before the Supreme Court in securing prohibition on similar grounds.

48. In *BS v. DPP* [2017] the Court of Appeal specifically mentioned that the facts in that case differ considerably from those in *MS v. DPP* [2015]. The facts in *MS v. DPP* [2015] are particularly similar to the within matter save that in *MS v. DPP* [2015] complaints related to up to 51 years previously, medical evidence was before the Court as to the applicant's ill-health and the applicant was in his 80s.

49. This is not a case in which the evidence before the Court will be limited to bare accusation with a bare denial and therefore the inability to establish that island of fact has not been made out.

50. In *J.(S).T. v. President of the Circuit Court* [2014] it was held that even if there had been undue prosecutorial delay the application would still have been refused because there did not exist any exceptional circumstances.

51. In the instant case, it does not appear to me to amount to culpable delay in suggesting that C should have an adult present when making his complaint, and in fact it does not appear that An Garda Síochána acted inappropriately in not providing C with a Guardian ad Litem chosen by them as opposed to communicating with C's parents. Given therefore that C did not want his parents to know it is hard to conceive of how activity by An Garda Síochána could have altered the circumstances in 1985.

52. The 1987 involvement of An Garda Síochána was because of a complaint of an individual not one of the complainants herein and there is no evidence to support that An Garda Síochána was aware of the instant complainants at that time. The fact that An Garda Síochána might well have had their suspicions relative to other possible complainants was not, as averred by Inspector Keating and Detective Sergeant Donoghue aforesaid, sufficient to commence an investigation.

53. The applicant relies upon the statement of Detective Cullimore of 30 November 2016 to support the contention that Garda Seán Barry was monitoring the applicant in the late 1980s. However, the statement suggests that Garda Barry was appointed as a sort of liaison to liaise with the applicant to ensure he was getting care and counselling which is an altogether different involvement than surveillance of all movements of the applicant since 1987.

54. The applicant complains that when F's sister attended with An Garda Síochána it was an unsatisfactory investigation and there was considerable prosecutorial delay thereafter. In fact in her statement F's sister says she did not mention F's name. Furthermore in accordance with the affidavits on behalf of the respondents a telephone call from F from abroad would be insufficient to commence an investigation. (see para. 51 and 61 of the affidavit of Detective Sergeant Donoghue and para. 36 of Inspector Keating's affidavit)

55. There is no jurisprudence to support that because of the antiquity of the evidence, the subject matter of the complaints herein, this Court should assume prejudice, and indeed no failure to prosecute within a reasonable time after the relevant statements of complaint were made have been identified. The fact that An Garda Síochána might have known or ought to have known that there were other complainants not identified in 2003 is entirely insufficient to suggest prosecutorial delay in the absence of a statement of complaint.

56. The fact that the school principal may well have suspected elicit activity is no basis for An Garda Síochána to commence a prosecution investigation in 1987. Insofar as the statement of grounds suggest that this Court should infer matters, for example, that An Garda Síochána knew of the complaint of E before he made his statement in 2018, this is not in accordance with the burden placed upon an applicant in discharging the applicant's onus of proof in or about an application for prohibition.

57. The alleged prejudice because of the unavailability of witnesses is all premised on general as opposed to specific prejudice. In this regard for example it is suggested that the applicant's parents would have been of some assistance in establishing that they were not away from the family home at the frequency required, if all the allegations herein are correct. The allegations refer to 41 counts relative to the family home over a 15-year period, and therefore the complaint in this regard is extremely general rather than specific, in particular, given that none of the complainants allege that either parent was in the house at the date of the alleged offending behaviour.

Conclusion

58. Given the nature of the offences and findings in the jurisprudence herein before identified, I am satisfied that even if there was prosecutorial delay the applicant has not established wholly exceptional circumstances (for example extreme ill-health as was the case in *TC v. DPP* [2017] where the applicant was terminally ill).

59. The applicant's position herein is particularly similar to *MS v. DPP* [2015] where the Court was satisfied that the grounds relied upon neither individually nor cumulatively created the risk of an unfair trial.

60. In the circumstances the applicant has not discharged the burden placed on him to establish that there is a real or serious risk, that by reason of the individual, or cumulative matters herein complained of, the applicant would not obtain a fair trial or that the trial would be unfair, which cannot be avoided by appropriate rulings and directions on the part of the trial judge.

61. The relief claimed is therefore refused.