

THE HIGH COURT

[2021] IEHC 332

RECORD NO. 2020 41 JR

BETWEEN

BM

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 14 May 2021

Summary

1. This case raises the question as to whether the decision of the DPP to reverse her decision to discontinue the prosecution of the applicant for a criminal damage charge, and to proceed with the prosecution, breaches the requirements of fair procedures as identified in the Supreme Court decision of *Eviston v. DPP* [2002] 3 I.R. 260.
2. A question arose in the proceedings as to the correct interpretation of the Criminal Justice (Victims of Crime) Act 2017, namely whether a victim has a right under that Act to a review of a decision to discontinue a prosecution, as opposed to a decision not to prosecute. However, given that it was not disputed that the DPP had reviewed her decision to withdraw the prosecution, resulting in a decision to re-charge the applicant with the same offence, and given that it was the position of the applicant that irrespective of how that decision had come about, it was in breach of fair procedure requirements, I did not find it necessary to resolve that question of statutory interpretation.
3. For the reasons set out below, I find that the decision of the DPP to reverse her decision to discontinue the prosecution was not in breach of the applicant's right to fair procedures, given (a) the fact that the applicant was represented by a solicitor and that an accused, properly advised by his or her solicitor, should be aware that a decision to discontinue a prosecution may be reversed by the DPP; and (b) the facts of this case did not disclose any matter, whether additional stress and anxiety caused by the decision to re-charge, delay, or prejudice that would justify a finding of breach of fair procedures.

Facts

4. The essential facts giving rise to the dispute are that following an incident on 27 July 2018, the applicant was arrested and detained by gardai and charged with an allegation that he had committed criminal damage by fire to a dwelling house (referred to henceforth as the "arson charge"). The house in question was one where the applicant's partner and his two-year old son were living. He made admissions in relation to certain matters when in custody at Tallaght Garda station following the incident. No decision was made over the next number of months as to whether he would be tried summarily or on indictment for this offence. On 19 March 2019, when the matter came before the District Court for directions (as it had already done on six previous occasions), Garda Doran told the court that the DPP had directed that the charge was to be withdrawn and the matter was struck out.

5. Two days later, on 22 March 2019, the applicant was charged with criminal damage perpetrated to a cell at Tallaght Garda station during his detention there following his arrest on 27 July 2018. That case was fixed for summary hearing before the District Court on 26 September 2019.
6. As averred to in the affidavit of Mr. O'Neill of the Victims Unit in the Office of the DPP sworn 25 September 2020, one or more persons directly affected by the fire, and who were considered to fall within the definition of "victim" within the meaning of the 2017 Act, were notified on 19 March 2019 as to the decision to discontinue the prosecution. On 4 April 2019, one of the victims wrote to the Victims Liaison Unit in the DPP and requested reasons for the decision to discontinue the prosecution. The DPP sent a response by letter to the victim on 17 May 2019 and the same victim responded via phone-call on 24 May 2019 requesting assistance in initiating a review and was advised to send a letter. On 27 May 2017 the DPP received a letter by a victim asking that the decision not to prosecute in respect of the arson charge be reviewed. The Victims Unit of the DPP then began an extensive internal procedure resulting in a memorandum finalised on 19 June 2019 which recommended overturning the decision not to prosecute, and also recommended a new charge of brandishing a knife in a public place.
7. On 27 June 2019 the DPP approved these recommendations. On 2 July 2019 the Head of the Victims Unit informed the directing officer to issue the revised directions. A letter was issued to An Garda Siochana on 20 September 2019 confirming the revised directions i.e. to re-charge the accused with the arson offence and to charge him with an offence in relation to possession of a knife and instructing that both should proceed on indictment. I address below the regrettable delay in conveying to the applicant the revised decision. No reason is given as to why it took two months for action to be taken following the decision of the DPP.
8. When the matter came on for hearing on 26 September 2019 in relation to the damage to the cell at Tallaght Garda station, the District Judge was informed on behalf of the prosecution that the DPP had redirected and the applicant was being re-charged with the arson charge and that the charge would be tried on indictment. The District Judge was also told that the charge of criminal damage to the cell would now be tried on indictment. Finally, the DPP added a new charge, being possession of a knife, and directed that this should also be tried on indictment.
9. On 7 November 2019, the applicant was sent forward for trial to the Dublin Circuit Court in relation to the three charges –arson, criminal damage to the cell, and possession of a knife. In fact, when the opposition papers were filed in this case, they indicated that the charge of criminal damage to the cell would not be pursued so the applicant is now facing two and not three charges arising out of the events of 27 July 2018.

The proceedings

10. Leave to seek judicial review was sought and granted by Meenan J. on 20 January 2020. These proceedings seek an order of prohibition injunctioning the DPP from further prosecuting the three charges. In fact, it was made clear by counsel at the hearing that

an order of prohibition is now only sought in respect of the arson charge. A declaration is also sought that the DPP's varying decisions in relation to the charge, including the decision to withdraw the charge and then to re-charge the applicant with the same charge after it had been withdrawn and struck out by the District Court, were unreasonable and unfair in all the circumstances.

11. At paragraph (e)(iii) of the Statement of Grounds it is pleaded that:

"(iii) Once the DPP had unequivocally and without caveat informed the Applicant (and the District Court) that the sole charge preferred against him in connection with incident on 27th July 2018, was being withdrawn and once it was struck out, it was a breach of his right to fair procedures to reverse this decision and to initiate a prosecution by recharging him. Having unequivocally withdrawn the arson charge, the DPP was not entitled to prosecute it again after it had been struck out by the District Court in the manner it was".

It is further pleaded at paragraph (iv) as follows:

"(iv) This Applicant is a vulnerable person. He suffers from mental health issues and he was extraordinarily subjected to and/or affected by stresses and strains and greatly prejudiced by the varying decisions of the Respondent".

12. In the grounding affidavit of the applicant's solicitor Mr O'Donovan sworn 17 January 2020, he avers as follows *"I believe the Applicant is a vulnerable person. I believe he suffers from mental health issues and that he was extraordinarily subjected to and or affected by stresses and strains and greatly prejudiced by the varying decisions of the Respondent"* [paragraph 12]. He refers to and exhibits an undated medical report from the applicant's GP, Dr. Daly, (Exhibit D) which states:

[BM]

[Address]

This young man suffers from depression, anxiety, and paranoid ideation and is a suicide risk. He attends counselling and has been on medication in past few years. I last saw him in Nov 2017. He should be urgently assessed in medical unit in Cloverhill and referred to Tallaght Hospital Psychiatric Services if deemed necessary."

13. Mr. O'Donovan also exhibits the correspondence between himself and the DPP (Exhibit B). In the letter of 22 August 2019 (exhibited to the affidavit of Mr. O'Neill at RON3), written to seek to persuade the DPP to drop the charge of criminal damage and before the decision to re-charge the applicant with arson, Mr. O'Donovan states: *"The circumstances are that our client has psychiatric difficulties and suffers from paranoid ideation and is a serious suicide risk"*.

14. In the further letter of Mr O'Donovan of 30 September 2019 (Exhibit A), after the decision was made to re-charge the applicant with arson, he states:

"Our client is a very vulnerable person who suffers from depression, anxiety, paranoid ideation and, as we previously outlined in our letter to you of 22nd August, has been deemed to be a suicide risk. He has been seriously prejudiced by your contradictory decisions to direct and withdraw charges and to prosecute him summarily and then on indictment".

15. Finally, there is an affidavit from the applicant himself sworn 16 January 2020 where he simply verifies the Statement of Grounds but does not provide any evidence about the impact upon him of the decision to re-charge.

Relevance of the 2017 Act

16. There has been considerable dispute between the parties as to whether the reliance upon the 2017 Act by the DPP, as the basis for the review of the earlier decision not to prosecute, was correct. This arises from the DPP's pleas at paragraphs 13 and 17 of the Statement of Opposition as follows:

"13. The Respondent's decision to reverse the previous directions concerning the prosecution of the Applicant for the offence of arson was occasioned by the revisiting of the evidence by a new and more senior prosecutor, which was prompted by the statutory review described herein. The revised decision to prosecute him with arson was justified by that reconsideration of the evidence and was neither unfair, unreasonable nor lacking in consistency.

...

17. In the instant case, the decision to re-charge the Applicant was occasioned by the statutory review which had been initiated by a victim of the alleged criminal offence, pursuant to s. 10 of the Criminal Justice (Victims of Crime) Act 2017. The decision to re-charge was justified by the requirement to recognise and vindicate the rights of the victim(s) of the alleged offences as provided for in this Act and Directive 2019/29/EU which the Act gives effect to. That a review may result in a different outcome from the original decision follows by necessary implication from those provisions as it would otherwise be a meaningless process".

17. The DPP asserts that, whether there is a decision not to prosecute simpliciter or whether there is a decision to discontinue the prosecution of a person, the scheme of the Act which provides both for an entitlement for a victim to a statement of reasons for the decision, and a review of the decision, applies. The applicant, on the other hand, asserts that the entitlement only arises where there has been a decision not to prosecute and does not apply where there is a decision to discontinue prosecution. It is argued that victims who are dissatisfied with a discontinuance decision are only entitled to reasons under s. 8(2)(e) of the Act and not a review of the decision.

18. The dispute between the parties raises a nice question of statutory interpretation that no doubt will require to be resolved at some point in the future. However, in this case there is no dispute but that there was a request by a person or persons coming within the definition of victim under the Act for the reasons for the decision to withdraw the prosecution, and there was also a request that the DPP review that decision. Equally, it is uncontested that the decision was reviewed, and a different decision made i.e. that the applicant should be re-charged with the arson offence.
19. Counsel for the applicant submits that in circumstances where the Act did not apply to the instant situation because it concerned a decision to discontinue, all the court should consider is whether the decision to prosecute was in accordance with fair procedures as per the test laid down in *Eviston*. In other words, he submits that the Act and its invocation by the DPP in the statement of opposition, is quite irrelevant and cannot dispense with the necessity to meet the test in *Eviston*.
20. Although counsel for the DPP staunchly argues that the Act is applicable and the decision to re-charge followed interventions by a victim made pursuant to s. 8, 9 and 10 of the Act, she quite correctly does not submit that the test in *Eviston* is accordingly inapplicable or redundant. Indeed, it is difficult to see how that argument could be made since the relevant sections of the Act are concerned with the entitlement to have a prosecutorial decision not to prosecute reviewed, but do not seek to prescribe the test applicable to the legality of decisions flowing from that review. The existing law, as identified by *Eviston* and further enunciated in *Carlin v. DPP* [2010] 3 I.R. 547, continues to apply to any such consideration.
21. That being the case, the circumstances in which the change of approach came about, including whether that was done pursuant to the 2017 Act, are not relevant to the application of the test, particularly in a case where the DPP does not rely on a change of circumstances to justify the decision to reverse her decision to discontinue. That is the situation here: as the summary of Mr O'Neill's affidavit set out above demonstrates, he does not indicate why a decision was ultimately made to re-charge the applicant with arson. As per the decision in *Eviston*, he is not obliged to do so. Accordingly, the circumstances in which the decision of the DPP was made to review the discontinuance are irrelevant to the question of the fairness of the decision to re-charge.
22. Nor is s. 37 of the Act, invoked by counsel for the DPP, in any way relevant here. That provision provides that a failure to observe a provision of the Act shall not of *itself inter alia* prevent any criminal or civil proceedings relating to an offence from being instituted or prosecuted. However, no failure to observe a provision of the Act is alleged by the applicant. Rather he simply says the Act is irrelevant in the instant circumstances and that the DPP mistakenly considers it applied. He asks that the arson charge should not go ahead, not because the DPP has failed to observe any provision of the Act, but because on his case, the DPP has breached fair procedures in deciding to re-charge the applicant. In those circumstances, s.37 has no application.

23. In conclusion, there is no need to resolve the dispute about the correct interpretation of the 2017 Act. Rather, what is required is a consideration of the principles in *Eviston* and an application of same to the facts of this case.

Application of *Eviston* principles

24. I do not intend to recite the facts or legal principles identified in *Eviston* in any detail since they are well known. In short, the legal principles derived from *Eviston* and from subsequent case law were identified by Barrett J. in *Hanrahan v. District Judge Fahy* [2016] IEHC 266 as follows:

"27. *What are the key lessons to be taken from the above consideration of Eviston and Carlin? It seems to the court that they are six-fold:*

- (1) *The decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned to the DPP under the Constitution and statute.*
- (2) *Absent bad faith and/or evidence that the DPP has abdicated her functions and/or improper motivation, the DPP cannot be called upon (a) to explain her decision, or (b) to give (i) the reasons for it or (ii) the sources of the information upon which it is based.*
- (3) *The DPP is entitled to review and to reverse her own earlier decision not to prosecute (a) even absent new evidence and/or (b) following the making of representations by the complainant or his family.*
- (4) *The DPP remains subject to the Constitution and the law in the exercise of her functions. She is not exempt in the performance of her statutory functions from the general constitutional requirements of fairness and fair procedures.*
- (5) *Where the DPP avails of her right not to give any reasons for a decision by her to reverse a previous decision not to prosecute but concedes that there has been no change of circumstances, her decision is, as a matter of law, prima facie reviewable on grounds of breach of fair procedures.*
- (6) *Whether such a breach has been established depends entirely on the circumstances of the particular case."*

25. Applying these principles to the circumstances of this case, it seems to me there are six issues that I must consider.

Knowledge that DPP may reverse decision re prosecution

26. The applicant argues that because the arson charge was struck out by the District Court on 19 March 2019 at the request of the DPP, it is unfair to re-charge him with that offence. That argument raises the issue as to the extent to which it is, or should be, understood by suspects or accused persons that, although a decision is made not to prosecute, or a prosecution is withdrawn, such decision may be revisited by the DPP. The

relevance of the understanding of the suspect arises from the fact that, in *Eviston*, heavy reliance was placed by Keane C.J. upon the fact that the applicant did not know the decision not to prosecute could be reviewed. It is worth noting that in *Carlin*, Fennelly J. concluded that the lack of knowledge of the applicant was not the primary reason that the Supreme Court decided to prevent the charges from proceeding:

"[41] I have come to the conclusion that the decisive component of the judgment of Keane C.J. in Eviston v. Director of Public Prosecutions [2002] 3 I.R. 260 was neither the absence of a caveat that the decision was subject to review, nor the fact that the review occurred without any new evidence, though each was a necessary ingredient, but the finding at p. 299 that "the degree of...stress and anxiety to which the applicant was subjected was exacerbated..." and that the applicant "was subjected to a further and entirely unnecessary layer of anxiety and stress".

27. Of course, there is a certain artificiality to this question since most suspects will not know anything about the law on prosecutorial discretion. What is really at issue is whether the powers of the DPP in this respect are sufficiently clear such that a solicitor for an accused person or a suspect should warn them that they continue to be at risk of prosecution on a charge, even though the DPP has decided not to proceed against them.
28. At this point in time, i.e. May 2021, it must be assumed that a person is fixed with the knowledge that a decision by the DPP in respect of prosecution is not immutable for the following reasons.
29. First, there is a statutory entitlement for a change of approach by the DPP. Section 4(2) of the Prosecution of Offences Act 1974 specifically provides:
 - (2) *A law officer may, without prejudice to the validity of anything previously done thereunder, revoke a direction given by him under this section.*
30. Second, *Eviston* was a significant decision that made clear the scope of the DPP's powers in respect of prosecution, including the entitlement to review and reverse earlier decisions not to prosecute. That was followed by the decision in *Carlin* which concerned a reversal of a decision to discontinue a prosecution by the DPP, which decision was upheld by the Supreme Court. In *Carlin*, Denham J. observed: *"It is entirely appropriate that the respondent have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain"* (paragraph 8).
31. Third, the obligation to give reasons for, and review, a decision not to prosecute, is now enshrined in statute. In *Eviston*, Keane C.J., in deciding there had been a breach of fair procedures, observed as follows: *"If those review procedures [of the DPP in respect of prosecutions] formed part of the law of the land, then, the applicant would be assumed, however artificially, to have been aware of that law. The review procedures of the respondent, however, are not part of the law: they constitute a legitimate, and indeed salutary, system of safeguards to ensure that errors of judgment in his department which are capable of correction are ultimately corrected"*.

32. Contrary to the position at that time, review procedures and an obligation to give reasons in the prosecutorial context are now part of the law of the land under the 2017 Act. Accused persons must be deemed to know the law and their solicitors must actually know the law.
33. Article 11 of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, explicitly provides that:
1. *Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.*
 2. *Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.*
34. Under the 2017 Act, which implements the Directive in Ireland, there is an explicit procedure whereby the DPP is obliged to review a decision not to prosecute. Section 9 of the Act provides that when a victim is informed of a decision not to prosecute, they shall also be informed of their right to request a review of that decision and the procedure for requesting such a review. Section 10 provides the procedure for such a review. The victim has a period of 28 days to submit a request for a review, which may be extended. The review must be carried out by either an independent member of An Garda Síochána or by the DPP, who must then notify the victim as to the outcome of the review.
35. Even if one accepts (and I make no finding in this respect) that the applicant is correct in his interpretation of the 2017 Act, and there is no entitlement of a victim to seek a review of a decision to discontinue a prosecution, there is an undisputed right for a victim to seek reasons for a decision not to continue with a prosecution under s.8(2). This provides in relevant part: "*A victim of an alleged offence may, during the course, or at the conclusion, of an investigation of the alleged offence... request the following information from ... the Director of Public Prosecutions...(e)information regarding a decision to discontinue the prosecution of a person for the alleged offence and a summary of the reasons for the decision*".
36. Given that a victim is entitled to seek reasons for either a decision not to prosecute or to discontinue a prosecution, there is nothing to stop a victim requesting a review (as opposed to being entitled to one) after receiving those reasons, which review, if carried out, may result in the reversal of a discontinuance decision. So again, even if the applicant's interpretation of the Act is right, it does not support an argument that the applicant could not have been expected to know that he could be re-charged. The

statutory entitlement of a victim to seek reasons may well set in train a series of events leading to a re-charge.

37. In summary, the above factors mean a solicitor is obliged to advise their clients that there is always a possibility that a decision to discontinue a prosecution (or not to prosecute) may be reversed. In those circumstances, the applicant cannot rely on a belief that he would not be re-charged with arson, even where it had been struck out in the District Court on 19 March 2019.

Reversal of discontinuance of a prosecution, rather than decision not to prosecute

38. Counsel for the applicant says that this case is more egregious than the circumstances in *Eviston* because the charge had been brought and then struck out and that the case law exclusively concerns decisions not to prosecute rather than discontinuation decisions. However, *Carlin* dealt with a decision to discontinue an existing prosecution and a subsequent reversal.
39. The applicant in *Carlin* was charged with an offence under s. 3 of the Non-Fatal Offences against the Person Act 1997. However, before the matter was listed in the District Court the applicant was sentenced to a period of three and a half years imprisonment in Northern Ireland. Upon his release from prison in Northern Ireland the DPP directed the gardaí not to prosecute the applicant but did not expressly reserve the right to reconsider that decision. The DPP later received representations from the victim's family which led to a review of the decision not to prosecute and ultimately a decision to issue a fresh direction to prosecute. The applicant sought to judicially review this decision to prosecute on the grounds that it was *ultra vires*, unlawful and in breach of fair procedures as the applicant had not been warned that the decision could be subject to review and/or reversal. The High Court dismissed the application for judicial review and the Supreme Court dismissed the subsequent appeal, holding there was no breach of fair procedures in the circumstances.
40. *Carlin* makes it clear there is no question of an absolute bar to a decision to reverse a discontinuance decision. The question as to whether such a decision constitutes a breach of fair procedures depends on the facts in every case. Undoubtedly, a person accused and charged with a crime, who then has those charges dropped against him or her, only to find that he or she is re-charged, goes through a different trajectory than a suspect who is told that a prosecution will not be brought against him or her. The person who has been charged may experience a discontinuance of a prosecution more intensely than a person told that no charge will be brought as (a) the person may have believed themselves to be in greater jeopardy and (b) are possibly more likely to believe that there has been a process which is unlikely to be reversed. But this will depend on the factual circumstances in any given case. And as identified above, a person properly advised should not have a basis for a belief that they are immunised in perpetuity from a re-charge on the matter discontinued.
41. In short, the mere fact of a decision to re-charge is not, of itself, sufficient to establish an unfairness.

Anxiety and stress

42. The impact upon the accused person of the change of position of the DPP is undoubtedly vital in any consideration of the fairness of such a decision. The court must consider the impact of the decision from the point of view of anxiety and stress caused to an applicant by same. In *Eviston Keane C.J.* observed as follows:

"Whether, in the particular circumstances of this case, fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment, stress and anxiety to which the presumably innocent citizen is subjected when he or she becomes the accused in a criminal process could not conceivably be, of itself, a sufficient justification for interfering with the undoubted prosecutorial discretion of the respondent. It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to review in accordance with the procedures in his office. ...In the result, she was subjected to a further and entirely unnecessary layer of anxiety and stress. Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled" (page 299).

43. Interestingly, there is no record in the judgments of any evidence put forward by the applicant in *Eviston* of the stress and anxiety she suffered. Rather it appears to have been assumed by both the High Court and the Supreme Court that a change of position by the DPP would add an additional layer of stress and anxiety to that which is already caused by a decision to prosecute.
44. In *Carlin* on the other hand, affidavit evidence was given about the stress and anxiety caused to the applicant as follows:

"I have found this process extremely stressful. I do not understand how it can be that at one moment I can be told that the prosecution will not proceed and that at the next moment and for no obvious reason that it would be going ahead. I had believed that I had put all of this behind me but now I find that I have to revisit the whole thing. There has been a long period of time during which I did not have to worry at all about the events surrounding the alleged offence but now I find I have to try and remember these events." (paragraph 44).

45. However, the Supreme Court did not consider that to be sufficient, with Fennelly J. observing that the passage:

*"... falls well short of describing the sort of exacerbated anxiety and stress described by Keane C.J. in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260. The*

most that is said about the result of receiving the bad news that the prosecution was to proceed after all is "I find that I have to revisit the whole thing" which seems related to the statement "I find I have to try and remember these events". The applicant does not seem to go beyond alleging a degree of annoyance and inconvenience. It has to be recalled that, as is stated in every style, the mere fact of suffering anxiety or stress is insufficient in itself to justify halting a prosecution. It is an inescapable feature of being prosecuted. The applicants would have to show that the level of anxiety or stress suffered was raised beyond that normal level by reason of the failure of the respondent to observe fair procedures. He has not done so" (paragraph 45).

46. In the instant case, the applicant is undoubtedly a very vulnerable person with mental health issues. But those mental health issues unfortunately appear to have long predated the decision to discontinue the charges and then re-charge him (see letter of 22 August 2019 referred to above). There is no evidence to suggest that his difficulties were exacerbated by the change of position of the DPP. The letter from his solicitor of 30 September 2019 quoted above states that the applicant has been seriously prejudiced by the contradictory decisions to direct and withdraw charges and prosecute summarily and then on indictment. However, no medical evidence is proffered in this respect. Rather a medical report from a doctor who last saw him in 2017 is exhibited, which does not and could not refer to the impact of change of position since this took place long after 2017. Importantly, no affidavit evidence is provided by the applicant himself, explaining how the change of position impacted upon him, apart from the normal affidavit simply verifying the statement of grounds.
47. In summary, it may be said that the complaints about the impact on the applicant are somewhat generic, in that there is no identification of how those changes of position specifically affected him, being a person with fragile mental health. It is impossible from the evidence before the court to understand the specific impact that the change of position had on him.
48. Accordingly, although I accept the applicant has mental health difficulties, I find there is insufficient evidence of particular prejudice or stress caused to him by the decision to re-charge him, as opposed to the stress caused by the incident of July 2018 and the consequent criminal charges. Given that it is necessary to differentiate the stress and anxiety caused by the reversal from the normal stress and anxiety caused by being charged with offences, it flows that an applicant must be able to specify with some precision precisely how the change of position has affected him or her. No such evidence exists here.

Prejudice to the applicant

49. Moreover, no evidence is given as to any action the applicant may have taken on foot of the decision to discontinue the prosecution, which was then undermined by the reversal of that decision. For example, had he taken up a job which he then lost following the reversal of the withdrawal of the prosecution, an argument might be made that he was

unfairly prejudiced. Equally, there is no evidence of any prejudice to the applicant in his defence by the change of position of the DPP.

Delay

50. Counsel for the applicant laid considerable emphasis on the fact that in *Eviston* there was only a one-month delay between the decision not to prosecute and the subsequent decision to prosecute. He noted that the period was considerably longer here. I have already identified the relevant time periods above, being from 19 March 2019 when the arson charge was struck out to 26 September 2019, when the applicant was told he was being re-charged with that offence. As identified above, there is no evidence of specific prejudice arising from that six-month period.
51. There is undoubtedly one episode of delay that I deprecate i.e. the period of two months that passed from the date a decision was made to re-charge the applicant in July 2019 until he was told of that decision on 26 September 2019, as identified in the affidavit of Mr. O'Neill. No explanation has been given for that delay and it was quite wrong that the applicant was not told of the decision to re-charge him as soon as that decision was made.
52. However, in the overall scheme of things, as identified above, the delay was relatively minor and considerably less than that which was accepted in *Carlin*, being a four-year delay between the decision to drop the charges and the decision to re-charge the accused. In an appropriate case, delay causing prejudice might well result in fair procedures being breached. But this is not such a case.

Treatment of other charges

53. Counsel for the applicant also relies on the treatment of the two additional charges as demonstrating a lack of fair procedures, being the addition of the possession of a knife charge on 26 September 2019, and the change in the charge in relation to the criminal damages to the cell from summary to indictable.
54. Although no order of prohibition is now sought in respect of the knife charge, and the criminal damage charge has been dropped, I must consider the treatment of same as part of the overall factual matrix.
55. The applicant did suffer the addition of the knife charge some 10 months after the original charges were preferred but the addition of a charge is not, in and of itself, unusual and is insufficient to render the decision to re-charge a breach of fair procedures.
56. In respect of the move from summary trial to trial on indictment for the criminal damage charge, as observed by Barrett J in *Hanrahan*, changes of approach in relation to whether offence will be tried summarily or on indictment can be made right up to the moment of acquittal/conviction provided the right to fair trial is not abused (see *Kelly v. DPP* [1996] 2 I.R. 596).
57. The applicant argues that it was not the change from summary to indictable per se or the addition of a charge that was objectionable but rather the cumulative effect on the

applicant when combined with the re-charge on arson. I can see the force of that argument: but it is not irrelevant that the twists and turns of the DPP's approach, criticised by the applicant, has now culminated in a dropping of the criminal damage charge. That must be taken into account. Equally, the absence of any evidence, as discussed above, in relation to the impact on the applicant of the various changes of position of the DPP is also relevant here.

58. Taking everything into account, I do not consider the overall factual matrix of this case has resulted in such unfairness that the arson charge should be the subject of an order of prohibition.

Conclusion

59. The decision on whether there has been a breach of fair procedures must be considered in the context of the very significant discretion of DPP in this respect, the wide parameters of her decision in respect of prosecutions and the public interest in ensuring that the DPP is in a position to review her decisions. As Keane C.J. observed in *Eviston*:

"The respondent was thus entitled, as a matter of policy, to adopt a procedure of reviewing earlier decisions made by him. Clearly, it could not be suggested that such a policy was in any sense improper: on the contrary, given the consequences for both the victims of crime and those suspected of having committed a crime of a decision to prosecute or not to prosecute, such a policy could only be regarded as being in the public interest, since, in the absence of an appeal procedure, it provides at least some opportunity to the respondent of reversing decisions which, on further consideration, appear erroneous" (page 296).

60. It is important as a matter of public policy that the DPP is free to review decisions to discontinue a prosecution, subject of course to fair procedures being observed in respect of an accused. In this case, as counsel for DPP noted, fourteen months after the event, the applicant knew what he was being charged with and the mode of trial. The alleged crime here is a serious one: the applicant is charged with causing criminal damage to a house where his girlfriend and young son resided. He has made certain admissions in respect of same. It does not appear unfair to me in all the circumstances, including the change of position of the DPP, that the applicant is to face trial on indictment for the charge of arson. Accordingly, I refuse the reliefs sought.