

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 673
[2020/319 JR]

BETWEEN

GLENN RYAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 22nd day of October, 2021

Issues

1. The substantive issue arising for consideration in these proceedings is whether or not the current prosecution against the applicant (*DPP (at the suit of Garda Cian Tennanty) v. Glenn Ryan*, case no. 2018/156713) pending before Blanchardstown District Court, should be enjoined by this Court on the basis that to allow the prosecution to continue would be a breach of the applicant's legitimate expectation, and/or would constitute a breach of fair procedures.

Brief background

2. On 17 May 2018 the applicant was stopped while driving a mechanically propelled vehicle, owing to the manner of his driving. Garda Tennanty formed an opinion that the applicant had committed an offence as a consequence whereof the applicant was arrested and conveyed to Clondalkin Garda Station. On 21 July 2018 Garda Tennanty received a certificate of analysis of the applicant's blood sample from the Medical Bureau of Road Safety which indicated a concentration of cannabis over the prescribed limit provided. Garda Tennanty then made an application for a summons alleging an offence contrary to s.4(1) of the Road Traffic Act 2010.
3. By letter of 19 June 2019 the applicant's solicitor wrote to the chief prosecution solicitor in the Office of the DPP complaining of a summons alleging an offence contrary to s.4(1) of the Road Traffic Act aforesaid, as opposed to s.4(1A) thereof. The view was expressed that this must have occurred in error. It was asserted that continuing with the prosecution under s.4(1) would amount to an abuse of process. The s.4(1A) is a lesser offence in so far as there is a mandatory disqualification from driving for one year as opposed to four years for an offence under s.4(1).
4. No response was received to the letter aforesaid.
5. By email of 2 December 2019 to the applicant's solicitor from the Office of the DPP, notification was given that the prosecution intended to move an application to amend the applicable summons the following day.
6. The application to amend on 3 December 2019 was moved by Garda Tennanty through the state solicitor. On inquiry from the district judge as to why an amendment was sought, the district judge was advised that Garda Tennanty had preferred the wrong charge.

7. The applicant, through his solicitor, objected to the amendment.
8. On 5 December 2019 the district judge refused to amend the summons whereupon it was indicated by Garda Tennanty (through the state solicitor) that the existing prosecution would proceed.
9. On 7 February 2020 the applicant's solicitor wrote to the DPP's office based on the assertion of an express concession that the wrong offence had been preferred, inadvertently or otherwise, and that it would be an abuse of process to continue the prosecution. A request was made to indicate an intention to withdraw the charge, otherwise the applicant would seek to prohibit the trial by way of judicial review.
10. By response of 2 March 2020 the chief prosecution solicitor indicated the view that the district judge was entirely correct to refuse the amendment, and that such amendment application was made in error. The view was further expressed that the evidence available was sufficient to meet the proofs required to mount the prosecution under s.4(1). A number of cases were referred to in support of the DPP's position (copies of which were subsequently sent to the applicant's solicitors). The letter concluded with the statement that the prosecution would proceed on 16 April 2020.

Time limits

11. Order 84 rule 21 of the Rules of the Superior Courts (RSC) sets out time limits for judicial review proceedings:

“(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:

 - (a) there is good and sufficient reason for doing so, and
 - (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
 - (i) were outside the control of, or
 - (ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.”
12. The respondent complains that the application for judicial review is out of time having regard to the provisions of O.84, r.21(1) of the RSC requiring an application for leave to apply for judicial review to be made within three months from the date when grounds for the application first arose. In this regard it is asserted that the applicant had legal advice at the Garda Station on 17 May 2018, and was represented when he was before the

District Court initially in January 2019. It is argued that the application for leave was not maintained until seventeen months later in May 2020.

13. In the alternative it is argued that it was formally confirmed in the District Court on 5 December 2019 that the prosecution under s.4(1) would proceed. A valid application to extend time based on a failure to seek leave within three months, it is argued, would only arise because of some matter outside of the control of the applicant or because of some matter that could not reasonably have been anticipated by him, and neither exist in these proceedings.
14. The applicant resists the time argument on the basis that having regard to the foregoing factual background it was necessary to communicate with the DPP's office further inviting a withdrawal of the prosecution prior to assessing an application for judicial review. It is argued on behalf of the applicant that it was the response letter from the DPP's office of 2 March 2020 which crystallised the grounds for seeking judicial review and therefore the application for leave made on 25 May 2020 was made within time.
15. Assuming that the respondent is correct in her assertion that the time to maintain a judicial review claim began to run on 5 December 2019, nevertheless, it does appear to me to be an appropriate matter in which to extend time under the provision of the rules, O.84 r.21(3):
 1. The applicant's solicitor took the view that the letter of 2 March 2020 crystallised the claim in judicial review. In advising the client, the solicitor believed it appropriate to correspond with the respondent so as to make sure her office was fully aware of the unusual circumstances which had arisen in the District Court. They took the view that the respondent should have a chance to reply and did not want to seek leave prematurely.
 2. It was reasonable for the applicant to seek confirmation in writing of the considered opinion of the DPP following on from the District Court decision of 5 December 2019, in all of the circumstances, in particular, the assertion on behalf of the DPP to the District Court that the wrong charge was preferred and notification in writing had been afforded by the DPP of her intention to amend the summons.
 3. Such request was made within three months.
 4. The DPP's response to the applicant's letter of 7 February 2020 took four weeks.
 5. The commencement of the COVID lockdown from 12 March 2020 was outside the control of the applicant.
 6. It could not have been reasonably anticipated or within the applicant's control that the DPP would proceed with the summons on the basis of completely ignoring the representation to the defendant that the summons incorporated the wrong charge.

Legitimate expectation/fair procedure

- 16.1 In *Eviston v. DPP* [2002] IESC 62, the Supreme Court considered the position of the applicant who was involved in a road traffic accident in which an innocent party was killed. Initially the respondent decided not to prosecute and so informed the applicant. Subsequently the DPP decided to prosecute following representation from a relative of the deceased person.
- 16.2 In his judgment Keane C.J. was of the view that a reversal of the DPP's original decision not to prosecute in circumstances where there was no new facts or evidential material, could be regarded as a breach of fair procedure. The Chief Justice was satisfied that the DPP was not exempt in the performance of a statutory function from the general constitutional requirement of fairness and fair procedure.
- 16.3 The DPP had a right not to give reasons for a decision to reverse a previous decision but in circumstances where it was conceded there was no change of circumstances, his decision is a matter of law *prima facie* reviewable on the ground that there has been a breach of fair procedures. The Chief Justice concluded his judgment by stating:
- "...I am forced to the conclusion that in circumstances where the DPP 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" (para.74).
- 16.4 The Chief Justice had earlier acknowledged that both the decision to initiate a prosecution, and the subsequent conduct of the prosecution, are functions exclusively assigned with limited exception to the DPP under the Constitution and relevant statutory provisions.
17. It is clear that *Eviston* is authority for the proposition that courts will intervene and prohibit a trial in certain limited circumstances.
18. In *Byrne v. DPP* [2010] IESC 54 it was held by the Supreme Court that the right to a fair trial on criminal charges guaranteed by Articles 38 and 34 of the Constitution are normally guaranteed through trial, and if necessary, an appeal process.
19. Hyland J. in *BM v. DPP* [2021] IEHC 332 was satisfied that the decision by the DPP to reverse an earlier decision to discontinue a 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, should be aware that a decision to discontinue may be reversed; and, (b) the case did not disclose any matter, whether additional stress and anxiety, delay, or prejudice that would justify a finding of breach of fair procedures.
20. The respondent argues that:
1. There has been no change or reversal of the decision to charge the applicant under s.4(1). The DPP in the letter of 2 March 2020 has confirmed that it has always been deemed to be the appropriate charge.

2. The DPP cannot properly be injuncted simply because it was open to her, in her discretion, to prefer a different charge - no argument to the contrary is made in the within proceedings by the applicant.
3. The court plays no role in the prosecution of offences, and distinguishes:
 - (a) *Eviston* on the basis that there was medical evidence available as to stress and anxiety;
 - (b) *GE v. DPP* [2008] IESC 61 on the basis that more serious charges were later preferred by the DPP in that case; and,
 - (c) *Keane v. The Commissioner of An Garda Síochána* [2021] IEHC 577 on the basis that ultimately the Garda Commissioner was attempting to impose a more serious sanction than any prior sanction imposed.
4. Heslin J. in *Keane*, was satisfied that the principles derived from *Eviston* were relevant given that the respondent's position subsequently adopted was a quantum leap from the initial decision. Although the respondent had never written to the applicant to state in explicit terms that he would not invoke the s.14 procedure, the Court was nevertheless satisfied that in the context of fair procedures and constitutional justice, it was a breach of the applicant's right to fair procedure on the part of the respondent to pursue s.14 of the An Garda Síochána Act 2005 and dismiss the applicant.
5. There is no mention of the representation made by Garda Tennanty to the District Court on 3 December 2019, either in the statement of opposition or affidavits filed on behalf of the DPP in this matter. In written submissions it is argued that an erroneous view expressed by the garda did not change the legal landscape.

Conclusion

21. In the present matter, notwithstanding:

- (a) the applicant was represented by a solicitor from the outset, and therefore as in the case of *BM* would be aware that a decision to discontinue a prosecution may be reversed;
- (b) there is no evidence of any additional anxiety or stress occasioned to the applicant;
- (c) the applicant was not informed that he would not be prosecuted;
- (d) there has been no change or reversal of the charge actually preferred against the applicant.

Nevertheless,

- (1) there is actual prejudice to the applicant on the basis that insofar as Garda Tennanty is concerned it is intended to prosecute the applicant under the wrong charge;

- (2) the applicant has not contributed to the within status;
 - (3) the intention to amend was notified by the DPP's office and the letter of 2 March 2019 suggests that the only error in the matter was the application to amend;
 - (4) it does appear to me to be significant that representations were made to the District Court to the effect that the wrong charge was preferred;
 - (5) the respondent has had an opportunity in the within judicial review proceedings to address the representations aforesaid made to the District Court on 3 December 2019 and has chosen to remain completely silent in respect of same. It is not mentioned in the letter of 2 March 2020, in the statement of opposition, and in the affidavits supporting the respondent's position in these judicial review proceedings. In such circumstances as a matter of law the decision is *prima facie* reviewable on the ground that there has been a breach of fair procedures (see the judgment of Keane CJ in *Eviston* aforesaid).
22. I am satisfied that in the present case, on the basis of the peculiar facts aforesaid, the continued prosecution of the applicant under s.4(1) constitutes a breach of the applicant's right to fair procedure, and accordingly it is appropriate that this Court would intervene and grant the order of prohibition sought.