

**THE HIGH COURT
JUDICIAL REVIEW**

[2023] IEHC 688

[Record No. 2022/498JR]

BETWEEN

TANYA HAMILL

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 6th day of December
2023**

1. This is the applicant's application for discovery of documentation concerning the Director's decisions about the applicant's prosecution, which is sought pursuant to the applicant's substantive judicial review proceedings to restrain the applicant's prosecution as unfair, in breach of her constitutional and Convention rights to a fair trial and fair procedures and in breach of her legitimate expectations.

2. For the reasons set out below, I am refusing this application for discovery.

Background

3. In November 2019, the applicant was summoned to appear at Portlaoise District Court in respect of possession and supply of drugs charges pursuant to the Misuse of Drugs Act 1977 which was adjourned to 21 March 2021. The prosecution sought an adjournment which the District Judge refused and he struck out the proceedings and said that if the applicant was to be recharged, this should be done within a period of four weeks. The applicant and the respondent agree that the District Judge lacked jurisdiction to direct a timeframe or the modality for any further prosecution. In November 2021, some eight months later, the applicant was recharged on indictment before the Circuit Court which the applicant claims causes her prejudice in exposing her to a far longer potential sentence and deprives her of the possibility of serving a concurrent sentence. She, therefore, says this

prosecution is in breach of her rights to fair procedures, to a fair trial and breaches her legitimate expectations. The applicant was granted leave to apply for judicial review on 4 July 2022.

4. By letter dated 2 May 2023, the applicant's solicitor sought discovery of all documentations concerning the Director's decisions to commence a summary prosecution against the applicant and to commence a prosecution on indictment against her. The letter said discovery was sought as sight of all documentation considered and available as part of the decision-making process would assist the court in its inquiry into the impugned decision. The Director disputes the relevance or necessity of the documents sought but primarily relies on her special and unique position arising from her independence, which means that she does not have to explain the reasons for a prosecution. The Director said she was entitled to prosecute as she did and disputed that any unfairness or direct prejudice had been caused to the applicant or that the applicant had suggested any impropriety such as to trigger the Director's exceptional duty to give reasons for her decision.

Discussion

5. Much of the applicant's submissions focussed on the Director's stated position that the documents sought may be privileged. I do not consider that a claim of privilege that may or may not be made over documents in itself should form the sole or primary rationale for granting or refusing discovery. If discovery is granted and privilege is claimed, the documents still have to be listed in the affidavit and in any event, any claim of privilege may be challenged. I do not consider the Director's position that she will, if necessary, assert privilege over the materials sought to be determinative of whether the applicant's application for discovery should be granted or refused.

6. The courts recognise that the Director is in a special and unique position in law, which means that the ordinary principles of discovery in judicial review and the expectation that a respondent State body will cooperate in making candid discovery with all cards facing upwards on the table, as set out by Barrett J. in *Murtagh v. Kilrane* [2017] IEHC 384, do not necessarily apply. It is only in exceptional circumstances that discovery about the Director's decision to prosecute can be directed because the Director's right to give no reasons for a decision to prosecute or not to prosecute "*is very firmly established*", as per Hardiman J. at p. 593 of *Dunphy v. DPP* [2005] 3 IR 585. What is required for such exceptional circumstances was explained by Charleton J. in *Monaghan v. DPP* [2007] IEHC 92, para. 9:

"There must be, at the least, evidence suggestive of an impropriety before the court would allow a proceeding for discovery to be initiated against the Director of Public Prosecutions."

That decision and *dicta* was cited with approval by the Supreme Court in *Marques v. The Minister for Justice and Equality & ors* [2019] IESC 16.

7. The applicant seeks to distinguish that line of authority from the situation here where there was a decision to prosecute summarily and then a later decision to prosecute on indictment. I do not consider that this brings the applicant's situation out of the "*firmly established*" jurisdiction of *Dunphy* and *Marques* and into the territory of exceptional circumstances. What the applicant seeks here is documentation concerning the decision to commence, firstly, a summary prosecution and, secondly, a prosecution on indictment in asserting her challenge to the respondent's decision to proceed the second time around in the Circuit rather than the District Court. The applicant cites the Supreme Court in *Cunningham v. President of the Circuit Court and DPP* [2006] 3 IR 541 as an example of the courts developing a jurisprudence in favour of granting discovery against the Director. In that case, discovery was granted of correspondence that had been mentioned on affidavit and on which the Director sought to rely in explaining the delay which the applicant was challenging. Whilst discovery was, unusually, granted, the Supreme Court was careful to say that this did not:-

"removes, reduces, or limits the special position of the second respondent [Director of Public Prosecutions] in relation to giving reasons for his decisions to prosecute or not to do so. Indeed, I wish to reiterate what I said on that topic in Dunphy (a minor) v. Director of Public Prosecutions [2005] IESC 75, [2005] 3 I.R. 585. That protection is in no way diluted by the granting of the relief sought here" (p. 551).

Here, whilst the replying affidavit refers to the Garda file, there is no attempt to rely on documentation referred to on affidavit other than insofar as the Director says what was done was lawful, which is a legal rather than an evidential point.

8. The applicant does not assert any impropriety in the impugned decision and does not plead *mal fides*, improper policy or improper purpose. The respondent relies heavily on that as well as on the fact that the distinction between the initial direction to prosecute and consent to summary disposal and the subsequent direction to prosecute on indictment is expressly permitted by law. The respondent disputes that the applicant has suffered direct prejudice and relies on *Kelly v. The DPP* [1996] 2 IR 596, admitting that there was no

adjudication on any issue by the District Court and, therefore, no gain to the applicant of which she was deprived.

9. I do not consider that the case law has progressed to the point of allowing discovery of documentation relating to a decision of the Director to prosecute, even in the particular circumstances here where a decision was made to prosecute summarily and later to prosecute on indictment over the same alleged incident. The Director's position remains as special as was set out by the Supreme Court in *Dunphy* and in *Marques*. What occurred here does not come within the exceptional circumstances required in order to direct discovery of documentation in relation to prosecution decisions where the facts on affidavit do not exclude the reasonable possibility of a proper and valid decision by the Director in prosecuting the applicant on a summary basis and later on indictment. I am, therefore, not satisfied that it would be lawful or appropriate to require the Director to provide the sources of information on which the decisions were based. I have come to this conclusion on the basis of the substantive application for discovery and not by reference to the Director's stated view that it may be necessary to assert privilege over the documents sought.

Indicative view on costs

10. My indicative view on costs is, in accordance with s. 169 of the Legal Services Regulation Act 2015, that the respondent, having succeeded in its position that discovery should be refused, is entitled to the costs of this application with a stay on the execution of that costs order pending the outcome of the substantive proceedings. I will put the matter in before me at 10.30am on 14 December 2023 for the purpose of making final orders including costs and the parties will have an opportunity to make submissions at that stage if they so wish.

Counsel for the applicant: Mel Christle SC, Richard Wixted BL.

Counsel for the respondent: Conor McKenna BL.