Neutral Citation Number: [2008] IEHC 244

THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1323 J.R.

BETWEEN

RALPH KEANE AND ELAINE KEANE

APPLICANTS

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Mr. Justice Hanna on the 10th day of June, 2008

1. The applicants Ralph Keane and Elaine Keane are a married couple. They are medical practitioners and are resident in Limerick, although natives of Gort, Co. Galway. They were granted leave to apply for judicial review against the respondent by the High Court (Peart J.). The applicants are seeking judicial review of a decision by the respondent to prosecute them under s. 13 of the Non-Fatal Offences Against the Person Act, 1997. They also seek an injunction preventing further advancement of the prosecution.

Background Facts

2. The applicants own a dwelling house situate at Cloonahaha, Ennis Road, Gort in the County of Galway. In May, 2005 the dwelling house was rented to one Marilda Luiza Dos Santos by Bridget Piggott, the mother of the second-named applicant and the mother-in-law of the first-named applicant, on their behalf. On the 1st of December, 2005, two Brazilian men identified as Roberto Perna Ramos and Erly Rodrigues Da Silva were found dead within the dwelling house owned by the applicants. The applicants were charged under s. 13 of the Non-Fatal Offences Against the Person Act, 1997, with intentionally or recklessly engaging in conduct by failing to maintain a boiler or to provide adequate ventilation, creating a substantial risk of death or serious harm to another. The property in which the tragedy occurred was adjacent to certain lands which had been transferred to the first named applicant by his father back in the early 1970s. The actual house was acquired by the applicants in 1999. It was used as a rental property and Bridget Piggott, referred to above, managed the lettings.

3. A number of affidavits have been filed on behalf of the parties herein. The first named applicant has filed three affidavits on his behalf and on behalf of the second named applicant. For the respondent, affidavits have been filed by Superintendent James O'Connor of Gort garda station, Mr. John Rohan, a solicitor in the Chief Prosecutions Solicitors Office and by Detective Garda Martin Glynn, also of Gort garda station and who played a key role in the investigation of the matters with which we are concerned. There was, indeed, a very detailed investigation of the circumstances leading to the tragic deaths of these two men including, inter alia, the compilation of detailed forensic expert evidence concerning the central heating boiler, the alleged source of allegedly lethal fumes which, the prosecution contends, brought about their demise. The principal affidavit of the first named applicant and that of Superintendent O'Connor, deal in some detail with the evidence which undoubtedly would be germane to the trial of the charge facing the applicants. I feel, however, that it would be inappropriate for this Court to pronounce in any way on the respective strengths or weaknesses (if such there be) of the potential criminal trial from either side's perspective. Accordingly, I do not propose to do so and will assume for the purposes of this judgment that there is a case which could proceed and that the same could be robustly defended.

4. There does not appear to be any dispute as to whether the applicants fully co-operated with the investigation. On the 1st December, 2005, the first named applicant was invited by Detective Garda Glynn to make a statement. He attended at the garda station in Gort and met Garda Michael Carroll, to whom he made a statement which was in the form of answers to specific questions put to him by the guard. The guard then wrote a statement which was read over and signed by Mr. Keane.

5. On the 14th December, 2005, a further telephone request for a statement was agreed to by Mr. Keane. Detective Garda Glynn drove to Limerick, to where the applicants reside, and a similar format was engaged in and a further statement was signed.

6. Finally, on the 13th March, 2006, a third statement was made, again in Limerick and the same interview technique was employed. Garda Glynn was accompanied on that occasion by Garda Paul McWalter.

7. Mr. Keane says that on one of these occasions, Detective Garda Glynn mentioned certain problems relating to the operation of the boiler in the dwelling house and that the matter was being referred to the Director of Public Prosecutions. He does not specify when this occurred. He goes on to say that Detective Garda Glynn expressed the view that he would be surprised if anything came of it. Nonetheless, it is evident that the applicants were aware that they were in the frame for a potential prosecution.

8. Given the background circumstances, one can readily understand that the frightful events of the 1st December, 2005 must have visited very great anxiety and distress on the families and friends of the victims, and, I have no doubt, on the applicants as well. We are told that Mrs. Keane, the second named applicant, is fragile of health. Added to the understandable human reaction to what had occurred, there was also the realisation that Mr. and Mrs. Keane could face criminal prosecution. In his principal affidavit, Mr. Keane expresses the situation thus at para. 14:-

> "The tragic events … caused great upset, anxiety and distress to me but more so to my wife whose health is fragile. This upset, anxiety and distress was aggravated by the threat of criminal prosecution and resulting from all of this I believe that there was a deterioration in the health of my wife. While emphasising the difficulty caused to my wife, I do not wish to diminish the level of my own anxiety and distress arising from the death of the deceased men and from the threat of criminal prosecution intimated to us by the investigating gardaí."

9. I am satisfied that the above paragraph fairly represents the state of mind of Mr. and Mrs. Keane up to early April 2006. There is no dispute as to what happened next. A decision was taken in the office of the Director of Public Prosecutions that no prosecution would ensue in this matter. That decision was communicated on the 10th April, 2006, by Detective Garda Martin Glynn to the first named applicant who then immediately informed his wife. It is evident that this lifted a considerable burden from them both, and, insofar as exposure to criminal prosecution was in the offing, as far as they were concerned, that was that.

10. It is common case that the decision of the Director was conveyed by Detective Garda Glynn without any *caveat* as to the possible review of the decision. Equally, it is accepted on behalf of the respondent that no fresh evidence was received between the communication of the DPP's decision to the Keanes and what subsequently transpired.

11. Throughout the hearing of this case, it was maintained on behalf of the respondent that he is entitled to revisit decisions not to prosecute and to subsequently direct the bringing of charges. Such an occurrence came to pass. In an affidavit sworn on behalf of

the respondent, Mr. John Rohan, solicitor, says that the case was brought to the Director's attention as a result of an internal review of recent decisions pertaining to prosecutions. No external request for a review was received. A decision was taken to notify the applicants that the file was under review and, according to Mr. Rohan, to invite them to furnish any additional information that they might want the Director of Public Prosecutions to consider.

12. In his affidavit, Detective Garda Martin Glynn says that on the 13th August, 2006, the Director of Public Prosecutions informed the State Solicitor, Mr. William Kennedy, that the question of a prosecution was being further considered. The letter was passed on to Detective Garda Glynn through his Superintendent and he says that he made sure to inform the first named applicant about this development. He believes he telephoned Mr. Keane shortly after he received this notification. It appears that this notification occurred in September, 2006. Mr. Keane says that he was contacted on the 4th September, 2006, by Detective Garda Glynn, as he puts it "out of the blue". He says he was informed by the garda, to his great shock, that the matter was being looked at again and that he was anxious to obtain further statements from the applicants. Mr. Keane says that he was unaware of any contact between the respondent and the State Solicitor. Mr. Keane asserts that he was unaware of any review procedure in the Director's office. Clearly, rightly or wrongly, Mr. and Mrs. Keane were of the view that the information communicated to them in April, 2006 was the end of the matter as far as the criminal law was concerned.

13. There is dispute between the parties as to whether or not the applicants were offered an opportunity to make further submissions to the Director, something which is asserted on behalf of the respondent. Not so, says Mr. Keane. Further statements were sought and that was as far as it went.

14. In early December 2006, Detective Garda Martin Glynn informed the applicants that the respondent would be prosecuting the applicants, notwithstanding the fact that no new evidence had emerged.

15. A letter sent from the solicitors for the applicants to the Superintendent in Gort dated 29th of March, 2007, noted concern that the delay in prosecuting may prejudice the applicants' defence.

16. On 28th of May, 2007, the charge was laid against the applicants in Gort District Court. On this occasion, the applicants highlighted the previous representations given to them by Detective Garda Martin Glynn that they would not face charges. It availed them naught.

Summary of Arguments by Applicants:
17. The applicant's central argument presented by Mr. Giblin S.C., is that the unequivocal initial communication by the respondent that there would be no prosecution and that the assurance that garda enquiries were complete constituted a final and conclusive decision. The review of this decision resulting in the instigation of the criminal proceedings breaches the applicant's constitutional rights, in particular the right to fair procedures when considered in the overall context of all that occurred.

18. Notwithstanding the power of the DPP to review decisions, it is argued that such a review cannot be performed after the communication that prosecution will not take place where no reference has been made as to the possibility of a review. Such a review without *caveat* is oppressive and contrary to justice and thus reviewable (see *Eviston v. DPP.* [2002] 3 I.R. 260).

19. The applicants also argue that recommencing proceedings in the absence of new evidence breaches their legal and constitutional rights and in particular the right to fair procedures. A review in the absence of new evidence was deemed to be "unfair and prejudicial". In *Eviston* it was held that a reversal of a decision not to prosecute could not occur "save where new factors had come to light which were not present when he made his original decision". [2002] 3 I.R. 260, at p. 296. The respondent has wrongly assumed an unfettered right to reverse his decision.

20. A claim of prejudice to the applicants is advanced, consequent upon the respondent's failure to preserve probative evidence. I shall specify the matters referred to in summarising the respondent's arguments. In brief, the decision not to prosecute was communicated in April, 2006; the review of this decision was communicated in September, 2006. The applicants argue that fingerprint evidence is no longer available due to this lapse of time. It is submitted that this five month period has further prejudiced the applicants' defence and has created a risk of injustice. In particular the applicants assert that they declined to appoint experts or conduct tests on foot of the representation that they would not face prosecution.

21. The applicants also claim that the decision to review with no warning exacerbated the stress and anxiety suffered and claim that this is a breach of fair procedures as outlined in *Eviston*.

22. Finally it is claimed that the *Guidelines for Prosecutors* issued in October, 2007 by the Office of the Director of Public Prosecutions were not complied with. Specifically para. 4.1 outlines the potential grave effects from a decision to prosecute or not. As such it was submitted that substantial grounds or fresh evidence must support the reversal of a decision not to prosecute.

Summary of Arguments by the Respondent:
23. Mr. Micheal O'Higgins B.L. on behalf of the respondent submitted, in the first instance, that the decision reached by the DPP was not reviewable at all. The respondent asserted that the applicants would receive a fair trial and that constitutional justice had not been breached. However, were the decision held to be reviewable because of unfair procedures, the respondent accepted that whilst the initial decision not to prosecute did not allude to the possibility of a review, this did not preclude the DPP from bringing charges. *Eviston* was cited as authority for the implicit power to review decisions not to prosecute despite a lack of new evidence. As such, any decision given by the DPP not to prosecute cannot constitute a "final and conclusive" decision.

24. In *Eviston* the applicant was informed by the respondent that she would not be prosecuted for dangerous driving causing death. The respondent subsequently decided to prosecute the applicant without new evidence on foot of a letter from the victim's father. The existence of political factors in the *Eviston* case was significant in the granting of an order prohibiting the trial of the applicant. The respondent argues that notwithstanding the order prohibiting trial, which was granted due to the particulars of that case, *Eviston* is authority for the DPP's right to review a decision even in the absence of further evidence.

25. The respondent relies on *Hobson v. Director of Public Prosecutions* [2006] 4 I.R. 239 in support of the proposition that decisions by the DPP may be reviewed even where no *caveat* has been added to the original decision. Due to this, the respondent argues that some other prejudice must be established to ground the applicants' claim.

26. As established in *Eviston*, the DPP enjoys a right to review or reverse a decision not to prosecute notwithstanding the fact that no new evidence has been discovered. As such, this function of the DPP has been afforded a level of special protection by case law and in *Dunphy (a minor) v. Director of Public Prosecutions* [2005] 3 I.R. 585, it was held that this protection means that the onus of

proof is on the applicant. Further, the decision to prosecute was held to be reviewable only in very limited circumstances. The case of *State (McCormack) v. Curran* [1987] I.L.R.M. 225 at p. 237, highlighted that review which is necessary in instances of mala fides, improper motive or improper policy but not where there exists "the reasonable probability of a proper and valid decision". *Director of Public Prosecutions v. Monaghan* [2007] I.E.H.C. 92 and *H v. DPP* [1994] 2 I.R. 589 were cited in support. The respondent submits that the facts of this case fall within this special protection. As such, the onus rests with the applicant to establish mala fides, improper motive or improper policy.

27. As to the issue of whether communication of the decision not to prosecute could preclude a subsequent prosecution, on the basis of *Eviston* it is argued that the mere communication of such a decision does not entitle the applicant to a prohibition of subsequent proceedings. Even communication without *caveat* as to possible review of the decision does not so entitle. In any event, since *Eviston*, such a possibility is common knowledge.

28. Furthermore, it was stated that it is accepted policy that the reversal of a decision taken by the respondent does not have to be explained. The respondent denies that he has acted *ultra vires* or employed improper policy.

29. The respondent denies that the initial representation made to the applicants that they would not be prosecuted resulted in prejudice. The applicants had contended that the communication that the DPP would not prosecute resulted in prejudice on two grounds:-

> (i) *That the delay of five months has prejudiced the applicants' opportunity to access evidence which is no longer available.* In particular, the applicants claim that fingerprints from the switch of the boiler have not been obtained or preserved. The lack of fingerprint evidence on the boiler switch is rebutted by the respondent as being immaterial as the criminal charges relate to the general condition of the boiler. There is no accusation that the applicants physically turned on the boiler thus negating the need for fingerprint evidence to enable the applicants to defend the charges they are facing.
>
> (ii) *That the delay has prejudiced the applicants' opportunity to commission expert evidence*. The applicant also claims that the respondent did not preserve evidence, thereby prejudicing the applicants in defending the charge against them. The respondent argues that the onus is on the applicants to prove prejudice causing a real risk of an unfair trial. In particular, the respondent refutes the relevance of the fingerprint evidence to the particular charge faced by the applicants. Similarly, it is denied that any delay is prejudicial as before the communication of the decision not to prosecute in April 2006, there was a four month period which allowed the applicants to gather evidence. The respondent argues that the applicants had abundant opportunity to engage expert witnesses and assemble evidence prior to April, 2007 and declined to do so.

30. As regards the compilation and preservation of evidence there has been no failure on the respondent's part.

31. The applicants' claim that they have suffered stress and anxiety due to the respondents' decision to prosecute is dismissed as immaterial to the judicial review proceedings.

32. On an ancillary note, it is argued that the applicants are focusing on the merits of the prosecution over the procedures followed. The merits of the criminal trial are not relevant to the judicial review proceedings.

33. The respondents conclude that fair procedures were followed and as such no prejudice occurred.

Conclusions

34. In this case, the DPP exercised his right to review an earlier decision not to prosecute. He was completely within his rights so to do. No new evidence had come to light and such was not necessary to entitle him to reverse his earlier decision. It is in the public interest, as a general principle, that the DPP enjoys the facility to revisit such matters when appropriate. When argument was finally distilled, I did not understand the applicants to demur from this general proposition. Further, I should observe that, not surprisingly, no question of improper motivation or *mala fides* arises.

35. In the *Eviston* case, Keane C.J. reflected on the role of the DPP. The Director is not a judge exercising judicial or *quasi* judicial functions. When he decides to prosecute, or not, as the case may be, he is not obliged to give reasons. However, the shield of protection afforded to the Director in the exercise of his statutory functions can be penetrated. The Director must have due regard to the constitutional requirements of fairness and fair procedures. Citing part of the judgment of Finlay P. (as he then was) in the *State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 43, Keane C.J. says at pp. 295-296:-

> "I am satisfied that the decision of Finlay P. in that case - that the respondent is not exempt in the performance of his statutory functions from the general constitutional requirements of fairness and fair procedures - was correct in point of law. It also seems to me to follow inexorably from that proposition that where, as here, the respondent avails of his undoubted right not to give any reasons for a decision by him to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, his decision is, as a matter of law, *prima facie* reviewable on the ground that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case.
>
> It is not suggested in this case that the respondent has acted with *mala fides*, or that he was influenced by an improper motive or policy in reversing his original decision not to prosecute the applicant. The contention on her behalf is that, having arrived at a decision not to prosecute her and communicated that decision to her, he could not as a matter of law subsequently reverse that decision, save where new factors had come to light which were not present when he made his original decision.
>
> It is undoubtedly the law that the respondent is entitled to review an earlier decision by him not to prosecute and to substitute for the earlier decision a decision to prosecute, at least in a case were he has not already communicated his earlier decision to the putative accused. Thus, having initially decided not to prosecute and so informed one of his officers who had given him advice on the matter, he may subsequently on reflection come to a different view and decide to prosecute. If, for whatever reason, it became public knowledge that, in such a case, the DPP had reversed an earlier decision not to prosecute, it would be unthinkable that his later decision should be reviewable on that ground alone. Again, his position can be contrasted with that of a court or *quasi*-judicial tribunal which is normally *functus officio* once the decision in a particular case has been pronounced.

> It follows that the respondent is entitled to review an earlier decision made by him not to prosecute and to arrive at a different decision. Nor is he obliged in either instance to give reasons for his decision. 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 DPP of reversing decisions which, on further consideration, appear erroneous."

36. It is undoubtedly the case that the citizen, impressed with the presumption of innocence, must find upsetting and distressful the prospect of facing a serious criminal charge, not less one arising from the tragic circumstances as here in a domestic setting. That fact alone is not, of course, any ground upon which to halt a trial. Even if an initial decision not to prosecute is communicated to the party concerned and is subsequently changed, that too, of itself, is not sufficient to prevent prosecution. Circumstances may be different where, for example, consequent upon a decision not to prosecute, the evidential landscape is disturbed in a way which is prejudicial to the defence. Keane C.J. says at p. 298:-

> "As I have already said, the anxiety and stress which must certainly have been caused to the applicant by the initiating of the prosecution in the present case, following the communication to her of a decision by the respondent not to prosecute, would not, of itself, afford her legal grounds for an injunction restraining the continuance of the prosecution. Moreover, assuming that the doctrine of equitable estoppel applies in a case of this nature, one could not say that there followed in the legal sense some detriment to the applicant which would render inequitable the continuance of the prosecution, since her ability to defend the proceedings had not in any way been impaired. Different considerations would have arisen if, for example, on receipt of the DPP's first decision, the wheel and tyre had been disposed of. In such a case, one could conceive of a prosecution being restrained either on the basis of an equitable estoppel having arisen or since the applicant could not be deprived of her constitutional right to a trial in due course of law because of the loss of evidence resulting from the respondent's actions."

37. Before reciting the concluding remarks of Keane C.J., perhaps a brief reminder of the facts in the *Eviston* case would be useful. On behalf of the applicants, it was urged that the facts of that case were "on all fours" with this. In many respects, they are certainly very similar. The intended prosecution of Mrs. Eviston arose from a road traffic accident which occurred on the 28th June, 1998, and resulted in the death of a young gentleman, Mr. Tony Moynihan. A garda investigation ensued, including the engagement and report of a firm of consulting engineers. In early December, 1998, the gardaí informed Mrs. Eviston's solicitor that the Director of Public Prosecutions had decided not to direct prosecution in the matter. This information was passed on to the applicant's solicitor and, in turn, to the applicant.

38. The late Mr. Moynihan's father wrote to the Director of Public Prosecutions on the 16th December, 1998, expressing his and his family's deep regret and hurt at the turn of events. On the 23rd December, 1998 a District Court summons was issued against Mrs. Eviston, charging her with dangerous driving causing death. In correspondence between that applicant's solicitor and the Office of the Director of Public Prosecutions, the then respondent, refused to give any reason for the change of decision. That in a very small nutshell outlines what occurred in the *Eviston* case but sufficient, I hope, to preface the concluding remarks of Keane C.J. at p. 299:-

> "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. If those review procedures 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. No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage. 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. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed."

39. In the instant case, the applicants' case is founded, nominally, on two arguments, but in reality, on one substantial one. The less forceful argument relates to the potential disadvantage visited upon the applicants in the conduct of the defence, by the communication of the original decision not to prosecute throwing the applicants off their guard and de-activating the defence. I am not persuaded by this. At a very early stage, the applicants were aware of the possibility of prosecution. The focus of that prosecution was the state and condition of the boiler and poisonous fumes allegedly emanating from same. They had some four months within which to engage with the case, to the extent that they could have retained an appropriate expert witness. No ascertainable explanation of how two professional people, presumably of some means and possessed of intelligence, let themselves become so disadvantaged. Even if they do labour under some prejudice (I am not convinced of this), I feel that the court should receive a clear and explicit explanation as to how they find themselves in such an evidential shortfall for reasons not of their doing. Of course, as proposed criminal defendants they are within their rights to "sit on their hands". But where an accused laments the lacuna in his or her defence strategy, consequent upon the perceived halting of the case against them, one would expect some explanation as to why they had not moved to prior 10th April, 2006.

40. I cannot find that there is any prejudice on this aspect of the case. Further, the presence or absence of fingerprints on the boiler switch seems, to my mind, to be immaterial to the charge facing the applicants.

41. Turning to what is in reality, the applicant's main case, as I have already observed, the Director of Public Prosecutions is entirely within his rights to revisit decisions taken not to prosecute and to subsequently reverse them. This can be done without a requirement for new evidence and he does not have to give reasons for changing his mind. Even where an initial decision not to prosecute is communicated to the party concerned and later reversed, this would not, of itself, entitle that party to halt the prosecution. Similarly, even when (as occurred here) the party charged had not been told of the internal review procedure, that too

would not afford grounds stopping a prosecution as a matter of course.

42. As the Supreme Court makes clear, ultimately each case falls to be decided upon its own facts. It seems to me that the following facts are material to the consideration of this Court. Firstly, it is clear that at an early stage, Mr. and Mrs. Keane were made aware of the fact that they were potential defendants in criminal proceedings. I accept their evidence that this was a matter of considerable distress and anxiety to them. I also accept (it is not disputed) that Mrs. Keane was, at all material times, suffering from frail health and that the stress and strain, impacted heavily upon Mr. Keane, and all the greater on his wife. Perhaps some solace was derived from Detective Garda Glynn's opinion, which I accept was expressed, that the case might not be proceeded with. However, I have no evidence as to the extent (if any) that this acted as a sort of balm on the anxiety experienced by Mr. and Mrs. Keane, nor indeed if it rendered all the more shocking the subsequent reversal of the decision not to prosecute. On the available evidence, I consider it safer not to weigh it significantly in the balance.

43. I am satisfied that Mr. and Mrs. Keane were greatly relieved when the decision not to prosecute was communicated to them. I am satisfied that no *caveat* was given. The failure to give a *caveat* does not, as a matter for course, entitle an applicant to succeed. However, it seems to me that as a matter of common sense, not to mention simple humanity, some mention should be made of the possibility of review of a decision not to prosecute. In this case, the applicants were fully co-operative with the gardaí. Detective Garda Glynn was a *conduit* between the machinery of State and Mr. and Mrs. Keane. He was the private face of the prosecutorial/investigative arm of the State. He travelled on two occasions to Limerick to interview Mr. Keane. The news imparted in April, 2006 must have been an overwhelming relief, coming as it did from him. There was no exchange of correspondence between solicitors at this stage. It would, in my view, be somewhat unreal to import into this state of affairs, the *minutiae* of the *Eviston* case regarding the possibility of a review of the decision not to prosecute. A policy decision taken after a period of considerable investigation, was communicated to them without qualification, by, in effect, the prosecution spokesman and they were entitled to rely on it. Yet again, that, of itself, is not enough to prevent the prosecution process.

44. Having been informed of the decision of the Director of Public Prosecutions in April, five months then elapsed. This contrasts with the period of some three weeks in the *Eviston* case. I accept fully what Mr. Keane says, that after this period the news coming "out of the blue" was indeed a very great shock.

45. I do not attach much importance as to whether or not Mr. and Mrs. Keane were obliged to make submissions to the DPP.

46. I am satisfied that the news of the review of the case and the subsequent prosecution exposed Mr. and Mrs. Keane to a level of stress and anxiety significantly beyond that which they bore as the unpleasant but necessary by-product of their being subject to a criminal investigation. In the circumstances of this case, this additional layer of distress and anxiety surpassed that which citizens, presumed innocent and labouring under the yoke of impending criminal prosecution, ought reasonably to endure. In my opinion, the respondent's actions in reviewing and reversing the decision to prosecute and the circumstances surrounding these actions, taken all together, amount to a breach of the applicants' constitutional right to fair procedures.

47. In the circumstances, I am disposed to grant the relief sought. I therefore propose to grant the applicants an injunction restraining the respondent from proceeding any further with the prosecution in this matter.