

**THE HIGH COURT**

[2023] IEHC 483  
**Record No. 2022/1088 JR**

**BETWEEN:-**

**B.H.**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, THE ATTORNEY GENERAL, AND THE  
COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Barr delivered *extempore* on 31st day of July 2023.**

**Introduction.**

- 1.** This is an application for an order directing that the first respondent should make discovery in the context of judicial review proceedings that have been brought by the applicant against the decision made by the first respondent that he should be prosecuted for certain historic sex offences.
- 2.** The background to the substantive judicial review proceedings can be very briefly summarised in the following way: statements were made by two complainants, who are brothers, alleging that they had been sexually assaulted by the applicant at various dates in or about 1991. The complaints were not made simultaneously. Having considered the complaint made by the first brother and the Garda investigation file thereon, the first respondent directed that there be no prosecution brought against the applicant. Thereupon, a statement of complaint was made by the second brother. Having considered the Garda investigation of that matter, the first respondent also directed that there should be no prosecution against the applicant in respect of those allegations.
- 3.** On 12 November 2021, one of the complainant's lodged a request with the DPP for a summary of reasons why she had not directed any prosecution in respect of his complaint, pursuant to the Criminal Justice (Victims of Crime) Act 2017 (hereinafter the "2017 Act"). It is the first respondent's case that that request precipitated an internal procedure whereby a professional officer in the Victims Unit of the first respondent, reviewed the files for the purposes of providing those reasons to the requesting party. Having carried out a review of the files, on 3 October 2022, the first respondent directed that a prosecution be brought against the applicant in respect of the complaints made by both complainants.
- 4.** In the substantive judicial review proceedings, the primary relief sought by the applicant is an

order of certiorari of the decision reached by the first respondent, directing that a prosecution be brought against him. The applicant also seeks a number of declaratory reliefs and injunctive reliefs in his substantive proceedings.

**5.** In the present application, the applicant seeks an order for discovery against the first respondent in respect of the following categories of documents:

*All documents, records and other relevant papers relating to the decision-making process, including guidelines, policies, training or instruction to be followed by directing officers in the discharge of their functions, limited to such material as applied at the time of the respective decisions herein.*

*All documents, records and other relevant papers relating to the decisions of the respondent (not to prosecute) as they relate to the complainants referenced in these proceedings as "BF" (decision of 16/10/2020) and to the complainant referenced in these proceedings as "AF" (decision of 20/10/2021) and the decision of the respondent (to prosecute) as it relates to both complainants BF and AF, (decision of 3/10/2022).*

*All documents, records and other relevant papers relating to the review of the aforementioned decisions, and the procedures for review.*

**Submissions on behalf of the Applicant.**

**6.** On behalf of the applicant, Mr. Paul Moore, solicitor, submitted that, having regard to the matters that had been pleaded in the applicant's statement of grounds and in the respondents' statement of opposition, the documentation which was sought in the applicant's notice of motion, was relevant and necessary to enable the applicant to adequately deal with the issues that would arise on the hearing of his judicial review application herein.

**7.** In particular, he stated that where the applicant was challenging the validity of the decision made by the first respondent to direct a prosecution against him, in circumstances where the first respondent had refused to issue such a direction in respect of the same complaints on previous occasions, and when no new evidence had come to light in the interim, which might have explained the change of mind on the part of the first respondent, it was appropriate that the applicant be furnished with the documentation sought in his notice of motion.

**8.** In relation to the documents sought at category 1, it was submitted that insofar as the respondent contended that the protocols and procedures governing when a review would be carried

out in her office in relation to decisions not to direct a prosecution, were publicly available documents and insofar as the first respondent sought to rely on the statement at paragraph 10 in her Annual Report of 1998; it was submitted that if that was a comprehensive statement of the guidelines, protocols and principles that were applicable at the time when the first respondent decided to carry out a review of the files in relation to the applicant, that should be clearly stated on affidavit.

**9.** Mr. Moore submitted that if it was the case that the protocols or principles governing when a review would be carried out in the office of the first respondent had not changed in the wake of the statutory changes introduced by the 2017 Act, the first respondent should be required to state that in an affidavit of discovery. Alternatively, if the policies and principles in relation to the circumstances in which a review would be carried out by her office, had changed following the introduction of that Act, those amended principles or protocols should be discovered to the applicant, to enable him to make his case that in directing a review of the earlier decisions not to prosecute him, and in reaching the decision to direct a prosecution on foot of the complaints previously considered, the first respondent had not acted in a lawful manner. In this regard, Mr. Moore referred to the decisions in *Eviston v. Director of Public Prosecutions* [2002] 3 IR 260; *Taylor v. Clonmel Healthcare Ltd* [2004] 1 IR 169.

**10.** It was accepted by the applicant's solicitor that the documentation sought under category 2, was probably too widely drafted. It was submitted that the court could make an order for discovery of documents under this category, limited to those documents that were relevant and necessary to enable the applicant, either to mount his case in the substantive judicial review proceedings, or to answer the case that had been put forward by the respondents in their statement of opposition and in the replying affidavit sworn by Mr. Padraic Taylor on 3 March 2023.

**11.** It was submitted that where an alleged victim of a criminal offence, had a statutory right to be furnished with reasons why a prosecution had not been directed in relation to their complaint; it followed that it was a requirement of justice that in appropriate circumstances, the person who had benefited from such decision, being the person accused of having committed a criminal offence, should also be furnished with the reasons why the original direction not to prosecute had been given; where the provision of such reasons was necessary in the context of subsequent legal proceedings. Mr. Moore submitted that the requirements of equal treatment, as provided for under the principles of natural justice and under the Constitution of Ireland, required that in the circumstances of this case, the applicant be furnished with the documentation concerning the decision not to prosecute him in

respect of the complaints that had been lodged by the complainants, which decisions had been made by the first respondent on 16 October 2020 and 20 October 2021.

**12.** In relation to the documents sought in category 3, Mr. Moore conceded that the documents sought therein, were essentially a combination of the documents that had been sought in categories 1 and 2 of the notice of motion. It did not appear to require production of any additional documents, that would not be covered under the previous two categories.

**Submissions on behalf of the Respondents.**

**13.** On behalf of the respondents, it was submitted by Ms. McDonagh SC, that an application for discovery of documents had to be viewed through the prism of the matters that arose for determination on the pleadings. It was submitted that in this case, the applicant's primary complaints were that (I) there had been a failure on the part of the first respondent to give reasons for her decision to direct that a prosecution be brought in respect of the complaints made against him by the two brothers; and (II) the applicant had asserted that there was a breach of fair procedures, due to the fact that he had not been informed that a review of the earlier decisions not to prosecute, had been commenced. Counsel stated that it was accepted by the respondents that they had not notified the applicant of the commencement of the review undertaken by the first respondent. It was submitted that where this was accepted, discovery of documents was not necessary.

**14.** It was submitted that it was well recognised at law, that the first respondent was entitled to change her mind in relation to her earlier decision not to direct a prosecution in a particular case: see *DPP v. DH* [2019] 2 IR 324; *BM v. DPP* (Unreported, Court of Appeal, 21 July 2022).

**15.** It was submitted that none of the documentation that was sought by the applicant in his notice of motion satisfied the test that had been set down in the case law that discovery of documents would only be ordered where it was established that such documents were both relevant and necessary to either enable the party seeking discovery to make his case, or to enable him to defeat the case made against him by the opposing party: see *Taylor v. Clonmel Healthcare*.

**16.** In relation to the documentation concerning the protocols that were applied in the office of the first respondent when considering whether to carry out a review of a previous decision, it was submitted that these protocols were publicly available, because they had been set out in the annual reports issued by the first respondent over a number of years; which documents were freely available to members of the public. It was submitted that where documentation was available to the public, it

was not appropriate to direct that discovery be made of such documentation.

**17.** In relation to the documentation sought under category 2, it was submitted that this category was far too broad. It was submitted that it effectively covered all the documentation that would have been considered by the first respondent, including all of the memoranda that may have passed between the gardaí and the office of the first respondent, and memoranda that passed between various officers within the first respondent's office. It was submitted that it was well established that such documentation would not be ordered to be produced by way of discovery, as such documentation came within public interest privilege and is therefore exempted from production. It was submitted that in these circumstances, the court should not direct that discovery be made of the documents sought at category 2 in the notice of motion.

**18.** It was submitted that the documentation sought at category 3, was merely a repetition of the categories of documents that had been sought in the previous paragraphs of the notice of motion. It was submitted that they were not discoverable for the reasons outlined above.

**Conclusions.**

**19.** It is important at the outset to keep at the forefront of one's mind, the fact that in this application, the court is not dealing with the substantive judicial review application that has been brought by the applicant herein. The court is dealing with an interlocutory application brought by the applicant seeking discovery of documents against the first respondent.

**20.** The general principles which are applicable when a party seeks discovery of documents from another party in litigation, are very well known. There is an obligation on the party seeking discovery, to persuade the court that the documentation sought is both relevant and necessary to enable the party seeking discovery to either make his or her case, or to enable him or her to answer the case against them made by the opposing party: see *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55; *Taylor v. Clonmel Healthcare Ltd* [2004] 1 IR 169; *Tobin v. Minister for Defence* [2020] 1 IR 211.

**21.** In the *Tobin* case, the Supreme Court stated that in addition to the relevance and necessity test, it was necessary for the moving party when seeking discovery, to establish that the amount of documentation required was not disproportionate to the supposed benefits that would accrue to them at the trial of the action. The court was required to carry out a proportionality assessment when considering whether it was appropriate to direct that discovery of documents be made. It is not

necessary to consider this aspect further on this application, as the issue of proportionality does not arise.

**22.** While the court accepts the argument put forward on behalf of the respondent in relation to the documents sought at category 1 of the notice of motion, that the court will not normally grant discovery of documents, where those documents are freely available to the public; the court considers that there is considerable strength in the argument made by Mr. Moore on behalf of the applicant, that it would be surprising that the guidelines and protocols governing when a review of a case would be carried out by the first respondent, would not have changed in light of the introduction of the 2017 Act.

**23.** The 2017 Act, implemented what is known as the Victims Directive in Irish law. Section 8(2) gave people who come within the definition of "victims", the right to obtain reasons as to why the first respondent did not direct that a prosecution take place in relation to a particular complaint or matter. Section 10 of the Act gave the victim a right to call for a review of the decision not to prosecute, that had been made by the first respondent. These were very significant changes in Irish law, because, prior to that time, while the first respondent was not obliged to either give reasons, or carry out a review and while she had the power to carry out a review if requested; after the passing of the Act, the first respondent was obliged to provide reasons to a victim, when she had directed that there would not be a prosecution and was obliged to carry out a review of that decision, if so requested by a victim.

**24.** The court accepts the argument that in light of these significant changes, it is difficult to see how the guidelines and protocols that existed in the office of the first respondent, which may have been set out in the annual reports that were publicly available; were not changed in light of the introduction of the 2017 Act.

**25.** In the letter dated 24 July 2023, responding to the request for voluntary discovery, the first respondent stated in relation to the documentation sought at category 1, that there was no necessity for discovery, due to the fact that the relevant principles governing when a review would be carried out, had been set out at paragraph 10 of the 1998 Annual Report issued by the first respondent, as quoted in the *Eviston* case. The letter further asserted that the procedures as outlined therein, had been recognised by the courts in a number of decisions, including in *BM v. DPP* (Court of Appeal, 21 July 2022). The court finds it difficult to comprehend that the guidelines and protocols governing when

a review would be carried out, would not have been updated since 1998, particularly in light of the enactment of the 2017 Act.

**26.** If these protocols and guidelines are freely available in annual reports published by the first respondent, it will be no difficulty for the first respondent to make discovery of the protocols and guidelines that were extant at the time that the request for reasons was made by one of the complainants in this case. Accordingly, the court will direct the first respondent to make discovery of all guidelines and protocols that were in existence concerning the carrying out of reviews of decisions where no prosecution had been directed, which were in existence at the time that the request for a summary of reasons was lodged with the office of the first respondent on 16 November 2021.

**27.** Turning to the documents sought at category 2 of the notice of motion, it was conceded on behalf of the applicant by Mr. Moore, that the documentation sought under this category was too wide, insofar as it encompassed memoranda that would have passed between the gardaí and the office of the first respondent, and memoranda that would have passed between various people working within the office of the first respondent.

**28.** The court accepts the argument made by counsel on behalf of the first respondent that such memoranda will undoubtedly be covered under public interest privilege. While a claim to privilege would normally be raised in an affidavit of discovery, the court is of the view that when one is dealing with documentation in the possession of the first respondent and having regard to the nature of that documentation, even disclosing its existence in an affidavit of discovery, albeit for the purpose of claiming public interest privilege, could of itself, cause significant harm to the common good generally. In such circumstances, the court is satisfied that it would not be appropriate to direct discovery in the broad terms sought at category 2 of the applicant's notice of motion.

**29.** Mr. Moore invited the court to make a more restrictive order for discovery under this heading. He suggested that, as the victim of an alleged crime is entitled under the 2017 Act, to a summary of the reasons why the first respondent had not directed a prosecution; it was a requirement of fair procedures and constitutional justice, that in an appropriate case, a person suspected of having committed a criminal offence, who had benefited from the initial direction not to prosecute given by the first respondent, should be entitled to a similar statement of reasons in relation to the first direction not to prosecute.

**30.** In argument at the bar, counsel for the respondents relied on the judgment of O'Malley J. in

*DPP v. DH*, where it was stated clearly that in relation to a decision to prosecute, the first respondent could not be called upon to disclose her reasons for giving such a direction. The learned judge stated as follows at paragraph 59:

*"In cases concerning a change of mind, an applicant for judicial review must show a prima facie case of mala fides, or evidence from which it could be inferred that the Director has abdicated his or her functions, or has otherwise been improperly motivated. The Director cannot be called upon to explain his or her decision to prosecute, or to give reasons for that decision, or to disclose the sources of the information upon which it is based. The reasons for this position relate partly to public policy. There is also a straightforward explanation — as O'Flaherty J. put it in H. v. Director of Public Prosecutions[1994] 2 I.R. 589 at p. 603:-*

*"In deciding whether to bring or not to bring a prosecution, the Director is not settling any question or dispute or deciding rights or liabilities; he is simply making a decision on whether it is appropriate to initiate a prosecution. If he does, it is afterwards for the courts to decide whether a conviction may be sustained."*

**31.** In the case of *BM v. DPP*, the Court of Appeal considered the principles that apply where the Director has carried out a review of an earlier decision. Edwards J., giving the decision of the court, stated as follows at paragraph 79:

*"In that regard we consider that the ability of the DPP to review earlier decisions made by her or her officials represents an important safeguard for the maintenance of public confidence in her decision making, particularly in finely balanced cases. Indeed, as Denham J. stated in her judgment in Carlin, "it is entirely appropriate that the respondent have a process wherein [s]he may review an earlier decision. The fact that he may review his[/her] decision is now a matter in the public domain." Denham J. also made the point, of course, that there are two sides to this coin, in that if the respondent is seen to change her decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is precisely because it is important that a prosecutor retains public confidence in her decision making that prosecutorial decisions involving a change of mind where there are no new factors are prima facie reviewable by the superior courts to ensure that fair procedures are observed. Thus the DPP's power to review earlier prosecutorial decisions made by her, or*



*by her officials, represents an important safeguard in itself for the maintenance of public confidence, and that of stakeholders/interested parties, in the prosecutorial system; with those interests being doubly protected by the existence in principle of the possibility of such decisions, where there has been a change of mind with no change in circumstances, being subjected to scrutiny by the courts at the behest of an accused, to ensure that the subject person's rights have been respected and that there has been no breach of the fair procedures to which he/she is entitled."*

**32.** This is an application for discovery of documents. From the affidavit sworn by Mr. Taylor on 3 May 2023, and in particular, having regard to his averments at paragraphs 9 – 14, it does not appear that any document was created which contained a summary of the reasons why the first respondent had directed that there be no prosecution in relation to the complaints made by the two brothers, when those matters had initially come before her. It was the submission of a request for a summary of reasons in respect of those decisions, that had prompted the carrying out of a review of the entire matter in the office of the first respondent. The details of that review have been set out in considerable detail by Mr. Taylor in his affidavit.

**33.** In these circumstances, where the applicant's main target in his judicial review proceedings, is not the original decisions made by the first respondent to direct that no prosecution be brought in respect of either set of complaints; but is the subsequent decision of the respondent, following the review, to direct that a prosecution should be brought in respect of both sets of complaints made by the two brothers; and as it is well settled at law, that people charged with criminal offences are not entitled to have sight of the reasons why the first respondent directed a prosecution; it is clear that the applicant is not entitled to see any documentation concerning the reasons why the first respondent made her decision on 3 October 2022, that a prosecution should be brought. The documentation in relation to the earlier decisions not to prosecute, are not relevant to the issues between the parties in this judicial review proceedings.

**34.** In these circumstances, the court refuses to direct the first respondent to make discovery of the documents set out at category 2 in the applicant's notice of motion.

**35.** As the documentation sought at category 3, was effectively just a repetition of the documentation sought at categories 1 and 2 in the notice of motion, the court refuses to direct the first respondent to make discovery of this category of documentation.

**36.** Having regard to the matters that are not in dispute between the parties on this application; namely, that the applicant was not informed that a review was being undertaken; that no new evidence came to light to prompt the subsequent decision to prosecute; and having regard to the detailed explanation as to how the review came about and as to how it proceeded, ultimately leading to the decision of the first respondent to direct that a prosecution be maintained; I am satisfied that the applicant has all the necessary information to enable him to adequately mount his judicial review proceedings herein and to answer the case that may be brought in response thereto by the respondents.

**37.** Insofar as his right to a fair trial is concerned in relation to the trial of the criminal matter, in the event that he is unsuccessful in overturning the decision to prosecute him, he will have the full panoply of procedures that are available to an accused; including the right to be furnished with a book of evidence and the right to be furnished with full disclosure in advance of the trial. In addition, he will have the right to make any submissions that may be appropriate to the trial judge, if it is felt that for some reason, for example due to delay, or for some other reason, he cannot obtain a fair trial.

**38.** In light of the court's findings above, the court directs that the first respondent is to make discovery of all guidelines and protocols that were in existence in her office in relation to when or how the decision to carry out a review of a case would be made, which were extant as of 16 November 2021. The court will direct that the affidavit of discovery be sworn by the first respondent, or by such other officer in her office as may be nominated by her in that regard; such affidavit to be sworn within six weeks of today's date.