**JUDICIAL REVIEW OF THE D.P.P.**

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The **Eviston Case**

The focus of this article is in respect of judicial review of a decision by the Director of Public Prosecutions not to prosecute an alleged crime. It seems to be an accepted proposition, both domestically and internationally, that prosecution authorities, such as the DPP are not susceptible to judicial review and public law remedies in the usual way. Now, the most recent domestic foray into review of the DPP comes with **Eviston v DPP** (“Eviston”) which of course, is not directly on the “bare” non-prosecution point. Rather, **Eviston** arose in connection with a decision by the DPP to reverse a decision not to prosecute. That, however, is not to say the decision is useless on the bare non-prosecution point. **Eviston** stands as a landmark decision - as part of an argument against general immunity. By affirming the application of fair procedures to the decision making processes of the DPP the Supreme Court opened that office to judicial review in new and bold way. If that step was made on a wide basis, perhaps using grand or first principles then those first principles may in fact inform the issue of immunity and review generally.

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1 Previous attempts to review the DPP have been made in several different contexts. First are challenges unsuccessfully made to the DPP’s decision to send an accused forward for trial in the Special Criminal Court – see inter alia, Savage v DPP [1982] ILRM 385 and Judge v DPP [1984] ILRM 225 and also Kavanagh v Ireland [1996] 1 IR 321. As McDermott notes in (2002) 12 (3) ICLJ 25, dicta in **Eviston** would suggest these authorities may need fresh consideration. Secondly, there are the challenges made to decisions not to prosecute originating with The State (Killian) v Attorney General (1958) 92 ILTR 182, and passing through The State (O’Callaghan) v O’hÚadiagh [1977] IR 42, where it is submitted, Killian is distinguished in very shaky grounds. Of obtuse value in this line of authority is Flynn v DPP [1986] ILRM 290. Returning to the issue directly is The State (McCormack) v Curran [1987] ILRM 225 and H v DPP [1994] 2 IR 589.

2 From a U.S. perspective, of particular interest would be the combined Confiscation Cases, (1868) 74 US (7 Wall) 454 which is probably easiest available in Ireland in the form of the 19th Lawyers Edition of the US Supreme Court Reports, Dec 1868-70 Terms. **Yick Wo v Hopkins** (1886) 118 US 356 and the notorious case of **United States v Nixon** (1974) 418 US 683 are of further interest. The issue has arisen throughout the commonwealth with a particular abundance of authority in New Zealand. Nevertheless, despite supporting the general point issues of crown prerogative tend to render decisions such as Burt v Governor General [1992] 3 NZLR 672 of limited assistance. For an English introduction see R v Metropolitan Police Commissioners ex parte Blackburn [1968] 2 Q.B. 118.

3 Unreported, 31 July 2002. The case freely available on the fast-becoming-indispensable IRLII online service at <http://www.irlii.org>. The judgment of Keane CJ was agreed with by Denham and Geoghegan JJ. Geoghegan J also agreed with the concurring judgment of McGuinness J. Murphy J dissented. The High Court decision of Kearns J is reported at [2002] 1 ILRM 134. An informative note on the fair procedures aspect of the case has already been made by McDermott (2002) 12 (3) ICLJ 25.

4 Suffice it to say, that **Eviston** is notable for being the first case in which such a review was successful.
Thus, it may well be that *Eviston* has a resonance far beyond the four corners of the decision itself. Therefore, we want to know whether *Eviston* can stand as a precedent for what I suppose one may call a more liberal approach to judicial review of the DPP. That is the point which this article attempts to consider.

### The Duty to Give Reasons

It has been established since *The State (McCormack) v Curran* that the DPP is under no obligation to give reasons in respect of a decision not to prosecute. The Supreme Court in *Eviston* re-iterated this principle. It is reasonably arguable that the refusal to recognise such a duty is due to the specific features, functions and limitations of the office of the DPP – i.e. that prosecutors simply lack the resources to prosecute every offence that is brought to their attention. A similar point is made by Ryan & Magee in *Irish Criminal Process* in relation to the Gardaí that

> [T]otal enforcement of the criminal law by the courts is an aim which is neither realistic or desirable. It is unrealistic in that police resources are such that choices must constantly be made as to the best deployment of manpower.

To further the point, it is hard to improve on the following passage taken from an American work

> The entirely legitimate factors that influence prosecutor’s resource allocation decisions are complicated, difficult to assess and dynamic. What kinds of offences are causing the greatest harm to society at any point in time? What kinds of cases can be proven most easily, given existing resource constraints?

Thus, at some level, law enforcement *must* be partly selective. If a duty to give reasons caused the DPP to expose such strategic choices it may be akin to inviting criminals to counter-strategise according the DPP’s unavoidable resource constraints. Indeed, (although in somewhat less alarmist terms) Finlay CJ summed up the position as follows: “I reject…the submission that [the DPP] has only got a discretion as to whether to prosecute or not to prosecute in any particular case

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6 If one was trying to otherwise allege that a duty to give reasons existed one would probably start by asserting that the body at issue has a quasi-judicial function. The authorities would tend to suggest that a duty to give reasons would probably follow on from this: See for instance *Rajah v Royal College of Surgeons* [1994] 1 IR 384 at 595. Cf *International Fishing Vessels Ltd. v Minister for the Marine* [1989] IR 149. However, as is made clear from the judgment of Keane CJ in *Eviston*, the DPP has no such quasi-judicial function in law. Thus one cannot deduce a duty to give reasons from this alleged nature of the DPP’s office.

7 As is implicit throughout the United States Supreme Court’s case-law: See the cases cited above at footnote 2.


10 Obviously one cannot take this too far. For example, although generally immune from review, a police commissioner or high ranking officer could not decide to merely stop enforcing a particular law. See in this regard, the comments of Lord Denning MR in *R v Metropolitan Police Commissioners ex parte Blackburn* [1968] 2 Q.B. 118

11 This would seem to be the same logic underlying the aspect of public interest privilege in respect of the prevention and detection of crime. See Delaney and McGrath, *Civil Procedure in the Civil Courts* (2001,Round Hall Sweet & Maxwell) at 312 *et seq.*
related exclusively to the probative value of the evidence laid before him”.\textsuperscript{12} This dictum and other like it are based on the simple idea that the reasons that motivate the DPP are of an ilk that should not be put in the public domain. Thus, we reject the existence of a duty to give reasons because, generally speaking, it makes sound policy sense to do so.

But what is the connection between the lack of a duty to give reasons and judicial review of a decision not to prosecute? Well, one particular method of challenging a decision is to establish that the body had no reasons to make its decision. \textit{The State (Daly) v Minister for Agriculture}\textsuperscript{13} (“\textit{Daly}”) is authority for the proposition that where a body does not give reasons a presumption may be raised that no evidence was in fact available upon which the decision maker could rest his decision. This “no evidence doctrine”\textsuperscript{14} is probably a manifestation of the idea that a where the exercise of a discretionary power has as a requisite the forming of opinion, then that opinion must be factually sustainable and not unreasonable.\textsuperscript{15}

An important gloss to this doctrine is added in \textit{McCormack v Garda Complaints Board}\textsuperscript{16} (“\textit{McCormack}”) where Costello P held that even in the absence of a duty to give reasons a failure to give reasons may nevertheless allow the inference that none existed. On the strength of \textit{McCormack}, the lack of a duty on the DPP to give reasons may not, in fact, bar the operation of the presumption and the resultant conclusion that the DPP made a decision on no evidence.

However, it is submitted that these authorities decide no more than it is proper and logical in all the circumstances of certain cases to raise a presumption that where no reasons are provided – irrespective of a duty to provide – that there are no such reasons. The logic would have to continue therefore, if other matters can explain the lack of reasons then the presumption cannot be raised in the first place. As has been argued above, it is peculiar to the DPP that there may be very valid explanations for a lack of reasons. For example, one may recall that in \textit{H v DPP}\textsuperscript{17} a decision not to prosecute was possibly made because the offender was a police informant. Thus, in relation to the DPP it is simply not logical or correct to make the \textit{Daly} association between “no provided reasons” and “no reasons at all”. The issue in \textit{Daly} concerned the dismissal of a probationary veterinarian. His contract of employment could be terminated during this probation at any time if his services were unsatisfactory. This ground was exercised by his employer, the Minister for Agriculture, without any reasons offered on request nor furnished at the trial itself. Thus in \textit{Daly} the failure to provide reasons told greatly against the cogency of the purported actual reasons i.e. that if there were proper reason for the dismissal at issue there it would have been made clear in court for it is generally reasonable to expect a defendant to put his best case forward.\textsuperscript{18} It is submitted that such an assumption cannot be made against the DPP since one cannot expect him to “defend” his decision not to prosecute at all. Not only is he immune from the duty to

\begin{footnotes}
\item[12] \textit{The State (McCormack) v Curran} [1987] I.L.R.M 225
\item[13] [1987] I.R. 165
\item[15] See, for example, \textit{The State (Lynch) v Cooney} [1982] IR 337.
\item[16] [1997] 2 I.R. 489
\item[17] [1994] 2 IR 589
\item[18] Unless of course there is some over-arching issue of privilege or something like it, which was not the case in \textit{Daly}.
\end{footnotes}
give reasons, but the very essence of that immunity necessarily means his office is not penetrable by the courts in the Daly or McCormack fashion.

In spite of this, in Eviston, Kearns J at first instance\(^1\) held along the lines of Daly and McCormack that non-disclosure of reasons allowed the presumption to be raised against the DPP. Although Keane CJ disagreed with this on appeal he seemed to fall into the trap of equating the Daly presumption with a duty to give reasons, arguing that since there was no duty to give reasons it was thus a fallacy to argue that failure to give such betrayed a lack of them. However, we have seen that McCormack necessarily contradicts this kind of reasoning. It may simply be that the Chief Justice simply mistook the McCormack ratio. However, it is probably the case that the learned Chief Justice is applying a deeper kind of reasoning. As we saw above, the no-evidence rule in its McCormack guise tends to suggest that the presumption is raised, not because of a duty to give reasons but because reasons can legitimately be expected to exist and be shown to exist. Keane CJ may simply be resorting to first principles and recognising that such assumptions cannot be held against the DPP. Thus, in “bare” non-prosecution cases, the reasoning of the DPP is impenetrable over and above the lack of the duty to give reasons.

Is Unreasonableness a ground of review?

It is trite law that judicial review is concerned with the decision making process as opposed to the actual decision itself. However, there is one exception to this which is generally expressed as the standard of unreasonableness or irrationality.\(^2\) Whilst the formulae of reasonableness may differ in some cases\(^3\) it essentially amounts to the proposition that where a decision maker acts in a manner in which no reasonable decision maker would act the courts have a jurisdiction to set that decision aside or otherwise remedy the problem thereby caused.\(^4\)

Our present question is whether the DPP can be reviewed this ground. Keane CJ’s distillation of previous cases in Eviston helpfully avoids the need for lengthy citation of past authorities. On the decision of the DPP not to prosecute Keane CJ says that the authorities “go no further” than saying a court will not interfere where:

- No prima facie case of mala fides is made out
- There is no evidence from which it can be inferred that he abdicated his functions or has been improperly motivated
- The facts of the case do not exclude the reasonable possibility of a proper and valid decision of the D.P.P. not to prosecute the person concerned\(^5\)

With the greatest respect, the language used is confusing. It is arguable that by introducing the above principles with the phrase “the decisions, accordingly, go no

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\(^1\) [2001] 1 ILRM 134

\(^2\) A fact that seems to have eluded O’Sullivan J in Aer Rianta v Commissioner for Aviation Regulation, Unreported, High Court, 16\(^{th}\) January 2003. See the point made some years earlier by Hogan in “Judicial Review, the Doctrine of Unreasonableness and the Immigration Process” (2001) 6 Bar Review 329.

\(^3\) See the leading, but somewhat differing, Irish formulations of the rule in The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642 and in O’Keefe v An Bord Pleanála [1993] 1 IR 39

\(^4\) Bailey v Flood, High Court, Unreported, 6\(^{th}\) March 2000 (Morris P).

further than saying that the courts will not interfere with the decision of the DPP not to prosecute...” the Chief Justice simply means to distinguish the case of non-prosecution from the situation in *Eviston*. As noted above, *Eviston* concerned a decision to reverse a decision already made not to prosecute without notice being given to the alleged offender. In the *Eviston* scenario this third party interest is crucial. Not only is one presented with the victim who may possess the right (in the broadest sense) to see justice done but there is also the alleged offender with perhaps a legitimate expectation to fair procedures created by the initial assurance that no prosecution would be taken. The *Eviston* situation thus brought in a whole panoply of interests that are lacking in a simple decision not to prosecute.24

An alternative interpretation would be that Keane CJ may be suggesting that the previous cases have not exhaustively examined the prospect of review. Thus a higher standard of review may exist. That is to say while grounds above may suffice to warrant court intervention, they are by no means necessary. Thus a court may perhaps intervene for unreasonableness or a want of fair procedures in the manner the decision not to prosecute was made. It should be noted that McGuiness J explicitly reserved this point for future consideration.

Now, it has been held in New Zealand, that while not immune from judicial review, a prosecutor is not reviewable via irrationality or unreasonableness. It is said in *Hallett v Attorney General (No.2)*25 that such would be the equivalent of deciding whether a prosecution should be brought in the first place, a matter which some common law courts have traditionally firmly placed in the prosecutors hands.26 However, it has to be recognised that Keane CJ expressly states that, in some cases, the DPP cannot escape the constitutional obligation to act fairly. There would then seem to be an argument that this would seem to include the unreasonableness ground in its constitutional guise as Henchy J understood it in *The State (Keegan) v Stardust Compensation Tribunal*.27 However, as we have seen *Eviston* is equal authority for the proposition that a decision cannot be seen as irrational where no reasons have been provided because such failure cannot betray a lack of reasons. Of course there are many other ways in which a decision could be unreasonable – for example, it may contradict every established fact. However, it is submitted that such a conclusion could only be reached if one knows what factors actually motivated the decision in the first place. It is fundamental to *Eviston* that a court cannot penetrate the office of the DPP in this way. There is thus no way in which a court can say that a decision of the DPP is unreasonable save where he would voluntarily provide reasons for his decision which are clearly unreasonable or untenable or in some other extreme case.

It is thus submitted that Keane CJ’s dicta relating to fair procedures are fundamentally connected with a possible legitimate expectation or interest which the alleged offender may have where told that there will be no prosecution which as we have seen is lacking in a “bare” decision not to prosecute. Whereas taking *Eviston* to the extremes of itself may suggest that unreasonableness, as perhaps an aspect of

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24 It was put in the following way by McGuinness J in *Eviston* – “The essential issue, therefore, arises from the fact that the Applicant had been informed that she would not be prosecuted and that no warning or caveat [relating to the power to review this decision] accompanied this information.”
26 See, for example, *R v Metropolitan Police Commissioners ex parte Blackburn* [1968] 2 Q.B. 118
27 [1985] IR 642
“fair procedures” can be a ground of challenge it is simply impossible to say in any case that a decision of the DPP is unreasonable given the inability of the court to penetrate its decision making process. As was held in the Australian case of *Weist v Director of Public Prosecutions* the fundamental question is whether an issue is raised over and above the decision to prosecute or not.

This kind of reasoning is not novel. In *R v Registrar of Companies ex parte Central Bank of India* the question was whether certiorari would lie to quash an incorrect registration of a charge. The problem was that provisions of the English companies legislation provided that a certificate of registration was conclusive evidence of that registration requirements have been complied with. Of this Dillon LJ held, (with the emphasis added)

> As a matter of construction of the words used in the “conclusive evidence” formula in s.98(2), it does not preclude an application for judicial review of a decision of the registrar. *But it would have the effect… that an application for judicial review would be bound to fail because no evidence could be adduced to show that the certificate was wrong…*

It is thus submitted that *Eviston* thus does not enlarge the grounds of review of the DPP for a decision not to prosecute. Rather, review of decisions not to prosecute is restricted to the egregious examples noted in *Eviston* where *inter alia* wholly improper motivation or *mala fides* can be made out.

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28 [1982] 81 A.L.R. 129  
29 [1986] 1 All E.R. 105  
30 S.98(2) of the Companies Act 1948