

THE HIGH COURT

[2022] IEHC 291

[2021 5471 P]

BETWEEN

MARK JENKINS

PLAINTIFF

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY

GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered *ex tempore* on the 18th day of May, 2022

Introduction

1. On 10th May, 2022, the court heard an application by the plaintiff for a stay directed towards the first named defendant (“the DPP”) in respect of three separate criminal prosecutions pending against him which are currently listed for mention on 7th June, 2022 to fix a trial date. The interlocutory application was resisted by the DPP. The second and third named defendants Ireland and the Attorney General (“the State defendants”) did not file any affidavit or participate in the interlocutory injunction hearing. I was informed that the position adopted by the State defendants was that they were “*neutral*” in respect of this application.

2. I was informed leave to apply for judicial review has been granted in at least three other sets of High Court proceedings raising similar issues of European Union (“EU”) and constitutional law to those arising in the present case. In the two cases to which the DPP is a party, orders staying the underlying criminal prosecutions pending trial have been granted. I

understand that at least one of these judicial review proceedings is listed for hearing in July 2022.

Factual background

3. The plaintiff owns and operates a business trading under the name “Re-Leaf”. The plaintiff operates from two premises, one in Co. Tipperary and one in Co. Waterford. Both premises are coffee shops and retail outlets which specialise in the sale of hemp related products and of products containing cannabiniol (known as CBD) and CBD derivatives.

4. As stated, this application relates to three separate prosecutions. The first prosecution is based on a search of the plaintiff’s business premises by An Garda Síochána on 11th February, 2020 pursuant to which eight bags and one white container was seized all of which contained green plant material. Analysis revealed a tetrahydrocannabinol (“THC”) content consistent with cannabis. THC is the principal psychoactive constituent of cannabis. The plaintiff was arrested and charged with two offences under s. 3 and s. 15 of the Misuse of Drugs Act, 1977 relating to possession and supply of a controlled drug, namely cannabis.

5. The second prosecution arises from a search of the plaintiff’s business premises on 4th July, 2020 at which green plant material, brown resinous material, and vials of oil were seized. A second District Court Summons issued against the plaintiff on 4th July, 2020 relating to possession and supply of a controlled drug, namely cannabis.

6. On 2nd May 2020, the plaintiff’s vehicle was stopped at a checkpoint in Lismore, Co. Waterford and, on searching same, An Garda Síochána found herbal cannabis, seed oil and a gold knuckle duster. On 9th November, 2020, a third District Court Summons issued against the plaintiff relating to possession and supply of a controlled drug, namely cannabis.

7. The plaintiff avers that he ordered the products seized from a company located in Wales, Rooted Zen Limited. Rooted Zen Limited are in partnership with a Swiss producer, Pure Production. The hemp was grown in Switzerland, which is not an EU member state.

8. The plaintiff obtained the release of a sample of the green plant material seized on 11th February, 2022 to allow it to be independently tested. The testing has demonstrated that the THC content in the plant materials seized does not exceed 0.2%. Although not averred to on affidavit, counsel for the plaintiff informed this court that the same is true in respect of the material seized on 2nd May, 2020. The results of the independent analysis in respect of the material seized on 4th July, 2020 are awaited.

9. The plaintiff alleges that the legislation upon which the criminal prosecutions are based – forming part of the legislative treatment of cannabis and its derivatives in Ireland - is in breach of EU law and breaches his constitutional rights.

Domestic legislative framework

Misuse of Drugs Act, 1977 (“The 1977 Act”)

10. Sections 3 and 15 of the 1977 Act (as amended) provide, respectively, for the offence of possession *simpliciter* and possession of a controlled drug for the purposes of selling or supplying it to another person. Section 2 (1) of the 1977 Act defines a controlled drug as meaning any substance, product or preparation which is either specified in the Schedule to the Act or is declared pursuant to s. 2 (2) of the Act to be a controlled drug for the purposes of the Act. The Schedule to the Act includes, *inter alia* cannabis, CBD, CBD derivatives and cannabis resin in the list of controlled drugs. It appears to be common case that the green plant material seized on 11th February, 2020 (forming the subject matter of the first prosecution) is hemp, which is cannabis, and is thus a controlled drug. The description of the material seized on 2nd May and 4th July 2020 (see paragraphs 5 and 6 above) suggests that the second and third

prosecutions may be in respect of a wider range of products than hemp/cannabis plant, and may include CBD, CBD derivatives and cannabis resin.

11. Section 13 (1) (a) of the 1977 Act allows the Minister, if he is of the opinion that it is in the public interest for the manufacture, production, preparation, sale, supply, distribution and possession of a drug to be either wholly unlawful or unlawful except for the purpose of research or for other special purposes specified in an order, to designate that drug by order as one to which s. 13 (1) applies.

12. Section 14 (1) of the 1977 Act allows the Minister to grant licences, permits or authorisations for any of the purposes of the Act, to attach conditions to any such licence, permit or authorisation, to vary such conditions and to revoke any such licence, permit or authorisation.

The Misuse of Drugs Regulations, 2017 (“the 2017 Regulations”)

13. Regulation 5 (1) of the 2017 Regulations provide that, subject to their provisions, a person shall not *inter alia* produce supply, import or export a controlled drug. Exemptions are provided to cover use for professional purposes by doctors, pharmacists, nurses and midwives, veterinary practitioners, prison officers, etc. and in other specified circumstances, none of which are contended by either party to apply in the case of the plaintiff. In addition to these controls, the Regulations specify the classes of persons who may have controlled drugs in their possession and the circumstances in which such possession would not be in contravention of the Act. Again, it is not contended by either party that the plaintiff is within these classes of person.

14. Regulation 6 of the 2017 Regulations provides that a person so authorised by a licence granted by the Minister under s. 14 may produce, supply, offer to supply, import, export or have in his possession any controlled drug in accordance with the said licence.

Misuse of Drugs (Designation) Order 2017 (“the 2017 Order”)

15. Schedule 1 of the 2017 Order, made pursuant to s. 13 of the 1977 Act designates as controlled drugs, *inter alia*, cannabis, CBD, CBD derivatives and cannabis resin.

16. The effect of s. 13 designation is that the manufacture, production, preparation, sale, supply, distribution and possession of cannabis remains unlawful except for specified purposes set out in Schedule 2 which include (a) research, forensic analysis or use as an essential intermediate or starting material in an industrial manufacturing process and (b) the growing of hemp from seed varieties specified by Article 189 of the European Communities as being eligible for the purposes of Article 1 of Regulation EU1307/2013 (which, as will be seen below, applies to hemp with a THC content below 0.2%). This, however is subject to such licensing provisions under the 1977 Act and the Regulations made thereunder as are applicable. It appears to be common case that the plaintiff does not come within the purposes specified in the 2017 Order and in any event he has not applied for, and does not hold, a licence under that Order.

17. The 2017 Order has since been repealed and replaced by the Misuse of Drugs (Designation) Order, 2021. However, the 2017 Order is the relevant order for the purposes of these proceedings.

Misuse of Drugs (Prescription and Control of Supply of Cannabis for Medicinal Use) Regulations, 2019 (“the 2019 Regulations”)

18. The 2019 Regulations apply to drugs which are sold or supplied for medicinal purposes. These Regulations are of no immediate relevance.

Summary of domestic legislative framework

19. In summary, therefore, in so far as same was opened to me by the parties, the legislative position in Ireland at the relevant time appears to be that the possession, production, supply or importation of cannabis, (which includes hemp), CBD and CBD derivative products, was unlawful unless (a) the relevant use is specified pursuant to the 2017 Regulations, or (b) same is permitted by licence for the purposes specified in Schedule 2 of the 2017 Order (research/ industrial manufacture or for the growing of certain hemp) or (c) same is permitted by licence for medical purposes pursuant to the 2019 Regulations. It appears to be common case that none of the potential exemptions or permissions at (a) to (c) would apply to a person such as the plaintiff who desires to market such products in circumstances other than those specified pursuant to the 2017 Regulations or for purposes other than those specified in the 2017 Order or the 2019 Regulations.

20. In addition to (a) to (c) above, pursuant to s. 14 of the 1977 Act, the Minister may issue licences, permits, or authorisation for any of the purposes of the Act. I have not been referred to any licences, permits or authorisations, granted by the Minister pursuant to this provision. It is not clear to me whether any such licences, permits or authorisations have in fact been granted, what conditions may have been attached thereto or to what products they may relate. It is common case that the plaintiff has not at any stage applied for a licence, permit or authorisation pursuant to s. 14.

21. Furthermore, save that Schedule 2 of the 2017 Order incorporates the requirements of Article 1 of Regulation EU1307/2013 (which, as will be seen below, relates to hemp with a THC content below 0.2%) as a pre-condition to lawful importation, possession or supply for the purposes of *growing hemp*, the domestic legislative framework does not distinguish between such products by reference to their THC content. Nor does the domestic legislative framework distinguish between imported and domestically produced products. No specific

provision is made to exempt from prohibition the importation, possession or supply of hemp, CBD and CBD derivative products with a THC content below 0.2% save for the purposes specified. Likewise, save for the purposes specified, no specific provision is made for the grant of a licence, permit or authorisation for the importation, possession or supply of hemp, CBD and CBD derivative products with a THC content below 0.2%

European law framework

Relevant provisions of the EU treaties

22. The Treaty on the Functioning of the European Union (“the Treaty”) enshrines the fundamental freedoms of movement which underly the EU internal market, including Title II thereof, the free movement of goods.

23. Chapter 3 of Title II of the Treaty sets out the relevant provisions prohibiting quantitative restrictions on movements of goods between member states and measures having equivalent effect. Article 34 of the Treaty provides that “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”; and Article 36 of the Treaty provides that *inter alia* Article 34 shall not preclude prohibitions or restrictions on imports “justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. However, it provides that such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

24. The plaintiff maintains that the material seized and forming the subject matter of these three prosecutions are “goods” and that Article 34 is therefore engaged.

25. Title III of the Treaty concerns Agriculture and Fisheries and includes Article 38. Article 38(1) of the Treaty provides that the Union shall define and implement a common agricultural and fisheries policy. Article 38(1), goes on to provide that the internal market shall be extended to agriculture, fisheries and trade in agricultural products. “*Agricultural products*” are defined as the products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products.

26. Article 38(2) of the Treaty provides that, save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products. Article 38(3) of the Treaty provides that the products subject to the provisions of Articles 39 to 44 of the Treaty are listed in Annex I of the Treaty.

27. The list of agricultural products in Annex I of the Treaty refers to products based on the nomenclature under the Harmonized Commodity Description and Coding System (referred to as the “Brussels Nomenclature”) and includes, with regard to hemp, references to...

(ii) Chapter 54, heading 54.01 of the Brussels Nomenclature: “[t]rue hemp (Cannabis Sativa), raw or processed but not spun; tow and waste of true hemp (including pulled or garneted rags or ropes)”.

28. The plaintiff maintains that the material seized and forming the subject matter of these three prosecutions falls within these definitions and constitutes an agricultural product and that the Regulations 1307/2013 and 1308/2013 are engaged (as to which see below).

Relevant EU legislation

29. The position under EU law in relation to the production and importation of hemp products, which contain THC content below 0.2% (which on the plaintiff’s case is in issue here) is specifically provided for by two EU Regulations. It is not disputed that both Regulations are directly applicable in Irish law by operation of Article 288 of the Treaty.

Regulation 1307/2013

30. EU Regulation 1307/2013 of 17th December, 2013 establishes rules within the framework of the Common Agricultural Policy for direct payments to farmers under support schemes.

31. Article 4(1)(d) of Regulation 1307/2013 defines the “*agricultural products*” to which it applies as being “*the products, with the exception of fishery products, listed in Annex I to the Treaties as well as cotton*”. As outlined above, this includes references to hemp products.

32. Title III of Regulation 1307/2013 sets out various matters in relation to the Basic Payments Scheme for farmers. Section 3 of Chapter 1 of Title III deals with the implementation of the Basic Payments Scheme and, under this heading, Article 32(1) specifies the manner in which payment entitlements are to be activated on a “*per eligible hectare*” basis.

33. Article 32(6) of Regulation 1307/2013 specifically recognises that hectares producing hemp products may be eligible hectares for the EU Basic Payments Scheme. In particular, Article 32(6) provides that “[*a*]reas used for the production of hemp shall only be eligible hectares if the varieties used have a (THC) content not exceeding 0.2%”.

34. Article 35(3) empowers the Commission to lay down rules conditioning such payments on the use of specified seeds and certain hemp varieties and providing for the verification of THC content.

Regulation 1308/2013

35. Regulation 1308/2013 establishes a common organisation of the EU market in agricultural products. Title III deals with Trade with Third Countries and, in particular, Chapter IV thereof sets out special import provisions for certain products.

36. As the hemp in issue here was grown outside the EU and imported into the EU, Article 189 of Regulation 1308/2013 is crucial. Under the heading of “*Imports of hemp*”, Article 189(1) provides that certain products may be imported into the Union only if the stated

conditions are met. The products listed at Article 189(1) include:

(a) raw true hemp falling within CN code 5302 10 00 meeting the conditions laid down in Article 32(6) and in Article 35(3) of Regulation (EU) No 1307/2013;...

37. The Explanatory notes to the Harmonised Commodity Description and Coding system- which are a non-binding aid to the interpretation of the various tariff heads - states that CN code 5302100 covers, *inter alia*, “raw hemp as harvested, whether or not the leaves and seeds have been removed”.

38. The plaintiff contends that the material satisfies such of the above conditions as are applicable and that the material seized falls within the scope of Regulation 1308/2013, and in particular Article 189 thereof.

Case C-663/13 B.S. Jue Kanavape Preliminary Reference (Judgment of the Fourth Chamber, 19th November 2020) ECLI:EU:C:2020:938 (“Kanavape”)

39. *Kanavape* concerned a request for a preliminary ruling by the Court of Appeal, Aix-en-Provence, France, arising out of a criminal prosecution of two former managers of a start-up company for selling vaping products containing CBD. The French public health code, as interpreted by the French competent authorities, prohibited the marketing of products derived from the hemp plant in its entirety irrespective of THC level. Certain specified uses of fibre and seeds of the plant could be authorised provided that the THC content thereof did not exceed 0.2%. Such specified uses included research, testing, manufacture of derivatives, cultivation, importation, exportation and industrial and commercial use. The applicant in the main proceedings was not eligible for such authorisation because it applied only to the fibres and seeds of the cannabis plant itself and not to the finished product resulting therefrom, including CBD based products. In addition, as CBD is found mainly in the leaves and flowers of the plant

and not in the fibres and seeds, it was not possible to extract CBD under conditions consistent with the French public health code.

40. The evidence before the French referring court was that the CBD in issues did not appear to have any recognised psychoactive effects and that there was insufficient data to classify it as harmful. The expert appointed in connection with the criminal inquiry giving rise to the proceedings concluded that it had “*little or no*” effect on the central nervous system.

41. The French court asked the Court of Justice of the European Union (“The European Court”) whether Regulations 1307/2013 and 1308/2013 and Articles 34 and 36 of the Treaty must be interpreted as precluding national legislation to the extent that it prohibited the marketing of CBD when it is extracted from the Cannabis Sativa plant in its entirety and not solely from its fibres and seeds.

42. The European Court first considered whether the CBD extracted from the Cannabis Sativa plant could be regarded as falling within Regulations 1307/2013 and 1308/2013. The product in question did not constitute “*true hemp (Cannabis sativa), raw or processed*” as it was extracted from the Cannabis Sativa plant. Nor did the product constitute “*raw hemp as harvested*”. It did not therefore fall within the categories of product referred to in Annex I to the Treaties. As a result, the CJEU held that the CBD present in the Cannabis Sativa plant as a whole could not be regarded as an agricultural product and was not covered by Regulations 1307 or 1308/2013.

43. Noting that the CBD at issue was lawfully produced and marketed in the Czech Republic, the European Court went on to consider whether the free movement provisions in Article 34 and 36 of the Treaty were applicable. The Court stated that, in light of their harmfulness, persons who market narcotic drugs cannot rely on the freedom of movement or the principle of non-discrimination. It was therefore necessary to determine whether the CBD at issue in the main proceedings constituted a narcotic drug within the meaning of the relevant

case law. On a literal interpretation of the relevant International Conventions pertaining to narcotics, CBD constituted cannabis extract and was consequently a “drug”. Notwithstanding this, the European Court went on to state:

*“72 ... it must be observed that... **the CBD at issue in the main proceedings does not appear to have any psychotropic effect or any harmful effect on human health on the basis of available scientific data.** Moreover, according to those elements in the file, the cannabis variety from which that substance was extracted, which was grown in the Czech Republic lawfully, **has a THC content not exceeding 0.2%.***

73 ... the Single Convention is based, inter alia, on an objective of protecting the health and welfare of mankind. It is therefore appropriate to take that objective into account when interpreting that convention’s provisions.

74 Such an approach is all the more compelling since a reading of the commentary on the Single Convention published by the United Nations relating to the definition of ‘cannabis’ for the purposes of that convention leads to the conclusion that, having regard to the purpose and general spirit of that convention, that definition is intrinsically linked to the state of scientific knowledge in terms of the harmfulness of cannabis-derived products to human health....

*75 **In the light of those factors, which it is for the referring court to verify, it must be held that, since CBD does not contain a psychoactive ingredient in the current state of scientific knowledge.. it would be contrary to the purpose and general spirit of the Single Convention to include it under the definition of ‘drugs’ within the meaning of that convention as a cannabis extract.***

76 It follows that the CBD at issue in the main proceedings is not a drug within the meaning of the Single Convention.”

44. Articles 34 and 36 the Treaty therefore applied to prohibit quantitative restrictions and measures having equivalent effect on imports of CBD. This covered any measures capable of hindering, directly or indirectly, actually or potentially intra union trade, in CBD, even if the measure in question does not have the object or the effect of treating goods coming from other member states less favourably. Such a measure could only be justified on one of the grounds of public interest laid down in Article 36 of the Treaty or by imperative requirements.

45. The Court noted that the health and life of humans ranked foremost upon the assets and interests protected by the Treaties. A wide measure of discretion was to be allowed to member states, particularly where uncertainties exist on the current state of scientific research as to the risks to consumers posed by certain substances. However, the provisions of the national law must nonetheless be appropriate for securing the attainment of the objective pursued and must not go beyond what was necessary in order to attain it. Any measures adopted must comply with the principle of proportionality.

46. The European Court noted that:

“87 Since Article 36 TFEU contains an exception, which must be narrowly interpreted, to the free movement of goods within the European Union, it is for the national authorities which invoke it to demonstrate in each case, taking account of the results of international scientific research, that their legislation is necessary in order effectively to protect the interests referred to in that provision, and, in particular, that the marketing of the products in question poses a genuine threat to public health that must undergo an in-depth assessment (judgment of 28 January 2010, Commission v France, C-333/08, EU:C:2010:44, paragraphs 87 and 88).”

47. Member states are obliged to carry out a risk assessment to appraise the degree of probability of harmful effects on human health from the use of prohibited products and the seriousness of those potential effects. If there is a high degree of scientific and practical uncertainty as to the impact on the health and life of humans, the precautionary principle would apply and protective measures could be taken without having to wait for the reality and seriousness of those risks to crystallise. However even in such circumstances, the assessment of risk could not be based on purely hypothetical considerations.

48. The European Court stated therefore that a correct application of the precautionary principle presupposes, first the identification of the potentially negative consequences for health of the proposed use of a substance and, second a comprehensive assessment of the risk to health, based on the most reliable scientific data available and the most recent results of

international research. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk but the likelihood of real harm to public health persists, the precautionary principle justifies the adoption of restrictive measures provided they are non-discriminatory and objective.

49. The European Court ultimately held that it was for the referring court to determine whether the prohibition on the marketing of CBD lawfully produced in another member state was appropriate for securing the attainment of the objective of protecting public health and did not go beyond what was necessary for that purpose. Although therefore it was not necessary for the French Republic to demonstrate that the dangerous properties of such a product were identical to that of narcotic drugs, it was for the referring court to assess the scientific data available and make sure that there was a real risk to public health or that any potential risk was not based on purely hypothetical considerations.

50. At paragraph 96 the court summarised its judgment as follows:

“96 In the light of all the foregoing considerations, the answer to the question referred is that Articles 34 and 36 TFEU must be interpreted as precluding national legislation which prohibits the marketing of CBD lawfully produced in another Member State when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds, unless that legislation is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose. Regulations No 1307/2013 and No 1308/2013 must be interpreted as not applying to such legislation.”

Principles governing injunction or stay

51. In *Okunade v Minister for Justice* [2012] IESC 49 Clarke J. (as he then was) set out a number of principles applicable in seeking an interlocutory injunction in judicial review proceedings.

“As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations: -

- (a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*
- (b) the court should consider where the greatest risk of injustice would lie. But*

in doing so the court should: -

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicants case.

52. It is common case that, subject to the more specific test to be applied when it is sought to stay a criminal prosecution specifically, (as to which see paragraph 57 below), these principles are engaged.

53. The test for interlocutory injunctive relief in a public law challenge to domestic legislation on the basis of claimed incompatibility with European law was considered in detail in cases such as *Dowling v. Minister for Finance* [2013] 4 IR 576 and *Friends of the Irish Environment v. Minister for Communication & Ors* [2019] IEHC 555. Interlocutory relief must at the very least be available under conditions similar to those governing proceedings where it is alleged that the measure in question is incompatible with the provisions of domestic law. In addition, in *Dowling* Clarke J. stated as follows:

*"In those circumstances, it seems to the court that, in considering whether, at an interim or interlocutory stage, to restrain action said to be justified by a national measure whose validity is challenged on the basis of European Union law, this court should apply the test in **Okunade v Minister for Justice** [2012] IESC 49, [2012] 3 IR 152 but should also have regard to the question of an effective remedy by the court's decision. In assessing the later question, the court should have regard to **Zuckerfabrik Suderdithmarschen AG v Hauptzollamt Itzehoe** and **Zuckerfabrik Soest GmbH v Hauptzollamt Paderbom** (Joined Cases C-143/88 & C-92/89) [1991] ECR I-415 and allied case law."*

54. Both *Okunade* and *Dowling* were considered by Simons J. in *Friends of the Irish Environment Ltd v Minister for Communications & Others* [2019] IEHC 555. Simons J. stated:

*"The Supreme Court in **Dowling** had to consider whether the principles in **Okunade** represented the appropriate test by reference to which an interlocutory injunction application should be determined in circumstances where the proceedings allege a breach of EU law. The Supreme Court, per Clarke J. (as he then was), conducted a careful review of the case law of the CJEU in respect of the legal test governing applications for interim measures. The Supreme Court emphasised the distinction drawn by the CJEU between cases where there is a challenge to the validity of domestic legislation, and those where there is a challenge to the validity of the underlying EU legislation. The procedural rules governing cases in the former category are a matter within the procedural autonomy of the Member State, subject always to the principles of equivalence and effectiveness. Clarke J. suggested that the judgments in respect of the latter category of cases were nevertheless of some relevance to a challenge to domestic legislation, in that the legal test in those cases must be taken to amount to the provision of an effective remedy."*

55. Simons J. also noted that Clarke J. had compared the *Okunade* principles with the legal test applicable to a challenge to the validity of EU legislation and had observed that:

"...Irish national rules may afford greater protection by requiring a person to establish a breach of their European Union rights to a lower standard ("arguable case") than that required in a challenge to EU legislation (the court must "entertain serious doubts" about the validity of the measure)."

56. Simons J. then concludes his consideration of the position by stating:

*"The judgment in **Dowling** thus appears to introduce a gloss to the **Okunade** principles insofar as it indicates that some limited assessment should be made of the strength of the defence to the proceedings, i. e. the court must be satisfied that there is an arguable defence. This gloss is consistent with the statement of principle at ...(d) of **Okunade**. This statement indicates that the court can place 'all due weight' on the strength or weakness of the applicant's case in judicial review proceedings which do not involve detailed investigation of fact or complex questions of law. Both statements of principle indicate that it will be legitimate in some cases to engage with the merits of the proceedings beyond simply confirming that an applicant has established an arguable case."*

57. The domestic legal principles arising on an application to stay criminal proceedings pending a (domestic) constitutional challenge were set out by Clarke J. in *MD v Ireland* [2009] 3 I.R. 690. There, the applicant was a minor who challenged certain provisions of the Criminal Law (Sexual Offences) Act 2006. He sought an injunction against the prosecution of his trial

pending his challenge being determined. Clarke J. considered that the nature of such an injunction was such that it was a jurisdiction to be exercised sparingly:

“... the relevant jurisdiction is one which must be most sparingly exercised. The reasons for this are obvious. Legislation which has been passed into law by the Oireachtas enjoys a presumption of constitutionality. If it were to be the case that persons who were able to establish a fair case to be tried concerning the validity of the relevant legislation having regard to the provisions of the Constitution (which is not a particularly high threshold) were able to obtain an injunction preventing, in practice, the application of the legislation to them until the proceedings had been determined, then it would follow that legislation could, in practice, be sterilised pending a final determination of the constitutional issues raised. Those considerations apply with equal force where the statute concerned is one which creates a criminal offence.”

58. Later in the judgment, Clarke J. also stated as follows:

“... it has to be emphasised that a very significant weight indeed needs to be attached, in considering the balance of convenience, to the desirability that legislation once coming into force should be applied unless and until such legislation is found to be invalid having regard to the Constitution. It should only be where significant countervailing factors can be identified or where it is possible to put in place measures which would minimise the extent to which there would be any interference with the proper and orderly implementation of the legislation concerned, that a court should be prepared to grant an injunction which would have the effect of preventing legislation which is prima facie valid from being enforced in the ordinary way.”

59. Turning then to the principles to be applied, Clarke J. stated as follows:

“In summary, I am satisfied that a court, asked to stay criminal proceedings in a constitutional challenge, must consider the following matters:-

- (a) Whether a fair case to be tried has been made out as to the validity of the statute concerned including a consideration of -whether any successful challenge would materially affect the pending criminal proceedings;*
- (b) If so (given that it is difficult to see that damages could be an adequate remedy) where the balance of convenience lies affording a very significant weight indeed to the need to ensure that laws enjoying the presumption of constitutionality are enforced; but*
- (c) Also considering any special or unusual countervailing factors which might render it disproportionate to require the criminal trial concerned to go ahead immediately, including having due regard to the possibility of minimising any effect on the proper progress of criminal litigation.”*

60. Taking the above authorities together, the principles governing the grant or refusal of a stay on criminal proceedings on the basis of a claimed incompatibility between the relevant provision of domestic law and European law can therefore be summarised as follows:

61. First the court should determine whether the applicant has established a fair issue to be tried as to the incompatibility of the provision concerned with European law. If not, the application must be refused. Second, if a fair issue to be tried has been made out, the court should consider whether any successful challenge would materially affect the pending criminal proceedings. Third, if so, it is difficult to see that damages could be an adequate remedy and the court should determine where the balance of convenience or the balance of justice lies, affording a very significant weight to the need to ensure that laws enjoying the presumption of constitutionality are enforced. Fourth, the court should also consider any special or unusual countervailing factors which might render it disproportionate to require the criminal trial concerned to proceed immediately, including having due regard to the possibility of minimising any effect on the proper progress of criminal litigation. Fifth, and subject to the issues arising not involving detailed investigation of fact or complex questions of law the court can place all due weight on the strength or weakness of the applicant's case and may also carry out some assessment of whether there is an arguable defence. Sixth, particularly if the court has serious doubts as to the compatibility with European law of the measure under challenge, it must ensure that the legal test is applied in a manner which provides the affected party with an effective remedy.

Analysis of whether the plaintiff has established an arguable case

The Plaintiff's case

62. The plaintiff's core complaint is that hemp, CBD and CBD derivative products lawfully produced in other EU member states or in free circulation within the EU, with an THC content below 0.2% should not be treated as controlled drugs by Irish law, despite not being psychoactive or harmful.

63. The plaintiff submits that hemp, CBD and CBD derivative products with THC content below 0.2% fall within the scope of Regulation 1308/2013. In the alternative, the plaintiff submits that, even if such products do not fall within the scope of Regulation 1308/2013, they are not “drugs” but are rather “goods” which benefit from the free movement of goods provisions of the Treaty.

64. The plaintiff therefore contends that the onus falls upon Ireland to justify the imposition of restrictions on the marketing of such goods in accordance with Article 36 of the Treaty by reference to scientific data demonstrating that the products pose a real risk to human health. The plaintiff contends that no such justification has been, or could be, advanced given the absence of harmful effects in respect of the products concerned.

65. The plaintiff argues that all of the above applies to the materials seized from him on the three occasions in 2020. However, the test results of the THC content are only before the court in relation to the first seizure on 11th February, 2020 (which forms the basis of the first prosecution). Therefore, although the plaintiff’s arguments went considerably further, this judgment will deal only with the material seized on 11th February, 2020 and the specific prosecution on foot thereof.

66. This particular material has been described as green plant material. It is hemp/cannabis, rather than CBD or a CBD derivative.

Distinction between this case and Kanavape

67. There is an important distinction between the current proceedings and the *Kanavape* case. The CBD in issue in *Kanavape*, originated from within the EU (the Czech Republic) whereas the material seized from the plaintiff in this case did not originate in an EU member state but in a third country, namely Switzerland.

68. In *Kanavape*, the European Court found that the CBD was not raw hemp since it was not as harvested but had been produced by means of an extraction process. As a result, the CBD was not included on the list of agricultural products at Annex I of the Treaty and was therefore not a product covered by Regulations 1307/2013 or 1308/2013. In *Kanavape* this was not fatal to the applicant's case, because, irrespective of whether or not the CBD was an agricultural product covered by these Regulations, the product attracted the free movement provisions at Article 34 and 36 of the Treaty.

69. The principle of free movement applies to products originating in member states and to products originating in third countries in free circulation in the EU. Pursuant to Article 29 of the Treaty, products coming from third countries are considered to freely circulate in a member state provided the import formalities have been complied with and the relevant customs duties levied. Article 189 of Regulation 1308/2013 governs the importation into the EU of hemp from a third country. Article 189 does not apply to the importation of hemp from another member state and therefore did not govern the importation of the CBD in *Kanavape*. Article 189 does however govern the importation of the material seized from the plaintiff.

70. In short, whilst in *Kanavape* the European Court was in a position to apply the free movement provisions of the Treaty to the CBD in issue even though same was not included on the list of agricultural products at Annex I of the Treaty, this is not the position in these proceedings because the free movement provisions will only apply to the material seized from the plaintiff if it was lawfully imported into the EU pursuant to Article 189 of Regulation 1308/2013 in the first place.

Raw True Hemp?

71. The DPP submits that the plaintiff has not provided evidence that the material seized is included on the list of agricultural products at Annex I. The DPP submits that there is insufficient evidence that the product seized is “*True hemp (Cannabis sativa L.), raw or processed...*” within the meaning of Annex I or “*raw true hemp falling within CN code 5302 10 00 meeting the*

conditions laid down in Article 32(6) and in Article 35(3) of Regulation (EU) No 1307/2013; ...”. Without such evidence, the plaintiff cannot demonstrate that the material seized was validly imported into the EU pursuant to Article 189 Regulation 1308/2013.

72. I accept that the plaintiff’s grounding affidavit and legal submissions are somewhat vague as to the precise nature of the material seized. Thus, paragraph 26 of the plaintiff’s grounding affidavit states that the green plant material seized by the Gardaí is a strain of “*hemp flowers*” which is sold under the name “*Harley Quinn*”. At paras. 29, 30, 31 and 32 of the affidavit, the material in question is variously referred to as “*industrial hemp flower*” and “*industrial hemp*”. However, paras. 36 and 37 of the plaintiff’s grounding affidavit state:

“Based on the above referenced analysis I say believe am so advised that the material seized by An Garda Síochána the subject matter of the summary prosecution is Industrial Hemp and therefore falls within Council Regulations (EC) No 1782/2003 & EU Regulation 1307/2013. I am contending that the material seized is “True Hemp” or “Industrial Hemp” and more particularly an agricultural/food product legitimately imported into Ireland from another Member State.

I am satisfied that the green plant material is an agricultural/food product within the meaning of Articles 38, 34 and 36 of the Treaty on Functioning of the European Union and the HS Convention (The international Convention on the Harmonised Commodity Description and Coding System).”

73. A replying affidavit was sworn on behalf of the DPP by Sergeant Graham Deegan, a member of An Garda Síochána. This affidavit is quite detailed on both issues of fact and law. It does not dispute the plaintiff’s averments that the material seized is true hemp (within the meaning of Regulation 1308/2013 and in particular Article 189 thereof).

74. In my view, the plaintiff has provided sufficient uncontested evidence that the green plant material seized on 11th February 2020 is raw true hemp as harvested and is an agricultural product within Annex I.

Article 189

75. Article 189 of Regulation 1308/2013 permits the importation into the EU of raw true hemp material provided the conditions laid down in Article 32 (6) and 35 (3) of Regulation

1307/2013 are complied with. Article 32 (6), it will be recalled, relates to hemp having a THC content not exceeding 0.2%. In light of the results of the analysis of THC content in the material, there is sufficient evidence that this condition is satisfied. Article 35 (3) authorises the Commission to adopt delegated acts specifying, *inter alia*, certified seeds and certain hemp varieties which will benefit from the Payment Scheme in Regulation 1307/2013 and governing the procedure for the verification of THC content. The DPP made no submission that the Commission had adopted such delegated acts and none were opened before me. Nor was any submission made that the hemp imported by the plaintiff did not comply with any such specifications as may have been adopted.

76. In such circumstances, the plaintiff has made out an arguable case of compliance with Article 189 of Regulation 1308/2013 in respect of the material seized on 11th February, 2020. I do not presently have sufficient information to draw a similar conclusion in relation to at least some of the material seized on 2nd May and 4th July, 2020. This appears to include not only green plant material but also CBD, CBD derivatives, and cannabis oil. Further, no evidence in relation to the THC content of this material has been put before the court.

“Goods” not “Drugs”

77. The plaintiff contends that, as the hemp was lawfully imported into the EU, in accordance with *Kanavape*, Articles 34 and 36 of the Treaty apply to these “goods”. However, these free movement provisions do not apply to narcotic drugs and the DPP submits that the plaintiff has offered insufficient that the material seized is not a “drug”. The plaintiff, it is said has provided insufficient evidence that the material seized does not have any recognised psychoactive effect or could not otherwise be classified as harmful. Evidence merely that the THC content did not exceed 0.2% is insufficient in this regard.

78. At present, the plaintiff's case is based solely upon the THC content of the material seized and no doubt it will be necessary at the full trial of the action for evidence to be led in relation to the absence of psychotropic or other harmful effects on human health notwithstanding the low THC content.

79. However, for the purposes of determining the interlocutory application, I think that there is sufficient evidence to this effect. 0.2% THC content has been designated by various instruments of the EU as defining a product which may lawfully be imported into the EU. In such circumstances, I think it is reasonable to infer, at least for the purposes of the interlocutory application, that hemp with a THC content of 0.2% has an absence of psychotropic or other harmful effect.

Application of Articles 34 and 36

80. Therefore, Articles 34 and 36 apply to the material seized and, in accordance with the *Kanavape* judgment, the onus is placed upon the State to demonstrate that the various prohibitions on *inter alia* the possession and supply of the product in question are appropriate for securing the attainment of the objective of protecting human health and does not go beyond what is necessary for that purpose.

81. As observed above, the relevant Irish statutory regime as established by the 1977 Act and the Regulations and Orders made thereunder prohibits the manufacture, production, preparation, sale, supply, distribution and possession of cannabis, including raw true hemp with a THC content below 0.2%, save for specified purposes which themselves are subject to licence. Persons in the position of the plaintiff may not benefit from these potential exemptions as they do not possess or supply the hemp for research purposes and furthermore do not possess or supply the hemp for the purposes of growing it. Likewise, the other potential exemptions and licences available (essentially linked to medicinal and professional uses) do not avail

persons in the position of the plaintiff who simply intend to market raw true hemp with THC content below 0.2%.

82. The DPP tentatively argues that the plaintiff could have applied directly to the Minister for a licence pursuant to s. 14 of the 1977 Act. It will be recalled that s. 14 of the Act provides that the Minister may, for any of the purposes of the Act, grant licences, attach conditions, vary such conditions and revoke such licences. However, the DPP did not submit that the marketing of hemp with a THC content below 0.2% would be in accordance with any of the purposes of the 1977 Act such as to suggest that a licence might be available for such activity. Without more, I cannot see that s. 14 provides a coherent framework pursuant to which to obtain a licence for the marketing of raw true hemp with a THC content below 0.2%. I have been referred to no published criteria or procedures governing a licence application to the Minister under s. 14. There is no evidence that such a licence has ever been granted in respect of any person in the position of the plaintiff. In short, there is a complete lack of legal certainty in relation to a potential licence application pursuant to s. 14 and it cannot in my view be an answer to the State's obligations in relation to the free movement of such products.

83. In light of the above, I reject the DPP's contention that "*the specific provisions in the domestic legislative framework fully incorporate European law in this area*". Whilst it is true to say that the 2017 Order refers to Regulation 1307/2013, its scope is restricted by the linkage to the two particular purposes therein set out (research/industrial manufacture or the growing of certain hemp).

84. Overall, the domestic legislative framework prohibits the possession, production, supply or importation of raw true hemp lawfully imported into and in free circulation within the EU, save for the purposes specified, and such prohibition applies irrespective of the THC content in the product. In my view, such a prohibition is capable of hindering, directly or indirectly, actually or potentially, intra union trade in raw true hemp and can only be justified

on one of the grounds of public interest laid down in Article 36 of the Treaty or by imperative requirements. It is for the State therefore to demonstrate, taking account of the results of international scientific research, that the legislation is necessary in order effectively to protect the interests referred to.

85. No evidence or argument whatsoever was tendered to the court by the DPP on this issue and the State defendants, Ireland and the Attorney General, did not participate in the interlocutory application. In the absence of any such submissions, argument or evidence, there no basis upon which the court could conclude, even for the purposes of the interlocutory application, that the relevant Irish legislation, insofar as it applies to this product in particular, i.e. raw true hemp with THC content below 0.2%, is appropriate for securing the objective of protecting public health and does not go beyond what is necessary for that purpose.

86. In short, the plaintiff has placed before me sufficient evidence to demonstrate an arguable case insofar as concerns the first prosecution which it is sought to stay. On the present state of the evidence, I can presently make no such finding in respect of the material seized in the second and third prosecutions. Certain of this material may not fall within Article 189 and to date no evidence of THC content is before the court.

Balance of justice

87. The plaintiff has made out a fair issue to be tried in so far as concerns the first prosecution. Clearly, a successful challenge in this case would materially affect the pending prosecution.

88. It is difficult to carry out any assessment of whether there is an arguable defence in the absence of participation by the State defendants. I have heard no evidence or argument that the prohibition of the marketing of raw true hemp with a THC content below 0.2% is not capable of hindering intra union trade in raw true hemp or that same can be justified on one of the

grounds of public interest laid down in Article 36 of the Treaty, or by imperative requirements. No scientific research has been tendered to demonstrate that the marketing of the products in question poses a genuine threat to public health. In these circumstances, I cannot but entertain serious doubts as to the compatibility of the said prohibition with EU law. I must therefore ensure that I apply the legal test for a stay in a manner which provides the plaintiff an effective remedy, should he succeed in his action.

89. If this court does not restrain the prosecution pending the outcome of these proceedings, damages could not be an adequate remedy for the plaintiff. The plaintiff would be obliged to stand trial and would face the possibility of conviction, potential fines and/or a custodial sentence. A criminal trial, together with all attendant media coverage, would cause the plaintiff substantial harm to his business, reputation and private life. There is clearly a threat of serious and irreparable damage to the plaintiff if the stay sought is not granted.

90. On the other hand, the jurisdiction to grant a stay of criminal proceedings may only be exercised in exceptional and rare circumstances. I am conscious of the undesirability of any order of the court sterilising the underlying legislation pending final determination of the EU law or constitutional issues raised. The DPP argues that the practical impact of a stay would be the suspension of the operation of the domestic misuse of drugs framework which should only be permitted in exceptional circumstances. However, staying the present prosecutions does not suspend the operation of the entire misuse of drugs legislative framework although the stay is likely to impact upon other prosecutions relating to cannabis products falling within the scope of the relevant Treaty provisions and EU Regulations, (provided the accused can provide coherent evidence that the THC content is below 0.2%). In any event, staying the present prosecution will sterilise the relevant legislation. Any limited suspension in the application of the legislation is the consequence of all four High Court proceedings in tandem.

91. The DPP argues that the plaintiff is free to advance his EU law arguments before the District Court, which like any other court is obliged to apply the doctrine of supremacy. Given that the same EU law issues are now raised in three other sets of High Court proceedings, it seems to me that the High Court is the most appropriate and efficient forum in which to resolve these issues. Such other High Court proceedings are at an advanced stage and one is listed for hearing in just two months time. The criminal prosecutions underlying these other proceedings have been stayed by the High Court pending their determination. I have been informed of no good reason for treating this plaintiff differently from the other applicants concerned. Overall, I am satisfied that there are special and unusual countervailing factors which render it disproportionate to require this criminal trial to proceed immediately.

92. If the present proceedings can be brought to trial without undue delay (and I think that they can) this will minimise any effect on the proper progress of the criminal litigation. The plaintiff delivered a statement of claim in January of 2022 and defences are awaited from both the DPP and the State defendants. I will hear all of the parties (including the State defendants) in relation to how this matter may be brought to trial as expeditiously as possible. It may be possible by case management to arrange for these proceedings to be heard in concert with one or more of the other High Court proceedings.

93. In the circumstances, I am prepared to grant the plaintiff a stay in respect of the criminal prosecution on foot of the seizure on 11th February, 2020. For the reasons explained above, the necessary evidence has not been placed before the court in respect of the second and third prosecutions. However, as it would clearly be undesirable for the three prosecutions to become severed, one from the other, and as it would also be undesirable for the second and third prosecutions to proceed in respect of some (but not all) of the material seized, it may be that the DPP will adopt a pragmatic view in relation thereto.

The plaintiff's constitutional law case

94. It is fair to say that the plaintiff's constitutional law case was advanced very much by way of a make weight and was scarcely argued. The plaintiff opened no authorities in support of the constitutional law case. In so far as I understand it, the plaintiff relies on his rights to private property under Articles 40.3.1, Article 40.3.2 and Article 43 of the Constitution; his right to earn a livelihood under Article 40.3.1 of the Constitution; his right to respect for his good name under Article 40.3.1 and Article 40.3.2 of the Constitution and his right to privacy under Article 40.3.1 of the Constitution.

95. The plaintiff's written submissions assert that, insofar as Ireland criminalises the possession and sale or supply of hemp, CBD and CBD derivative products, despite such products not possessing psychotropic effects, this interferes with the foregoing rights. Whilst he accepts that the State can lawfully regulate the use of products for health and safety purposes, any such limitations must be proportionate to the actual dangers posed to public health or safety.

96. In his written submissions the plaintiff maintains that the Irish legislative regime and the arrests on foot thereof constitute an unjust attack and/or disproportionate interference with his rights. He contends that the lack of clarity surrounding the criminalisation of hemp, CBD and CBD derivatives, the inconsistency of such criminalisation with directly effective provisions of EU law and the absence of any coherent regime whereby a person in his position can apply for a permit or authorisation, infringes his constitutional rights.

97. In the absence of any substantive submissions from either party on the constitutional law case, and in light of my finding that an arguable case has been made out on EU law grounds sufficient to entitle the plaintiff to the reliefs which he seeks in respect of the first prosecution, it is not necessary to comment further on the constitutional law case.