(4)

SUPREME COURT

Record No.00031/2015

Court of Appeal Record No.2014/1409

BETWEEN:

STANISLAV BEDEREV

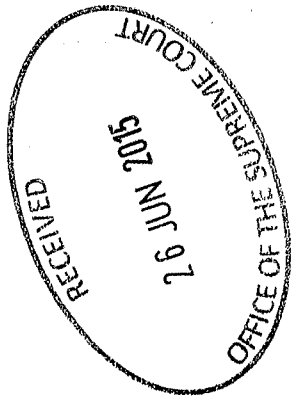
RESPONDENT

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANTS

Filed this 26th day of June, 2015 by Lauren Martin, Solicitor for Mr. Stanislav Bederev, Respondent, of Martin & Gately Solicitors, 36 Charles Street West, Dublin 7.



To: The Chief State Solicitor's Office,
Osmond House,
Little Ship Street,
Dublin 8.

And To: The Office of the Registrar to the Supreme Court,
The Four Courts,
Inns Quay,
Dublin.

1. Respondent Details

The respondent was served with the application for leave to appeal and notice of appeal on the 22nd day of June, 2015.

The Respondent intends:

1. Not to oppose the application for an extension of time to apply for leave to appeal;

2. To oppose the application for leave to appeal;
3. In the event that leave to appeal is granted, the Respondent will seek that the costs of resisting the leave application be reserved;
4. In the event that leave to appeal is not granted, the Respondent seeks that his costs of resisting this application be awarded against the Applicants, to be taxed in default of agreement.

The Respondent's solicitor's email address is lauren@martingately.ie. The Respondent's solicitor respectfully requests notification by email. The Respondent's representation details are otherwise as set out in the Applicants' application.

2. Respondent's reasons for opposing extension of time

The Respondent does not object to an extension of time but notes that 3 months have passed since the Judgment of the Court of Appeal and, as there is no longer any prosecution pending against him, is anxious to have this matter resolved.

3. Information about the decision that it is sought to appeal

The Court of Appeal delivered a unanimous decision in this case and on foot of same the charges against the Respondent were struck out.

Specifically, the reasoning of the Court of Appeal at paragraphs 63-64 sets out the correct test and exactly how the Misuse of Drugs Act, 1977 should properly be construed:

> *63. Applying that test, therefore, by what standards, for example, could a court, faced with a challenge to the vires of any order made by the Government under s. 2(2), measure undefined and somewhat abstract concepts referred to in the long title such as "misuse", "harmful" and "dangerous" in the absence of any further guidance by way of principles and policies contained in the operative part of the 1977 Act itself? All of this, perhaps, is to say that it is rather asking too much of a long title to contain the guidance needed to meet the test set out by Murphy J. in* O'Neill, *since, to recall again the words of Murray C.J. in* BUPA Ireland, *one cannot realistically expect that the long title will contain the type of specific detail which is invariably only to be found in the substantive provisions of an Act itself.*

64. One might also ask whether it would be open to the Government to employ s. 2(2) of the 1977 Act to ban other types of drugs which are in everyday use and which are potentially both harmful and liable to be misused? Alcohol and tobacco are the most common cases in point. Alcohol is a major factor in range of serious anti-social activities, including road traffic fatalities and accidents, domestic violence and other serious crimes such as assault and public order offences. Alcohol is addictive and the abuse of alcohol in Irish society is regrettably so prevalent that it presents major public health challenges, of which alcoholism and cirrhosis of the liver are among only the most prominent. Tobacco consumption is highly addictive and greatly increases the risk of lung cancer, heart disease and a range of other serious illnesses. On any view, both drugs are harmful and are liable to be misused.

The Court then recited Ms. Kinsella's evidence, and there is no dispute but that she set out worthy goals or aspirations on behalf of her department to analyse emerging trends in respect of substances which are likely to be universally harmful. However, the Court held:

66. I would observe, however, that there is nothing as such in either the long title or the 1977 Act which states that only substances "which are likely to be universally harmful to those who misuse them" can, as such, be the subject of an order under s. 2(2) of the 1977 Act. Judged by the long title, it is simply sufficient that the substance is harmful (or, for that matter, dangerous) and is liable to misused. In any event, there can be little doubt but that both alcohol and tobacco are likely to be universally harmful to those who misuse them.

The Applicants expressly asserted that alcohol and tobacco would not be capable of being prohibited under section 2(2) in both the High Court and the Court of Appeal, and they do not appear to be demurring from that position in the herein application. The Court of Appeal concluded:

67. If, therefore, tobacco and alcohol are potentially outside the scope of s. 2(2) and the 1977 Act more generally, this can only be because of some external source – such as, as Gilligan J. remarked, a corpus of other legislation dealing with the sale, distribution and consumption of tobacco and alcohol – which would preclude such a course of

action. The fact, however, that there would appear to be nothing within the parameters of the 1977 Act which would prevent the Government making an order under s. 2(2) in respect of either tobacco or alcohol may be taken as indicative in its own way of the scope of the sub-section and the extent of the policy choices which the Government are thereby empowered to make.

68. The special cases of tobacco and alcohol apart, it is nevertheless clear that, given the breadth of s. 2(2) of the 1977 Act, the Government is more or less at large in determining which substances or products should be declared to be controlled drugs. In the present case, the fundamental choice which remains with the Government for the purposes of s. 2(2) is which dangerous or harmful drugs are liable to misuse such that they should be declared to be controlled drugs. But there is almost no guidance given on this topic by the substantive provisions of the 1977 Act itself and the key words of the long title ("misuse", "certain", "harmful", "dangerous") are in themselves too general to be sufficient for this purpose. Adopting the words of Blayney J. in McDaid, *this is "far from a case of the Government filling in only the details" insofar as the making of a controlled drugs order under s. 2(2) of the 1977 Act is concerned. Nor can the present case be compared with cases such* Pigs Marketing Board *or* City View Press *where prices or fees were set by reference to fixed objectives and standards contained in the parent legislation.*

The Court of Appeal then relied upon the decision of this Honourable Court in the *McGowan* case to point out that, while the objectives of legislation were laudable and desirable they did not "constitute a sufficient restriction on an otherwise unlimited power of regulation to bring the power conferred by s.27 within the constitutional limits". The Court of Appeal found that this is applicable by analogy to the Misuse of Drugs Act because the words "misuse", "dangerous" and "harmful" did not constitute a sufficient restriction on the Government's powers.

Finally, in terms of the provision that the regulations be laid before the Oireachtas, following the *City View Press* test, this "cannot in itself save a statutory provision which – as in the present case – otherwise clearly offends Article 15.2.1".

4. Respondent's reasons for opposing leave to appeal

This is understood to be only the second application made to this Honourable Court to appeal against a decision of the Court of Appeal. In *DPP v. Reddington* [2015] IESCDET 14 this Honourable Court declined to allow leave to appeal against a decision of the Court of Appeal to reverse its decision on a section 4E application. It was argued by the Respondent in that case that it was a matter of well settled law and so was not an issue of general public importance. This Honourable Court determined that it was not a suitable matter for a further appeal as the ground advanced had not been sufficiently argued before the Court of Appeal.

In the *Gamma case* (IESCDET 7) this Honourable Court noted that the new constitutional regime presumes that the Court of Appeal meets the ordinary requirement of giving a right of appeal. The Respondent lodged his appeal in this Honourable Court and it was transferred to the Court of Appeal pursuant to Article 64. The Applicants were entitled to apply under Article 64 to have the matter heard by this Honourable Court but did not seek such a declaration.

The Respondent will contend that, while it is accepted that the decision of the Court of Appeal was a decision of public importance (as indeed would all constitutional cases or cases concerning a criminal trial or extradition/immigration matter), the real question is whether allowing an appeal from that decision involves a matter of general public importance. If the decision of the Court of Appeal constitutes an application of the well established and generally accepted principles of law, then there is no matter of general public importance. Equally, unless they can establish that there is a clear mistake of law or that the decision is "plainly wrong" as per the decision of the Honourable Mr. Justice O'Donnell in *D.P.P. v. J.C.* [2015] I.E.S.C. 31, then there can be no necessity in the interests of justice that a further appeal will lie. It is submitted that this is true even if the decision which is sought to be impugned has had significant impact on a wide number of cases, as the present case clearly has. The underlying constitutional test is not the importance of the matter before the Court of Appeal, but the importance of the matter that this Honourable Court will hear, should this Honourable Court grant leave to the Applicants.

The Respondent will also contend that there have been two types of application for leave before this Honourable Court (in addition to applications to cancel the Article 64 direction) - applications to appeal directly from the High Court to this Honourable Court and bypass the Court of Appeal and appeals from the Court of Appeal. It is respectfully submitted that the

latter type of appeal would require more anxious scrutiny of the merits of the case in circumstances where in the former case there has only been a first instance determination and in the latter case there has been a first instance determination and also a full appeal. It is submitted that the additional factor to be considered in the latter type of appeal is the question as to whether there is a clear error of law on the part of the Court of Appeal. Absent any suggestion of a clear error by the Court of Appeal in applying the established principles of this Honourable Court, there can be no point of general public importance, nor can there be any matter which it is necessary in the interests of justice to bring an appeal to this Honourable Court.

It is respectfully submitted that in passing the 33rd Amendment of Bunreacht na hÉireann, the people intended that this Honourable Court only deal with cases where there are genuine controversies that require this Honourable Court's determination. Article 34.4.2° expressly provides that the Court of Appeal has appellate jurisdiction in respect of the validity of Constitutional provisions so it cannot be a correct interpretation of Article 34 that this appeal would be allowed solely because the decision of the Court of Appeal resulted in a declaration of invalidity of section 2 of the Misuse of Drugs Act, 1977. Nor could it be said that the significant impact that this decision has had on other cases would justify of itself an appeal to this Honourable Court. This Honourable Court is concerned with cases where there is genuine uncertainty in the law, which need to be resolved, and it is respectfully submitted that it is not the function of this Honourable Court to entertain appeals from unanimous decisions of the Court of Appeal on the sole basis of the subject matter before the Court of Appeal.

Thus, it is respectfully submitted that, although the decision of the Court of Appeal could be said to be of some importance, that does not mean that there is a matter of general public importance in this Honourable Court permitting an appeal against that decision. Furthermore, there is no necessity in the interests of justice that an Appeal be brought as the Applicants has not identified any clear error in the established principles in this area. At most, the Applicants simply disagrees with the application of those principles to the legislation in question.

More specifically, the Respondent will rely on the following points in supporting the decision of the Court of Appeal:

a. it was a unanimous decision of the Court of Appeal;

b. the respondents would have to show that it is clearly wrong or a miscarriage of justice which they have not done;

c. the respondents are not entitled to urge a different view of the facts or ask this Honourable Court to form a different view as to the facts;

d. it is now moot as a new Act has been put in place;

e. the only benefit for the Applicants is in relation to the *Cityview Press* test, but that test is well settled and clear and no reasons for departing from same have been advanced;

f. the test adopted by the Court of Appeal is correct and well established - it does not conflict with any other established authorities;

g. the case has already had a first instance determination and an appeal. A further appeal is a rare concession and should only be given where the Applicants can clearly show that the decision is wrong or that this Honourable Court might come to a different view. Simply asserting that the Court of Appeal could have come to a different view is not sufficient to meet the test.

In relation to the four reasons given by the Applicants in their Application for Leave, the Respondent seeks to make the following points:

1. It is accepted that these proceedings raise a constitutional issue. It is accepted that Drugs legislation generally is of considerable importance. However, the consequences of this particular case are not far reaching. Primary legislation to prohibit the substances in question has been brought in by the Misuse of Drugs Act, 2015. A number of ongoing criminal cases were affected by the case but they have been resolved (although the Applicants suggests in their Notice of Application that there are a number of pending cases, it is the Respondent's legal advisers understanding that these cases have been finalised, in many instances by the DPP entering a *nolle prosequi* or a strike out in the District Court, and if this Honourable Court requires evidence of same the Respondents will endeavour to provide same). In effect, the law as regards the Misuse of Drugs Acts has moved on since this case was decided in March, and there are no significant outstanding issues of controversy. In such circumstances, this is not a matter of general public importance such that this Honourable Court should entertain an appeal.

2. It is likewise accepted that the principles and policies test is of considerable importance. The constitutional principles have been established as far back as the *Pigs Marketing Board v. Donnelly* [1939] I.R.413 case. The importance of setting out principles and policies for delegated legislation is almost as long established as Bunreacht na hÉireann itself. The test has been considered in multiple cases such as *City View Press* [1980] I.R. 381 and more recently by this Honourable Court in *McGowan v. Labour Court* [2013] IESC 21 and by the Divisional High Court in *Collins v. Minister for Finance* [2013] IEHC 530. There was no significant dispute between the parties as regards the correct test – indeed, both parties relied on the same cases in many respects. This is not a case where there are two conflicting views of the correct law (see, for example, *D.P.P. v. J.C.* [2015] I.E.S.C. 31, where this Honourable Court resolved the conflict between the decisions in *A.G. v. O'Brien* and *D.P.P. v. Kenny*). The law is well settled on this issue and this case did not change or advance this jurisprudence in any way. As such, there is nothing of general importance in this point – this Honourable Court would simply be affirming that which has already been decided by it on a number of occasions, and which has never been demurred from.

3. As regards the suggestion that clear guidance is required on the standards applicable, the Court of Appeal made it clear that the vague references to "harmful", "misuse" etc were not sufficient to delimit what is or is not acceptable in terms of the exercise of delegated legislation. A key issue in the case was whether substances such as tobacco and alcohol could be prohibited under s. 2 as they could be harmful or subjected to misuse. Although the Applicants were at pains to point out that those substances would not be the subject of delegated legislation under the section, they could not point to anything in the Act which prevented the government from so doing. Thus, the Applicants' perception of the limitations in the Act were not actually contained in the Act itself, hence the section could not be otherwise than unconstitutional. It is clear from the Judgment that factors or criterion to determine which types of substance can be controlled by government Order must be set out in the primary legislation if they are to delegate the power to set legislative policy. What precise factors or criteria are used to control the Government's power is a matter of legislative competence, provided it does not result in the Government usurping the Oireachtas' role as policy maker and primary legislative body. It is

respectfully submitted that the Court of Appeal could not have been any clearer on why the section fell foul of Article 15.

Moreover, it is clear from cases such as *C.C. v. Ireland* [2006] 4 I.R. 1 that it is not this Honourable Court's function to give guidance as to how the legislation should be phrased. The decision of the Court of Appeal was to strike down a section which violated Article 15 of Bunreacht na hÉireann. It is not the function of the Court of Appeal nor this Honourable Court to give guidance and, as the Honourable Mr. Justice Hardiman stated in *C.C.*, "there is, obviously, more than one form of statutory rape provision which would pass constitutional muster, and it does not appear to be appropriate for the court, as opposed to the legislature, to choose between them".

This point is also undermined by the fact that, in paragraph 6 subparagraph 1(4) of the Grounds of Appeal, it is contended by the Applicants that the Court of Appeal erred in law in finding that the section left important policy judgments to the Government. If that is the Applicants' position, they cannot also argue that the position of delegated legislation is unclear – delegated legislation cannot usurp the Oireachtas' role of setting policy in the area of Drugs Legislation. The Applicants' application is thus self-contradictory insofar as they cannot argue the two contradictory propositions that section 2 allowed the government to prohibit dangerous substances to meet a pressing social need and at the same time that they were not setting policy for government. It is respectfully submitted that if this Honourable Court grants leave to the Applicant, it should constrain the Applicant to arguing only one of these positions so that the Respondent does not have to meet a contradictory case.

4. In relation to the point concerning the power of annulment, it should be pointed out that the Applicants never pleaded that such a power could save an otherwise invalid section in their Defence in the High Court. Thus, they are seeking to rely on a ground of appeal not advanced in the pleadings. While the power of annulment was considered by both the High Court and the Court of Appeal, it is clear from paragraph 73 of the Court of Appeal's decision that "As *City View Press* makes clear, the fact that an order of this kind can subsequently be annulled by resolution

of either House cannot in itself save a statutory provision which – as in the present case – otherwise clearly offends Article 15.2.1." This point is well settled law and did not form a significant part of the hearing before the Court of Appeal.

The Applicants sets out in the second last page of their Notice of Application that they seek that this Honourable Court departs from its decisions in *Laurentiu v Minister for Justice* [1999] 4 I.R. 26, *McGowan v Labour Court* [2013] 2 I.L.R.M. 276 and *D.P.P. v. Quilligan (No.2)* [1986] I.R. 495. It is a matter of some considerable concern that at no stage during the trial before the High Court nor the appeal before the Court of Appeal did the Applicants suggest that those cases were incorrectly decided or, in the words of the Honourable Mr. Justice O'Donnell in *J.C.*, "plainly wrong". Crucially, they have not advanced reasons as to why the foregoing decisions are incorrect such that they amount to an exceptional circumstance whereby this Honourable Court can revisit its own decisions. As such, if this Honourable Court grants leave to the Applicant, it is respectfully submitted that they should be expressly precluded from advancing any argument to suggest that this Honourable Court should depart from those principles, at the very least they should not do so without first filing an amended Applicants' notice stating the reasons they believe such decisions are "plainly wrong".

It is respectfully submitted that seeking to overturn those decisions is at the core of the Applicants' application insofar as they seek to set aside the jurisprudence regarding the unconstitutionality of impermissible delegations of legislative authority which has been well established since the *Pigs Marketing Board* case. This was not argued in the Court of Appeal and the notice of appeal gives no reason as to why these well established principles should be departed from.

As such, while it is accepted that the Court of Appeal has dealt with an issue of public importance, it is respectfully submitted that nothing in the Applicants' Notice satisfies the Constitutional test as to there being general public importance in hearing this Appeal, nor is there anything to suggest that it would be necessary in the interests of justice to hear this appeal. It is respectfully submitted that the decision of the Court of Appeal is correct and leave to appeal should be refused.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

1. The Court of Appeal made no error in law in quashing the decision of the Learned Trial Judge and making an Order declaring that section 2 of the Misuse of Drugs Act, 1977 is unconstitutional. In answer to the grounds raised by the Applicants/Appellants in their Notice of Application, the Respondent will rely on the Judgment of the Court of Appeal and the reasons set out therein in full.

2. The Respondent will rely solely on the arguments advanced before the Court of Appeal as if set out herein and traversed *seriatim*, such grounds being substantially the same as the grounds advanced before the Learned Trial Judge in the High Court, and will only expand on those arguments:

    - If the submissions of the Applicants/Appellants vary from those made in the Court of Appeal, and in such a case only insofar as is necessary to meet such new issues;
    - If new developments in law arise between the drafting of the herein Respondent's Notice and the hearing of any such appeal;
    - As this Honourable Court directs.

6. Additional grounds on which decision should be affirmed

Insofar as the regulations passed pursuant to the invalid section (section 2 of the Misuse of Drugs Act, 1977) have been re-enacted by new legislation (the Misuse of Drugs Act, 2015), and by reason of the charges against the Respondent being dropped in the *interim*, the herein appeal is moot.

While this Honourable Court retains a discretion to hear a moot case where it is necessary to prevent a future wrong, such is unlikely to arise in this case. While this Honourable Court also retains a discretion to hear a moot case where it is in the public interest generally that the controversy be determined, this is not an exceptional case such that a moot case will be determined.

Are you asking the Supreme Court to:				
depart from (or distinguish) one of its own decisions?		Yes	X	No

If Yes, please give details below:				
make a reference to the Court of Justice of the European Union?		Yes	X	No
If Yes, please give details below:				

Will you request a priority hearing?	X	Yes		No
If Yes, please give reasons below:				
This case was instituted in 2012 and if successful the Respondent may be recharged with an offence dating back to then. The Respondent has prosecuted his case and appeal, and he is now entitled to finality.				

SUNNIVA McDONAGH S.C.

JOHN NOONAN B.L.

26th June, 2015