

APPROVED

[2024] IEHC 463



**THE HIGH COURT
JUDICIAL REVIEW**

2021 1092 JR

BETWEEN

DENISE LYNCH

APPLICANT

AND

**MINISTER FOR HEALTH
COMMISSIONER OF AN GARDA SÍOCHÁNA
GOVERNMENT OF IRELAND
ATTORNEY GENERAL
DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 July 2024

INTRODUCTION

1. This judgment addresses the question of whether the Irish State is entitled, as a matter of EU law, to prohibit the importation and sale of products which contain elements of the main psychoactive ingredient in cannabis. The essence of the Applicant’s case is that, provided that the quantity of this psychoactive ingredient present in the product falls below a certain threshold, the product does not constitute a “*drug*” or “*narcotic*” for the purpose of EU law. Rather, on the

NO REDACTION REQUIRED

Applicant's case, the product constitutes a conventional "good" subject to the principle of the free movement of goods under the Treaty on the Functioning of the European Union.

2. The Applicant's case is predicated, almost exclusively, on a tendentious interpretation of a decision of the European Court of Justice. An argument in almost identical terms to that now made by the Applicant has previously been rejected by the High Court in *Bogusas v. Minister for Health* [2022] IEHC 621.

CANNABIS, THC AND CBD

3. These proceedings are concerned with the regulation of two chemical compounds which may be extracted from a cannabis plant. The first chemical compound is delta-9-tetrahydrocannabinol ("*THC*"). THC is the principal psychoactive ingredient in cannabis. The second chemical compound is cannabidiol ("*CBD*").
4. Under national law, THC is a controlled drug for the purpose of the Misuse of Drugs Act 1977 and the implementing regulations made under the Act. This is because it comes within the definition of "*cannabinol derivative*". Any substance or preparation which contains THC is a controlled drug, irrespective of the proportion of THC present.
5. There are exceptions for delta-9-tetrahydrocannabinol contaminant in foodstuffs below certain prescribed levels, and for medicinal cannabis products, but these exceptions are not relevant to the present proceedings. The principal exceptions for foodstuffs came into effect on a date *subsequent* to the date upon which the events, the subject-matter of these proceedings, occurred: see the Misuse of Drugs (Amendment) Regulations 2023 (S.I. No. 150 of 2023).

6. The gravamen of the Applicant's case is that a CBD based product—such, as for example, hemp oil—which contains elements of THC should not be regarded as a controlled drug provided that the proportion of THC is below a certain threshold, namely 0.2 per cent.

PROCEDURAL HISTORY

7. The Applicant is the owner of a shop known as “*D. Hemp Shop*” located at 17 Market Street, Cootehill, County Cavan (“*the business*”). The business also has an online presence. The business has been trading since April or May 2021.
8. These proceedings have their genesis in events on 24 September 2021. On that date, members of An Garda Síochána executed search warrants against the business premises and the Applicant's home, respectively. Officials from the Food Safety Authority of Ireland and the Health Products Regulation Authority (“*HPRA*”) were also in attendance. The search warrants had been issued by the District Court pursuant to section 26 of the Misuse of Drugs Act 1977.
9. During the course of the search of the business premises, a number of items had been seized including, *inter alia*, CBD oils, hemp protein, CBD coffee, “*Hempture*” buds, massage oils and a product described as “*life serum*”. The Applicant gave separate statements, under caution, to an official from the Food Safety Authority of Ireland and to a member of An Garda Síochána, respectively.
10. The Applicant has since conceded, on affidavit, that THC is a psychoactive substance and that some of the products which she sells may contain traces of THC.
11. A number of the products which had been seized were subsequently returned to the Applicant. Other products were retained and were forwarded to Forensic

Science Ireland (“*FSI*”) for examination. A certificate of analysis pursuant to section 10 of the Misuse of Drugs Act 1984 has been exhibited as part of these proceedings.

12. The within judicial review proceedings were instituted on 20 December 2021. Leave to apply for judicial review was granted *ex parte* on 17 January 2022. The essence of the Applicant’s case is described as follows at paragraph (e) 16 of the statement of grounds:

“On the basis of their content, products such as those retailed by the Applicant apparently do not constitute drugs for the purpose of EU law or the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961, concluded in New York on 30 March 1961.”

13. It is pleaded, at paragraph (e) 17, that the prohibition on retailing products, lawfully produced within the European Union, which contain less than 0.2 per cent THC constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 34 of the Treaty on the Functioning of the European Union (“*TFEU*”).
14. Subsequent to the institution of these judicial review proceedings, the Applicant has been charged with a number of alleged offences under the Misuse of Drugs Act 1977. In brief, the Applicant is charged, variously, with the unlawful possession of cannabis and cannabis resin, and with the possession, for the purpose of sale or supply, of cannabis and cannabis resin. The date of the alleged offences is 24 September 2021. The criminal proceedings were initiated by way of application, in March 2023, to the relevant District Court Office for the issuance of summonses pursuant to the Courts (No. 3) Act 1986.

15. The criminal proceedings are pending before the District Court. The Applicant has not sought to amend her statement of grounds to seek any specific relief in relation to the criminal proceedings.
16. The statement of grounds had sought orders of *certiorari* quashing the search warrant pursuant to which the products (described earlier) had been seized from the business premises. The Director of Public Prosecutions applied to be joined to the proceedings to address this aspect of the case. The High Court (Hyland J.) made an order on 16 January 2024 joining the Director of Public Prosecutions as a respondent to the proceedings. Counsel for the Applicant has since confirmed, at the hearing on 20 June 2024, that the Applicant is not now pursuing any reliefs in respect of the search warrants.
17. Counsel also confirmed that the pleaded grounds, which are referable to Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013, are not being pursued. This concession is sensibly made in circumstances where no evidence has been adduced to establish that the seized products meet the definition of “*agricultural products*”.

NARCOTIC DRUGS AND FREE MOVEMENT OF GOODS

18. The European Court of Justice (“*ECJ*”) has consistently held that the principle of free movement of goods does not apply to narcotic drugs. This is subject to an exception in respect of drugs which are to be used for medical and scientific purposes and which are distributed through strictly controlled channels. Narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union.

19. The concept of a “*narcotic drug*” is not specifically defined under EU legislation in relation to the free movement of goods. The pragmatic approach taken by the ECJ has been to adopt the definitions which are to be found in various international instruments which the Member States have cooperated on, or acceded to, such as the United Nations Single Convention on Narcotic Drugs 1961 (as amended in 1972) (“*Single Convention on Narcotic Drugs*”).
20. Article 1(1)(j) of the Single Convention on Narcotic Drugs defines the term “*drug*” as meaning any of the substances in Schedules I and II of that convention, whether natural or synthetic. Relevantly, cannabis, cannabis resin and cannabis extracts and tinctures are all listed in Schedule I.
21. The term “*cannabis*” is defined, under the Single Convention on Narcotic Drugs, as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated. The term “*cannabis plant*” is defined as any plant of the genus *Cannabis*.
22. An early example of the approach of the ECJ is provided by the judgment in *Josemans*, Case C-137/09, EU:C:2010:774. There, the ECJ held that a coffee-shop proprietor, located in the Netherlands, could not rely on the freedom of movement or the principle of non-discrimination in relation to the marketing of cannabis. The ECJ relied on the fact that cannabis is among the substances and products referred to in the Single Convention on Narcotic Drugs.
23. The ECJ adopted a more nuanced approach in its decision in *Kanavape*, Case C-663/18, EU:C:2020:938. The matter had come before the ECJ by way of a reference for a preliminary ruling from a French court pursuant to Article 267 TFEU. The main proceedings concerned the criminal conviction of the directors

of a company for infringements of domestic legislation on poisonous substances. The criminal convictions related to the importation of an oil based product which contained cannabidiol (“*CBD*”).

24. There was a derogation under French law for the cultivation, importation, exportation, and industrial and commercial use of the *fibre and seeds* of varieties of *Cannabis sativa L.*, subject to the proviso that the THC content of those varieties did not exceed 0.2 per cent. The company directors had been unable to rely on this derogation because the CBD, which was contained in the finished product which they had imported, had been extracted from the *Cannabis sativa* plant *in its entirety*, i.e. not solely from its fibre and seeds. The fact that the derogation was confined to the fibre and seeds had the seemingly anomalous result that the marketing of *synthetic CBD*, which had the same characteristics and effects as the CBD oil the subject of the criminal prosecution, would benefit from the derogation.
25. The fact that the successful prosecution turned on the peculiarity of the finished product having been derived from the entirety of the cannabis plant (rather than from the fibre and seeds, which would have been lawful) meant that the legal issues arising on the Article 267 reference were very narrow. This point is explained as follows by the Advocate General (at paragraph 23 of his opinion):

“In [one of the defendants’ view], the Court should assess compatibility with EU law, not only of the prohibition on the marketing of hemp leaves and flowers, but also of three other requirements the French legislation imposes on the marketing of hemp, which are, first, the fact that the plant in question should belong to certain, exhaustively listed, varieties of *Cannabis sativa L.*, secondly, that the THC content of the plant should not exceed 0.20% and, thirdly, that the THC content of the *finished product* should be zero. However, the Court should not, in my view, carry out such an assessment. The question whether the latter three requirements are compatible with Articles 34 and 36 TFEU

has no relevance to the subject matter of the main proceedings, since, according to the national court, B. S. and C. A. were convicted of an offence ‘due to the use in the manufacture of the product at issue of the whole hemp plant, including the leaves and flowers’, not because the CBD oil used was extracted from a hemp variety not covered by the Decree of 22 August 1990 or because the THC content of the oil, although below 0.20%, was not zero.”

*Footnotes omitted

26. The Advocate General recommended that the ECJ should confine itself to an assessment of whether national legislation, which restricts the importation of hemp from another Member State solely to hemp fibre and seeds, complies with EU law.
27. The ECJ accepted this recommendation: the question which had been referred by the national court was reformulated by the ECJ as follows (at paragraphs 44 and 45 of the judgment):

“Although the referring court refers, in the wording of its question, to limiting ‘the cultivation, industrialisation and marketing of hemp solely to fibre and seeds’, it is apparent from its own explanations that the question asked can be relevant to the case in the main proceedings only to the extent that it concerns the conformity with EU law of national legislation which prohibits the marketing of CBD when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.

It is therefore necessary to consider that, by its question, the referring court asks, in essence, whether Regulations No 1307/2013 and No 1308/2013 and Articles 34 and 36 TFEU must be interpreted as precluding national legislation to the extent that it prohibits the marketing of CBD when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.”

28. The aspect of the judgment which is relied upon by the Applicant in the present proceedings concerns the ECJ’s consideration of the concept of narcotic drugs. The ECJ held that whereas the finished product would, on a literal interpretation, come within the concept of a “drug” within the meaning of the Single

Convention on Narcotic Drugs, it was appropriate to apply a purposive approach to interpretation. See paragraphs 70 to 78 of the judgment as follows:

“In the case at hand, it is apparent from the information in the file before the Court that the CBD at issue in the main proceedings is extracted from the *Cannabis sativa* plant in its entirety and not solely from the seeds and leaves of that plant, to the exclusion of its flowering or fruiting tops.

In those circumstances, it is true that a literal interpretation of the provisions of the Single Convention might lead to the conclusion that, in so far as CBD is extracted from a plant of the *Cannabis* genus and that plant is used in its entirety – including its flowering or fruiting tops – it constitutes a cannabis extract within the meaning of Schedule I of that convention and, consequently, a ‘drug’ within the meaning of Article 1(1)(j) of that convention.

However, it must be observed that it follows from the elements in the file before the Court, which are summarised in paragraph 34 of the present judgment, 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%.

As is apparent from paragraph 67 of the present judgment, 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.

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. By way of illustration, it is thus apparent, in particular, from that commentary that the exclusion from the definition of cannabis set out in Article 1(1)(b) of the same convention of flowering or fruiting tops from which the resin has been extracted was justified by the fact that those tops contain only a negligible quantity of psychoactive ingredient.

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 recalled in paragraph 34 of the present judgment, 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.

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

Furthermore, it is also important to add that, as the Commission has also pointed out, the CBD at issue in the main proceedings was lawfully produced and marketed in the Czech Republic.

In the light of all the foregoing considerations, it must be concluded that Articles 34 and 36 TFEU are applicable to the CBD at issue in the main proceedings.”

29. The following two aspects of the judgment in *Kanavape* are potentially relevant to these judicial review proceedings. First, the judgment is principally concerned with a legal issue not a factual issue. The significance of the judgment lies in its holding that it is appropriate to adopt a purposive, rather than a literal, interpretation to the concept of a drug. The concept is to be understood by reference to the purpose and general spirit of the Single Convention on Narcotic Drugs. Secondly, the judgment recognises that the determination of whether a particular substance constitutes a drug is a *question of fact*, and requires consideration of whether, having regard to the current state of scientific knowledge, such substance is harmful to human health. The ECJ stated that it was ultimately a matter for the referring court, i.e. the French national court, to verify whether the substance at issue in the main proceedings fulfilled the definition of a drug.

EVENTS SUBSEQUENT TO JUDGMENT IN *KANAVAPE*

30. There have been a number of events subsequent to the judgment in *Kanavape* which are relevant to the interpretation of the Single Convention on Narcotic Drugs. These events relate to proposals to amend the schedules to the convention.
31. The procedure for the amendment of the schedules is prescribed under Article 3 of the Single Convention on Narcotic Drugs. Relevantly, the World Health Organization, where it has information which in its opinion may require an amendment to any of the schedules, shall notify the Secretary-General of the United Nations and furnish him with the information in support of the notification. Where a notification relates to a drug already in Schedule I or Schedule II or to a preparation in Schedule III, the Commission on Narcotic Drugs may, in accordance with the recommendation of the World Health Organization, amend any of the Schedules by, *inter alia*, deleting a drug or a preparation, as the case may be, from a schedule.
32. The World Health Organization had, in January 2019, made a series of recommendations as to the most relevant level of international control for cannabis and cannabis-related substances. The WHO recommended that pure cannabidiol (“*CBD*”) should not be scheduled, and that this recommendation should be given effect to by adding a footnote to the entry for cannabis and cannabis resin to read as follows:
- “Preparations containing predominantly cannabidiol and not more than 0,2 percent of delta-9-tetrahydrocannabinol are not under international control”.
33. This recommendation was one of a number of recommendations which were to be considered by the Commission on Narcotic Drugs (“*CND*”) at its reconvened

sixty-third session in December 2020. In advance of this date, the Council of the European Union had adopted a decision, addressed to the Member States, on the position to be taken on the European Union's behalf at the (then) forthcoming session of the CND. This decision, Council Decision (EU) 2021/3, was adopted by the Council of the European Union on 23 November 2020. The Member States were advised to oppose the recommendation that the footnote (above) be added to the entry for cannabis and cannabis resin in Schedule I of the Single Convention on Narcotic Drugs.

34. The rationale for this advice is explained as follows, at recitals (26) and (27) of the Council Decision:

“However, that recommendation would lower the current control level for those preparations. Moreover, the establishment of that limit of 0,2 percent of *delta-9-tetrahydrocannabinol* is not sufficiently supported by scientific evidence, the wording of that recommendation does not exclude possible divergent interpretations concerning the way of calculating that limit of 0,2 percent of *delta-9-tetrahydrocannabinol*, and the technical implementation of that recommendation will be difficult for reasons of technical and administrative capacity. The differentiated treatment of cannabidiol compared to other cannabinoids is not in line with the existing structure of the Schedules of the Convention on Narcotic Drugs and the Convention on Psychotropic Substances. That recommendation, as it has been drafted, does not offer the necessary legal certainty.

Therefore, the position of the Union should be to vote against the recommendation to add a footnote concerning ‘preparations containing predominantly cannabidiol and not more than 0.2 percent of *delta-9-tetrahydrocannabinol*’ to the entry for cannabis and cannabis resin in Schedule I of the Convention on Narcotic Drugs.”

35. The recommendation to add the proposed footnote was rejected by the CND at its reconvened session in December 2020. The significance of the rejection of

this recommendation for the present proceedings is discussed under the next heading below (in particular, at paragraphs 47 to 51).

DISCUSSION OF THE “*FREE MOVEMENT OF GOODS*” GROUND

36. The Applicant’s case is presented at a high level of abstraction. The Applicant contends that the ECJ, in its judgment in *Kanavape*, has determined that a CBD based product which contains less than 0.2 per cent THC is subject to the free movement of goods. With respect, this contention is not well founded. As is apparent from the passages from the Advocate General’s opinion and the ECJ’s judgment cited above, the legal issue arising on the reference for a preliminary ruling in *Kanavape* was very narrow. The reference turned on the fact that the derogation, under French law, was confined to the fibre and seeds of the cannabis plant. It had not been necessary for the ECJ to address the significance or otherwise of the threshold prescribed under French law in respect of the THC content of the plant variety. It will be recalled that French law had required that the THC content of the plant variety should not exceed 0.2 per cent.
37. Counsel for the Applicant submits that there is mention made, in the narrative part of the judgment in *Kanavape*, to the CBD based product having been tested by the French authorities and to the level of THC present in the products tested having been below the legally permitted threshold. This submission is correct insofar as it goes. Crucially, however, the existence of the 0.2 per cent threshold does not feature in the operative part of the judgment. It is simply not an element of the *ratio decidendi* of the judgment. As explained at paragraphs 25 to 27 above, the ECJ reworded the questions posed on the preliminary reference to narrow the issues, as had been recommended by the Advocate General.

38. Moreover, the judgment in *Kanavape*, as is true of all preliminary rulings on a reference pursuant to Article 267 TFEU, involves the determination of legal issues not factual issues. The ECJ held that the schedules to the Single Convention on Narcotic Drugs were to be given a purposive, rather than a literal, interpretation. More specifically, the ECJ held that it is appropriate to take the stated objective of the Convention, i.e. the protection of the health and welfare of mankind, into account when interpreting its provisions. The ECJ was careful to acknowledge that the application of this interpretation to the particular facts of the case was a matter for the national court, which had made the reference for a preliminary ruling, to verify. Put shortly, the ECJ left it to the French court to decide whether, *as a matter of fact*, the substance at issue in that case would be harmful to human health having regard to the current state of scientific knowledge. Certainly, the ECJ did not purport to make a finding of fact, of general application, that a substance which contains less than 0.2 per cent THC does not present an unacceptable risk to human health.
39. It should be noted that even if *Kanavape* were authority for the asserted proposition, this would not necessarily avail the Applicant. This is because the 0.2 per cent threshold mentioned by the referring court had been applicable solely to the *plant variety* from which the cannabis has been extracted: it is not a threshold for the finished product. This distinction appears to have been missed, initially, by the French custom authorities and it became necessary for the French Ministry of Justice to issue the following guidance in July 2018:

“Contrary to the argument sometimes put forward by establishments offering cannabidiol-based products for sale, the authorised delta-9-tetrahydrocannabinol content of 0.2% applies to the cannabis plant and not to the finished product resulting from it.”

40. It follows that the proposition which the Applicant seeks to advance, namely that the supposed 0.2 per cent threshold is referable to the *finished products*, is simply not borne out by the judgment in *Kanavape*, on even the most generous reading.
41. (For completeness, it should be noted that no admissible evidence has been adduced in these judicial review proceedings to suggest that the *finished products*, which had been seized from the Applicant's business premises, had a THC content of less than 0.2 per cent).
42. An argument in almost identical terms to that pursued in these proceedings has previously been rejected in *Bogusas v. Minister for Health* [2022] IEHC 621. The High Court (Owens J.) held that the ECJ in *Kanavape* did not conclude as a fact that THC is not a harmful drug or harmful product. (See, in particular, paragraphs 114 to 117 of the judgment). Owens J. also rejected the submission that the Single Convention on Narcotic Drugs permitted the marketing to the public of Schedule I psychoactive drugs in preparations which contain small quantities of such drugs.
43. The Applicant in the present case seeks to argue that the judgment of Owens J. was incorrectly decided. This court is invited to refuse to follow the judgment in *Bogusas v. Minister for Health*. Before this could happen, this court would have to be satisfied that the criteria identified in *Re Worldport Ireland Ltd* [2005] IEHC 189 have been met. These criteria have recently been reiterated by the Supreme Court in *A. v. Minister for Justice and Equality* [2020] IESC 70, [2021] 3 I.R. 140. In brief, a judge should, as a general rule, follow a decision of a colleague of the same jurisdiction unless there is a clear basis for departing from that earlier decision. Amongst the circumstances where it may be appropriate for a court not to follow a decision of co-ordinate jurisdiction would

be where it was clear that the earlier decision was not based upon a review of significant relevant authority, where there is a clear error in the earlier decision, or where the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period since the date of delivery of the first decision.

44. No such circumstances arise in relation to the judgment in *Bogusas v. Minister for Health*. The judgment is closely reasoned and is predicated on a comprehensive survey of the relevant case law, statutory provisions and international conventions. The judgment is of recent vintage (October 2022) and there have been no jurisprudential changes in the interim which might render the rationale of the judgment redundant.
45. Not only am I satisfied that the high threshold for refusing to follow a judgment of co-ordinate jurisdiction is not met, I am also satisfied that the outcome of the judgment in *Bogusas v. Minister for Health* is entirely correct. It involves a faithful implementation of the decision of the ECJ in *Kanavape*.
46. For completeness, it should be recorded that the Applicant placed much emphasis on the *ex tempore* judgment of the High Court (Egan J.) in *Jenkins v. Director of Public Prosecutions* [2022] IEHC 291. There is no doubt but that *Jenkins* is a comprehensive and impressive judgment. Indeed, it has been cited with approval by the Court of Appeal in England and Wales: *R. v. Margiotta* [2023] EWCA Crim 759. Crucially, however, the judgment in *Jenkins* was delivered in the context of an interlocutory application for a stay in relation to criminal proceedings pending the determination of the substantive application for judicial review. The judgment goes no further than finding that the applicant had established a “*fair issue to be tried*” on the question of whether the provisions of the Misuse of Drugs Act 1977 were incompatible with EU law. By

contrast, this court is adjudicating upon a substantive application for judicial review and is required, therefore, to make definitive findings on the legal issues rather than merely applying a test of arguability.

47. There is an additional reason for saying that the Applicant's case is not well founded. This reason relates to the events subsequent to the judgment in *Kanavape*, namely, the rejection of proposed amendments to the Single Convention on Narcotic Drugs.
48. It will be recalled that the ECJ in *Kanavape* had relied on the definition of drugs under the Single Convention on Narcotic Drugs as a proxy for determining whether a particular substance or preparation attracted the principle of free movement of goods. The Applicant misreads the judgment in *Kanavape* as containing an implicit finding of fact to the effect that a CBD based product which contains less than 0.2 per cent THC does not come within the schedule of the Single Convention on Narcotic Drugs. For the reasons already explained, there is no such finding in the judgment. But even if there had been such a finding—and there is not—the logic of same would have been overtaken by events, for the reasons which follow.
49. The Vienna Convention of 23 May 1969 on the Law of Treaties (*United Nations Treaty Series*, vol. 1155, p. 331) provides that any subsequent agreement or subsequent practice in the application of a treaty, which establishes the agreement of the parties regarding its interpretation, may be taken into account in interpreting the relevant treaty.
50. The contracting parties to the Single Convention on Narcotic Drugs expressly rejected an amendment which would have excluded preparations containing not more than 0.2 percent of delta-9-tetrahydrocannabinol from measures of control.

Having regard to this legislative history, the Single Convention on Narcotic Drugs cannot sensibly be interpreted as *excluding* from its ambit preparations which fall below this threshold. To apply such an interpretation would be to disregard the express intentions of the contracting parties as expressed in December 2020 and would bring about the precise interpretation which they chose to reject. It follows, therefore, that a substance or preparation which contains even a low level of THC comes within the concept of a narcotic drug under the Single Convention on Narcotic Drugs, and, by logical extension, is not a good which is entitled to benefit from the principle of the free movement of goods under Article 34 TFEU.

51. Finally, for completeness, it should be recorded that counsel for the Applicant had agitated for a reference to the ECJ, pursuant to Article 267 TFEU, on the grounds of a supposed discrepancy between the judgment of the ECJ in *Kanavape* and the position of the Council of the European Union as reflected in Council Decision (EU) 2021/3 (discussed above). With respect, there is no necessity for a reference. First, the judgment in *Kanavape* does not have the effect which the Applicant has attributed to it. Secondly, and in any event, the fact that an earlier judgment might not—as a result of *subsequent* legislative developments—continue to represent good law is not a reason for saying that there is a discrepancy which requires to be resolved. The legal position in relation to THC is entirely clear as a result of the rejection of the proposed amendments to the Single Convention on Narcotic Drugs.

RIGHT TO EARN A LIVELIHOOD

52. In addition to the principal ground of challenge (discussed above), the Applicant has sought to advance an argument that the designation of cannabinol derivatives, including, relevantly, tetrahydrocannabinol, as controlled drugs for the purpose of the Misuse of Drugs Act 1977 has interfered with her right to earn a livelihood. This argument is made by reference to the provisions of the Constitution of Ireland and the European Convention on Human Rights, respectively. Counsel for the Applicant rested on his written legal submissions in respect of this aspect of the case.

53. The nature of the constitutional right to work or to earn a livelihood has been described as follows by the Supreme Court in *N.H.V. v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 I.R. 246 (at paragraph 13):

“[...] If there was some general and unspecified right to work, it would arguably be engaged, if not infringed, when an economy did not provide for full employment, when a person who was in employment was dismissed, or when someone was precluded from working because of a strike. I find it difficult to believe for example that the Constitution imposes on the Government an obligation (presumably enforceable by action in court) to pursue policies directed towards full employment, as was suggested in some of the international material submitted on behalf of the applicant. It is easier I think to conceive of any constitutionally protected interest as a freedom, and in this case, freedom to seek work, which however implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification.”

54. The Applicant submits that the “*absolute prohibition*” on the import and sale of all products containing “*even minimum levels*” of THC or tetrahydro derivatives of cannabinol represents an “*unjust attack*” upon the Applicant’s constitutional right to carry on business and earn a livelihood, and upon her property rights. The Applicant has consciously chosen to link this submission inextricably with

her EU law argument. More specifically, the constitutional argument is expressly predicated on the—mistaken—assumption that the statutory restrictions on the import and sale of products containing THC are not in compliance with EU law. This assumption is incorrect for all of the reasons explained under the previous heading. The constitutional challenge is, therefore, fatally flawed in that it is founded on an incorrect understanding of the status of the relevant products. A product which contains even a low level of THC is not a “good” which is entitled to benefit from the principle of the free movement of goods. Indeed, if and insofar as EU law is relevant to the constitutional challenge at all, it suggests that the Irish State may be obliged to prohibit the import and sale of such products. The ECJ has held that since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes (*Josemans*, C-137/09, EU:C:2010:774, at paragraph 36). There is a respectable argument that even if the Applicant had established a *prima facie* infringement of her constitutional rights, same would be shielded by Article 29.4.6° of the Constitution of Ireland.

55. The Applicant has made no meaningful attempt to explain how the operation of a provision of the criminal law, which is of general application, might involve a disproportionate interference with any personal right of hers. The onus lies with the Applicant to put forward evidence which suggests that the prohibition on the possession and supply of a controlled drug is disproportionate. The Applicant has failed to do so. The Applicant has not, for example, adduced any evidence

to suggest that the products at issue do not have a harmful effect. Indeed, the Applicant expressly concedes that THC is a psychoactive substance.

56. It is not necessary to address this issue further in circumstances where the Applicant has signally failed to substantiate the constitutional challenge on either the facts or the law. As emphasised by the Court of Appeal in *Muldoon v. Minister for the Environment and Local Government* [2023] IECA 61 (at paragraph 172), it is not appropriate for an applicant simply to make a bare plea to the effect that their right to earn a livelihood has been interfered with.
57. The Applicant's case under the European Convention on Human Rights is even less fleshed out. The only judgment of the ECtHR cited by the Applicant (in support of her claim for a declaration of incompatibility) which specifically addresses the deprivation of the means of earning a living is *Lallement v. France* (No. 46044/99). That judgment is concerned with the adequacy of compensation for the expropriation of part of a dairy farm. It has no resonance with the circumstances of the present case.

CONCLUSION AND PROPOSED FORM OF ORDER

58. The principal issue raised in these proceedings is whether the designation of cannabinol derivatives, including, relevantly, tetrahydrocannabinol, as controlled drugs for the purpose of the Misuse of Drugs Act 1977 is contrary to EU law.
59. An argument in almost identical terms to that made by the Applicant has previously been rejected by the High Court in *Bogusas v. Minister for Health* [2022] IEHC 621. For the reasons explained earlier, I am not only satisfied that the high threshold for refusing to follow a judgment of co-ordinate jurisdiction

is not met, but I am also satisfied that the outcome of the judgment in *Bogusas v. Minister for Health* is entirely correct. It involves a faithful implementation of the decision of the ECJ in *Kanavape*, Case C-663/18, EU:C:2020:938.

60. Moreover, having regard to the legislative history summarised at paragraphs 30 to 35 above, the Single Convention on Narcotic Drugs cannot sensibly be interpreted as *excluding* from its ambit preparations which fall below a threshold of 0.2 percent of delta-9-tetrahydrocannabinol. It follows, therefore, that a substance or preparation which contains even a low level of THC comes within the concept of a narcotic drug under the Single Convention on Narcotic Drugs, and, by logical extension, is not a “*good*” which is entitled to benefit from the principle of the free movement of goods under Article 34 TFEU.
61. It flows—as a corollary of this court’s finding that legislative restrictions on the import or sale of a substance or preparation which contains even a low level of THC do not engage Article 34 TFEU—that the relevant provisions of the Misuse of Drugs Act 1977 do not require to be justified on one of the grounds of public interest laid down in Article 36 TFEU or by imperative requirements. There is no basis, therefore, for the declaratory and mandatory relief sought at part (d) of the statement of grounds.
62. The separate grounds pleaded by reference to the right to earn a livelihood are, with respect, makeweight grounds only. No meaningful attempt has been made to substantiate these grounds on either the facts or the law.
63. Accordingly, the application for judicial review must be dismissed in its entirety. As to legal costs, my *provisional* view is that the Respondents, having been entirely successful in their defence of the proceedings, are entitled to recover their costs as against the Applicant. This would represent the default position

under section 169 of the Legal Services Regulation Act 2015. If either party wishes to contend for a different form of costs order, they should contact the registrar on or before 20 September 2024 and arrange to have the matter listed before me, on a date convenient to the parties, to hear submissions on costs.

Appearances

Derek Shortall SC and Stephen T. Faulkner for the applicant instructed by Mulholland Law

William Abrahamson SC and Frank Kennedy for the first to fourth named respondents instructed by the Chief State Solicitor

James Dwyer SC and Conor McKenna for the fifth named respondent instructed by the Chief Prosecution Solicitor