

THE HIGH COURT

[2022] IEHC 222
[Record No. 2019/7162P]

BETWEEN

PIOTR PERUCKI

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 8th day of April, 2022.

Introduction.

1. In this action, the plaintiff seeks a number of declarations to the effect that section 4E of the Criminal Procedure Act 1967 (as amended), or particular parts thereof, are contrary to the provisions of the Constitution.
2. In essence, s.4E of the 1967 Act enables an accused to bring an application before the court of trial to dismiss one or more of the charges against him or her. Section 4E(4) provides that if it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge.
3. If the accused is unsuccessful in his application, the matter proceeds to trial. If he is successful that will be the end of the matter, save that s.4E(7) provides that where a charge is dismissed by the trial court under sub. (4), the prosecutor may, within twenty-one days after the dismissal date, appeal against the dismissal to the Court of Appeal. No such right of appeal is afforded to the accused.
4. The plaintiff maintains that the provisions of s.4E of the 1967 Act, are in breach of his right to a fair trial and his right to equality of arms in the conduct of the criminal prosecution against him, due to the fact that he has been denied a right of appeal against an unfavourable determination on his application pursuant to the section.
5. In *Brohoon v. Ireland & Ors.* [2011] 2 IR 639, an identical challenge to the constitutionality of the section was rejected by Kearns P. The plaintiff maintains that for a number of reasons, that decision is no longer binding on this Court.
6. The defendant argued that having regard to the doctrine of stare decisis, this court should follow the decision in the *Brohoon* case, unless it is satisfied that that case was wrongly decided, or that on some other ground, it would not be appropriate to follow it. It was submitted that no such factors arose in relation to the decision in the *Brohoon* case.
7. Thus, while a number of matters were touched on during the hearing, the central issue for determination is whether the decision in the *Brohoon* case should be followed by this Court in determining these proceedings.

Background.

8. There was no controversy between the parties in relation to the background facts. The plaintiff has been charged with seven offences under the Misuse of Drugs Acts 1977-1984, including two charges of possessing a controlled drug for the purposes of sale or supply contrary to s.15 of the Acts and one charge of knowingly permitting his land or premises to be used for the manufacturing and/or production of controlled drugs contrary to s.19 of the Acts.
9. The plaintiff, along with a co-accused, was returned for trial from the District Court to the Circuit Court on 26th April, 2018. The plaintiff was served with a Book of Evidence on that date. The evidence against the plaintiff largely emanates from a search under warrant of the plaintiff's residence conducted on 30th August, 2017.
10. On 21st March, 2019, an application pursuant to s.4E was moved on behalf of the plaintiff. The basis of his application was that the search of his dwelling by the Gardaí was unlawful and unconstitutional. The s.4E application was refused, primarily on the basis that any unconstitutionality was inadvertent.
11. The plaintiff issued the present proceedings on 16th September, 2019. The criminal proceedings against the plaintiff stand adjourned to the outcome of these proceedings.

Relevant statutory provisions.

12. The relevant parts of s.4E of the Criminal Procedure Act 1967, as inserted by s.9 of the Criminal Justice Act 1999 and as amended by the Criminal Justice Act 2006, are as follows: -

"4E.—(1) At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused.

[...]

(4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge.

[...]

(7) Where a charge is dismissed by the trial court under subsection (4), the prosecutor may, within 21 days after the dismissal date, appeal against the dismissal to the [Court of Appeal]."

The Plaintiff's Submissions.

13. In his submissions to the court, Mr. Colman Fitzgerald SC on behalf of the plaintiff, accepted that, while it was pleaded in the statement of claim that the court should depart from the decision in the *Brohoon* case because the rights of appeal that had been conferred on the DPP by s.23 of the Criminal Procedure Act 2010 (as amended) and s.34 of the Criminal Procedure Act 1967 (as substituted by s.21 of the Criminal Justice Act 2006), were not in place at the time of that judgment; that was not in fact correct, it was

accepted that those statutory provisions existed at the time when the *Brohoon* judgment was handed down.

14. Nevertheless, counsel submitted that the court should depart from the *Brohoon* decision because the learned trial judge in that case, had not referred to the existence of such rights of appeal as enjoyed by the DPP, when carrying out the balancing exercise that he had done in his judgment in relation to the opportunities for an accused to raise his grounds of challenge, as against the lack of any appeal from an unfavourable decision for the prosecution following a s.4E application, which lacuna was covered by the provisions of s.4E(7). It was submitted that Kearns P. had not had regard to the fact that the DPP enjoyed significant rights of appeal under the said statutory provisions.
15. It was further submitted that while Kearns P. had had regard to a number of cases dealing with both s.4E and the issue of appeals in pre-trial matters generally, the case of *Carmody v. Minister for Justice* [2010] 1 IR 635 had not been opened in the course of argument and had not been referred to in the judgment of the court.
16. It was submitted that the *Carmody* decision was an important decision which had established the principle of a right to equality of arms in the criminal trial process. The case had involved a challenge by an accused to the statutory provisions in relation to the provision of legal aid to an accused in the District Court, which provided that such funding would only cover the services of a solicitor. The plaintiff in that case submitted that, as he was facing trial in the District Court on a number of charges on complex issues relating to material that had been fed to his cattle, and where it was likely that the prosecution would retain the services of counsel, there was an unjust inequality of arms by virtue of the fact that he would not be able to secure the services of counsel under the legal aid provisions.
17. Counsel submitted that the case was of significance to the present case, because in the *Carmody* case, Murray C.J. stated in the course of his judgment that the notion of "equality of arms" was but one aspect of the general right to a fair trial, or a trial in due course of law. The Supreme Court went on to allow the appeal and to make a declaration that the plaintiff, as a defendant in a criminal prosecution before the District Court, had a constitutional right, prior to being tried, to apply to and have determined by a court or other appropriate body whether he should be granted legal aid, to include representation by counsel, as well as by a solicitor. The court made an order prohibiting the State from proceeding with the prosecution unless and until the plaintiff was afforded that right.
18. It was further submitted that the decision in *Brohoon* was unsound, due to the fact that the options that had been identified by Kearns P. as being open to an accused who was unsuccessful in their application pursuant to s.4E, as set out at para. 36 of the judgment, were not correct in law or in fact, because in reality, many of the options were not available to an accused. An accused could not bring a judicial review challenge on the basis of an erroneous finding of fact, nor could he request a case stated on a point of fact, only on a point of law.

19. In relation to the finding that decisions under s.4E could have a precedent value and therefore it was desirable and necessary to afford the prosecution a right of appeal in respect of an unfavourable determination, it was submitted that in the vast majority of cases, the determination of the judge hearing such applications, was made *ex tempore*. On this basis, it was submitted that there was no precedent value for such determinations for other cases.
20. Having regard to these matters, the court was urged to hold that it was not bound to follow the *Brohoon* decision and that having regard to the inequality of treatment between an accused and the prosecution under s.4E and the lack of a rational justification for such discrimination, the court should make the declaration sought in the statement of claim.
21. In relation to the ancillary grounds pleaded by way of objection by the defendant, to the effect that the plaintiff lacked *locus standi*, because the Circuit Court judge should not have embarked on the application, because it involved disputed questions of fact; it was submitted that it was too late to make that objection. In this case an application had been made by the plaintiff pursuant to s.4E of the 1967 Act. The hearing of that application had taken place before the Circuit Court. The prosecution had participated in the hearing. The plaintiff had obtained an adverse determination in relation to his application and he had no right of appeal in respect of it. It was submitted that it was clear that he had locus standi to challenge the constitutionality of the section insofar as he was denied a right of appeal under it. It was submitted that it was too late for the defendant to raise the objection that the Circuit Court judge ought never to have embarked on the hearing of the application in the first place.
22. In relation to the objection raised by the defendant to the effect that the plaintiff lacked *locus standi*, because he could not secure any positive benefit by virtue of the declarations sought in the statement of claim, it was submitted that if the court were of the view that the section was contrary to the provisions of the Constitution, the court was then in a position to fashion whatever remedy may be necessary in the circumstances. In this regard counsel referred to the *Carmody* decision and to the decision at first instance in *McCabe v. Governor of Mountjoy Prison* [2014] IEHC 435, where Hogan J. had held that compliance with the obligations placed on the court by Article 40.3 of the Constitution to vindicate the constitutional rights of the plaintiff, required that he was entitled to a real remedy, fashioned by the court, in order to ensure that his rights were vindicated and were not further infringed. Counsel pointed out that the decision at first instance had been successfully appealed by the State to the Court of Appeal, but it had overturned the decision on a different ground.

The Defendant's Submissions.

23. Ms. Anne-Marie Lawlor SC submitted on behalf of the defendant, that the key issue before this Court was whether it was obliged by virtue of the doctrine of stare decisis to follow the decision in the *Brohoon* case. In this regard counsel referred to the dicta of Parke J. in *Irish Trust Bank Limited v. The Central Bank* [1976] ILRM 50, as follows: -

"I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A Court may depart from a decision of a Court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the Judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authority cited or in some other way departed from the proper standard to be adopted in judicial determination."

24. Counsel submitted that in the *Brohoon* case, Kearns P. had given the matter detailed consideration. He had considered all the relevant authorities. It was submitted that the plaintiff had not shown that the decision was wrong and should not be followed by this Court.
25. It was submitted that the rights of appeal that had been referred to by the plaintiff, which were enjoyed by the prosecution under various statutes, had existed at the time of the *Brohoon* decision. It was further submitted that those rights of appeal were not relevant to that decision, as they arose at a different stage in the criminal process; given that they arose after the trial had ended. A s.4E application was a pre-trial procedural step, that could be availed of by an accused. It was clearly a step taken prior to the trial. That was shown by the terms of s.4E(4). It had also been recognised in the dicta of Hardiman J. in *Phipps v. Hogan* [2007] IESC 68, as cited by Kearns P. in the *Brohoon* judgment at para. 25.
26. It was submitted that a fair trial process did not require identical treatment of the prosecution and the defence at all pre-trial stages. There could be a difference in treatment between them, as long as there was a rational and fair justification for the difference in treatment and it did not put the accused at a disadvantage in dealing with the trial. It was submitted that in this case there was a good reason for giving the prosecution a right of appeal, as had been recognised by Kearns P. in the *Brohoon* judgment, where he had noted that if no right of appeal were given to the prosecution, then certain adverse determinations on s.4E applications, would go unchallenged and would thus become precedents for future cases; whereas if an adverse determination was given against an accused, he could repeat the challenge again at his trial and could bring an appeal against any conviction that may arise as a result of the trial. There were also other avenues of challenge open to him, as had been set out by Kearns P. in the *Brohoon* judgment.
27. While not abandoning the submissions that had been made in their written submissions on *locus standi*, counsel indicated that the main focus of their submission was that the court was bound by the decision in *Brohoon*, as no basis had been established on which the court should depart from it.
28. On behalf of the notice party, Mr. Niall Nolan BL, adopted the submissions that had been made by the defendant. He stated that it was not correct for the plaintiff to state that determinations on s.4E applications were invariably given *ex tempore*. He stated that on

occasions reserved judgments were given on such applications. These judgments would have precedent value for future cases; in particular, as they very often dealt with aspects concerning search warrants. It was for that reason, if an adverse determination was given against the prosecution, it was necessary for them to have an opportunity to challenge that by way of an appeal.

Conclusions

29. As noted at the beginning of this judgment, the central issue in this case is whether the court is bound by the decision in the *Brohoon* case. The principle of stare decisis has been established for a very long time. The statement of that principle as given by Parke J. in the Irish Trust Bank case, as cited above, was reiterated more recently by Clarke J. (as he then was) in *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 in the following terms at para. 14: -

"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority –v- Watson [1947] K.B. 842 at 848, Re Howard’s Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

30. In *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, Clarke J. noted that the principles which he had set out in the *Worldport* case, had been adopted in a number of subsequent decisions. He stated as follows at paras. 2.1 and 2.2:

"2.1 The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in Irish Trust Bank v. Central Bank of Ireland [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189, by Kearns P. in Brady v. D.P.P. [2010] IEHC 231, and most recently by Cross J. in B.N.J.L. v. Minister for Justice, Equality & Law Reform [2012] IEHC 74 where Worldport was expressly followed.

2.2 It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing."

31. More recently, in *A & Ors. v. Minister for Justice* [2020] IESC 70, Dunne J., delivering the majority judgment of the Supreme Court, endorsed these principles at para. 63 of her judgment. In his concurring judgment, Charleton J. gave the rationale for the rule that in general a High Court judge should follow a previous decision of that court, in the following terms at para. 8: -

*"Departure from horizontal precedent is possible. It is also not desirable without there being an expressed and good reason. The law operates as a fortress of certainty from within, whereby the shape of decisions is apparent to those approaching it. Legal certainty and the value of resort to the courts may be undermined by quarrels among judges. Hence, the difficulty faced here. While particular skill and a deftly polite style is needed in expressing that a colleague of co-ordinate jurisdiction was wrong, it is better for the administration of justice, as well as being legally required, to quietly state a reason for not following a decision. In that way, an appellate court can see where the divergence is and why a co-ordinate decision should not be followed. The relevant decisions are binding and are as set out in the judgment of Dunne J. In particular, *Re Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 and *Kadri v The Governor of Wheatfield Prison* [2012] IESC 27 highlight that it should be unusual not to follow a judge of co-ordinate decision without reasons, politely expressed, as to why that other judgment was wrong. It may be that an authority was not considered, or a statute or piece of European law was left out of the analysis, or that time has advanced the understanding of the basis for the general rule upon which the decision was made and so ought no longer to be considered as an authority in modern circumstances."*

32. Having regard to these authorities, the court is of the view that it should follow the decision of Kearns P. in the *Brohoon* case, unless it is persuaded that that decision was wrong, or otherwise infirm, on one of the grounds outlined in the *Worldport* case and in subsequent decisions. Having considered the submissions of the plaintiff, the court is not satisfied that the *Brohoon* decision is wrong in law.

33. The court would go further and state that it appears to this court that the analysis and reasoning engaged in by Kearns P. was entirely correct in law and the conclusion that he reached was also correct. For the reasons set out in the *Brohoon* judgment, the court is satisfied that s.4E is not unconstitutional, either in whole, or in part.
34. The applicant argued that the *Brohoon* decision was unsound, as no reference was made therein to certain statutory rights of appeal enjoyed by the prosecution. The plaintiff accepted that those rights existed at the time that that decision was handed down. While the rights of appeal enjoyed by the prosecution were not referred to by Kearns P. in his judgment, the court is not satisfied that the existence of those statutory rights of appeal were relevant to his consideration of the issues that arose in the case before him. The statutory rights of appeal referred to in the plaintiff's statement of claim, concern rights of appeal that can be availed of by the prosecution after a trial has been completed. The existence of such rights is not relevant to the pre-trial procedure that is afforded by s.4E of the 1967 Act.
35. The plaintiff also argued that the judgment in *Brohoon* was unsound, because contrary to what had been found by Kearns P., determinations made by judges on hearing s.4E applications, did not in general have any precedent value for future cases. The court prefers the submissions of the notice party that such rulings, either in transcript, or in the form of a reserved judgment, can give rise to precedents, which can affect other cases pending before the courts, or that may come before the courts in the future. Accordingly, the court accepts the reasoning of Kearns P. in the *Brohoon* judgment that this fact provides a justification for the right of appeal given to the prosecution in s.4E(7).
36. The court is satisfied that there is no inherent unfairness in the disparity of treatment of the accused and the prosecution provided for in s.4E. As noted by Kearns P., if unsuccessful in his application pursuant to s.4E, the accused retains all his rights going into the trial. He can reiterate his challenge to the admissibility of evidence, or to the weight of evidence, at the trial. He enjoys all the rights of appeal and challenge by way of judicial review, that have always been available to him. There is no unfairness to him, by virtue of the fact that he does not have a right of appeal against a refusal of his application pursuant to s.4E, whereas the prosecution does enjoy a right of appeal against an adverse determination against it.
37. Having regard to the findings made by the court on this central issue, it is not necessary for the court to go on and determine the issue of any alleged lack of *locus standi* on the part of the plaintiff.
38. Having regard to the findings made by the court in its judgment, the court refuses all of the reliefs sought by the plaintiff in his plenary summons and in his statement of claim. The court dismisses the plaintiff's action against the defendants.
39. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the form of the final order and on costs and on any other matters that may arise.