

THE HIGH COURT

[2008 No. 9139 P.]

BETWEEN

THOMAS MURPHY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered the 16th day of November 2011

Section 46(2) of the Offences Against the State Act 1939, as amended by s. 11 of the Criminal Justice Act 1999, s. 3 of the Prosecution of Offences Act 1974 and s. 21(2) of the Courts Act 1991, provides that:

"Whenever a person is brought before a judge of the District Court charged with an indictable offence which is not a scheduled offence and such judge sends such person forward for trial on such charge, such judge shall, if an application in this behalf is made to him by or on behalf of the Director of Public Prosecutions grounded upon the certificate of the Director of Public Prosecutions that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, send such person forward in custody or, with the consent of the Director of Public Prosecutions, at liberty on bail for trial by a Special Criminal Court on such charge."

On the 8th November, 2007, the plaintiff was charged with a number of offences of having failed, being a chargeable person, without reasonable excuse to furnish a return in the prescribed form of his income, profits or gains or the sources of his income, profits or gains, to the Collector General as required by the Taxes Consolidation Act 1997, (as amended), in respect of the chargeable periods 1996/1997, 1997/1998, 1999/2000, 2000/2001, 2001/2002, 2002/2003, and, 2003/2004.

It was admitted during the course of the hearing that these were all non scheduled indictable offences. On the 17th December, 2007, the Director of Public Prosecutions issued a Certificate pursuant to the above section of the Act of 1939. On the 10th January, 2008, a Judge of the District Court made an order sending the plaintiff forward for trial on these charges by the Special Criminal Court. At the hearing of this action this Court was advised that this particular return for trial was quashed on the 19th November, 2008, by O'Neill J. in proceedings by way of judicial review entitled, *Thomas Murphy v. The Director of Public Prosecutions* [2009] 2 I.R. 268 and, the matter was remitted back to the District Court for rehearing. The basis of this decision was that three amendments of the original return for trial to the Special Criminal Court had been permitted by the District Court on the 14th January, 2008, in the absence of the plaintiff and of his solicitor in circumstances which O'Neill J. found following upon a close analysis of the relevant facts, to be an infringement of the plaintiffs constitutional right to fair procedures. The instant proceedings arise because the Certificate of the Director of Public Prosecutions remains extant.

By a letter dated the 25th February, 2008, directed to the Director of Public Prosecutions the solicitors for the plaintiff asserted that the effect of this certificate was to deprive the plaintiff of a constitutional right to a trial before a judge and jury and, requested the Director of Public Prosecutions to set out, within fourteen days, precisely the basis upon which the Certificate was issued. The letter then continued as follows:-

"In the event that you are unwilling to take such a course, we would be obliged if you would do the following:

- (i) Explain in precise terms why you are refusing to supply this information.
- (ii) In the event that any form of privilege is being relied upon, please specify the privilege and the basis upon which it is being asserted.

You will appreciate that in order for us to advise our client adequately, we need to know how this decision was reached. In the event that you are not going to explain how or why it was reached, and the underlying reasoning, we also need to be in a position to know precisely the basis upon which this information is being withheld."

Following a reminder letter dated the 27th February, 2008, the Chief Prosecution Solicitor, on behalf of the Director of Public Prosecutions, responded by a letter dated the 18th March, 2008, stating that in accordance with statutory provisions and case law the Director of Public Prosecutions was not obliged to provide and therefore declined to provide reasons beyond those stated in his Certificate. By letter dated the 28th March, 2008, the solicitors for the plaintiff countered that though they accepted that there was no obligation on the Director of Public Prosecutions to provide such reasons it did not automatically follow that the Director never gave a reason. They submitted that reasons for his decision should be given by the Director of Public Prosecutions or good reason shown for declining to disclose them. The author of this letter dated the 28th March, 2008, then goes on to state the following:

"The right to a trial by jury is a very important right. It should not be diluted save in circumstances where it is manifestly demonstrated to be necessary. We are not necessarily suggesting that because the Director has the power to dilute this right without explanation, automatically amounts to an abuse. However, we would respectively point out that it would be

highly unusual that a citizen be deprived of a basic and fundamental right by an arm of the State in circumstances where no explanation to this citizen was available or required. We would further receptively suggest that, in the event that such is the law, it is likely to be in breach, both of our client's rights under the Constitution and the European Charter on Human Rights."

By letter in response dated the 21st April, 2008, the Chief Prosecution Solicitor on behalf of the Director of Public Prosecutions advised that the position of the Director of Public Prosecutions remained as per the letter of the 18th March, 2008. By letter dated the 16th May, 2008, the solicitors for the plaintiff protested that it was "inherently unfair" for the Director of Public Prosecutions simply to decline to give any reasons why he considered that the ordinary courts were inadequate to secure justice in this instance, when there was nothing in law preventing him from so doing.

On the 5th November, 2008, the plaintiff issued a Plenary Summons followed on the 15th January, 2009, by a Statement of Claim. In these pleadings the plaintiff seeks the following reliefs:-

1. A Declaration that s. 46(2) of the Offences Against the State Act 1939, as amended, is repugnant to the provisions of the Constitution of Ireland, 1937.
2. A Declaration that s. 46(2) of the Offences Against the State Act 1939, as amended, is incompatible with the State's obligations under the European Convention on Human Rights as provided for by the European Convention on Human Rights Act 2003.
3. A Declaration that the Director of Public Prosecutions has acted otherwise than in accordance with law and in breach of the rights of the plaintiff under the Constitution of Ireland 1937, and the European Convention on Human Rights.
4. An Order by way of an interim injunction restraining the Director of Public Prosecutions from prosecuting the plaintiff on foot of a Bill of Indictment at present pending before the Special Criminal Court pending the determination of the within proceedings or further order of this Honourable Court.
5. Interlocutory relief in terms of para. 4.
6. Such further or other Order as shall seem meet or appropriate.
7. The costs of these proceedings.

The basis upon which the plaintiff claims a right to these reliefs is set out as follows in the Statement of Claim:-

- (a) Section 46(2) of the 1939 Act, fails to guarantee the plaintiff's right to be held equal before the law.
- (b) Section 26(2) of the 1939 Act, fails to guarantee the plaintiff's right to a fair trial in due course of law and/or a trial on an indictable matter before a jury of his peers.
- (c) The decision of the Director of Public Prosecutions to exercise the powers conferred under s. 46(2) may well be based upon alleged facts which are untrue and/or inaccurate. Furthermore, the disclosure of the existence of such alleged facts may not have the effect of compromising any individual's security, or the security of the State. Notwithstanding, there is no obligation on the Director of Public Prosecutions to disclose the material, nor is there any method by which he can be compelled so to disclose.
- (d) Section 46(2) makes not provision for notifying the plaintiff if the intention to issue a certificate and makes no provision to allow the plaintiff to be heard before a certificate is issued and/or to allow the plaintiff to be heard once a certificate is issued.
- (e) The decision to remove the right of trial by jury is done unilaterally. It is in breach of the *audi alteram partem* principle, and furthermore such breach occurs in circumstances where there is no onus on the Director of Public Prosecutions to demonstrate that there is any need to withhold the information upon which the decision is based from the plaintiff.
- (f) The decision affects a fundamental right of the plaintiff. It is taken in secrecy and, in circumstances where the Director of Public Prosecutions is not obliged to account for how or why the said decision was taken. Indeed the only circumstances upon which a court might likely intervene, is where *mala fides* is demonstrated. However, in circumstances where the plaintiff will have no access to the material upon which the decision is based, it will be impossible to demonstrate that the decision has been so motivated.
- (g) Section 46(2) makes no provision for the provision of information to the plaintiff to allow for a meaningful assessment of the lawfulness of the decision to issue the certificate. Further, and in the alternative, while the section does not prohibit the release of such information, the decision of the Director of Public Prosecutions to refuse to provide same is otherwise than in accordance with law and represents a positive attack on the rights of the plaintiff.
- (h) Further and in the alternative, the inflexibility of the third named defendant in relation to his policy to refuse to give reasons is inconsistent with the Constitution and incompatible with the State's obligations under the European Convention and renders the decision to deprive the plaintiff of his right to trial by jury effectively non justiciable.
- (i) Section 46(2) of the Offences Against the State Act 1939, fails to provide for a right of appeal or review in relation to a decision with far reaching effects on the fundamental rights of the plaintiff.
- (g) The Director of Public Prosecutions has acted arbitrarily and/or unreasonably in reaching the decision to issue the said certificate and/or has acted on the basis of improper motive and has abused the process of the Courts in so doing. Further, the Director of Public Prosecutions has failed to have regard to his special obligation to ensure a trial in due course of law and has adopted a course subversive to the plaintiffs constitutional and Convention rights and has acted in a discriminatory manner.

(k) If there are circumstances which would justify taking a decision in secret and not informing the plaintiff of the basis upon which it is made, the same could only be justified in particular and exceptional circumstances, and where it was demonstrated that the material upon which the decision was based would be harmful to an individual or to the security of the State if disclosed to him.

By letter dated the 7th November, 2008, the solicitors for the plaintiff referred the Director of Public Prosecutions to the views of the Human Rights Committee of the United Nations given on the 26th April, 2001, invoking Article 5, para. 4 of the International Covenant on Civil and Political Rights, *In the Matter of the Communication of Joseph Kavanagh* and *In the Matter of Ireland*, and sought to be informed as to whether the Minister for Justice had communicated with the Director of Public Prosecutions, "for the purpose of ensuring compliance with that Article [26]". Despite two reminder letters dated the 2nd December, 2008 and 23rd December, 2008, this query remained unanswered as of the date of hearing of this action.

A defence was delivered by the defendants on the 30th June, 2010. In this defence four "Preliminary Objections" to the plaintiff's case are pleaded. These, I consider, may be stated as follows in the order of priority afforded them at the hearing of the action:-

1. The plaintiff lacks *locus standi* to challenge the constitutional validity of s. 46(2) of the Act of 1939, as enacted or as amended and its compatibility with the provisions of Article 6, 13 and 14 of the European Convention on Human Rights.
2. The plaintiff may not make and/or is estopped from maintaining any challenge to the failure and refusal of the Director of Public Prosecutions to furnish reasons for issuing the Certificate, because this would constitute an impermissible collateral challenge to that Certificate and to the decision to issue it, the validity of which was not challenged by way of application for Judicial Review.
3. The plaintiff's challenge to the constitutional validity of s. 46(2) of the Act of 1939, as enacted or as amended is unnecessary and inappropriate because the issues raised by the plaintiff could and ought to have been the subject of an application for Judicial review. Likewise and, for the same reason, the plaintiff is not entitled to advance a claim that the said section is incompatible with the obligations of this State under the provisions of Articles 6, 13 and 14 of the European Convention on Human Rights as given effect by the European Convention on Human Rights Act 2003.
4. The Statement of Claim discloses no reasonable cause of action and/or the action is shown by the pleadings to be frivolous and/or vexatious and/or an abuse of the process of the Courts.

Apart from the foregoing and also joining issue with the plaintiff on his claims in the Statement of Claim, the defendants plead reliance upon the provisions of Article 38 of the Constitution as expressly permitting the establishment by law of Special Courts and excepting from the guarantee that no person shall be tried on any criminal charge without a jury, offences where it is determined in accordance with Law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in a particular case. It is expressly denied that the decision of the Director of Public Prosecutions was based on facts that were untrue and/or inaccurate and that the disclosure of the existence of such facts would not or might not compromise the security of individuals or the security of the State. At para. 14(w) of their defence, the defendants plead that it is not admitted that the decisions of the Director of Public Prosecutions impugned could only be justified in particular and exceptional circumstances which involved demonstrating that the material upon which the decision was based would be harmful to an individual or to the security of the State if disclosed to the plaintiff.

At para. 14(m) to (p) inclusive, the defendants plead as follows:-

- (m) The circumstances in which a decision to issue a certificate pursuant to s. 46(2) is subject to review by a Court and the circumstances (if any) in which the Director of Public Prosecutions might be obliged to give reasons for such a decision and/or provide information or material on which that decision was based is a matter for consideration and determination in an appropriate case. As hereinbefore pleaded it was open to the plaintiff to seek to review the decision of the Director of Public Prosecutions to issue a certificate in this case, but the plaintiff chose not to do so.
- (n) The Defendants plead that, in the event that it were established to the satisfaction of this Court that any failure on the part of the Director of Public Prosecutions to give reasons for a decision to issue a certificate pursuant to s. 46(2) of the Act of 1939 and/or any failure to provide information or material on which that decision was based violated, or would violate a fundamental constitutional right of an accused person, it would be open to the Court to direct the provision of such reasons and/or information and nothing ins. 46(2) of the 1939 Act, would preclude the making of an order to that effect in such circumstances.
- (o) For the avoidance of doubt, the Defendants deny any right of the plaintiff was violated by the refusal of the Director of Public Prosecutions to give reasons for the issuing of the s. 46(2) certificate in relation to the plaintiff and/or any alleged failure or refusal by the Director of Public Prosecutions to provide the plaintiff with the information relied on by him to issue the certificate.
- (p) The Defendants will rely upon the presumption of Constitutionality which applies to s. 46(2) of the Offences against the State Act 1939, as enacted and as amended.

The defendants plead that the European Convention on Human Rights and Fundamental Freedoms is not part of the domestic law of this State and, the plaintiff is not therefore entitled to "interim or injunctive relief in relation to the prosecution". The defendants plead that the impugned acts and omissions of the Director of Public Prosecutions are valid and lawful having regard to the provisions of the Constitution, the European Convention on Human Rights and Fundamental Freedoms and the European Convention on Human Rights Act 2003 and, if they impinge on the plaintiffs rights as alleged (which is denied), they do so in a manner which is both proportionate and lawful.

A Notice for Particulars dated the 15th April, 2009, was served by the defendants on the solicitors for the plaintiff. At subparas. (k), (l) and (m) the defendants sought full and detailed particulars of the allegation by the plaintiff that the decisions of the Director of Public Prosecutions to issue the Certificate may well be based on alleged facts which were untrue and/or inaccurate. At subpara. (z) and the following paragraphs, the defendants sought full and detailed particulars of the allegation at subpara. (j) of the Statement of Claim that the Director of Public Prosecutions acted arbitrarily, unreasonably, and/or on the basis of some improper motive and/or in abuse of the Courts in reaching a decision to issue the Certificate and, failed to have regard to an alleged special obligation to ensure

that the plaintiff received a fair trial in due course of law and/or adopted a course subversive of the rights of the plaintiff. Replies were furnished on behalf of the plaintiff on the 26th April, 2010. As regards subparas. (k), (l), and (m) the reply given was, "this is not an appropriate matter for particulars". As regards subpara. (z) and the following subparagraphs, the reply given was "this is a matter for evidence and submissions at the hearing of the action".

In the events which occurred, no oral evidence was in fact given at the hearing of the action nor was any affidavit evidence proffered. Certain facts, as hereinbefore recited, were agreed and admitted into the record. Extensive written submissions by counsel representing the parties were furnished the Court at the commencement of the case. Counsel then made oral submissions addressed to the submissions of the other side. A very large number of judicial decisions, reported and unreported, were considered and discussed.

In advancing his principal preliminary objection that the plaintiff lacked *locus standi* to maintain this action, senior counsel for the defendants submitted that this Court was being invited to determine the plaintiffs alleged case in a "factual vacuum". The plaintiff, he submitted, was asking the Court to accept that he did not know why the Director of Public Prosecutions might have issued the Certificate in his particular case and that he was actually prejudiced by this lack of knowledge. This claim by the plaintiff was not supported by any facts: the plaintiff chose not to give evidence or to seek to put evidence on affidavit before the Court. The plaintiff, senior counsel for the defendants said, could not challenge of the constitutionality of s. 46(2) by conjuring up some conceived prejudice that might possibly be suffered by a hypothetical person who demonstrated to the Court by admissible evidence that he or she was totally unaware of anything in his or her life or circumstances which might reasonably cause the Director of Public Prosecutions to exercise the discretion vested in him by s. 46(2) of the Act of 1939.

Senior counsel for the defendants submitted that there was no evidence before the Court that the situation in the plaintiff's case was similar or as to what were the actual facts in his case. If the facts in his case were similar and the Director of Public Prosecutions were to continue to decline to give reasons for his decision to issue a Certificate the plaintiff might well have *locus standi* to seek the declarative relief claimed in these proceedings. However, this was not in fact the case. The plaintiff claimed the he was personally prejudiced because he was deprived of what he claimed would otherwise be his constitutional right to trial before a judge and jury, in circumstances where he had to be taken as claiming that he did not know why the Director of Public Prosecutions had so acted and where there was a continuing refusal on the part of the Director of Public Prosecutions to shed any light whatsoever on his inexplicable decision to treat him in this fashion. One might hypothesise that a person charged with a non-scheduled indictable offence could demonstrate by appropriate evidence that he or she did not know why a Certificate had issued in his or her case. However, senior counsel for the defendants submitted that the onus lay on the plaintiff to establish by proper evidence the facts in his case and he had not discharged that onus. In this respect, senior counsel for the defendants adverted to what he stated was the very significant fact of the withdrawal during the hearing of the pleading of improper motive, arbitrariness, discrimination and subversion of the plaintiffs constitutional and conventional rights on the part of the Director of Public Prosecutions despite the assertion in the reply to particulars that these would be matters for evidence and submissions at the hearing of the action. Senior counsel for the defendants relied on the authority of *Cahill v. Sutton* [1980] I.R. 269, Supreme Court per. Henchy J. at 281-286, and *A. v. The Governor of Arbour Hill Prison* [2006] 4 I.R. 88 per Hardiman J. 164-165.

Counsel for the plaintiff (the court was addressed by both senior and junior counsel) submitted that the defendants' contention that the plaintiff lacked *locus standi* to maintain this case was based upon a failure on the part of the defendants to have any or any proper regard to the particular application of the principles stated by the Supreme Court in *Cahill v. Sutton* in legal cases as distinct from their application in civil cases. Counsel for the plaintiff submitted that the defendants relied principally upon what they claimed was an evidential deficit in the plaintiff's case. Counsel for the plaintiff submitted that the refusal of the Director of Public Prosecutions either initially or when requested to give reasons why a Certificate had been issued in this case was a decision affecting the constitutional rights of the plaintiff so that, said counsel, he had *locus standi* to make the complaint even though the factual issues in the case had not been determined and might not necessarily be determined adversely to him. Counsel for the plaintiff cited the decision of the Supreme Court in *Osmanovic v. The Director of Public Prosecutions* [2006] 3 I.R. 504, where Geoghegan J. in delivering the judgment of Court held at p.510/511:-

"Is each of these applicants acting prematurely in seeking to challenge the constitutionality of s. 89(b) [of the Finance Act 1999 as amending s. 186 of the Customs Consolidation Act 1876]? The trial judge thought so but I do not agree. In the first case, the judge took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision. In relation to the second case the respondents [The Director of Public Prosecutions and others] lay emphasis on the very early stage of that case and that it is not known yet what options are open to the appellant at the District Court stage. In other words, the Act of 1967 has not really yet come into play. The trial judge seems to have been of the same view. I do not accept that *locus standi* is such a narrow concept or that the views of the learned trial judge conformed with the principles of this court set out in *Cahill v. Sutton* [1980] I.R. 269. I appreciate that prematurity and *locus standi* are not quite the same thing. In each of these three cases, however, I am of the opinion that if the applicants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted."

Counsel for the plaintiff also relied upon the decisions in *Curtis v. The Attorney General and The Revenue Commissioners* [1985] I.R. 458 at 462 per. Carroll J. and *S.M v. Ireland, The Attorney General and The Director of Public Prosecutions (No.2)* [2007] 4 I.R. 369 at 378-379 per. Laffoy J.

While acknowledging that neither s. 46(2) of the Act of 1939 nor, the law imposed any obligation on the Director of Public Prosecutions to do any of these things, the plaintiff complained that the Certificate was issued without his being informed of the intention to do so and, without his being afforded an opportunity of making prior submissions in that regard. He further complained, - and at the hearing of the action, this was his principal complaint, - that having issued the Certificate, the Director of Public Prosecutions had refused and continued to refuse to give him any reasons for making this particular determination in his case.

The plaintiff claimed that this had a serious impact on him. He claimed that he has suffered prejudice in being deprived of what he asserts would have otherwise been his "right" under Article 38.5 of the Constitution to be tried on these criminal charges by a judge and jury. This he claimed, was due the failure of the Director of Public Prosecutions in making a determination to issue a Certificate in his case, to have regard in the foregoing respects to his unenumerated rights, pursuant to Article 40.3.1 and Article 40.3.2 of the Constitution, to fair procedures and equality before the law. Citing *Eviston v. The Director of Public Prosecutions* [2002] 3 I.R. 260 at 294-295 per. Keane C.J. and *Carlin v. The Director of Public Prosecutions* (Unreported, Supreme Court, 16th March, 2010), counsel for the plaintiff submitted that the Director of Public Prosecutions in making the determination in his case was obliged to have regard to and respect these constitutional rights of his.

Counsel for the plaintiff accepted and did not seek to distinguish or to resile from the decisions of this Court and the Supreme Court in cases such as *Kavanagh v. Ireland and others* [1996] 1 I.R. 321 at 350 per Barrington J.; *William O'Reilly and Peter Judge v. The Director of Public Prosecutions and others* [1984] I.L.R.M. 224 per Carroll J.; *Thomas Savage and Daniel McOwen v The Director of Public Prosecutions and The Attorney General* [1982] I.L.R.M. 385 per. Finlay P. (as he then was), and *In The Matter of the Application of Thomas MacCurtain* [1941] I.R. 83 per Gavan Duffy J. confirming the right of the Director of Public Prosecutions to exercise such administrative power and that the decision of the Director of Public Prosecutions to issue a Certificate pursuant to the provisions of s. 46(2) of the Act of 1939, is not reviewable by the Courts, whether in open court or as a private investigation, unless it can be shown that the decision of the Director of Public Prosecutions was made *mala fide* or was influenced by some improper motive or policy (*G.E. v. The Director of Public Prosecutions* [2009] 1 I.R. 801, Supreme Court at 803 per. Kearns J. (as he then was)). However, counsel for the plaintiff submitted that this merely served to emphasise the unconstitutionality of s. 46(2). Counsel for the plaintiff submitted that in no previous decision of this Court or of the Supreme Court had the question of the procedures which should be followed by the Director of Public Prosecutions in making a decision to issue a Certificate pursuant to the provisions of s. 46(2) of the Act of 1939, been addressed.

Counsel for the plaintiff submitted that without knowing the reasons for the Certificate, there was no possibility of the plaintiff ever being in a position to prove *mala fides* or improper motive or policy on the part of the Director of Public Prosecutions. For the same reason, he submitted that s. 46(2) was incompatible with the provisions of Articles 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms as set out in Schedule I of the European Convention on Human Rights Act 2003. Without knowing the reasons for the determination to issue the Certificate, the plaintiff did not have any effective remedy against a possible violation of his Convention rights under Article 6 by the Director of Public Prosecutions acting in an official capacity. Counsel for the plaintiff submitted that there was no presumption of regularity in favour of the Director of Public Prosecutions in making this determination.

In summing up, counsel for the plaintiff submitted that the plaintiff complained that he had been deprived of what would otherwise have been his constitutional right to a trial before a judge and jury by a decision on the part of the Director of Public Prosecutions for which reasons were not given and continued to be withheld, in consequence of which that decision was immune from effective review. The plaintiff's constitutional and Convention challenges to this decision of the Director of Public Prosecutions were addressed to the process of determination which he claimed infringed his rights under Articles 40.3.1 and 3.2 of the Constitution and he was entitled to argue them at this stage.

While this is undoubtedly a complaint made by the plaintiff, based upon the Constitution, I am not satisfied that it is an argument which the plaintiff is justified in making. The plaintiff has significantly failed to demonstrate by admissible evidence that his complaint is rooted in his own factual circumstances. The whole basis for this complaint is the assertion that he does not know the reasons why the Director of Public Prosecutions decided to issue the Certificate in his case. He therefore complains that without knowing the actual reasons for that decision, he cannot avail even of the very limited grounds of review of the decision of the Director of Public Prosecutions which would otherwise be available to him. No evidence whatever is offered by the plaintiff which would support either contention.

Counsel for the plaintiff submits that unless the Director of Public Prosecutions identifies and confirms his reasons for issuing the Certificate, the plaintiff cannot know what those reasons were. I do not accept that this follows at all, especially in the context of a certification that in the plaintiff's case the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. I am satisfied that the reasons for such a certification are well capable of being known and recognised by the plaintiff without their having to be expressly confirmed to him. However, counsel for the plaintiff submits that the plaintiff does not know the reasons why the Director of Public Prosecutions decided to issue a Certificate in his case. In my judgment, none of this is of any practical relevance because the plaintiff has chosen not to set out or to engage with any facts whatsoever in his case. The court is in essence invited to accept as proven these statements by counsel for the plaintiff and to make assumptions as to the facts in the plaintiff's case and then to go on and to draw inferences and reach conclusions based upon these statements and assumptions. I am satisfied that the Court should decline to do any of these things. What the court is being invited to do is no different from deciding the issues by reference to hypothetical or third party facts.

The plaintiff's claim must amount to this: that if he knew the reasons for the Certificate he could ascertain, by reference to what he knows to be the true facts affecting him (but which he withholds from the court), whether the reasons for the decision of the Director of Public Prosecutions to issue the Certificate were or were not tainted by *mala fides* or improper motive or policy or suffered from one or more of the infirmities suggested in argument in *Savage v. The Director of Public Prosecutions* [1982] I.L.R.M. 385 and helpfully listed in the judgment of Finlay P. (as he then was) at pp. 388 and 389 and he could therefore properly review the decision of the Director of Public Prosecutions. However, no facts in his own case were put before this Court by the plaintiff. The Court will not consider whether the plaintiff might have an arguable case that he was prejudiced by not knowing the reasons for the determination by the Director of Public Prosecutions to issue a Certificate in his case, in circumstances where the plaintiff declines to identify any facts in his own case which would reasonably cause him to entertain a legitimate concern that the decision of the Director of Public Prosecutions in his case might have been flawed. The plaintiff refers to what he alleges is the absence of fair procedures in the making of that decision. However, the plaintiff while neglecting or declining to put his own facts before the Court, failed to establish "any transcendent need to assert against the statute the constitutional provisions that has been invoked" by him.

Reference was made by counsel for the plaintiff in the course of argument to possible situations where an inability to know the true reasons why a Certificate was issued by the Director of Public Prosecutions in his case might amount to an invasion of the plaintiff's indicated constitutional and convention rights. Suppose, said counsel, the Director of Public Prosecutions had acted on confidential information which deliberately or mistakenly had connected the plaintiff with an illegal organisation how could he meaningfully challenge this if he did not know that it was the reason for the decision to issue the Certificate? In my judgment, this is the very sort of situation covered by the principles stated by the Supreme Court in *Cahill v. Sutton*, which, despite what appeared to be a suggestion to the contrary by counsel for the plaintiff, apply with equal effect in legal as well as in civil cases (*Osmanovic v. The Director of Public Prosecutions*, (above cited) per. Geoghegan J. at p. 511). As in *Cahill v. Sutton*, the plaintiff here seeks to ground his allegations of unconstitutionality on prejudice that might be suffered by third parties or in hypothetical situations. The plaintiff complains that he does not know the reasons why the Director of Public Prosecutions issued a Certificate in his case. The sort of situation postulated by counsel for the plaintiff is indeed significant in this regard; that it must reasonably be the case that a belief by the Director of Public Prosecutions that he was a member of, or had connections with, a proscribed organisation or was involved in organised crime, would rationally be the first reason to suggest itself to the recipient of such a Certificate and his legal advisers. Given the nature of the Certificate, another possible reason that would suggest itself would be a belief that he had previously interfered with a jury. Yet this plaintiff did not support his claim with a single fact: not even with a bare statement on oath that he had no such involvement or connection and had not done or said anything which might possibly be seen by the Director of Public Prosecutions as amounting to such an overwhelmingly serious matter, as a threat to the effective administration of justice or to the preservation of public peace and order by the ordinary courts. I find that there is nothing unreasonable, unjust or unduly burdensome

in requiring him to do so, and I reject the submission that he is being asked to prove a negative.

In my judgment the plaintiff lacks legal capacity to come before this Court to vindicate some form of general obligation on the part of the Director of Public Prosecutions to give reasons for his decision in every case in which he determines to issue a Certificate. This would inevitably involve the plaintiff in arguing from facts not confined to the facts of his own case but by reference to third party and hypothetical facts best suited to advance the argument. He cannot divorce the concept of "prejudice" from the facts of his own case.

Counsel for the plaintiff submitted that the plaintiff was not aware of any other case in which the Director of Public Prosecutions had issued a Certificate pursuant to the provisions of s. 46(2) of the Act of 1939, in respect of a person charged with similar offences. Even assuming that this were so, it does not assist the plaintiff on the issue of *locus standi* which falls to be determined solely by reference to the facts of the plaintiff's own case and the actual or threatened prejudice which he claims he has or will suffer.

I find it very significant that counsel for the plaintiff abandoned the pleading at para. 9 (J) of the Statement of Claim in the course of his opening submissions to this Court. When particulars were sought in relation to this pleading, which senior counsel for the defendants described as containing "appalling allegations of *mala fides* and impropriety on the part of the Director of Public Prosecutions of the grossest and most flagrant type", the reply given was that evidence would be given and submissions made in relation to it at the hearing of the action. By first failing to particularise and then by abandoning this claim, the plaintiff, in my judgment, emphasised the total disengagement of the case sought to be made by him from any facts and prejudice personal to him such as might be sufficient to confer *locus standi* in the matter.

In my judgment, the plaintiff has not established *locus standi* to maintain this action and, the Court will decline to consider the matter further.