FOR ELECTRONIC DELIVERY

UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number [2021} IECA 8
Record No: CA 2018/406

Edwards J.

Haughton J.

Pilkington J.

STEPHEN BRADY

Applicant/Appellant

V

THE REVENUE COMMISIONERS, THE COMMISSIONER OF AN GARDA SIOCHÁNA, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of the Court delivered on the 18th of January, 2021 by Mr. Justice Edwards

Introduction

1. This appeal is against the Order of the High Court (Burns (T) J.) dated the 28th of September 2018 dismissing the applicant/appellant's ("the appellant's") application for leave to apply for various reliefs, including declaratory relief and *certiorari*, by way of judicial review; and against the related judgment of the same date, the neutral citation for which is [2018] IEHC 540, giving the court's reasons for the said refusal.

2. The background to the application resides in the conviction of the appellant before Judge Sean McBride sitting at Monaghan District Court on the 14th of October 2013 for being in possession on the 25th of November 2011 at Planation, Co Monaghan, of an unregistered Mercedes Benz vehicle, registration mark, WEZ5923, such vehicle not being lawfully exempted under s. 135 of the Finance Act 1992 ("the Act of 1992"), or being used in accordance with any conditions, restrictions or limitations referred to in that section contrary to s.139(3)(a) and s.139(4) of the Act of 1992 as amended by s.240 of the Finance Act 2001 and s.77 of the Finance Act 2008 and to the form of the statute made and provided. The appellant was sentenced at first instance to a fine of €5,000 to be paid within six months, or 3 months imprisonment in default of the payment thereof.

3. The appellant's said conviction and sentence was subsequently appealed to Monaghan Circuit Court (Her Honour Judge Berkeley presiding) and came on for hearing on the 29th of November 2016. The appeal against conviction was dismissed on the merits, but the appellant was partly successfully in his appeal against sentence in that the Circuit Court judge was disposed to vary the amount of the fine from €5000 to €3000.

4. The basis on which the appellant unsuccessfully sought to defend the case before both the District Court and the Circuit Court was that the vehicle in question,

on which it was admitted no VRT had been paid in this jurisdiction, was registered in the ownership of the appellant's wife in Northern Ireland, and was on temporary loan to him at the time that he was stopped by a member of An Garda Siochána on the 25th of November 2011. He contended that under EU law, and specifically Article 63 TFEU (formerly Article 56 EC), a directly effective provision which prohibits restrictions on movements of capital between Member States, a citizen of one EU Member State may borrow for temporary use from another EU citizen in another Member State a motor vehicle registered in that other Member State and drive the borrowed vehicle on the road network of the borrower's Member State, and that any domestic law which suggests the contrary is invalid and must be disregarded in circumstances where Article 63 TFEU is directly effective.

5. In support of this argument the appellant relied upon the decision of the CJEU in the conjoined cases of *Staatssecretaris van Financien v. van Putten, Mook and Frank* ("*van Putten and others*") (Cases C-578/10, C-579/10 and C-580/10) which involved a request from the Supreme Court of the Netherlands to the CJEU for a preliminary ruling on the question (identical in all three cases): *"does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, which has been borrowed from a resident of that other Member State and has been driven by a resident of the first Member State in the territory of that Member State?"*

6. The CJEU answered the question posed in the affirmative, stating:

> *[56] …Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires residents who have borrowed a vehicle registered in another Member State from a resident of that State to*

pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way."

7. The transcript of the proceedings before the Circuit Court was reviewed at length by the High Court judge, and it is unnecessary to do so again in as much detail, although later in this judgment we will need to refer to some of the evidence that was before the Circuit Court. We adopt the High Court judge's review and it should be read in conjunction with this judgment. Beyond that, it is sufficient at this point to state that the transcript reveals significant engagement between counsel and the bench in regard to this argument, and that the relevant authority was handed up, and was opened to, the Circuit Court judge.

8. It is clear from the transcript that the Circuit Court judge considered that she understood the argument that was being made, but that she ultimately rejected it, firstly on the basis that she had no jurisdiction to declare a domestic statute to be invalid as contravening EU law, and secondly in so far as any possible disapplication of the domestic statute was concerned on the basis that she believed the case of *van Putten and others* was in any event distinguishable from the appellant's case. She expressly stated that in her view, the *van Putten and others* ruling was *"on the basis of a first use of the vehicle on a national [roads] network"* and that *"that is not the case made by the defence in this case. Quite the contrary. That's not the issue in this*

case at all. Mrs Brady's evidence was that she regularly gave her husband the car to use and had done so; not so much at this time because he had been very unwell."

9. There had been evidence in the case that the appellant had previously been stopped while driving the same vehicle in this jurisdiction in February 2011, following which the vehicle was seized and was only released after the appellant's wife had paid a financial penalty and had signed a declaration that the vehicle would either be registered within the State or permanently exported. Subsequent to this the vehicle was observed by Customs officials, being driven by the appellant, in this jurisdiction, on three further occasions prior to the occasion the subject matter of the prosecution at issue, and specifically in July, August and September 2011. Further, there was evidence that a thirty-day period of grace is given by the Revenue Commissioners to the importer of a foreign registered car to register it in this jurisdiction. The appellant had clearly not acted to bring himself into compliance with the law within that grace period. The Circuit Court judge remarked in that regard:

> *"If this had been a case where in February of 2011 when they were stopped they said they were registering it and they had been charged, that would be a different scenario altogether and van Putten may (sic) well be relevant but not in these circumstances …".*

What does the judgment in the cases of *van Putten and others* actually decide?

10. The background to the three cases was that the defendants in the main proceedings (i.e., the proceedings before the Dutch Supreme Court), all residents of the Netherlands, were detected using cars registered in other Member States on the road network in the Netherlands without having paid vehicle tax. Under the relevant

Dutch law the tax in question was due on registration of the vehicle in the Netherlands. However, when a car or motorcycle which was not registered in the Netherlands was made available to a natural or legal person residing or established in the Netherlands, the tax was due on first use of that motor vehicle on the road network in the Netherlands.

11. It seems that on the first occasion the defendants were detected discretion was exercised by the tax authority and they were advised that, on a subsequent check they might be issued with an assessment notice for the payment of that tax. On a subsequent check the defendants were stopped and found to be in the same situation again, leading to them being issued with assessment notices. The defendants had unsuccessfully challenged the validity of the assessment notices before the relevant tax authority on the basis that the relevant Dutch law constituted a restriction on free movement of capital that was contrary to EU law, had then succeeded in an appeal to the Dutch Court of Appeal against that ruling, following which the tax authority had further appealed to the Dutch Supreme Court. It was in the context of hearing that appeal that the Dutch Supreme Court had requested the aforementioned preliminary ruling from the CJEU.

12. According to referring court, the full amount of the tax at issue in the main proceedings was charged to the defendants without any account being taken of the actual duration of the use of the motor vehicles on the road network in the Netherlands and without the defendants having been able to invoke any right to exemption from or reimbursement of that tax (see para 25 of the judgment).

13. The CJEU observed (at para 26 of the judgment) that:

"Therefore, the questions referred must be understood as seeking to know whether European Union law must be interpreted as meaning that it precludes legislation of a Member State which requires its residents who have borrowed a car registered in another Member States from a resident of that State, to pay in full, on first use of that vehicle on the national road network, a tax normally due on registration of a vehicle in the first Member State, without any account being taken of the duration of the use of that vehicle on that road network and without the persons concerned being able to invoke any right to exemption or reimbursement."

14. The judgment of the CJEU rehearses that what was then Article 56 EC (now Article 63 TFEU) prohibits restriction on free movement of capital. However, the relevant treaty (both then and now) does not provide a definition of "movement of capital". Be that as it may, it had become settled case-law that, in the absence of a definition in the Treaty of 'movement of capital' for the purposes of Article 56(1) EC, the nomenclature annexed to Council Directive 88/361/EEC had indicative value subject to the qualification, contained in the introduction to the nomenclature, that the list set out there does not define exhaustively the concept of movements of capital. (See paragraph 28 of the CJEU's judgment where the relevant cases are cited. It is not necessary for our purposes to list them).

15. The judgment goes on to note (in para 29) that in a case of *Schröder* (Case No C-450/09, reported at [2011] ECR I-2497, the CJEU has held that inheritances and gifts, which fall under heading XI of Annex I to Directive 88/361, entitled 'Personal Capital Movements', constitute movements of capital within the meaning of Article 63 TFEU, except in cases where their constituent elements are confined within

a single Member State. The same applies to 'loans' which fall within the same heading of Annex I to that directive, and it is immaterial whether a loan is for consideration or free of charge or what the purpose of the loan is.

16. In any event it was the court's view (expressed at para 31) that, *"the loan of a motor vehicle for use free of charge constitutes a benefit which represents a specific economic value, corresponding to the cost of use of a hire car of the same type and for the same period."*

17. It followed that, as the Advocate General had pointed out in point 31 of her Opinion, *"the cross-border lending of a vehicle free of charge constitutes a capital movement within the meaning of Article 56 EC* (now Article 63 TFEU)*"* (see para 36 of the judgment). The issues therefore to be determined in the cases giving rise to the reference were whether, in the particular circumstances of those cases, there was any restriction on the free movement of capital and, if so, any possible justification for such restriction.

18. The CJEU noted that apart from certain exceptions that were not relevant, taxation of motor vehicles has not been harmonised at European Union level. The Member States were thus free to exercise their powers of taxation in that area provided that they did so in compliance with European Union law (see para 37 of the judgment).

19. In paragraphs 39 to 41of the judgment it was observed that:

> *"39. As the essential element of a loan is the option of using the goods loaned, it must be observed that the national legislation at issue in the main proceedings, by requiring residents of the Netherlands to pay a tax on first use of a vehicle registered in another Member State on the road network in the*

Netherlands, including where that vehicle was loaned free of charge by a resident of another Member State, results in the taxation of cross-border loans free of charge of motor vehicles.

40. On the other hand, loans of a motor vehicle for use free of charge are not subject to that tax where the vehicle is registered in the Netherlands. Such a difference, or at least apparent difference, in treatment according to the State in which the loaned vehicle is registered is, therefore, liable to make such cross-border capital movements less attractive, by dissuading residents of the Netherlands from accepting loans offered by residents of another Member State of a vehicle registered in that State. Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision (see Case C-478/98 Commission v Belgium [2000] ECR I-7587, paragraph 18 and the case-law cited).

41. Such national legislation therefore constitutes a restriction on the free movement of capital for the purposes of Article 56(1) EC.

20. It is understood that in the present case the appellant has at all stages (i.e., before the District Court, before the Circuit Court, before the High Court and before us in the Court of appeal) sought to contend that the same principles apply *mutatis mutandis* to the loan to him by his wife free of charge of the vehicle registered in her name in Northern Ireland, namely that the Irish legislation under which he was being required to pay VRT, and on foot of which he was being prosecuted for failing to do

so, constitutes (at least in the circumstances of his case) a restriction on the free movement of capital for the purposes of what is now Article 63 TFEU.

21. Of course, the mere fact that it can be established that in certain circumstances domestic legislation might restrict free movement of capital would not *per se* be dispositive of a claim, such as that being raised by the appellant in his defence, that it must necessarily be disapplied. The CJEU in *van Putten and others* makes clear that it would further have to be established (a) that the situations being contrasted were in fact comparable, (b) that there was in fact a difference in treatment, and (c) that there was no possible justification for the restriction. A restriction would not be incompatible with the Treaty if the difference in treatment between two comparable situations *"was justified by an overriding reason in the public interest"* and the measure at issue was *"consistent with the principle of proportionality"* (see para 44 of the CJEU's judgment).

22. On the issue as to whether the situations being contrasted in the case before them were comparable, the CJEU observed that while it was true that the owners of vehicles registered in the Netherlands had already paid vehicle tax when the vehicle was entered on the vehicle register in the Netherlands, the fact nonetheless remained that, as a rule, those vehicles were intended to be used essentially in that Member State on a permanent basis or that they are, in fact, used in that way. The Court had already held in several cases (cited in the judgment) that a Member State may impose a registration tax on a motor vehicle registered in another Member State where that vehicle is intended to be used essentially in the first Member State on a permanent basis or where it is, in fact, used in that manner. However, if those conditions were not satisfied, the connection with one Member State of the vehicle registered in

another Member State would be weaker, necessitating another justification for the restriction (paras 45 to 47). According to the order for reference the defendants in the main proceedings had had to pay the full amount of the vehicle tax, as the amount was calculated without any account being taken of the duration of the use of the vehicles concerned and without the users of those vehicles having been able to invoke any right to exemption or reimbursement. However, it was not apparent from the documents submitted to the Court that those vehicles were intended to be used essentially in the Netherlands on a permanent basis or that they were, in fact, used in that way. It was therefore the task of the national court to assess the duration of the loans at issue in the main proceedings and how the loaned vehicles had in fact been used.

23. The Court continued (at para 50):

> *"Thus, if the vehicles at issue in the main proceedings, which are not registered in the Netherlands, are intended to be used essentially in the Netherlands on a permanent basis or if they are, in fact, used in that way, there is not actually a difference in the treatment of a person who resides in the Netherlands and uses such a vehicle free of charge and a person who uses a vehicle registered in that Member State on the same conditions, since the latter vehicle, which is also intended to be used essentially in the Netherlands on a permanent basis, was already subject to vehicle tax on its first registration in the Netherlands."*

24. In those circumstances, the charging of vehicle tax on first use on the road network in the Netherlands of vehicles which were not registered in the Netherlands, was justified in the same way as the tax due on the registration of such vehicles in the

Netherlands was, provided that the tax took account, as appeared to be the case, of the depreciation of such vehicles at the time of that first use.

25. The CJUE continued (at para 52):

> *"On the other hand, …, if the vehicles at issue in the main proceedings were not intended to be used essentially in the Netherlands on a permanent basis or were not, in fact, used in that way, there would be a difference in treatment between the two categories of persons mentioned … and the charging of the tax concerned would not be justified. In such circumstances, the connection of those vehicles with the Netherlands would be insufficient to justify the charging of a tax normally due on registration of a vehicle in the Netherlands."*

26. That statement was then qualified with the observation that, *"[e]ven if such a difference in treatment might, in some circumstances, be justified by an overriding reason in the general interest, it is also necessary for the tax to comply with the principle of proportionality"* (para 53).

27. The CJEU ultimately concluded that:

> *"Since, on the one hand, it is not apparent from the order for reference that, in the disputes in the main proceedings, it has been established that the vehicles in question are intended to be used essentially in the Netherlands on a permanent basis or that they are, in fact, used in that way and, on the other hand, neither the referring court nor the Netherlands Government has put forward other overriding reasons in the general interest to justify the restriction at issue, it must be held that Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires*

residents who have borrowed a vehicle registered in another Member State from a resident of that State to pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way."

28. Accordingly, the referred questions were answered by the CJEU as indicated earlier in this judgment.

Implications of *van Putten and others* for the prosecution of the appellant.

29. The first thing to be said is that *van Putten and others* does not in any way invalidate s.139 of the Act of 1992. It was always, and remains, a valid provision of an Irish domestic statute. At its height, *van Putten and others* establishes that in certain circumstances the application of a provision such as that in s.139 could amount to an unjustified restriction on the free movement of capital, contrary to EU law, and specifically Article 63 TFEU. If such circumstances are demonstrated to exist, then a court that is being requested to act on foot of s.139 in those circumstances would be obliged to disapply it, on the basis that Article 63 is directly effective and the doctrine of supremacy of EU law requires the disapplication of conflicting domestic legislation in such a situation.

30. Although the circumstances of the cases of *van Putten and others* involved liability to vehicle tax based on first use on the road network of the Netherlands of a

vehicle registered in another Member State, it does not seem to us correct to interpret that decision, as the Circuit Court judge appears to have done, as being narrowly confined to a "first use" case. Rather, the *ratio decidendi* (in the loose sense – the phrase is not entirely apposite in the context of European court jurisprudence) or curial part of the decision is based on the principle of non-discrimination in EU law which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Accordingly, what *van Putten and others* affirms is that, where Article 63 TFEU is prima facie engaged, the relevant enquiry must be concerned with whether the contrasted situations (whether that involves first use or any other circumstances of use being relied upon) are comparable, whether if they are indeed comparable there is in fact a difference of treatment, and, if so, whether the difference was justified by an overriding reason in the general interest and, finally, whether the measure at issue is consistent with the principle of proportionality.

31. We are satisfied (without expressing any view on the merits of it) that the true legal case the appellant had sought to make, although far from clearly articulated, was that he, while residing in this State, had had occasional temporary use by way of a loan (or loans) from his wife, free of charge, of the vehicle at issue which was registered in another Member State, during which he would drive it on the road network in this State. He was not seeking to contend that his case was concerned with first such use, and it was not disputed that he been detected using the vehicle in the State on multiple occasions. On the contrary, his case was that his situation was comparable to, and ought to be compared to, that of a person in the same situation in all respects, save for the fact that the vehicle borrowed by the other person was

registered in this State; that although the two cases were comparable there was a difference in vehicle tax treatment between them which would operate as a disincentive to cross border loans, and that there was no justification for that difference. In those circumstances he would say that he was not liable to pay the tax demanded of him; that the prosecution brought under s.139 of the Act of 1992 was therefore misconceived, and that were he to be convicted it would represent an unjustified breach of Article 63 TFEU. Accordingly, the Circuit Court judge ought to disapply s.139 and acquit him by direction.

32. It was certainly open to the appellant to seek to make such a case. In that regard, however, we would offer the following commentary. This was a criminal prosecution, and accordingly the appellant bore no legal burden of proof. It was for the State to prove every facet of the case against him, and to do so beyond reasonable doubt. However, it was not for the prosecution to prove *in vacuo* that in relying, as they were proposing to do, on a valid provision of an Irish domestic statute, they would not be acting in breach of any EU law. In so far as the appellant was seeking to suggest that the application of the relevant provision of domestic legislation underpinning his prosecution, i.e., s.139 of the Act of 1992, as amended, to the circumstances of his case would be contrary to EU law, and specifically Article 63 TFEU, and of relying on that as a defence, it was for him to raise that issue. That meant that he bore an initial evidential burden of showing that there was a real possibility that Article 63 TFEU was engaged in the circumstances of his case. The threshold for doing so was low, but he was required to be able to point to some cogent evidence, adduced by either side, tending to suggest such engagement at the level of real possibility. Assuming he could discharge that evidential burden, the normal rules

as to the legal burden of proof would apply thereafter, and it would be for the State to establish beyond reasonable doubt that Article 63 TFEU was not in fact engaged in the circumstances of the case; or if so, that there was no breach of it because the defendant's case was not genuinely comparable to whatever other case he was proffering as a relevant comparator (e.g., by persuading the court that his was not a true case of "temporary" user and that, on the contrary, the vehicle was intended to be used in the State on a permanent basis, or that it was in fact being used in that way); or that if his situation was comparable that his case was not being treated differently to that of the comparator; or that, if so, that different treatment was justifiable on some other basis and was proportionate.

Evidence adduced before the Circuit Court

33. In terms of evidence adduced, the prosecution had called a Garda and two Customs & Excise officers. It is common case that the cumulative evidence of these three witnesses was sufficient to establish the appellant's guilt of the charge under s.139 of the Act of 1992, unless it fell to be disapplied to prevent a breach of Article 63 TFEU in the circumstances of the case.

34. The evidence of the Garda had included (*inter alia*) the details that when stopped while driving the vehicle in the State in February 2011, the appellant, who confirmed that he was resident in the State, had contended that the vehicle belonged to his wife who resided in Northern Ireland, and that he had it on loan. The Garda further testified to seeing the appellant driving the same vehicle in the State on several subsequent occasions.

35. The Customs & Excise officers dealt in their evidence with (*inter alia*) the seizures of the vehicle and their dealings with the appellant and his wife. They also dealt with certain technical aspects of the offence with which the appellant was charged, which required to be proved to sustain the charge. It is not proposed to rehearse this technical evidence as nothing turns on it in circumstances where it is accepted that, aside from the European law point, evidence sufficient to convict the appellant had been adduced.

36. However, a few matters merit being highlighted from the transcript. There was evidence that when the appellant and his wife were jointly interviewed under caution in November 2011 it was confirmed by them that they were married. It was further asserted by the appellant that he resided in the State, and by his wife that she resided in Armagh in Northern Ireland and that she had always lived outside the State. There was evidence that attempts were made to verify the assertions that had been made concerning the appellant's wife's residence, and evidence was given that enquiries had revealed that both the appellant and his wife were claiming mortgage interest relief in respect of a farm property in Co Monaghan and that the appellant was claiming Illness benefit from the Department of Social Welfare in this State in respect of himself, his wife and their three children, all with an address at the farm property in Co Monaghan.

37. When it was put to the first Customs and Excise Officer, an Officer Martin, in cross-examination that the appellant's wife was going to say in evidence that she had lent the vehicle at issue to the appellant, and further put to Officer Martin that the sightings of the appellant driving the vehicle within the State were consistent with that, she responded, *"Mr. Brady is a State resident, Judge. He is not entitled to own*

or drive an unregistered vehicle. So our argument is that he's continually used -- using the vehicle so the vehicle was not on loan to him."

38. None of these witnesses was asked, either in chief or under cross-examination, what would be the situation in terms of a liability to pay vehicle registration tax on a vehicle loaned temporarily free of charge in an alternative scenario (analogous to that postulated in paragraph 40 of the judgment of the CJEU in *van Putten and others*) where the circumstances of the case were identical save in one respect, namely that the borrowed vehicle was registered in this jurisdiction. Indeed, there was no attempt by defence counsel in cross-examining any of the States witnesses to suggest the existence of a discriminatory situation that would be outlawed by EU law; or to put a comparable situation to any of the prosecution witnesses for their observations or commentary in terms of the legitimacy of the comparison being proffered, whether there would be a difference in treatment and, if so, whether it was justifiable and proportionate.

39. There was, however, some cross examination of the second Customs and Excise officer, a Mr Heffernan, in relation to a 30- day grace period allowed by the authorities during which an unregistered vehicle may be temporarily used on the road network of the State, pending its registration. In that context there were the following exchanges:

> *Q. In relation to section 139 itself, is there any provision there for a set off? Say, for example, if it were the case and it's our case and there's evidence will be given in relation to this by Mrs. Brady, if we were to show that Mrs. Brady is a resident of the north of Ireland and that of the vehicle, I think, is -- there's no dispute but the vehicle is registered in the north of Ireland, if we were to*

show that she's a resident of the jurisdiction in which a vehicle is registered, would there be any setoff in relation to the VRT on the vehicle?

A. Not on -- Judge, not on this occasion because, quite clearly, Stephen Brady had possession of the vehicle for outside a period of 30 days.

Q. So, it's 30 days, that's the determining factor?

A. Yes, Judge. The -- when a person takes possession of an unregistered vehicle, as explained by Officer Martin, they have seven days to make an appointment with the NCT centre and 30 days to complete the registration. And the reason the Revenue Commissioners allow that is because the -- because of the issue with loaning a vehicle. Then the loaning of the vehicle is no longer relevant because they have possession of it for outside of 30 days.

Q. And if there were a situation, for example, where over a two month period that if the vehicle were used both in the north of Ireland and in the south of Ireland, there is no provision under the Act, as it stands, for any kind of pro rata set-off?

A. No, the section is quite clear –

Q. The shutter comes down, if you like, after 30 days and that's it?

A. The – clearly -- the section clearly states that a State resident is not entitled to own or drive an unregistered vehicle.

Q. Okay, so there's no set off, there is no pro rata and there is no --?

A. But, excuse me, there is because the Revenue Commissioners have given that 30 day concession –

Q. Yes?

A. -- to get – to – and that gets away -- get you away from the loaning. The loaning then is no longer relevant because the Revenue Commissioners have been -- have been found to be fair in the way they've implemented that section by giving the 30 day period.

Q. And I'm not finding any fault with the Revenue because Revenue has to enforce the law, as it's made by the Oireachtas?

A. But I'm explaining it to you to get you away from -- the loan issue is not relevant to this case because the person had possession of the vehicle for outside the 30 days, which the Revenue Commissioners have allowed. So, the loaning is not relevant at all, Judge, in this case; it doesn't come into it at all.

Q. Well, I'll put something to you in reply to that, if you have a case of a married couple who were raising children together and who live apart in different jurisdictions, then it surely a case that if the vehicle is led in the context of that relationship, then such lending can go on and off over a period of over 30 days?

A. No, Judge, the Revenue Commissioners don't allow for that.

Q. Well --?

A. And the vehicle registration legislation doesn't allow for that.

40. Two witnesses were called for the defence in the Circuit Court, namely the appellant's wife and his accountant. The appellant himself did not give evidence. He was under no obligation to do so. His wife's evidence included testimony that she has lived in Armagh in Northern Ireland since her birth, that she is married to the appellant since 2000, and that they have three children, all of whom are at school in Northern Ireland. She said the house she and the children live in in Armagh is jointly

owned by herself and her husband. She and her husband also own a farm property in Co Monaghan and she confirmed that her husband lives there, and that he also works in the south, and that he had not been well for some time, having mental health issues. She said there was no marital disharmony and that the separate residential arrangements were in part due to her need to be in Armagh in order to care for her elderly mother, and the fact that the children attended school in the north, and in part due to her husband having taken up temporary residence on the farm property in the south on occasions of his ill health. She said the farm property was in a poor state of repair and not suitable for herself and the children.

41. Mrs Brady confirmed she was the registered owner of the car at issue, and that it was registered in Northern Ireland. She accepted that on occasions the car had been observed being driven by her husband in the Monaghan area south of the border with Northern Ireland, and that it had twice been intercepted by Gardai/Customs & Excise officers while being so driven in February and November 2011. She offered explanations of the circumstances that it is unnecessary to describe. She said that she was the major user of the vehicle, and that her husband had his own southern registered van. She would bring the children to see their father in the south once or maybe twice a week. Sometimes she would loan her vehicle to her husband. She was asked:

> *Q. Well, just in that particular period -- how many days in that year, 2011, might you have given the Jeep to your husband on loan?*
>
> *A. Not many because he was very unwell. Not many.*
>
> *Q. That particular year?*
>
> *A. Yes, in that particular year he was very unwell.*

Q. Yes. And in any of the other years would he have had greater use of the vehicle?

A. No, because he had his own vehicle. He had a van registered here in -- in the –

Q. In the south?

A. In the south so he had his own means of transport, you know, so.

Q. Yes. So it would arise just occasionally?

A. Just very occasionally, yes. Just, for instance, the one incident where I was not well.

42. Mrs Brady was robustly cross-examined by counsel for the prosecution, and in circumstances where it was manifest that the Irish authorities were sceptical of her claim that she has at all material times been a full time resident in Northern Ireland, the cross-examination focussed on that, and sought to impugn her credibility and reliability as a witness. As the trial judge opted to make no finding with respect to where Mrs Brady was resident, it is not necessary to review her cross-examination.

43. The evidence given by the appellant's accountant provides us with no assistance in terms of the issues on this appeal, and it is unnecessary to review it.

The case for leave to apply for judicial review

44. The appellant's complaint, prompting him to seek leave to apply for judicial review, when distilled to its essence, appears to be that he received an unfair trial before the Circuit Court because his counsel was either *de facto* precluded from making the case that he wished to make, alternatively that there was no proper

engagement by the Court with the case that he was seeking to make and with the evidence offered in support of it.

45. The suggestion that his counsel was precluded from making the case that he wanted to make arises from the following exchanges, as disclosed on the transcript of the proceedings in the Circuit Court on the 29th of November 2016 (at p.71, l. 1-9):

> *DEFENCE COUNSEL: Sorry, Judge, if I may, in reply to my friend, she set out the case, the domestic law, very succinctly, and the charge that is now before the court, and the charge in my submission would be sustainable if it only pertained to domestic law. I am seeking to inform the court of jurisprudence from the European Union which affects the outcome of this case and which leads in essence to the disapplication of the various sections of the Finance Act cited in the charge, section –*
>
> *JUDGE: Mr [counsel's name], I am going to stop you. You know that this court cannot make any such finding, that I have no jurisdiction to do that. Have you brought proceedings in a higher court?*

46. The judge's query was answered by counsel to the effect that his client had not. The court was informed that he had, however, initiated judicial review proceedings in respect of his conviction before the District Court, but had ultimately opted not to proceed with that and to appeal to the Circuit Court instead.

47. Defence counsel had then sought a second time to persuade the Circuit Court judge that it would be open to her disapply the relevant provisions of domestic legislation if she was satisfied that to apply them would breach EU law, but he was met with the same response (transcript, p. 72, l.-4.):

DEFENCE COUNSEL: I would understand that the legal applicable in domestic law (sic) *are subject to European law and European jurisprudence.*

JUDGE: Mr [counsel's name], I'm not saying that it's compliant. I am simply saying that I don't have jurisdiction to determine that issue, as you well know.

48. The alternative basis advanced for maintaining that his trial before the Circuit Court was unfair, namely that there was no proper engagement by the Court with the case that he was seeking to make and with the evidence offered in support of it, is to the effect that the Circuit Court judge inappropriately distinguished the case of *van Putten and others* on a superficial basis (namely that it applied only to a first use situation, and that the appellant's case did not involve first use) and refused to either state a case for the opinion of this court as to whether the principles set out therein were of wider application potentially covering a situation such as the appellant's, or to seek clarification in regard to the scope of its application from the CJEU by making a preliminary reference under Article 267 TFEU.

49. The first thing to be said about the application made to the High Court for leave to apply for judicial review is that it doesn't purport to name the Circuit Court for the County of Monaghan as a respondent. That court is a court of record, and it is that court that has convicted him. If he wants to undo his conviction, in circumstances where he has no further right of appeal, he needs to seek on stateable grounds to quash his conviction by obtaining an *Order of Certiorari* addressed to the court that convicted him. While his draft statement of grounds does claim an *Order of Certiorari* quashing that order (as well as various declarations, stays on further action on foot of that order, and damages for alleged breaches of rights and the tort of detinue), that relief is sought not against the court that convicted him but against the

presently named respondents none of whom were the legal entity that made the order in question. As a matter of first principles, a court cannot be asked in judicial review proceedings to quash the order or decision of a party that is not before the court.

50. Counsel for the appellant has sought to justify before us his framing of the intended proceedings in this way, on the basis that he understood that the appellant was precluded from joining the court that had convicted him by the terms of Order 84 (2A) of the Rules of the Superior Courts.

51. Order 84(2A) provides:

> "Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein—
>
> (a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,
>
> (b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and
>
> (c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned."

52. Counsel has misinterpreted the rule. What is precluded is the identifying by name in the title to proceedings of a judicial office holder whose actions are the subject of complaint, save in the circumstances permitted by the rule. There is no prohibition, nor could there be, on naming generically any institution or legal entity represented on the occasion in question by, or comprised by, a judicial office holder. Thus, while the appellant was precluded from naming "Her Honour Judge Berkley" as a respondent, there was nothing to preclude him from naming "The Circuit Court for the County of Monaghan" as a respondent, that being the court of record that convicted him. Accordingly, although nobody had raised the point before this court did so of its own motion during exchanges with counsel at the oral hearing of this appeal, we are satisfied that the application for leave to apply for judicial review as currently framed is misconceived and wrongly constituted.

53. Be that as it may, allowing for the possibility that the appellant may seek to reconstitute his proceedings appropriately (and expressing no view on possible implications or outcomes should that to be attempted), we think it appropriate to nonetheless engage *de bene esse* with the appellant's core complaints. Before doing so, however, it is appropriate to consider the approach of the High Court judge.

The Judgment of the High Court

54. With respect to the first core complaint made by the appellant, namely, that his counsel was precluded from making the case that he wished to make., the matter is dealt with at paragraphs 10, and 11, respectively of the High Court's judgment, where it was held:

10. At the conclusion of the evidence, an application was made on behalf of the Applicant asking the Circuit Court Judge to "disapply" the relevant sections of the 1992 Finance Act, as amended.

11. The Circuit Court Judge, correctly and appropriately found that she had no jurisdiction to make any determination of invalidity relating to an Act of the Oireachtas having regard to European Law and that any such application should have been the subject of Judicial Review proceedings. Whilst in the present application, the Applicant seeks a declaration that sections 135, 139(3), (4) & (5) of the Finance Act 1992, as amended, and Section 140(3) of the Finance Act 2001 are incompatible with Article 63 of the European Treaty, no such application was brought prior to the District or Circuit Court hearings. No issue can arise in relation to the Circuit Court Judge's correct determination in this regard, being, as she was, a court of local and limited jurisdiction."

55. There does appear to have been an ostensible conflation in the minds of both the Circuit Court judge, and the High Court judge, of the concept, on the one hand, of disapplying a provision of a domestic statute because its application in the circumstances of the case would contravene EU law; and on the other hand, the concept of granting a declaration that a provision of a domestic statute is incompatible with EU law. Every domestic court at every level, whether it enjoys local and limited jurisdiction, full original jurisdiction or appellate jurisdiction, is bound to have regard to the doctrine of supremacy of EU law where it applies and has jurisdiction to disapply a provision of a domestic statute where its application would clearly

contravene EU law. That was what counsel for the defendant (i.e. the present appellant) was asking the Circuit Court to do.

56. He was clear about that, stating:

> "*I am seeking to inform the court of jurisprudence from the European Union which affects the outcome of this case and which leads in essence to the disapplication of the various sections of the Finance Act cited in the charge."*

57. The response of the Circuit Court judge was:

> *"I am going to stop you. You know that this court cannot make any such finding, that I have no jurisdiction to do that. Have you brought proceedings in a higher court?"*

58. Counsel never suggested to the Circuit Court judge that he was asking the court to declare the relevant domestic statutory provision to be invalid. Rather, he had a suggested possible disapplication on the basis of the doctrine of supremacy of EU law, and the response of the Circuit Court judge was *prima facie* addressed to that suggestion. It was not correct therefore for the High Court judge to have concluded that, *"[t]he Circuit Court Judge, correctly and appropriately found that she had no jurisdiction to make any determination of invalidity relating to an Act of the Oireachtas having regard to European Law and that any such application should have been the subject of Judicial Review proceedings",* because no such application had been addressed to the court. While it is to speculate, it may have been the case that the Circuit Court simply misunderstood the nature of the application, but that is neither here nor there. Her response did not properly address the submission that had been made to her, and the High Court judge was incorrect to hold that it did. It is true

that if such an application had been made the Circuit Court would not have had the necessary jurisdiction to grant that relief, but it was not the relief that was asked for.

59. A further point that requires to be made is that while the High Court judge correctly observed that the first relief claimed in the appellant's proposed Statement of Grounds in the present judicial proceedings is *"a declaration that sections 135, 139(3), (4) & (5) of the Finance Act 1992, as amended, and Section 140(3) of the Finance Act 2001 are incompatible with Article 63 TFEU",* she omitted the next clause of the sentence in which that claim is asserted which goes on to say *"and therefore should be disapplied in relation to the facts of the case."* If is fair to comment that the way in which the relief is claimed is somewhat infelicitous, and that now seems to be accepted by counsel for the applicant who, at para 19.1 of his written submissions to this Court, has felt the need to emphasise:

> *"Appellant reiterates the fact that appellant does not wish - if leave is granted, on Appeal, by this Honourable Court - the High Court to strike down the national law upon which the criminal conviction was secured."*

60. Be all of that as it may, and notwithstanding our view that the High Court judge was ostensibly in error in her approach to the appellant's claim that he was precluded from making the case that he wished to make, the transcript of the Circuit Court hearing reveals that the appellant's counsel was in fact allowed to put forward the *van Putten and others* case, that there was considerable engagement between the counsel and the bench concerning the implications of it (although we offer no commentary at this point concerning whether the analysis engaged in was sufficiently rigorous), and that the case advanced by his counsel was that to apply s.139 of the Act of 1992 in the circumstances of the appellant's case would, by analogy with the

situation in *van Putten and others,* involve a contravention of Article 63 TFEU. That being so, we do not think that the appellant has an arguable case for relief by way of judicial review in terms of a complaint that he was precluded from making the case that he wished to make.

61. The appellant's second core complaint is, as we have identified, that even if the appellant's counsel had not been precluded from putting forward the case that he wanted to make, there was no proper engagement by the Court with that case, with the evidence offered in support of it, and with the jurisprudence relied upon. His complaint is that the Court failed to properly consider the *van Putten and others* jurisprudence, to appreciate the full implications of it and how it might apply in the circumstances of the appellant's case, to engage in an appropriately rigorous analysis of the evidence and to make necessary findings of fact relevant to (and appellant would say tending to support) the defence being put forward. It is contended in substance that the basis on which *van Putten and others* was distinguished was completely superficial, that it reflected an insufficient judicial analysis of that case and a want of judicial effort at properly understanding the judgment proffered to the court for its consideration and the extent of its import, and a spurious dismissal of the true case that counsel was putting before the court.

62. Again, it is appropriate to look at how the High Court addressed these complaints. Commencing at paragraph 19 of her judgment, the High Court judge stated:

> *19. …, the Court finds it necessary to set out some basic principles regarding the remedy of certiorari in Judicial Review proceedings. As stated by Chief*

Justice O'Higgins in The State (Abenglen Properties) v. Corporation of Dublin [1984] IR, at p. 392 of the report:-

> *"Its (certiorari) purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of."*

20. Having regard to the extensive transcript extract set out above, it is clear that the Circuit Court Judge carefully considered the issue of European law which was raised before her. It is also very clear that she considered the facts of the case before her and considered the application of the van Putten case to those facts. The Circuit Court Judge was of the view that the van Putten case was not applicable to the case before her and for that reason she determined to convict the Applicant of the offence charged and to refuse to state a case to the Court of Appeal. Each of these determinations were available to the Circuit Court Judge acting within her jurisdiction. The suggestion that she acted in excess of jurisdiction is simply not supported on the transcript extract.

21. It was equally within the Circuit Court Judge's discretion to determine what facts she had to decide. The fact that she determined not to decide whether the Applicant's wife was residing in Northern Ireland is not a decision made in excess of jurisdiction. Indeed, in light of the uncontroverted fact that that the vehicle which the Applicant was in possession of, on the date

of the offence, was registered within Northern Ireland, the residency of the Applicant's wife was not of significance.

22. Accordingly, the Applicant has not established an arguable case that a relief of certiorari lies in respect of the order of conviction which the Circuit Court Judge made.

23. While it is not necessary for me to determine the following issue, it is my view that the Circuit Court Judge, in any event, was entirely correct in the determination she made regarding the applicability of the van Putten case to the uncontroverted facts in the case before her. The van Putten case only prohibits legislation in a Member State which imposes Vehicle Registration Tax on a motor vehicle on its first use within that state. The uncontroverted evidence in the instant case was that the car, the subject matter of the prosecution, had been driven, within this jurisdiction, in February, July, August, September and the date of the offence itself, namely 25th November 2011. Further, the evidence before the Circuit Court was that the Revenue Commissioners operate a system whereby a thirty day period of grace is given in respect of a foreign registered car being driven within this jurisdiction. The van Putten decision makes it very clear that while the requirement to register a car, already registered in one Member State, in another Member State, where it is being used there on loan, restricts the free movement of capital, it only offends Article 56 of the Treaty if there is a difference in treatment with the registration requirement on a car loaned internally within the Member State; and if there is such a difference in treatment, whether that difference is justified in the general interest; and whether the measure is consistent with the

principle of proportionality. Van Putten states that it is the task of the national court to assess the duration of the loan at issue and how the loaned vehicles have in fact been used to determine that issue. In light of the evidence relating to the use of the vehicle the subject matter of these proceedings, the Circuit Court Judge correctly determined that van Putten was not applicable to the facts of the case before her."

63. It is necessary to state as a matter of principle that a trial judge, who has had jurisprudence opened to him or her, is entitled to come to the view that the case or cases relied upon are distinguishable from the circumstances of the case with which the judge is concerned, and in doing so will be acting within his or her jurisdiction. It is part of the function of being a judge to consider legal submissions as to the applicable law, and to decide what is the applicable law. Moreover, while a judge who does so acting in good faith may get it wrong occasionally (to err is human), providing he or she has acted judicially and has genuinely strived to arrive at the correct decision, his or her decision in that regard cannot be challenged by way of judicial review. If there is an error it can be corrected on appeal, if an appeal on the merits is available. However, an appeal on the merits will not always be available. This is such a case. While it always behoves the holder of a judicial office to do his or her best to render a correct decision in accordance with the law, the responsibility to strive to do so is even more onerous in a case, and particularly a criminal case, where there is no possibility of an appeal.

64. Therefore, while the position is that a decision to distinguish a case relied upon by a party will in the vast majority of cases be held to be a decision made within jurisdiction, and unimpeachable by way of judicial review on that account, it is not

possible to foreclose on the possibility that on rare occasions such a decision could be impeached as having been made in excess of jurisdiction by virtue of the circumstances in which it was arrived at. If a judge were referred to an authority with which they were unfamiliar but had refused to listen to the details of it, or where a copy of a decision with which the judge was unfamiliar had been proffered for the court's consideration and the judge had without justification neglected to read it carefully and then had purported to distinguish it on a superficial or spurious basis without having properly engaged with the true import of that jurisprudence, a reviewing court might well consider that the decision to distinguish was made in excess of jurisdiction. After all, the declaration made by a judge under the Constitution on assuming office requires him or her to uphold the Constitution and the laws. We hasten to add that a judge could justifiably consider it unnecessary to read for himself or herself jurisprudence proffered in support of a point if he or she was satisfied that there had been proper explication of it by counsel in court, with relevant passages from the judgment having been opened. However, a judge who blinkers himself or herself to the law, or who refuses or neglects to engage properly with it, cannot be said to be acting within jurisdiction.

65. It is therefore possible to make such a case on judicial review, although the bar that is required to be vaulted in order to succeed is a high one indeed. If leave were granted to make such a case, it would be for a reviewing court to consider, based on all available evidence, whether the decision to distinguish was in fact made within jurisdiction.

66. We have already expressed the view that it is not correct to interpret *van Putten and others* as being narrowly confined to a "first use" case, and that what that

case affirms is that, where Article 63 TFEU is prima facie engaged, the relevant enquiry must be concerned with whether the contrasted situations (whether that involves first use or any other circumstances of use being relied upon) are comparable; whether if they are indeed comparable there is in fact a difference of treatment; and, if so, whether the difference was justified by an overriding reason in the general interest and, finally, even if that be the case, whether the measure at issue is consistent with the principle of proportionality. Indeed, it seems to us that the reasoning and decision in *van Putten and others* is quite clear, although to appreciate its full import does require careful reading and close analysis.

67. We are therefore satisfied to conclude that the Circuit Court judge was wrong to distinguish *van Putten and others* on the basis that it applied only to a case of first use, and that the appellant's case was not based on first use. It follows that we also disagree with the High Court judge's view that the Circuit Court judge correctly determined that *van Putten and others* was not applicable to the facts of the case before her. However, we are not prepared to express any view one way or the other on the proposition that the decision to distinguish on that basis was made in excess of jurisdiction.

68. At the leave stage of judicial review proceedings, which this is, a court from which leave is being sought need only be concerned with whether an arguable case could be made for relief by way of judicial review. In *G. v. Director of Public Prosecutions* [1994] I.R. 374 Finlay CJ found that -

> *"an applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of he following matters:*

(a) That he has sufficient interest in the matter to which the application relates to comply with rule 20(4).

(b) That the facts averred to in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks,

(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O84 r 21 (1)..."

69. We have concluded that if the decision complained of, namely to distinguish *van Putten and others* on the grounds that its import extended only to situations of first use, had been made in circumstances where the appellant had discharged the evidential burden spoken of earlier of showing that Article 63 TFEU was engaged in the circumstances of the case, he would have had at least an arguable case for relief by way of judicial review against the court that convicted him. Such an argument could be made on the basis that the judge does not appear to have read the decision in full before she saw fit to distinguish it on what we are satisfied was a superficial and ultimately untenable basis. We offer no view as to whether such an argument would be likely to succeed, beyond simply observing that, in fairness to the judge concerned, while a copy of the decision was handed in she was not invited to rise to read it, and she does not appear to have received a proper explication of its true import from counsel. At any rate, if the appellant's proceedings were properly constituted, he would have been *prima facie* entitled to leave.

70. However, having considered the transcript of the evidence adduced before the Circuit Court in detail we are not persuaded that the evidential burden of showing that Article 63 TFEU was engaged in the circumstances of the case had been discharged. To discharge the burden the appellant was required to be able to point to some "evidence" tending to show a *prima-facie* discrimination. As we observed earlier in this judgment there was no attempt by defence counsel in cross-examining any of the State's witnesses to confront them with a claim that their actions created a discriminatory situation that would be outlawed by EU law; or to put an objectively comparable situation to any of the prosecution witnesses and to invite their observations or commentary in terms of the legitimacy of the comparison being proffered, whether there would be a difference in treatment and, if so, whether it was justifiable and proportionate.

71. Neither was evidence given on behalf of the appellant sufficient to establish an unlawful discrimination. There was certainly evidence of how s.139 of the Act of 1992 was being applied in the appellant's own case. However, there was no evidence (or even express assertion in argument) as to how it would be applied to a notional, much less an actual, comparator such as might establish the objective comparability in principle of the two situations, and the fact of a difference in treatment. What was involved was not a pure question of law but rather a mixed question of fact and law. It is clear to us from the transcript that the evidential and legal foundation necessary to demonstrate that Article 63 TFEU was engaged was not properly laid. In addition, there was no clear articulation of the required legal argument (beyond euphemistic references to "developments in European law" and repeated references to the *van Putten* and others case as requiring s.139 to be disapplied, without clearly identifying

the applicable principle of law to be extracted from that case and applied to the circumstances of the defendant's case to justify that). For example, counsel for the defence never once referred in his submission to the Circuit Court to a comparable situation, whether real or hypothesised on the basis on the existing domestic statutory position, that would attract different treatment suggestive of a discrimination contrary to EU law that would operate as a disincentive to cross-border loans of motor vehicles so as to infringe the principle of free movement of capital; much less pointed to evidence tending to show the Revenue would, as a matter of practice, treat an individual differently in an objectively comparable situation.

72. There was some criticism focussed on the 30-day grace period; we infer this was to support the suggestion that it was insufficient to adequately take account of the duration of the use of the vehicle on the road network of the State. However, that was to put the cart before the horse. Before a proportionality issue could ever arise for consideration, there required to be evidence tending to suggest a discriminatory situation, but one that was potentially justifiable in the public interest providing the measure concerned was proportionate. However, the transcript of the Circuit Court proceedings reveals no evidence suggestive of a discriminatory situation, whether potentially justifiable or not. Indeed, the word "discrimination" does not appear anywhere in defence counsel's remarks, neither does "comparable" or "comparator", or the expressions "difference in treatment" or "different treatment", nor any analogue for them.

73. In the circumstances we believe that as the evidential and legal foundation required to support a *van Putten and others* type defence had not been properly laid, and as the proceedings are clearly inappropriately constituted, it would not be

appropriate to grant the appellant leave to apply to seek *certiorari,* and the other relief he seeks. The unfairness of which he complains, even if it was sustained, could have had no bearing on the outcome of his trial in circumstances where the evidence before the court was insufficient in any event to show that Article 63 TFEU was engaged; and where in any case he has not sought join the court that convicted him.

74. In the circumstances we must dismiss the appeal.

75. Our provisional view with regard to costs is that since the respondents, who were on notice at the direction of the High Court, and who participated in this appeal, have been entirely successful, they should be entitled to the costs of this appeal. If the appellant wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms we have suggested will be made.