



Neutral Citation Number: [2023] EWCA Crim 759

Case No: 202301455 B2; 202301456 B2; 202301457 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT IPSWICH
MR RECORDER DIJEN BASU KC
T20200445

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

Before :

LORD JUSTICE EDIS
MR JUSTICE JAY
and
MR JUSTICE FOXTON

Between :

R

Appellant

- and -

ELEANOR MARGIOTTA
DEAN TAYLOR
ALEXANDRIA MARGIOTTA

Respondent

Louis Mably KC and Richard Evans (instructed by **Crown Prosecution Service**) for the
Applicant

Eleanor Margiotta in person.

The other respondents did not appear and were not represented.

Hearing dates : 21 June 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Foxton J (giving the judgment of the court at the request of Edis LJ):

Introduction

- 1 On 15 October 2020, the Respondents were each charged with:
 - (1) being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods contrary to section 170(2) of the Customs and Excise Management Act 1979, namely cannabis, in fraudulent evasion of the prohibition on importation imposed by section 3(1) of the Misuse of Drugs Act 1971 (**MDA 1971**); and
 - (2) being concerned in the supply of cannabis to another, contrary to section 4(3)(b) of the MDA 1971.

Those charges arose from packages of plant matter despatched to the Respondents (**the Imported Material**), which were intercepted in late September 2019.

- 2 By a final ruling dated 18 April 2023 (**the Final Ruling**), Mr Recorder Dijen Basu KC (**the Recorder**) stayed the prosecution, on the basis that, having regard to Article 34 of the Treaty on the Functioning of the European Union (**TFEU**), it was not a criminal offence for the Respondents to import and sell the Imported Material, having regard to its chemical composition.
- 3 The applicant (**the Prosecution**) now seeks permission to appeal that ruling on three grounds:
 - (1) The Recorder erred in holding that Article 34 TFEU applied to the Imported Material (Ground 1).
 - (2) Even if Article 34 TFEU applied, the Judge erred in failing to conclude that the prohibition under domestic law on the importation and sale of the Imported Material was justified under Article 36 TFEU (Ground 2).
 - (3) In the alternative, if the effect of the decision of the Court of Justice of the European Union (**CJEU**) in *BS, CA Preliminary Reference C-663/13* [2021] 2 CMLR 5 was that the Imported Material did fall within Article 34 TFEU, the Court should refuse to follow that decision (Ground 3).

The Prosecution's application is governed by the provisions of Part 9 of the Criminal Justice Act 2003 (**CJA 2003**). The Recorder's decision is in the nature of being a terminating ruling, and the Prosecution has given the requisite undertaking. Under section 57(4), the leave of this court is required. Under section 67, this court may allow the application only if the Recorder's decision were wrong in law or in principle, or if he reached a conclusion on the facts that it was unreasonable for him to make.

The background

- 4 In 2019, the Respondents carried on business under the name “Uncle Herb” importing and selling vegetable material, namely the plant *Cannabis sativa*, from Italy where it was grown lawfully. The Imported Material included the “female” flowering heads of the cannabis plant.
- 5 On 21 September 2019, individuals at a delivery depot handling packages addressed to the Respondents noted the smell of cannabis emanating from the packages, and alerted the authorities. A police investigation followed, which established the following:
- (1) The Imported Material was cannabis within the meaning of the MDA 1971 and therefore, as a matter of the domestic law of the United Kingdom, a controlled drug of Class B.
 - (2) The Imported Material contained trace levels of Delta-9-tetrahydrocannabinol (**THC**), the psychoactive element of cannabis, which did not exceed 0.2%.
- 6 An indictment setting out the charges at [1] was preferred on 6 November 2020. In their Defence Statements, the Respondents put forward a number of defences, including that *Cannabis sativa* or hemp with a THC content of 0.2% was not a controlled drug, having regard to the provisions of EU law which were in force when the Imported Material was intercepted.
- 7 On 6 January 2021, and again on 8 April 2021, the Respondents applied to dismiss the charges on various grounds. Those applications were rejected, for reasons which were not placed before this court. However, on 4 October 2022, the Respondents issued a further application asking the court to stay the charges on the basis they constitute an abuse of process, raising grounds which overlapped with those previously raised on the application to dismiss. We understand that the Prosecution accepted that it was open to the Respondents to bring the abuse of process application on the basis on which they did.
- 8 It might well be thought that the Respondents’ essential complaint – that the matters with which they were charged did not disclose an offence known to English law – was one which was more appropriately advanced either by way of an application to dismiss, or as a defence at trial on the basis that there was no case to answer on the Prosecution’s evidence, rather than relied upon as rendering the prosecution an abuse of process. The Prosecution having been content for the Respondents to raise their objection through the medium of an abuse of process application, we have dealt with it on that basis. We should make it clear that, in doing so, we are not to be understood as accepting either that an application to stay for abuse of process is the appropriate means of pursuing an argument of the kind the Respondents raise, nor that, such an argument having failed to obtain a dismissal, it could nonetheless be put forward in support of the stay application. Finally, the procedural course followed, and the Prosecution’s approach to the abuse of process application as set out below, have had the result that the factual position against which the issues of law raised by the Prosecution are to be decided is neither as clear nor as comprehensive as would be desirable.

- 9 On 20 September, HHJ Levett ordered the Respondents to serve their skeleton argument in support of the abuse of process application by 3 October 2022, with the Prosecution’s response to be served by 24 October 2022. The Respondents served a substantial skeleton argument, supported by a large number of attachments and supporting material, by the stipulated date. The Prosecution sought and was given additional time for its response, but it had still not served that response when the application came on for hearing before the Recorder on 15 and 16 November. Prosecuting counsel attended the hearing on the understanding that the application was not listed for full argument, and was not in a position to assist the Recorder on the legal issues which the abuse of process application raised.
- 10 In these circumstances, the Recorder decided to hear the Respondents’ application and to issue a draft ruling setting out any points he was minded to accept, with the Prosecution then being afforded an opportunity to respond to and challenge the draft ruling. The draft ruling was provided to the Prosecution and the Respondents on 16 November, and it upheld the abuse of process application insofar as it alleged that the conduct alleged in the indictment was not unlawful, once regard was had to the position under EU law. The Prosecution served a response to the ruling on 6 December 2022, challenging the draft ruling. On 18 April 2023, the Recorder issued the Final Ruling.
- 11 We wish to pay tribute to the Recorder’s careful and comprehensive ruling. He summarised his conclusions at [63]:

“My conclusions on the EU law questions raised by the Defendants are as follows:-

- (i) absent EU law considerations, the plant material which is the subject of the charges amounts to cannabis within the meaning of the MDA, assuming that the forensic report is accurate;
- (ii) there is no dispute that the plant material is grown lawfully in Italy and contains only trace amounts of THC, not exceeding 0.2%;
- (iii) that being the case, it was for the Crown to show, had they sought so to do, that the plant material in question amounted to a ‘narcotic drug’ which could not amount to a good to which Article 34 TFEU applies, despite the fact that only trace levels of THC were present, not exceeding 0.2% (as the Crown accepts), bearing in mind that only a product whose harmfulness is demonstrated or generally recognised and whose importation and marketing is prohibited in all Member States may be classified as such. They would have faced an uphill struggle, in my view, and wisely elected not to seek to do so;
- (iv) I hold that the plant material does not amount to a ‘narcotic drug’ so that the criminal law provisions which underpin the charges in the indictment are measures capable of hindering, directly or indirectly, actually or potentially intra Union trade in the plant material in question and must be justified on one of the grounds of public interest laid down in Article 36 TFEU (or by imperative requirements), being proportionate to the goal of securing the attainment of the objective pursued and not going beyond what is necessary in order to attain it;

- (v) the Crown have not sought to establish justification by means of expert (and perhaps other) evidence. I assume, in their favour, that they rely on the 1961 UN Single Convention on Narcotic Drugs as justifying the charges. Assuming they do, I consider that this reliance is misconceived because the material in question here cannot be classified as a narcotic drug – alternatively, has not been shown, by evidence, to be properly classified as such;
- (vi) justification not having been established, the charges are misconceived, alleging something that could not be criminalised at the material time, and they are an abuse of the process of the Court. They must be stayed in order to protect the integrity of the criminal justice system.”

12 We would note the Recorder’s observation that the Prosecution had not sought to justify the application of the MDA 1971 to the Imported Material on the basis of Article 36 of the TFEU, or to adduce evidence to support such a contention.

The *Cannabis sativa* plant

13 In characteristically clear terms, Lord Diplock explained the biological and chemical characteristics of the *cannabis* plant in *DPP v Goodchild* [1978] 1 WLR 578, 580 as follows:

“... The plant contains hallucinogenic ingredients, of which the chemical names are cannabinol and other substances of closely related molecular structure known to chemists as cannabinol derivatives. Of these one of the most potent and important is the tetrahydro derivative of cannabinol known familiarly as T.H.C.

Cannabis sativa is an annual. It grows to a height of 4 feet to 16 feet and flowers and fruits in October to November. The floral structure is formed at the top of the stems and is associated with a mass of small leaves known as vegetative tops. The lower parts of the plant also have a luxuriant growth of leaves which differ, and are to be distinguished, from the vegetative tops. The hallucinogenic ingredients are found in the resin of the plant. These are secreted in the hairs of trichomes on the leaves and on the flowering and fruiting tops. They are present in increasingly greater concentration as one moves from bottom to top of the plant. There is very little in the stem itself or in the ripe seeds. The concentration in the flowers is about two-and-a-half times, and in the vegetative tops is about twice, the concentration in the lower leaves. The resin can be extracted from the plant by brushing it off the leaves and flowers. The hallucinogenic ingredients, cannabinol, T.H.C. can then be extracted from the resin.

The narcotic effect of the cannabis plant when subjected to no other treatment except drying thus varies with the portion of the plant that is used. The resin when separated from the plant contains a higher concentration of narcotic than the plant itself, while the highest narcotic content is to be found in cannabinol and cannabinol derivatives after they have been extracted from the resin.”

14 The biological intricacies described by Lord Diplock – whereby the concentration of psychotropic ingredients in the plant vary markedly between different parts of the floral structure – are matched by complexities as to the uses which are made of it. The

plant's fibre – generally referred to in this connection as hemp or “industrial hemp”– has been used for millennia in the manufacture of extremely useful products such as rope, textiles, paints and cosmetics. The plant's seeds are used not only to grow the plant, but also in animal, human and avian foodstuffs. Therapeutic properties said to be associated with cannabidiol or **CBD** – one of a number of structural compounds or cannabinoids found in *Cannabis sativa* – have attracted significant attention over recent decades. Finally, cannabis is a dangerous narcotic, which is the subject of a substantial illicit traffic, and the acquisition, supply and use of which is subject to extensive legal and regulatory control. As this Court noted in *R v Taylor* [2001] EWCA Crim 2263, [2002] 1 Cr App Rep 37, [10]:

“The Single Convention on Narcotic Drugs 1961, as amended by the 1972 protocol, expresses the concern of the contracting parties, which include the United Kingdom, about the health and welfare of mankind; recognises the need for medical use of narcotic drugs; recognises that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind; considers that effective measures against abuse of such drugs requires co-ordinated and universal action; and expresses a desire to conclude a generally acceptable international convention, limiting such drugs to medical and scientific use. That convention applies to cannabis, cannabis plant and cannabis resin, among other drugs, each of which is defined.”

The Single Convention and the MDA 1971

- 15 The features of *Cannabis sativa* noted at [13] above are reflected in the United Nations Single Convention on Narcotic Drugs 1961 (**the Single Convention**), and in the MDA 1971 which was passed to give effect to the obligations of the United Kingdom as a signatory to the Single Convention (*R v Taylor*, [14] and [31]).
- 16 Taking the Single Convention first, Article 1:
 - (1) defines “cannabis” as: “the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated” (Article 1(b));
 - (2) defines “cannabis plant” as “any plant of the genus *Cannabis*” (Article 1(c)); and
 - (3) defines “Cannabis resin” as “the separated resin, whether crude or purified, obtained from the cannabis plant” (Article 1(d)).
- 17 It will be noted that the definition of cannabis is by reference to specific parts of the plant, either on their own or in combination with other parts, a definition which only applies if the resin has not been extracted. It will also be noted that the definition does not require any particular level of THC in the specified parts of the plant.
- 18 Article 2(1) provides:

“... [T]he drugs in Schedule 1 are subject to all measures of control applicable to drugs under this Convention”.

Article 2(5) provides that:

“The drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to the drugs in the latter Schedule, and in addition thereto:

- (a) a Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included;
- (b) a Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party”.

Schedule I includes “Cannabis and Cannabis resin and extracts and tictures of cannabis”. In its original form, Schedule IV includes “cannabis and cannabis resin”.

19 Article 4 provides that:

“The parties shall take such legislative and administrative measures as may be necessary:

- (a) To give effect to and carry out the provisions of this Convention within their own territories ...
- (c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”.

20 Article 28 provides:

- “1. If a Party permits the cultivation of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.
- 2 This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.
- 3 The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.”

21 Finally, Article 30(1)(a) provides:

“The Parties shall require that the trade in and distribution of drugs be under licence except where such trade or distribution is carried out by a State enterprise or State enterprises”.

- 22 On 24 January 2019, the World Health Organisation recommended amending Schedule I to the Single Convention to clarify that CBD was not a narcotic drug, and removing cannabis from Schedule IV, which lists narcotics perceived as particularly dangerous. The amendments to Schedule IV were made in 2021.
- 23 As we have observed, the United Kingdom gave effect to its obligations as a signatory to the Single Convention through the MDA 1971.
- 24 Section 2(1) of that Act defines “controlled drug[s]” as those specified in Parts I, II and III of Schedule 2 to the Act.
- (1) Part II of Schedule 2 provides that Class B drugs include cannabinal, cannabinal derivatives, cannabis and cannabis resin, any ester or ether of cannabinal or of a cannabinal derivative.
 - (2) “Cannabinal derivatives” are defined as “the following substances, except where contained in cannabis or cannabis resin, namely tetrahydro derivatives of cannabinal and 3-alkyl homologues or cannabinal or of its tetrahydro derivatives.”

For the avoidance of doubt, cannabinal and CBD are not the same substances. Cannabinal is psychoactive and CBD is not. For that reason, the latter is not a “controlled drug”.

- 25 Section 3 of the MDA 1971 prohibits the importation and exportation of a controlled drug, save where the drug is for the time being excepted from that prohibition or “in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto.”
- 26 Section 4 provides that, subject to regulations, “it shall not be lawful for a person—
(a) to produce a controlled drug; or (b) to supply or offer to supply a controlled drug to another” and makes it a criminal offence to engage or be concerned in those activities.
- 27 Section 37 contains the following definitions:
- “‘*cannabis*’ (except in the expression ‘cannabis resin’) means any plant of the genus *Cannabis* or any part of any such plant (by whatever name designated) except that it does not include cannabis resin or any of the following products after separation from the rest of the plant, namely—
- (a) mature stalk of any such plant.
 - (b) fibre produced from mature stalk of any such plant, and

(c) seed of any such plant;

‘*cannabis resin*’ means the separated resin, whether crude or purified, obtained from any plant of the genus *Cannabis* .”

28 Like the Single Convention:

- (1) the MDA 1971 excludes certain parts of the cannabis plant (the mature stalk, fibre produced from the mature stalk and seed) from the definition where they exist in a separated state from the plant;
- (2) the definitions of cannabis and cannabis resin do not require any particular level of THC content.

29 For the purposes of determining the abuse of process application, the Recorder accepted that the Imported Material constituted a controlled substance, namely cannabis ([25] of the Final Ruling). There is no dispute that the Respondents did not have a licence to import or sell it. On that basis, viewed through the lens of the MDA 1971 (and subject to any defences), the Respondents’ activities were capable of giving rise to criminal offences. The Respondents argue that if the field of vision is widened to include EU law, that ceases to be the case.

The status of *Cannabis sativa* as a matter under EU law

Articles 34 to 36 of the TFEU

30 This case is principally concerned with provisions of EU law addressing the common, or as it became known single, market in agricultural products. Articles 34 to 36 of the TFEU (previously Articles 28 to 30 of the Treaty of Rome) provide:

“Quantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States.

Quantitative restrictions on exports and all measures having equivalent effect, shall be prohibited between Member States.

The provisions shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

31 By Article 38 (previously Article 32):

- “(2) Save as otherwise provided in Articles 39 to 44 [previously Articles 33 to 38] the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.
- (3) The products subject to the provisions of Articles 39 to 44 are listed Annex 1”.

32 Articles 39 to 44 set out the common agricultural policy. Annex I includes as Chapter 57:

“True hemp (*Cannabis sativa*), raw or processed but not spun; tow and waste of true hemp (including pulled or garneted rags or ropes”).

33 The law of the EU has had to grapple with the multiple potential uses of the plant *Cannabis sativa*, seeking to apply the principles of the common market to hemp as an agricultural product, while acknowledging the status of cannabis as a narcotic.

34 Regulation (EEC) No 1308/70 of 29 June 1970 on the common organisation of the market in flax and hemp made provision for community aid in support of industrial hemp production. That Regulation was amended by Council Regulation (EEC) No 1430/82 of 18 May 1982. The recitals to the amending Regulation provided:

“Whereas the increasing abuse of narcotics in the Community is likely to endanger human health;

Whereas the stalk of true hemp may in some cases contain intoxicating substances;

Whereas, however, the cultivation of hemp in the Community is of considerable significance in some regions;

Whereas, to prevent the danger referred to above from being increased by the cultivation of hemp in the Community and by imports of raw hemp and hemp seed, the aid granted under Article 4 of Council Regulation (EEC) No 1308 /70 of 29 June 1970 on the common organisation of the market in flax and hemp, as last amended by the 1979 Act of Accession, should be limited to varieties providing adequate safeguards in terms of human health, and imports of hemp and hemp seed which do not provide adequate safeguards should be prohibited.”

The general rules for granting aid in respect of flax and hemp were set out in a further Regulation, Regulation (EEC) No 619/71 of 22 March 1971.

35 Article 4(1) of Regulation 1308/70 was amended (by Council Regulation (EEC) No 1430/82 of 18 May 1982) to add an additional paragraph to Article 4(1):

“However, aid shall be granted only for hemp grown from seed of varieties providing certain safeguards to be determined in respect of the content of intoxicating substances in the harvested product.”

36 Regulation (EEC) No 618/71 was also amended by Regulation (EC) No 1420/98 of 26 June 1998, so as to provide:

“Aid shall only be granted for hemp harvested after seed formation and grown from certified seed of varieties contained in a list to be drawn up in accordance with the procedure laid down in Article 12 of Regulation (EEC) No 1308/70. This list shall include only varieties for which a Member State has found by

analysis that the weight of THC (tetrahydrocannabinol) in the weight of a sample maintained at constant weight is no more than:

- 0.3% for the purposes of the grant of aid for the marketing years 1998/1999 to 2000/2001.
- 0.2% for the purposes of the grant of aid for subsequent marketing”.

The Hammarsten case

- 37 The CJEU’s decision in *Hammarsten* (Case C-462/01 of 16 January 2003) concerned a Swedish farmer who wished to grow a crop of industrial hemp. Section 1 of the (Swedish) Law on Narcotics 1968:64 prohibited the cultivation of narcotics without the necessary authorisation, and section 6 permitted the State to forfeit any narcotics grown in breach of Section 1. Further legislation limited the possession of narcotics to medical or scientific purposes or for reasons of public interest, and sections 4 to 8 of the Law on the Control of Narcotics 1992:860 provided that the cultivation of narcotics was subject to authorisation by the Swedish Medical Products Agency.
- 38 Annex 1 to the (Swedish) Regulation on the Control of Narcotics 1992:1554 provided that all parts above ground of cultivated plants of the cannabis species (with the exception of seeds) from which the resin had not been extracted constituted narcotics. Like the Single Convention and the MDA 1971, there was no specified THC content.
- 39 Mr Hammarsten applied for, but was refused, authorisation to cultivate *Cannabis sativa*. He proceeded to grow the crop anyway, and the plants were seized by the Swedish authorities who brought court proceedings to forfeit them. In response, Mr Hammarsten contended that the hemp seized came exclusively from plants which had a THC content which did not exceed 0.3%. He argued that the plants constituted “agricultural products” for the purposes of the Treaty of Rome, and that EU law permitted the cultivation of *Cannabis sativa* from authorised strains whose THC content did not exceed 0.3%/0.2% from 2001/2002. The Swedish Court (the Halmstads Tingsrätt) referred three questions to the CJEU:
- (1) Did Article 28 (now Article 34) of the Treaty of Rome permit a Member State to prohibit the cultivation of or “other operations” with industrial hemp allowed under EC Regulations?
 - (2) If not, could an exception nevertheless be made under Article 30 of the Treaty of Rome (now Article 36) with the result that such a prohibition does not conflict with EC law?
 - (3) If not, could the Swedish prohibition be justified on some other basis?
- 40 In support of its argument, the Swedish Government pointed to the fact that cannabis was listed in Schedules I and IV of the Single Convention, and the irrelevance of the THC content to that classification. It contended that the cultivation of industrial hemp increased the risk of plants with a high THC content being grown because of the impossibility of distinguishing between the two without laboratory analysis, and because the THC content of plants can increase during their life.

41 In her opinion of 8 October 2021, Advocate General Stix-Hackl stated that the Single Convention did not apply to cannabis cultivated for industrial purposes. She expressed the view that the Swedish prohibition on the cultivation of industrial hemp interfered with the common organisation of the market in flax and hemp, and had an effect equivalent to the quantitative restrictions in Articles 28 and 29 (now Articles 34 and 35). For those measures to be justified under Article 30 (now Article 36), they must pursue an objective which is not covered by EU law, and the national rules must be consistent with the principle of proportionality. The Advocate General expressed the view (at [53]) that the first of those requirements was not satisfied because:

“As is clear from the first two recitals in the preamble to Regulation No 1430/82, the relevant organisation of the market already serves the objective pursued by the Swedish rules, namely health protection. Since the first condition – that the national legislation must pursue an objective not also pursued by secondary law – is therefore not met, it is not necessary to examine whether the Swedish rules fulfil the three conditions governing the principle of proportionality.”

42 We note that this observation – that the Regulation has already addressed and answered the issue of the impact of cannabis on health, through the THC limits specified – does not appear to engage with the Swedish Government’s argument that a system of effective cannabis control could not practically be undertaken if its application depended on the THC level, given the impossibility of distinguishing between cannabis plants on that basis outside a laboratory.

43 The CJEU, in its judgment of 16 January 2003, held that the prohibition undermined the common organisation of the market in the hemp sector, because it deprived Swedish farmers of any possibility of claiming the community aid which was available, and that:

“[I]t must be observed that the Swedish legislation on narcotic drugs does not pursue a public interest objective which is not covered by the common organisation of the market in the hemp sector.” [32]

44 It rejected reliance on the Single Convention, stating that:

“It is clear from the first two recitals in the preamble to Regulation No 1430/82 that the risks to human health constituted by the use of narcotic drugs have been specifically taken into account within the framework of the common organisation of the market in the hemp sector”. [34]

45 The CJEU concluded by holding that the limits of aid specified in Regulation 1308/70 to the growing of seeds with particular characteristics “preclude national legislation such as that in point in the main proceedings”. [36]

The decision in BS, CA

- 46 The specific enactments setting the framework for the cultivation, importation and sale of cannabis plants and their products have changed since the *Hammarsten* decision, although their broad effect has remained the same.
- 47 By Council Framework Decision 2004/757/JHA of 25 October 2004, minimum provisions as to the constituent elements of criminal acts and penalties in the field of illicit drug trafficking were established. Article 1 defined “drugs” as substances covered by the Single Convention, and a further United Nations Convention, the Convention on Psychotropic Substances 1971. This listed psychotropic substances in four schedules, none of which referred to cannabis or cannabis-derived products, although Schedule I included some isomers of THC. By Article 2(1)(a) of the Framework Decision, each Member State undertook to take the necessary measures to ensure that the intentional undertaking of various acts of manufacture, sale, distribution, delivery, importation and exportation of drugs without legal right was punishable.
- 48 Regulation (EU) No 1307/2013 of 17 December 2013 now sets out the rules for direct payments to farmers under the common agricultural policy:
- (1) Article 4(1)(d) said that references to “agricultural products” in the Regulation meant “the products, with the exception of fishery products, listed in Annex I to the Treaties as well as cotton.”
- (2) Article 32(6) provides:
- “ Areas used for the production of hemp shall only be eligible hectares if the varieties used have a tetrahydrocannabinol content not exceeding 0.2%.”
- (3) Article 35(3) provides:
- “In order to preserve public health, the [European] Commission shall be empowered to adopt delegated acts in accordance with Article 70 laying down rules making the granting of payments conditional upon the use of certain seeds of hemp varieties and the procedure for the determination of hemp varieties and the verification of their tetrahydrocannabinol content referred to in Article 32(6).”
- 49 Regulation (EU) 1308/2013 of 17 December 2013 now establishes the “common organisation of the markets in agricultural products”:
- (1) Article 1(1) defined agricultural products as “all the products listed in Annex I to the Treaties”.
- (2) Article 1(2) divided agricultural products as defined in Article 1(1) into various sectors as listed in Annex I, including “(h) flax and hemp, Part VIII”.
- (3) Article 189(1) addresses imports of hemp and provides:
- “The following products may be imported into the Union only if the following conditions are met:

- (a) raw true hemp falling within CN code 5302 10 00 meeting the conditions laid down in Article 32(6) and in Article 35(3) of Regulation (EU) No 1307/2013;
- (b) seeds of varieties of hemp falling within CN code ex 1207 99 20 for sowing accompanied by proof that the tetrahydrocannabinol level of the variety concerned does not exceed that fixed in accordance with Article 32(6) and in Article 35(3) of Regulation (EU) No 1307/2013;
- (c) hemp seeds other than for sowing, falling within CN code 1207 99 91 and imported only by importers authorised by the Member State in order to ensure that such seeds are not intended for sowing.”

50 In *BS*, *CA*, *BS* and *CA* were directors of a French company which marketed an electronic cigarette which contained CBD oil imported from the Czech Republic, where the cannabis plants from which the CBD oil had been extracted had also been grown. They were convicted of an offence under Article R. 5132-86 of the Public Health Code which prohibited the production, manufacture, transportation, importation, exportation, possession, supply, transfer, acquisition or use of:

- “1. Cannabis, cannabis plants and cannabis resin, products containing cannabis or products obtained from cannabis, cannabis plants or cannabis resin;
- 2. Tetrahydrocannabinols, with the exception of delta-9-tetrahydrocannabinol, of tetrahydrocannabinol esters, ethers and salts, and of salts of the aforementioned derivatives, and of products containing them.”

The Public Health Code further provided that:

“Derogations may be granted from the above provisions for research and testing purposes and the manufacture of derivatives authorised by the Director-General of the National Agency for Medicinal Product and Health Product Safety.

The cultivation, importation, exportation and industrial and commercial use of cannabis varieties not possessing narcotic properties or of products containing such varieties may be authorised, on a proposal from the Director-General of the Agency, by order of the Ministers with responsibility for Agriculture, Customs, Industry and Health.”

51 The Decree of 22 August 1990 had been adopted pursuant to that derogation, authorising the importation, exportation and industrial and commercial use (fibre and seeds) of varieties of *Cannabis sativa* with a THC content which did not exceed 0.2%. This derogation was limited to CBD oil extracted from fibre and seeds, and did not apply to the CBD oil used in the electronic cigarettes which was extracted from the whole plant, including leaves and flowers. *BS* and *CA* were found guilty. On appeal the Court of Appeal of Aix-en-Provence referred the following question to the CJEU:

“Must Regulations No 1307/2013 and 1308/2013 and the principle of free movement of goods be interpreted as meaning that the derogating provisions introduced by the Decree of 22 August 1990, by limiting the cultivation, industrialisation and marketing of hemp solely of fibre and seeds, impose a restriction that is not in accordance with [EU] law?”

- 52 Advocate General Tanchev, in his opinion of 14 May 2020, began by considering whether Regulations No 1307/2013 and 1308/2013 applied to the product whose use had been held by the Marseilles Criminal Court to be unlawful – the CBD oil imported from the Czech Republic. He expressed the opinion that the Regulations were not applicable, because CBD oil was not a product referred to in Annex I of the TFEU and “therefore CBD oil does not come within the scope of Regulations No 1307/2013 and No 1308/2013” ([42]-[45]).
- 53 He also held that, even if the Regulations had applied, it would have been open to France to adopt legislation prohibiting the importation of CBD provided that it was appropriate for ensuring protection of human health and did not go beyond what is necessary to attain that objective ([61]). As we read the opinion, Advocate General Tanchev proceeded on the basis that, if Regulations No 1307/2013 and 1308/2013 had applied to the CBD oil, that would have been determinative that Article 34 applied, albeit leaving open the scope for the Member State to impose measures under Article 36:
- (1) At [46], he noted “even if Regulations No 1307/2013 and No 1308/2013 were applicable to hemp oil, they would not, in my view, preclude a Member State from adopting legislation such as that at issue in the main proceedings, provided it was appropriate for ensuring the protection of human health and did not go beyond what is necessary to attain that objective”. The clear implication is that this is the only basis on which such legislation could be justified.
 - (2) At [47], he noted that “the establishment of a common market organisation does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than that covered by that common market organisation .. even if those rules are likely to have an effect on the functioning of the internal market in the sector concerned”, the clear implication being that if Regulations Nos 1307/2013 and 1308/2013 applied, the CBD oil would form part of a common market within Article 34 of which those Regulations formed part of the organisation.
 - (3) He noted that Regulation No 1307 was only concerned with *the production of Cannabis sativa* and associated products, and Regulation No 1308 only with imports from outside the EU, and neither with imports from another Member State ([49]), but expressed the view that Regulation No 1308 was an exhaustive exercise of EU competence in the area of the free movement of the goods to which it applied ([51]). It followed that these Regulations, and consequently, Article 34, applied to the importation of *Cannabis sativa* of less than 0.2% THC content into one Member State from another.
- 54 It is also noticeable that, in contrast to Advocate General Stix-Hackl and the CJEU in *Hammarsten*, Advocate General Tanchev did not regard the application of

Regulations Nos 1307/2013 and 1308/2013, with their reference to the need for the THC content of *Cannabis sativa* plants not to exceed 0.2%, as precluding legislation by a Member State which would be compatible with Article 36. He rejected the suggestion that the risks to human health posed or potentially posed were covered exhaustively by Regulation No 1308 ([54]), noting that the Recitals to Regulation No 1308/2013 were in different terms to those to Regulation No 1480/82 ([56]).

- 55 The Advocate General went on to consider whether Articles 34 and 36 of the TFEU applied to the importation of the CBD oil independently of any application of these Regulations. For this purpose, the Advocate General addressed the issue of whether CBD oil was to be treated as a narcotic drug, and hence a *res extra commercium*, which would not fall within Article 34 ([62]). The Advocate General’s conclusion was that CBD oil did fall within Article 34.
- 56 He accepted that narcotic drugs which were not distributed through controlled channels with a view to use for medical or scientific purposes did not benefit from Article 34 and the free movement of goods, referring in this connection to decisions on cannabis sold from a Dutch coffee-shop (*Josemans*, C-137/09, EU:C:2010:774) or a youth centre (*Happy Family v Inspecteur Der Omzetbelasting* C 289/86, 5 July 1988) ([72]). However, he concluded on the evidence before the court that CBD oil was not a narcotic, noting:
- (1) CBD oil was not so classified under French law ([71]); and
 - (2) CBD oil was not identified as a narcotic drug under the single Convention or the United Nations Convention on Psychotropic Substances of 21 February 1971 ([73]).
- 57 The Advocate General considered whether the Decree of 22 August 1990 could be justified under Article 36. He noted that, on the evidence, CBD oil did not appear to possess any psychotropic effects, and there was no evidence that the French Government had carried out any comprehensive assessment of the risk of CBD oil in electronic cigarettes by reference to the most reliable and recent scientific evidence available, but stated that, ultimately, this was for the national court to determine ([83]-[84]).
- 58 The CJEU, in its judgment of 19 November 2020 agreed that Regulations Nos 1307/2013 and 1308/2013 did not apply to CBD oil, which did not fall within the definition of “true hemp” used in Annex I to the Treaties ([51]). The Court did not address the Advocate General’s alternative analysis based on the premise that Regulations Nos 1307/2013 and 1308/2013 did apply. However, the Court said nothing to challenge the assumption on which the referring court had raised the issue of their application – namely, if these Regulations applied, the Decree of 22 August 1990 would not be in accordance with EU law.
- 59 Like the Advocate General, the Court accepted that narcotic drugs which were not distributed through strictly channels strictly controlled by competent authorities for medical and scientific purposes did not fall within Articles 34 and 36 ([61]). The Court considered whether CBD oil fell within the Single Convention. It stated that “on a literal interpretation”, it “might” be concluded that CBD oil, having been

extracted from the cannabis plant, constituted an “extract ... of cannabis” ([71]), but noted that:

- (1) On the evidence, CBD oil did not appear to have any psychotropic or harmful effects.
- (2) The cannabis plants from which the CBD oil had been extracted had been grown lawfully in the Czech Republic, and had a THC content which did not exceed 02.%.
- (3) Having regard to the purpose of the Single Convention, the CBD oil did not constitute a “cannabis extract.”

60 Having concluded that the CBD oil was not a drug for the purposes of the Single Convention, Articles 34 and 36 TFEU applied to it. The CJEU noted that a restriction hindering access by products originating in one Member State to the market of another Member State might nonetheless be justified by reference to one of the grounds of public interest in Article 36, but that “the provision of national law must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it” ([83]). It was for the French Government, taking account of international scientific research, to demonstrate that the Decree of 22 August 1990 satisfied these requirements.

The status of EU law at the time of the events which form the basis of the charges

61 There is no dispute that, at the time of the alleged offences, the TFEU and Regulations such as 1307/2013 and 1308/2013 had direct effect as a matter of UK domestic law, and therefore the force of law. Section 3(1) of the European Union (Withdrawal) Act 2018 continued their effect as “retained EU law”.

62 By section 6(1) of that Act, case law of the CJEU handed down prior to 11pm on 31 December 2020 remains binding on the courts of England and Wales. However, section 6(4) and (5A) permitted regulations to be made to determine the extent to which any UK court was bound by retained EU case law. Regulation 3(b) of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525 provide that the Court of Appeal could depart from retained EU case law. Regulation 5 provided that, in deciding whether or not to do so, the court should apply the same test as the Supreme Court would apply when deciding whether to depart from its case law. That test is summarised in *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234 as supplemented by case law.

63 After that lengthy background, we turn to the Prosecution’s Grounds of Appeal.

Ground 1: The Recorder erred in holding that Article 34 TFEU applied to the Imported Material

64 The Prosecution’s submissions on Ground 1 sought to distinguish the CJEU’s decision in *BS, CA* on the basis that a cannabis plant (whatever its THC content) *did* constitute a drug for the purposes of the Single Convention, and for that reason fell outside Article 34 TFEU, whatever its THC level might be. The effect of this

submission was that, whilst it might be possible applying the interpretative rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties Between States and International Organisations to interpret the words “extracts of cannabis” as only not extending to CBD oil extracted from cannabis plants with a THC content not exceeding 0.2%, it was not possible to interpret the words “the flowering or fruiting tops of the cannabis plant” as meaning “the flowering or fruiting tops of the cannabis plant where the THC content of the plant exceeds 0.2%.”

65 It also contended that:

- (1) *BS, CA* was “a decision on its own facts”, confined to CBD oil extracted from cannabis plants which had a THC content which did not exceed 0.2%, and extending to no other substance; and
- (2) the present case differed from *BS, CA* because it did not concern an extract from cannabis, but cannabis, which, on the evidence, had at least trace levels of THC.

66 Whatever the merits of these points, based as they are solely on an analysis of Article 34 read in conjunction with the Single Convention and not on Regulations 1307/2013 and 1308/2013, in our view the Prosecution faces a more fundamental difficulty arising from the findings of fact made by the Recorder. In the Final Decision, the Recorder found that:

- (1) the Imported Material was “loose green vegetable matter with the appearance of female flowering heads” ([10]-[11]);
- (2) the Imported Material constituted “raw hemp” and Regulation 1307/2013, and, by implication, Regulation 1308/2013, applied to the Imported Material ([48]); and
- (3) “the green vegetable matter seems to me to have fallen within Annex I TFEU and so was an agricultural product”.

67 On the basis of those factual findings, which (for understandable reasons) there was no attempt to challenge on the application, in our view the CJEU decision in *Hammarsten* is directly engaged:

- (1) the Imported Material is specifically identified by Regulations 1307/2013 and 1308/2013 as an agricultural product forming part of the common organisation of the market in the hemp sector;
- (2) subject to the argument under Article 36 TFEU raised under Ground 2, this “preclude[s] national legislation such as that in point”.

68 The conclusion that the application of Regulations Nos 1307/2013 and 1308/2018 to the Imported Material is determinative of the application of Article 34 is also supported by Advocate General Tanchev’s opinion in *BS, CA*, as we have set out at [53] above. Although the CJEU did not directly address that argument, the structure of

their judgment is consistent with the view that the applications of those Regulations would be determinative of the application of Article 34 ([58] above).

69 We further note that this conclusion is also consistent with the decision of Ms Justice Egan sitting in the High Court of Ireland, in an impressive *ex tempore* judgment in *Jenkins v DPP, Ireland* [2022] IEHC 291. *Jenkins* was a case in which the court was being asked to grant a stay of the criminal prosecution brought under the Irish Misuse of Drugs Act 1977 in respect of cannabis material imported into Ireland from a non-EU country. Obtaining a stay appears only to have required the plaintiff to establish an arguable case that the matters alleged to give rise to the offences with which he was charged did not disclose a criminal offence known to Irish law, once the provisions of EU were brought into account ([61]). However:

- (1) It was the plaintiff's case that the material which gave rise to the charges fell within the scope of Annex I to the TFEU and Regulations Nos 1307/2013 and 1308/2013 ([28], [38], [63]).
- (2) That contention was held to be established on uncontested evidence ([74]).
- (3) It was arguable that at least some of the material in question met the requirements of Regulation 1308/2013 by having a THC content not exceeding 0.2% ([76]).
- (4) Commenting on *BS, CA*, Ms Justice Egan proceeded on the basis that *BS* and *CA* would have established the application of Article 34 if Regulations Nos 1307/2013 and 1308/2018 applied, but noted that their failure to do was not "fatal" to their case ([68]).

70 We are not persuaded that there is any material distinction between the MDA 1971 and the provisions of the Swedish "Criminal Law on Narcotic Drugs" and the "Law on the Control of Narcotics" considered in *Hammarsten*. Both permitted the cultivation, import, manufacture, export and sale of cannabis or cannabis plants with authorisation from the authorities for medical, scientific or public purposes. If the question is posed whether the MDA 1971 as it applies to the Imported Material has the effect of hindering the access of *Cannabis sativa* plants with THC levels not exceeding 0.2% to the UK market (applying the test in *Austria v Germany* C-591/17, EU:C:209:504, [121]), the answer can only be yes.

71 In these circumstances, we are satisfied that on the factual findings he made in the context of the application of Regulations 1307/2013 and 1308/2013, the Recorder was right to conclude that the importation of the Imported Material engaged Article 34 TFEU.

72 In reaching this conclusion, we are not to be interpreted as holding that Mr Mably's submissions on Article 34 do not possess some force. If one were to put the Regulations entirely to one side, the focus would be on the relationship between Article 1 of the Single Convention (applying as it does to *Cannabis sativa* regardless of its THC content) and the exemption in Article 28.2 to the cultivation of industrial hemp *exclusively* for its flax and seeds. It is clearly arguable that the Imported Material does not fall within that exemption. In addition, there is some force in the

contention that whereas CBD oil is capable of being envisaged as other than a cannabis extract for the purposes of the Single Convention, the same could not be said of the flowering heads of the plant itself. This is an issue on which a more extensive investigation of the history and terms of the Single Convention and the accompanying United Nations Commentary on the Single Convention on Narcotic Drug, 1961, might well have cast light. However, Mr Mably had no real answer to the brace of CJEU decisions which we have considered in some depth founded, as they are on delegated legislation which clearly had in mind the salient provisions of the Single Convention.

73 For these reasons we think it right to grant the application for leave to appeal on Ground 1, but to dismiss the appeal.

Ground 2: Even if Article 34 TFEU applied, the Judge erred in concluding that the prohibition on importing the Imported Material created by MDA1971 was not justified under Article 36 TFEU

74 Mr Mably identified a number of reasons why it was said that a prohibition on the importation of cannabis plants which did not distinguish between plants depending on whether or not their THC levels exceeded 0.2% was justified by Article 36, on “grounds of public morality, public policy or public security [and] the protection of health and life of humans.”

75 The argument included points along the following lines:

- (1) As the Single Convention recognised, and as confirmed by this Court in *R v Taylor*, [10]-[13], narcotic drugs derived from the *Cannabis sativa* plant pose significant dangers to human health and well-being.
- (2) A system of criminalisation and control of import and supply which depended on the THC content of the plants in question could not be operated in practice, it being impossible to determine from visual inspection alone whether cannabis plants were lawful or unlawful.
- (3) The control of cultivation of unlawful cannabis would not be practicable, given that the THC content of plants could vary at different stages of their life.
- (4) The cultivation of lawful cannabis could be used as an effective cover for unlawful production.
- (5) The MDA 1971 did not impose a blanket ban, but a licensing system which allowed for a proportionate and targeted response, including proper enquiries into those seeking to undertake those activities.

76 We are far from saying these are negligible arguments. We note in this regard that the United Nations Commentary on the Single Convention stated that the definition of cannabis which it adopted was broader than that in the League of Nations Convention of 1925. The latter was confined to the dried or fruiting tops of the female plant, which were “particularly rich in the pharmacologically strongly active resin”. The Commentary explains:

“The authors of the Single Convention ... wished to cover the male plants even if they might yielded lesser quantities of the potent material, *inter alia*, in order to facilitate the task of enforcement officers who would find it mostly impossible and in any event very difficult to distinguish material obtained from female plants to that derived from male plants.”

77 However, it is right to note that Ms Margiotta had many points she wanted to make in response to any Article 36 argument. We also note the scope for debate as to the permissible ambit of any Article 36 argument (comparing the approaches in *Hammarsten* referred to at [41-44] above, and that of the Advocate General in *BS, CA* referred to at [53(1); 54]), as well as the requirements under EU law in order for establishing an Article 36 justification.

78 However, the Prosecution faces the fundamental difficulty that, while Ground 2 alleges that the Recorder erred in concluding that no Article 36 justification was made out, the reality is that no Article 36 argument was advanced before the Recorder, nor did the Prosecution seek to lay any evidential the groundwork for such an argument.

79 In these circumstances, and given the terms of section 67 of the CJA 2003, it would not be appropriate for this Court to seek to grapple with an argument of this kind for the first time on an appeal, nor would it be fair to the Respondents (who were first charged with these offences back in September 2019) to seek to do so.

80 For that reason, we refuse leave to appeal on Ground 2.

Ground 3: If the effect of the decision in *BS, CA* is that it would render the present prosecution inconsistent with EU law, that decision should not be followed

81 This point was very much a fall-back argument in Mr Mably’s submissions. He did not develop it either in writing or orally.

82 We have reached our conclusion on Ground 1 not solely by reference to *BS, CA*, but also by reference to the CJEU’s decision in *Hammarsten*. We have not found it necessary to consider the Article 36 argument, because the Prosecution did not raise that argument before the Recorder. Nor have we had the benefit of submissions on the history and scope of the 1961 Convention and the associated commentary which might will be material to any decision as to whether to depart from *Hammarsten* and *BS, CA* (cf [72] above). Further, we have been informed that Articles 34 and 36 no longer have direct effect as a matter of UK law, following the Prohibition on Quantum Restrictions Regulations 2020/1625. Finally, the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 emphasises the particular importance of certainty in the criminal law.

83 In these circumstances, we do not regard this case as an appropriate one in which to consider whether or not the court should depart from CJEU decisions forming part of retained EU law. In effect, this ground raises a different way of arguing Ground 1, in respect of which we have given leave to appeal. We refuse leave to argue it as a separate ground of appeal, but this would not prevent that argument from being advanced in support of any further appeal on Ground 1 if so advised.

Disposal

84 We dismiss the appeal/application for leave to appeal and, pursuant to section 61(3) of the CJA 2003, order that the Respondents be acquitted on both charges in the Indictment.