

THE HIGH COURT

JUDICIAL REVIEW

Record No.: 2017/168JR

BETWEEN:

STEPHEN BRADY

APPLICANT

-and-

THE REVENUE COMMISSIONS, THE COMMISSIONER OF AN GARDA SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Tara Burns delivered on 28th September, 2018

1. The Applicant seeks leave to bring Judicial Review proceedings relating to his conviction before Monaghan Circuit Court on 29th November 2016 for an offence, contrary to s. 139 of the Finance Act 1992, as amended, of being in possession, on 25th November 2011, as an unauthorised person, of an unregistered vehicle for the purpose of vehicle registration tax, when the said vehicle was not an exempted vehicle.

2. When this application was initially made *ex parte*, the Applicant was directed to put the proposed Respondents on notice of the said application. Accordingly, a replying affidavit, sworn on behalf of the proposed Respondents, which exhibits the transcript of the DAR recording before the Circuit Court relating to the criminal proceedings, has been filed before this Court. Rather bizarrely, this transcript was omitted from the exhibits referred to in the grounding affidavit filed on behalf of the Applicant, although transcripts of an irrelevant District Court hearing were provided to this Court on behalf of the Applicant.

3. The Applicant had been convicted and sentenced before the District Court of the said offence on 14th October 2013. He appealed this conviction to the Circuit Court whereupon his conviction was upheld on 29th November 2016.

4. The kernel of the Applicant's argument is that s. 139 of the Finance Act 1992, as amended, is incompatible with Article 63 of the European Treaty and that a full defence, suggested to be available to him pursuant to a decision of the CJEU in *Staatssecretaris van Financiën v. van Putten*, (C-578/10, C-579/10 and C-580/10, 26th April, 2012), was not considered by the Circuit Court Judge. It is further claimed that the Circuit Court Judge should have stated a case to the Court of Appeal in relation to this issue.

Offence

5. Section 139 of the Finance Act 1992, as amended, makes it an offence to be in possession of a vehicle which was not registered and thereby subject to Vehicle Registration Tax, unless the person is an authorised person, as defined, or the vehicle is the subject of a defined exemption. The Applicant does not claim to be an authorised person or that the vehicle was subject to a defined exemption within the meaning of the Finance Acts. Indeed, the Applicant accepts that, having regard to the established facts of the case, the ingredients of the offence were made out and that a conviction should have ensued if domestic law was the only issue to be considered.

6. The Defence, which the Applicant asserts was not considered by the Circuit Court Judge, arises from a decision of the CJEU in *Staatssecretaris van Financiën v. van Putten*, (C-578/10, C-579/10 and C-580/10, 26th April, 2012), wherein the CJEU held that:-

"[A]rticle 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."

Proceedings before the Circuit Court

7. As previously referred to, the transcript of the DAR recording of the Circuit Court proceedings was exhibited in a replying affidavit filed on behalf of the proposed Respondents.

8. In summary, the evidence against the Applicant, which was not in dispute, was that the Applicant was stopped on the 25th November 2011 by a member of An Garda Síochána, driving a motor vehicle registration number WEZ 5923, which was registered to the Applicant's wife at an address in Northern Ireland. The Applicant was resident in this jurisdiction at the time. The Applicant had previously been stopped driving this vehicle within this jurisdiction in February 2011. At that time, the vehicle was seized, but had been returned to the Applicant's wife after she paid a penalty and signed a declaration that the vehicle would either be registered within the State or permanently exported. However, subsequent to this, the vehicle was seen by Customs Officials, being driven by the Applicant, within this jurisdiction, on a number of occasions, specifically in July, August and September 2011. The Applicant's wife accepted that she had occasionally given the car to the Applicant for his use. A thirty day period of grace is given by the Revenue Commissioners to register a car, which had been registered in another jurisdiction, within this jurisdiction.

9. It was in dispute whether the Applicant's wife was a resident of this jurisdiction or the Northern Irish jurisdiction.

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.

12. A further application was made on behalf of the Applicant to the Circuit Court Judge asking her to consider the *van Putten* judgment, referred to above, with an argument canvassed that this judgment provided the Applicant a full defence to the charge against him. The trial judge was asked to state a case to the Court of Appeal on that basis.

13. In determining that application, the Circuit Judge did not make a finding of fact as to where the Applicant's wife was resident. Having heard argument from both sides, she determined that the *van Putten* case did not apply to the facts of this case, as the uncontroverted evidence before her established that the occasion of the accepted possession by the Applicant of the non-registered car grounding the offence, was not an occasion of first use or even initial use by him.

14. The following extended excerpt from the Circuit Court transcript is relevant in this regard:-

"Mr. O'Toole: Sorry, Judge, if I may, in reply to my friend, she set out the case, the domestic law, very succinctly, and the charge 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 this application of the various sections of the Finance Act cited in the charge, section--.

Judge: Mr. O'Toole I am going to stop you. You know that this Court cannot make any such finding, that I have no jurisdiction in relation to that. Have you brought proceedings in a higher court?

Mr. O'Toole: Judge, I can ask this Court to state a case to a higher court, to the Court of Appeal, on the--

Judge: I just asked you a question. Have you instituted proceedings in the High Court in relation to the applicability of this EU legislation?

Mr. O'Toole: No, there was a judicial review.

Judge: No, that was your option.

Mr. O'Toole: Sorry, well there was a judicial review which was by consent struck out, with no order, but--

Judge: I don't know anything about it. A judicial review of what?

Mr. O'Toole: I accept that. There was a judicial review in relation to this matter, and, almost two years ago now, it was struck out and has gone out of the picture. I'm instructed today with the appeal from the District Court--

Judge: What is the relevance of the judicial review then?

Mr. O'Toole: Well it has no relevance to the present proceedings, none whatever, because-- I can't remember the specifics of the judicial review but it went by the board, by agreement, no order as to costs, and we decided to concentrate because of the facts found, I remember in the District Court. We decided to concentrate on the appeal and the facts found in the District Court, on the factual basis, was in effect that Stephen Brady's wife did not reside north of the border.

Judge: Alright. I'm going to clarify, I am not making any finding nor am I obliged to make any finding, in this Court in relation to Mrs. Brady. It is not relevant to the case, so I won't be making any finding. I was actually, I wouldn't say concerned, about what the prosecution said in relation to Mrs. Brady. I am not making any finding of fact in relation to Mrs. Brady, nor do I have to do so, to determine this case. It is not an element of the offence.

Mr. O'Toole: I would understand that the legal applicable in domestic law are subject to European law and European jurisprudence.

Judge: Mr. O'Toole, 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 known.

Mr. O'Toole: Could I ask it this way, Judge. Would the Court, if sufficient evidence was supplied of the jurisprudence of the European Court, would this Court be willing to state a case to a higher court and let the higher court decide the issue? From the District Court up, every court in Ireland is a Court of European law and has regard to it. That is my understanding.

Judge: It is a court of European law. However, I can make no determination in relation to the relevance and its applicability, only the superior courts can and there is a method whereby Mr. Brady can pursue that and should have pursued that through the High Court.

Mr. O'Toole: Sorry, I am just looking at the foundation article 267, in the Treaty of the European Union. It says that: "The Court of Justice at the European Union shall have jurisdiction to give preliminary rulings concerning ..." and then it says: "(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, officers or agencies of the Union".

Judge: Would you just repeat the first line of that, please?

Mr. O'Toole: "The Court of Justice at the European Union shall have jurisdiction to give preliminary rulings--".

Judge: "The Court of Justice of the European Union"; that's me is it?

Mr. O'Toole: No, no, no. It may be in the future. But I am asking, Judge, that the case be stated.

Judge: To?

Mr. O'Toole: A case can be stated to the Court of Appeal in this jurisdiction.

Judge: You open the Rules in relation to stating cases and the grounds upon which they should be stated and when; the procedure to be adopted by the courts.

Mr. O'Toole: I am looking at Article 267 and it says--

Judge: No, our own domestic rules in relation to the stating of cases, when it should be done and at what stage of proceedings.

Mr. O'Toole: If an issue of law arises and the domestic court wishes to get guidance from a superior court, it simply summarises the facts and puts the question of law, the parties normally agree them, and it puts the question of law to the higher court and that higher court deals with law. In this instance here, the facts are well established, well aired to the court and I would be in a position to draft for my friend to agree or disagree with --

Judge: Mr. O'Toole, I don't want to be interrupting you but we haven't reached that stage yet, what you say the issue is, when I have not made any findings of fact in relation to the prosecution case.

Mr. O'Toole: The issue is one of the applicability of the particular -- I can read them out to the court -- section 135 of the Finance Act 1992, section 139(4) of the Finance Act 1992, as amended, and section 77 of the Finance Act 2008: all of those sections are set out in the indictment, or in the charge, that was in the District Court and all of those sections, in light of developments in European law, should have been disapplied; they should have been applied in the District Court to the facts of this case, no matter which way the judge went on the facts of the case, because of developments in European law. Clearly the relevant European law, I can cite just one case--

Judge: Sorry, what is the case stated, that you are proposing?

Mr. O'Toole: I am proposing a question to the higher court whether these sections of the Finance Act before this Court and found in this prosecution are applicable in light of developments in European law.

Judge: Will you just apply them to the case to tell me on what basis.

Mr. O'Toole: Sorry if I could mention the Van Putten case to you.

Judge: No, just tell me in relation to this case how you say that.

Mr. O'Toole: Because European law has now developed to the extent that use in one Member State, of a borrowed private motor, registered in another Member State, is allowable, it is not a matter that can be prosecuted, and in this case the questioning this morning related to the extent of use in the Republic, in the area of the Republic, of a motor vehicle registered in Northern Ireland. The jurisprudence clearly shows-- and this case I am referring to was decided in April 2012-- whereas the prosecution in this case is in 2013, so that the out of date law was used to prosecute my client, Stephen Brady, in the District Court. That's the reason, on appeal, why I am asking this court to state a case to a higher court as to the applicability of the essential elements of the prosecution. I would accept, as my friend has said, that on the face of things, in domestic law, every aspect of this matter, as a matter of prosecution, has been proven, but the particular sections contained in the indictment, or the charge, should have been disapplied as long ago as certainly late 2012. This prosecution should never have taken place. I am simply asking the Court, if the court cannot directly deal with the matter, to state a case to clarify the legal position at this stage. I have written submissions in the matter, but I wanted to open just one case to the Court, the Van Putten case, a case of a German citizen driving vehicles registered in Germany, in Holland. The decision there was that a borrowed motor vehicle, driven by a national of one Member State into another Member State, had to be dealt with in a proportionate manner and that the other Member State had to disapply certain of its customs and excise laws in relation to those vehicles being on the roads of the other Member State.

Judge: I am still confused as to what the stated question is.

Mr. O'Toole: Sorry. I would draft it. Article 56 of the European Community, that is the Treaty of the European Union, it is the old Article 63, it says in the Van Putten case "...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 the tax normally due on registration of a vehicle in the first Member State". Now that is the VRT.

Judge: What is the case stated?

Mr. O'Toole: Whether in this case, on this charge, that the sections in the charge can be applied domestically in the light of European jurisprudence. It is straightforward in that sense. The expected result relying on the Van Putten case, and other cases to the same tone, would be that the hard border approach reflected in these sections would be set aside. So the case stated is simply are these charges based on these sections of the various Finance Acts viable and can they be enforced, notwithstanding the developments in European law. I think I had a draft of a possible case statement, but that would be the reason to state the case, that, in the light of developing European law, these particular sections are no longer viable in European law. The Superior Courts or Court would hear the arguments on both sides and decide the matter because--

Judge: I am still struggling with this. So the argument being that I can buy a car in Northern Ireland and bring it home and drive it around and that's--

Mr. O'Toole: Sorry, no. I can read--

Judge: No, relate it to the facts, Mr. O'Toole

Mr. O'Toole: No, I am not saying that

Judge: Are you saying that that's what the EU says now, that I can buy a car in any country and bring it into my country, where I reside--?

Mr. O'Toole: No, I am not saying that.

Judge: I don't understand the difference.

Mr. O'Toole: Well, I can read out a possible case stated. I have a draft.

Judge: Well, no; from the facts of this case, because the facts of this case are that of the vehicle registered in a foreign jurisdiction and it is brought in and driven by a resident in this jurisdiction.

Mr. O'Toole: Yes. European law has now imposed a test of proportionality on the use of such vehicles in other Member States. In other words, the use of a northern registered vehicle in the Republic is now an issue of proportionality. It is not the full imposition of the VRT, the vehicle registration tax. Accepting the customs official gave evidence this morning of the 30 day grace period but after that there is no grace and that full tax is applicable and that is now in contrast with the developments in European law.

Judge: Is it the same as the question I have asked you?. So I can buy a car in Northern Ireland, register it--

Mr. O'Toole: It's temporary use. You cannot--

Judge: You haven't said that to me.

Mr. O'Toole: Sorry

Judge: What does temporary use mean?

Mr. O'Toole: The temporary use is as evidence in this case where Mrs. Brady owns a vehicle and she gives it to her husband, who drives it now and then, I think in July and August of one of the years, in the South, without paying any road tax on it, in the South. Now, that is a temporary, we would argue a temporary use; that is elicited in terms of European law and that overbears Article 29 of the Constitution; it overbears domestic law. Now I can read out, sorry, Judge, if you bear with me for a second, I could ask the question this way. Does European law, and in particular Article 63 of the Treaty on the functioning of the European Union, preclude Part 2, Chapter 4 of the Finance Act 1992 which requires Irish residents who have borrowed a motor vehicle registered in another Member State from a resident of that State to pay on first use of that vehicle on the road network of Ireland the full amount of vehicle registration tax normally due on registration of a motor vehicle in Ireland without taking account of the duration of use of that motor vehicle on the road network in Ireland and without that person being able to invoke a right to exemption, or reimbursement where that motor vehicle is neither intended to be used essentially on the road network in Ireland on a permanent basis nor in fact used in that way? Now, if I was being asked is that the case stated, I would say yes. I would be quite happy to have that stated, in light of the facts in this case, and have the matter decided by a higher court. If I could open the Van Putten case, it's precisely dealing with the temporary use of a road vehicle taxed in one State, in another State, without being taxed in that other State.

Judge: Taxed? Registered?

Mr. O'Toole: Without being registered, sorry, the VRT, the vehicle registration tax. I can see the customs official and the gardai know the law, the domestic law in this country; they were quite correct in their attitude towards it. That is the knowledge they have. If they see an unregistered car from the North they are on the QV; they are suspicious immediately and correctly so, as the domestic law has stood. The domestic law changed in 2012 by virtue of the jurisprudence of the European Court and that was in a case involving Germany and Holland, but it is equally applicable in this jurisdiction. All we want is the opportunity to forward that case on foot of the facts to be found in this case to--

Judge: What does temporary use mean?

Mr. O'Toole: Temporary use is something like day tripping or in and out. The area in the Netherlands where this happened is an area where a lot of German tourists come and there are some German residents in that part of Holland who drive in and out. So it is a narrow enough issue but that is the development. If I may, I could hand in one case that the Court might consider, if I hand up the Van Putten case. There were three different cases that go under that. I'm sorry, I gave a copy to my friend; I think my friend has a copy. If I could just briefly open that case, the judgment was given on the 26th April, 2012 in that case. It is the third chamber of the court.

Judge: I will come back to the authorities in a minute Mr. O'Toole. I want to just see what the State's attitude, generally speaking, is to it and then we'll come back to the actual authorities.

Speaker: The first I can say, Judge, is that I disagree with my friend when he says that the domestic law changed in 2012 on foot of a decision in Van Putten. The domestic law hasn't changed in any shape or form. In terms of the Court having to consider whether to state a case, you have to be, I suppose, questioning as to whether this is a well settled area of law. That's one of the first things that the Court has to be concerned with. The Finance Act that we are concerned with in relation to this prosecution stems from 1992. It is well settled law at this stage. It's still constitutional. It's still deemed valid. Domestic law has not changed on foot of the Van Putten decision, which was 2012. The other thing is that it was always opened to my friend, if he felt that the law had changed in 2012, to seek an order of prohibition on foot of the fact the law that we are now prosecuting Mr. Brady under, which was 2013, when the prosecution came before the District Court. It was always open to them to bring, in the normal way, proceedings in the High Court seeking an order of prohibition on foot of the fact that we were relying on what they submit is law that is now outdated or has in some way changed or has been altered or is unconstitutional. That was always open to my friend in advance of the prosecution of this in the District Court. That wasn't done. The issue of the EU law was raised in the District Court and your colleague made very similar comments insofar as it is not his ambit, nor was it at the time, nor was it within his jurisdiction to deem domestic law unconstitutional or invalid in favour of European law.

I certainly don't agree with my friend's comments at all in relation to what he says the European position is and that that had changed the domestic position. That is the first thing I will say.

The second thing that I will say is that the Van Putten case that has been referred to and the suggested case stated in relation to possible references to Van Putten concerned itself, and Mr. O'Toole did use the words, concerned itself with, "first use of a vehicle" in a Member State. There is no suggestion that this was the first use. In fact, we have evidence that it was used in February, and seized in February. It was also used in July, August, September, and then again in November. That again was evidence that went unchallenged and unrefuted from the defence perspective, but the Van Putten decision, whilst it does deal with the movement, if I can put it that way, of vehicles between Member States, it related to a registration tax that was imposed on first time use on the public road. That is why I clarified, and I did say it may become relevant later on, that's why I clarified it with Mr. Heffernan, that the Revenue does not adopt such a position. In fact, the Revenue gives a 30 day period within which drivers are free to use a Northern-registered vehicle, or indeed any other country's registered vehicle, until such time as they can get their affairs in order. Van Putten addressed specifically a first use of the vehicle and that was deemed to be heavy handed and unlawful, if I can put it that way to you, Judge. But that's not comparable with the position that is before this Court, so I think that is the second difficulty that my friend faces in relation to the Van Putten case.

The third thing I'll say in relation to that is that Mr. O'Toole is making reference to what he deems temporary use of a vehicle is. That issue is left silent insofar as the Van Putten decision is concerned and the Revenue, it was indicated by Mr. Heffernan, have sought guidance from Brussels in relation to what they have imposed on their mechanisms here and Brussels haven't come back to them saying that there's anything wrong with the way they operate, which is to give individuals a 30 day grace period within which they can register their vehicles and even thereafter, as happened in this case to Mr. Brady on the first instance, notwithstanding the fact the vehicle, Mrs. Brady's vehicle, wasn't in order, a compromised fine situation was entered into and no prosecution was brought in relation to the February stop.

That leads me to what is going to be my last point, Judge, which is that both Mr. and Mrs. Brady have already acquiesced in relation to the jurisdiction of both the domestic law and indeed the jurisdiction of this Court.

Judge: I am distinguishing that and it is very clear to me, on the reasoning that I have just had of the case, this is not first use on a national roads case and it is not the case that the defence made, at any time, that they were going to register the vehicle and that this was a period of grace they were seeking; quite the contrary. The evidence is that Mrs. Brady allowed him to use the car on this occasion and had done so on other occasions so it is distinguishable, Mr. O'Toole.

Mr. O'Toole: Judge, paragraph 14 of the Van Putten case, my friend isn't quite correct on the facts. In paragraph 13: "In the course of checks, officers of the tax authority established that the defendants in the main proceedings were using cars registered in other Member States on the road network in the Netherlands without having paid vehicle tax. Accordingly, they were advised that on a subsequent check they might be issued with an assessment notice for the payment of that tax". In paragraph 14: "On a subsequent check, the defendants in the main proceedings were stopped and found to be in the same situation again". That's a direct parallel with the events here and that judgment--

Judge: Yes, but that's not what the case decides. The ruling is on the basis of a first use of the vehicle on a national network--

Speaker: That's at paragraph 57.

Judge: --and 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.

Mr. O'Toole: Well, I would invite the court to read the Van Putten judgment because it allows for occasional use from time to time.

Judge: Well, can you tell me which paragraph that it states that?

Mr. O'Toole: I think it was the last one... Hold on. It's the last paragraph, if I'm correct. Hold on, I'll come down to it. It talks... sorry. Yes, sorry it's in 57. Sorry it's after 57 because 57 deals with... It's the ruling of Court Chamber in having considered the Van Putten case in detail and it says "Article 56, European Communities must be interpreted as meaning that it precludes legislation for 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 roadwork, the full amount of the tax normally due on registration of a vehicle in 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 of exemption or reimbursement when 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". So the real issue as it comes down is whether that vehicle is intended to be used on a permanent basis, and it can be stopped naturally by the authorities in any Member State for it to be checked and dealt with, but that is the ruling on Article 56 and it's the free movement of capital actually. It's one of the four freedoms but it's not persons. It is the free movement of capital is the issue as described in the body of that case, and the facts were almost uncannily similar but I am not relying on that. I'm relying on that finding after paragraph 57 which is the... and there are other cases to the same... That case, in fact, concerned three different cases. It's called the Van Putten case but it dealt with two other cases P Mook 579/10 and G Frank 580/10 and all I would ask the Court to do is I would ask the Court simply to consider that judgment in its entirety and open it to the court--

Judge: Well, I have; I have. It's not that long, Mr. O'Toole. I am distinguishing it on the basis of what it rules. I don't see that it's on fours with this case at all.

Mr. O'Toole: Well that's---

Judge: 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 well be relevant but not in the circumstances of this case.

Mr. O'Toole: Yes, well, its 26th of April, 2012 that this case came in but the particular-- and this matter was raised in the District Court, in fact, and the court was alerted to the existence of this case law at that time. And the summons in this case is dated the 12th of February, 2013 and the order in the District Court is the 14th of October, 2013. My difficulty is, Judge, that the Circuit Court is the end of the road, as it were, for this type of case.

Judge: Yes, but it wasn't.

Mr. O'Toole: Sorry?

Judge: Mr. Brady could have sought prohibition. He could have sought declaratory relief. He could have gone to the High Court. Now, at this stage of the proceedings, the Circuit Court is the appellat court.

Mr. O'Toole: Could I refer very briefly then to Article 267 *inter alia* that says that: "Where any such question is raised in a case pending before a Court or Tribunal of a Member State against whose decisions there is no judicial remedy under national law, the Court or Tribunal shall bring the matter before the court." And that's the Court of Justice so I'm simply asking the court to consider stating the case because that keeps it within the jurisdiction of this Court which is the final court in the matter and it's a question of doing justice in the light of domestic and European law.

Judge: Well, as I say, I'm distinguishing Van Putten and I don't see any grounds for stating a case on the basis of that case, so unless there's something else and there were alternatives available to Mr. Brady. There was an alternative way of dealing with this on the basis of his argument and that was by issuing proceedings in the High Court and there was a variety of options available to him. Yes, this is the final court of appeal but he had those other options available, so section 267 he did have other remedies available. I don't see that it's a case where a case should be stated on the basis of Van Putten."

15. Having heard the evidence and submissions in the case, the Circuit Court Judge proceeded to convict the Applicant of the offence charged. The sentence imposed by her was reduced to a fine in the sum of €3,500.

16. I have set out extensively the relevant transcript of the Circuit Court relating to the issue of the "van Putten" defence in light of the manner that this was issue was presented to this Court at the hearing of this application. Counsel for the Applicant asserted that the Circuit Court Judge found that she could not recognise this defence. Counsel for the proposed Respondent sought to correct this mischaracterisation of the Circuit Court hearing. As I have already indicated, the transcript from the DAR recording of the hearing was exhibited in an affidavit filed on behalf of the proposed Respondent rather than being an exhibit in the Applicant's papers. A perusal of that transcript reveals the very extensive discussion (set out above) which took place regarding this issue. It also very clearly reveals that far from the Circuit Court Judge finding that she could not entertain the *van Putten* Defence, she considered the ruling of the CJEU and made findings in relation to its applicability to the facts of the case before her. When this issue was raised by this Court with Counsel for the Applicant, in the course of his Reply to the proposed Respondent's submissions, his position remained that the trial judge had refused to consider same. This clearly is not the case.

Availability of Judicial Review as a remedy

17. The reliefs sought by the Applicant by way of Judicial Review are set out in the Statement of Grounds and are principally declaratory relief that the relevant sections of the Finance Act are incompatible with Article 63 of the European Union and an Order of *certiorari* quashing the Order of the Circuit Court convicting the Applicant of the offence.

18. In a most unusual manner, this Court was invited to amend the reliefs sought to whatever the Court thought was appropriate, having regard to the facts of the case. Such an invitation is inappropriate and the Court wishes to note its dissatisfaction that such a suggestion was made without any invitation from the Court for the Applicant to consider the reliefs sought by him. It is not for this Court to advise an Applicant in a Judicial Review leave application as to what reliefs are appropriate for him to seek.

19. In light of the content of the papers filed in support of this application and the manner in which the application was moved before the Court, 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.

24. In light of these findings, the other reliefs which are sought by the Applicant do not arise.

25. I therefore dismiss the application before me and refuse the Applicant leave to bring Judicial Review proceedings for the reliefs sought.