Leading THC Case Lends Support To UK Legalization Debates

By **Robert Jappie and Josh Normanton** (July 14, 2023)

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On June 30, the Court of Appeal of England and Wales handed down a decision in R v. Margiotta, which is likely to be viewed as a landmark judgment for companies or individuals engaged in hemp flower businesses in the United Kingdom.[1]

The effect of the case is to provide a strong defence in criminal proceedings to anyone importing or selling cannabis sativa — also known as CBD flower, hemp, hemp flower and low THC cannabis — with a THC level not exceeding 0.2% prior to Dec. 31, 2020.

The case should also serve to make the Crown Prosecution Service think carefully before continuing or commencing any prosecutions relating to low THC cannabis supply or importation generally.

There are also broader implications for the debate about legalisation.

Although it is a welcome judgment, it is important to approach it with caution. Crucially, what this judgment does not do is:

- Legalize the sale of hemp flower with THC below 0.2% in the United Kingdom now or at any point after Dec, 31, 2020, which is ultimately because of the effect of Brexit; or
- Provide a completely bulletproof defence to any conduct prior to Dec. 31, 2020.

One of the reasons the defendants in Margiotta won is because of errors made by the CPS.

Importantly, the CPS in the Ipswich Crown Court, where the case was originally considered, failed to make certain key arguments, crucially failing to justify the prohibition on the product by reference to European Union law. This meant that the Court of Appeal, which was considering the Crown Court's decision, decided not to entertain those arguments on appeal.

If the CPS is better prepared next time around, it may lead to a different outcome.

To understand the argument that the CPS could have made, and evaluate just how Margiotta might affect older cases, and why its impact on the legality of current sales is limited, it is necessary first to understand the basis on which the Court of Appeal made their decision.

The defendants were operating a business named "Uncle Herb," which imported and sold cannabis sativa, also known as hemp, including the female flowering heads of the cannabis plant. They imported the cannabis from Italy where it was grown legally. The cannabis had less than 0.2% THC content.

The U.K. police intercepted their importation, and they were charged with importing

cannabis, a controlled drug. The police took this position because the definition of cannabis under Section 37 of the English Misuse of Drugs Act 1971 does not involve an assessment of THC content. The definition includes the flowering heads of the plant regardless of THC level.

However, the defendants argued that when one considered EU law, which at the time of the importation and sales took precedence over U.K. national law, they were not actually committing an offence. This was because within the common market, there were rules on the free movement of goods, including Article 34 of the Treaty on the Functioning of the European Union, or TFEU, and associated EU regulations.

One of these rules was that it was unlawful to place any restriction on the movement of the particular product — cannabis sativa, or hemp, with a THC level of below 0.2% — they sold, which they submitted to the court, was an agricultural product.

As the effect of the Misuse of Drugs Act was to criminalize cannabis without regard to THC content, that law served as an unsustainable restriction on the movement of the hemp.

Therefore, the ultimate effect of the EU law was that no offence had been committed, and the defendants maintained they had acted legally in importing and supplying the product.

The Crown Court agreed with the defendants and the Court of Appeal considered the appeal of the CPS against that decision, also agreeing with the defendant's analysis. The Court of Appeal considered key European Court of Justice case law in concluding that Article 34 did apply to the hemp in question.

The Court of Appeal then went on to consider Article 36 of the TFEU. This provision allows states to justify prohibitions against the free movement of goods on the "grounds of public morality, public policy or public security [and] the protection of health and life of humans."

Although noting some of the arguments in favor of a prohibition on low THC hemp, the Court of Appeal said that the prosecution had failed to make the case for a prohibition before the Crown Court, and it was therefore not appropriate to consider the prosecution's argument on this point in the Court of Appeal.

The effect of this approach was that no restrictions could be justified under Article 36 and the effect of Article 34 was that no prohibition could be placed on the importation or sale of the hemp. Ultimately, this meant the defendants had committed no offense.

The hemp community will understandably welcome this judgment. It serves as authoritative support for what many in the industry have been arguing for years.

Yet, we would caution against overexcitement. The key point is that the judgment does not immediately serve to legalise low THC cannabis in the U.K. as things stand today.

These are our key observations on the judgment:

First, the prosecution appears to have been quite poor and disorganized in their approach in the Crown Court, failing to advance key arguments.

Given conventions that apply in appeal cases, this meant that the prosecution could not advance certain arguments in response in the Court of Appeal. It is possible they could advance these arguments next time around.

Consider, for example, the argument for a restriction against the movement of low THC hemp under Article 36 of the TFEU.

One argument we expect to see advanced in the future is that it is appropriate and lawful to restrict the importation or sale of low THC cannabis because a system of control of import and supply, which depends on the THC content of plants, is impossible to operate in practice. This is because it would be impossible to determine from visual inspection alone whether cannabis plants were lawful or unlawful.

There is actually support for this argument in the United Nations Commentary on the 1961 Single Convention — the international treaty on which the Misuse of Drugs Act 1971 is based — that states that the definition of cannabis is intended to:

> cover the male plants even if they might yield … lesser quantities of the potent material…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.

It follows that there is a risk that this argument will be advanced in the future by a better prepared prosecution. The Court of Appeal has certainly left the door open for the prosecution to make the argument in the future. However, there are of course strong counterarguments available.

For example, it is possible to conduct scientific testing of THC levels relatively quickly.

One might also expect that the authorities can conduct some form of triage approach when faced with a trader selling low THC cannabis to the public, i.e., checking testing certificates, etc.

Secondly, the judge in the lower court made key findings on the nature of the product, which served the defendants well in the Court of Appeal.

For example, the judge found that the green vegetable matter was an agricultural product. He also concluded the product was "raw hemp" as defined in EU law. In our experience, it is rare for such findings to be made in criminal cases.

However, in light of this judgment, judges are more likely to be attuned to these issues and a greater focus on expert identification of the product is likely to result.

Ultimately, these findings were key to establishing that the products were subject to Article 34 of the TFEU and the associated regulations.

Thirdly, the effect of the judgment is to provide an arguable defence, subject to the points made above and the risk of a better prepared prosecution, to anyone accusing of importing and selling the same product as "Uncle Herb" prior to Dec. 31, 2020.

However, the effect of Brexit is that no one selling or importing after that date, which is the implementation period completion day, can rely on the same argument. This is because Article 34 is no longer applicable in U.K. law after that date, by virtue of Regulation 2 of the Prohibition on Quantum Regulations 2020. It follows that the immediate effect is not the effective legalization of trade in CBD flowers or hemp flowers.

The above said, the judgment is both an influential authority in the ongoing debate about legalization and something for prosecutors to reflect on when considering the public interest in pursuing criminal charges against importers and traders.

The judgment now provides authority for the fact that low THC cannabis sativa is not to be considered a "narcotic drug," i.e., a product whose harmfulness is demonstrated or generally recognized and whose importation and marketing is prohibited in all member states.

Although those in the hemp community having been saying this for years, it is crucial to the development of industry and for discussions about legalisation and control to have such authoritative support for that position.

Even post-Brexit, we continue to wonder how sensible evidence-based lawmaking can possibly justify any prohibition on low-THC cannabis given absence of evidence that the product is harmful.

More immediately, prosecutors have to consider the public interest in continuing or pursuing a prosecution for the importation or sale of low THC cannabis.

The conclusion that these substances are not narcotic drugs is a strong argument against prosecution and in favor of alternative methods of disposal, such as the authorities providing informal warnings or advice to traders. It would be prudent to review all existing cases involving low THC cannabis in light of Margiotta.

For those in the industry looking ahead to the future, the effect of Margiotta is bittersweet. It is a case that can be relied upon to justify the legal importation and supply of low THC cannabis but only at a time in the past. Due to Brexit, the basis on which it is possible to say the conduct is legal largely falls away.

However, the fundamental rationale for a legal system that permits the legal supply of low THC cannabis remains. There is no good or logical reason why the industry should become collateral damage in the change in laws necessitated by Brexit.

The analysis in Margiotta, the fact the product is not narcotic, and the principle of evidence-based lawmaking, combine to create powerful arguments for the legalisation of supply in low THC cannabis. Given Margiotta, this would simply put the law back to how it was less than three years ago — it is not a revolutionary change.

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[1] R v. Margiotta and Ors [2023] EWCA Crim 759.