Neutral Citation Number: [2006] IEHC 40

THE HIGH COURT

[2004 No. 626 J.R.]

BETWEEN

P. H.

APPLICANT

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Clarke delivered the 16th February, 2006.

1. Introduction

1.1 On the 20th March, 2000 the applicant ("Mr. H.") pleaded guilty to certain sexual offences before the Central Criminal Court. On the 19th May, 2000 he was sentenced to 11 years imprisonment for those offences. Mr. H. had been in custody since September 1998. The convictions themselves related to offences that occurred on dates unknown between the 1st April, 1996 and the 31st December, 1996 in respect of a single injured party. Mr. H. appealed against the severity of the sentence and on the 4th October, 2001 the original sentence imposed by the Central Criminal Court was reduced on appeal by the Court of Criminal Appeal to a term of eight years. On that basis and having regard to both the time when he commenced custody and the normal periods of time off Mr. H. was released in September, 2004.

1.2 In those circumstances Mr. H. is subject to certain provisions of the Sex Offenders Act 2001 ("the 2001 Act"). By virtue of Article 2 of the Sex Offenders Act 2001 (Commencement) Order 2001 (S.I. No. 426 of 2001) the 2001 Act came into force on the 27th September, 2001. It should be noted, therefore, that while the 2001 Act was not in force at the time of the original conviction and sentence of Mr. H. before the Central Criminal Court, it's provisions were in force as of the time of the variance of his sentence by the Court of Criminal Appeal.

1.3 In these proceedings Mr. H. challenges the consistency of certain provisions of the 2001 Act with Bunreacht na hÉireann. In substance his challenge is directed to the fact that the Act, in its terms, is retrospective to the extent that it imposes certain reporting obligations on persons, such as Mr. H., who are convicted of specified sexual offences irrespective of whether the offence of which they were convicted occurred before or after the coming into force of the 2001 Act.

1.4 Mr. H. contends that the retrospective nature of the legislation is in breach of Articles 15.5 and 38.1 of the Constitution and is also in breach of Article 7.1 of the European Convention on Human Rights ("the Convention").

In order to have a proper understanding of the issues which arise it is necessary to turn first to a consideration of the statutory scheme.

2. The 2001 Act

2.1 Part 2 of the 2001 Act contains provisions under the heading:-

> "Obligations of Sex Offenders to Notify Certain Information"

2.2 The core provision of Part 2 is to be found in s. 10 of the Act which requires that persons coming within the scope of the Act should notify An Garda Síochána of their name, address, any change of address and certain other information concerning their whereabouts. Such obligation is subject to a criminal penalty.

2.3 Section 7 of the 2001 Act specifies the categories of persons who are subject to the above notification requirements. In particular s. 7(2) provides that a person who has been convicted of a sexual offence as defined before the commencement of part 2 of the Act is, nonetheless, subject to the provisions of the Act where a sentence has been imposed and is not yet fully spent.

2.4 Sexual offences for the purposes of the Act are defined by reference to the schedule which includes a wide range of sexual offences both contrary to common law and provided for by statute. Certain exclusions are provided for in s. 3(2) for cases where the victim or other party to the offence was of full age and a non custodial sentence was imposed. Furthermore exclusions are contained in s. 3(3) in respect of offences where the guilty party is less than 17 years of age and not more than 3 years older than the victim or other party to the offence.

2.5 Therefore it is clear that the requirements of the 2001 Act apply to a very wide range of sexual offences.

2.6 Section 8 sets out the period during which the requirements of part 2 are to apply. In simple terms there is a sliding scale referable to the term of imprisonment imposed. The obligation period is indefinite in the case of person sentenced to a term of more than two years, sliding down to a five year period where the accused is not sentenced to a custodial sentence (including, for these purposes, a suspended custodial sentence). The periods are reduced by 50% in the case of persons who were, at the time of sentence, aged under 18 years.

2.7 The obligations on a person to whom the Act applies are, as indicted above, set out in s. 10. The principle initial obligation is a requirement to notify name and address to An Garda Síochána within 7 days. Thereafter there is a further obligation to notify any new name used by the person, any change of address, and certain other information where the person is to be away from their notified address (whether within or without the State) for periods in excess of seven days.

2.8 Under s. 10(6) each of the notifications required to be given must include the date of birth of the individual and the name or names and address as of the relevant date. Under s. 10(8) the relevant notification can be given either in person or by post.

2.9 It should also be noted that a person who is subject to an indefinite obligation to comply with the Act has an entitlement to make application, on notice to An Garda Síochána, to the Circuit Court which court can, under s. 11(5), if it

> "Is satisfied that the interests of the common good would no longer be served by the applicant's continuing to be subject to the requirements of (Part 2) make an order discharging the applicant from the obligation to comply with those requirements".

2.10 Finally the sanction for failure to comply with the obligations under the section is contained in s. 12 which renders failure to comply "without reasonable excuse" or the giving of false or misleading information, to be an offence punishable on summary conviction to a fine not exceeding the euro equivalent of IR£1,500 or imprisonment for a term not exceeding 12 months or both. Section 13 makes provision for the application of the provisions of Part 2 to certain persons convicted outside the State of similar offences where such persons become resident in the State.

2.11 As will be seen from the above, the statutory scheme requires persons who are subject to the Act (including Mr. H.) to notify An Garda Síochána of their name (including any other name which they may from time to time use), their address and any significant movements in the sense of being away from their notified address for a period in excess of seven days.

2.12 While the term "sex abuse register" has gained a certain currency it is clear, both from the provisions of the 2001 Act and from the evidence led on behalf of the respondents in these proceedings, that there is no register as such. However the notification requirements of the 2001 Act enable the unit of An Garda Síochána charged with dealing with these matters to know with reasonable accuracy the current name and whereabouts of all persons who have been convicted of sexual offences, as defined, for the period applicable to their offence and sentence and subject, of course, to the person concerned having complied with his or her obligations under the Act.

3. Mr. H.'s circumstances
3.1 Having regard to the sentence which Mr. H. received, he is subject to an indefinite obligation to comply with the provisions of the 2001 Act. In evidence he indicated that he has gone back to reside in the house where he lived prior to the commission of the offences. He indicated that he rarely travels from that house save to a local village and that he has not and does not presently intend to travel in any extensive way which would give rise to obligations to notify.

3.2 There is no reason to believe that Mr. H. has, in any way, been in breach of his obligations under the Act. Indeed that very fact is relied upon by the respondents to argue that Mr. H. has not sufficient standing to maintain these proceedings. It is to that issue that I should, therefore, first turn.

4. Standing
4.1 It is, of course, well settled that a person must have the necessary standing to mount a challenge to the consistency of any statute with Bunreacht na hÉireann: *Cahill v. Sutton* [1980] I.R. 269. The respondents argue that Mr. H.'s rights have not yet been infringed. He will not, it is said, be threatened by prosecution if he complies with the notification requirements in the 2001 Act.

4.2 Save in one respect (to which I will return) I do not agree. Part 2 of the 2001 Act is designed to impose obligations on a limited number of persons (i.e. those convicted of sexual offences as defined and for the period applicable to the person concerned by reference to the sentence imposed in respect of that sexual offence). On the evidence it would seem that, in current conditions, it is unlikely, at any time in the near future, that the number of persons who will be subject to the provisions of the Act at any given time would exceed 1,000 persons. While it is true to state that Mr. H. has indicated that he does not intend to breach his obligations, this does not mean that he is not still subject to those obligations and that these obligations apply only to a relatively small number of persons.

4.3 If there were to be a constitutional infirmity about those provisions then an application of the standing rule in the manner which the respondents contend for, would place persons such as Mr. H. in what, in my view, would be an invidious position. They would either have to comply with what would, on that view, be a constitutionally impermissible restriction on their activities, and thus lack standing to challenge the validity of those restrictions or, alternatively, would be forced, in order that they might have standing, to commit what would, *prima facie*, be a criminal offence under a statute enjoying the presumption of constitutionality. Such an interpretation of the standing rule would not, in my view, be consistent with a harmonious interpretation of the Constitution as a whole.

4.4 I am, therefore, satisfied that where, as here, a regulatory provision imposes a burden on a small and defined group of persons on pain of a criminal sanction, any person subject to the burden concerned has, in general terms, standing to challenge the imposition of that burden notwithstanding the fact that they have chosen to obey the regime imposed upon them.

4.5 The underlying rational for the standing rule is to prevent one person making another person's case. In that context it does seem to me that Mr. H. lacks standing to advance one aspect of the arguments put forward on his behalf. One of the consequences, it is said, of the retrospective nature of part 2 of the 2001 Act derives from the extent to which the burden imposed by the Act can be taken into account in sentencing. I will refer in due course to the fact that the criminal courts have taken into account the fact that the 2001 Act places a burden on a person sentenced for a sexual offence which can, and should in an appropriate case, be taken into account in determining sentence. In those circumstances, it is argued that an aspect of the unfair retrospective application of the Act is that persons are nonetheless subject to its burdens who did not, at the time of their sentence, have the opportunity to urge upon the court imposing sentence that the application of the provisions of part 2 of the 2001 Act should be taken into account in calculating that sentence.

4.6 Whatever may be the merits or otherwise of that argument in an appropriate case, it does not seem to me that it arises in Mr. H.'s case. As pointed out above his revised sentence, as imposed by the Court of Criminal Appeal, was determined after the 2001 Act came into force. Insofar as there might have been any merit in urging that the court take into account the fact that Mr. H. would be subject to the provisions of the Act in calculating the appropriate sentence in his case, it was open to those then representing Mr. H. to urge such a factor upon the court at that time. Whatever, therefore, might be the situation in a case where the final sentence imposed upon a person was passed down at a time when the Act was not in force, it does not seem to me that Mr. H. has the standing to make arguments of the type which I have just identified. To permit him so to do would be to allow him to make another person's case.

4.7 However subject to that caveat I am satisfied that Mr. H. has the necessary standing to challenge the legislation on all of the other grounds put forward.

5. The Constitutional Challenge
5.1 At the outset it must be said that the substance of the challenge which Mr. H. now brings in respect of the 2001 Act has been the subject of a comprehensive and recent adjudication by this court in *Enright v. Ireland and the Attorney General* [2003] 2 I.R. 321.

In Enright Finlay Geoghegan J. dealt, in a most comprehensive way, with each of the issues now raised.

5.2 In *Re Worldport Ireland Limited* (Unreported, High Court, Clarke J., 16th June, 2005) I considered the circumstances in which it was appropriate for a judge of this court to revisit an issue recently decided by another judge of the court. In that context I came to the following view, at p. 7:-

> "It would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in *Industrial Services*. It is well established that, as a matter of judicial comity, a judge of First Instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong *Huddersfield Police Authority v. Watson* (1947) KB 842 at p. 848, *Re Howard's Wills Trust, Leven & Bradley* (1961) Ch 507 at p. 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficient lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issues so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in *Industrial Services* and decline to take the view, as urged by counsel for the bank, that the case was wrongly decided".

5.3 This case, of course, involves a challenge to a statute on the grounds of alleged inconsistency with the Constitution. The factors to be taken into account in determining whether it is appropriate to revisit a previous unsuccessful challenge of that type may not be exactly the same as apply in relation to the determination of points of law or statutory interpretation. Nonetheless I am satisfied that a reluctance to depart from recent authority should be exercised in such cases.

5.4 *Enright* is a recent judgment, arrived at after a comprehensive hearing, in which, it would appear, each of the issues raised in this case and all of the relevant authorities to which I have been referred, were considered by the trial judge. It was not suggested on behalf of Mr. H., at the hearing before me, that the judgment in *Enright* could be said to be in error on the basis of the authorities referred to in it. Nor could it be said that there was any absence of a review of the relevant authorities. Subject to one matter, to which I will return, neither could it be said that there has been any development in the jurisprudence which might warrant me coming to a different conclusion than that arrived at in *Enright*. The one change in circumstance relied upon by Mr. H. stems from a number of judgments delivered by the Court of Criminal Appeal as part of the criminal sentencing process in cases involving persons who had been convicted of offences scheduled under the 2001 Act. However before considering the effect of those judgments it is necessary to set out the issues raised and conclusions reached in *Enright*.

6. Enright

6.1 In her judgment in *Enright*, Finlay Geoghegan J., in dismissing the plaintiff's claim, came to a series of conclusions.

6.2 The relevant provisions of Bunreacht na hÉireann relied on in *Enright* were, in substance, the provisions relied on in this case. Reliance was also placed, as here, on Article 7(1) of the European Convention on Human Rights. The Constitutional provisions relied on were firstly Art. 15.5 which provides:-

> "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."

And secondly Art. 38.1 which provides:-

> "No person shall be tried of any criminal charge save in due course of law."

It is, of course, well settled, that the requirement that the conduct of criminal cases be "in due course of law" requires not merely technical compliance with statute, rules of court and the like but also "an application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function": *State (Healy) v. Donoghue* [1976] I.R. 325.

6.3 In coming to the conclusions which she did, Finlay Geoghegan J. had regard to the comparable jurisprudence of the superior courts of the United States and also to the jurisprudence of the institutions charged with implementing the European Convention on Human Rights. It is worthy of note that by virtue of the view which she took of the case Finlay Geoghegan J. did not find it necessary to reach a conclusion as to whether Article 15.5 of Bunreacht na hÉireann should be interpreted in such a way as to impose an absolute prohibition on the imposition of a penalty for a criminal offence which was not part of the criminal law as of the date when the offence was committed.

6.4 There is no doubt that Article 7(1) of the Convention is different in its terms from Art 15.5 of the Constitution. Article 7(C1) provides:-

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one which was applicable at the time the criminal offence was committed".

6.5 Therefore Article 7(1) of the Convention expressly refers to criminal penalties while Article 15.5. of the Constitution does not. However having taken the view that the imposition of the burden of compliance with the provisions of Part 2 of the 2001 Act did not amount to a penalty such issue did not arise. Finlay Geoghegan J. did, however, hold that independent of the interpretation of Article 15.5.1, one of the rights encompassed within Article 38.1 was to the effect that a person should only be punished on the basis of the law existing at the time of the commission of the alleged offence. The difference between the effects of a right under Article 15.5 on the one hand and Article 38 on the other hand, it was argued, is that Article 15.5 would seem to impose an absolute prohibition on legislative provisions which contravene it, whereas Article 38.1 merely confers a right on an accused which needs to be considered and weighed in the light of other competing rights and obligations.

6.6 As indicated above Finlay Geoghegan J. then considered whether the imposition of an obligation to comply with the provisions of Part 2 of the 2001 Act amounted to a penalty. For the reasons set out in the course of the judgment, she held that it did not. Reliance was placed upon both United States and European jurisprudence. With one exception no development in that jurisprudence

has occurred since the judgment in *Enright*. As noted at p. 337 of the judgment the then most recent decision from the United States was that in *Doe v. Otte* (2001) 259 S.3d 979, which was a decision then under appeal to the US Supreme Court. Since the judgment in *Enright* the US Supreme Court has given judgment in *Doe v. Otte* on 5th March, 2003. The decision of the majority of the Supreme Court is even less favourable to the contentions put forward by Mr. H. than would have been the case under the judgment of the Ninth Circuit which was considered in *Enright*. Therefore, insofar as there has been any development in the international jurisprudence relied on by Finlay Geoghegan J., it is, if anything, adverse to Mr. H.

6.7 In assessing the test by reference to which a burden might be said to be punitive, it was held in Enright that in order that a disability or restriction by statute on persons who have been convicted of a criminal offence be considered to be part of the criminal penalty for such offence, the restriction concerned must be considered to be punitive in intent and effect. However the fact that it had a punitive or deterrent element does not, of itself, mean that it should be considered a penalty for the criminal offence. In coming to that view, reliance was placed on *O'Keeffe v. Ferris* [1997] 3 I.R. 436 and *Conroy and the Attorney General and Another* [1965] I.R. 441.

6.8 In concluding that the requirement of compliance with Part 2 did not constitute a penalty it was held that the 2001 Act did not evince an intention on the part of the Oireachtas that the statute be considered as punitive. Furthermore Finlay Geoghegan J. was not satisfied that it had been established that the provisions contained in Part 2 were punitive in purpose or effect. The notification requirements in s. 10 did impose a burden on the sex offender but did not restrain him in his movements or activities or place him under a disability.

6.9 The court also took into account the fact, as it found, that registration of offenders had not been historically regarded as a punishment; that the imposition of the minimal notification requirements, without individual assessment of the risk imposed, did not support a punitive intent or effect; that the mandatory notifications were minimal requirements as such and treated all sex offenders released from prison as if they were in a low risk group; furthermore that, in that case, as in this case, there was undisputed evidence that the commitment to register was a minimal level of intervention and that from a therapeutic point of view it was the lowest of any intervention programme in relapse prevention. In that context Finlay Geoghegan J. placed reliance on the decision of the US Supreme Court in *Kennedy v. Mendoza-Martinez* (1962) 372 US 144.

6.10 In addition the court came to the view that, while the existence of the obligations under s. 10 of the Act of the 2001 Act was something to which a judge having charge of a criminal trial or an appeal in the criminal process was probably entitled to have regard to when sentencing, given the minimal nature of the burden imposed, it was improbable that it was something which would materially affect the sentence imposed. For reasons which I address later, this prediction may not have turned out to be fully correct. On that basis it was held that the requirements of s. 10 impaired Mr. Enright's right to fair procedures as little as possible and were proportionate to the objectives to be achieved. Furthermore it was held that having regard to Article 40.3.1 of the Constitution it was permissible for the State, when enacting legislation which sought to defend or vindicate personal rights of citizens, to have regard to the practicalities or feasibility of imposing the proposed obligation on different classes of persons and to distinguish between such persons.

6.11 By virtue of the fact that the registration requirements set out in Part 2 of the 2001 Act did not constitute a penalty for the sexual offences committed the court held that their imposition under s. 7(2) of the 2001 Act could not be inconsistent with a constitutional right under Article 38.1 not to have a penalty imposed which did not exist at the date of the offence.

6.12 It was also held that there was a legitimate legislative purpose in imposing the requirements of Part 2 of the 2001 Act on all convicted sex offenders "insofar as practicable". On that basis Finlay Geoghegan J. was satisfied that there was no arbitrary or impermissibly wide and indiscriminate criteria in the 2001 Act notwithstanding that the legislation does, undoubtedly, distinguish between those convicted offenders who are still serving a prison sentence at the date of commencement of the Act and those who were already released and beyond the expiry date of their sentence. In that context *Cox v. Ireland* [1992] 2 I.R. was distinguished.

6.13 Finlay Geoghegan J. also took the view that the removal by statute of a privilege or benefit conferred by statute was not the element which determined the principles according to which the courts determined what was or was not a penalty in the sense of primary punishment for the relevant offence. However that fact does not appear to be decisive in determining whether a burden is a penalty for the purpose of Art. 15.5 and Art. 38.1.

6.14 The court also held that, as a general principle, if there were a matter which a sentencing judge was entitled to take into account, then, *prima facie* having regard to the guarantees in Articles 38.1 and 40.3, the accused should ordinarily be entitled to make submissions to a sentencing judge in respect of that matter.

6.15 Finally, Finlay Geoghegan J. held that the Oireachtas, in enacting the 2001 Act, was engaged in an exercise of balancing the constitutional rights of convicted persons with the constitutional rights of other citizens who might be at risk of attack from such person following their release from prison. It was necessary to determine whether this balance was so contrary to reason and fairness as to constitute an unjust attack on the plaintiff's rights to fair procedures. As well as the balancing exercise, the proportionality test compromised of the following tests ought to be applied:

> (a) were the impugned provisions rationally connected to the objective?
>
> (b) did they impair the plaintiff's constitutional rights as little as possible?
>
> (c) are they such as their effects on the plaintiff's constitutional rights are proportional to the objectives sought to be obtained by the 2001 Act.

In coming to those views *Tuohy v. Courtney* [1994] 3 I.R. 1 and *Heaney v. Ireland* [1994] 3 I.R. 593 were applied.

6.16 Having regard, therefore, to the principles which should be applied when a judge of this court is invited to reconsider a recent and considered judgment of another judge of the court and having regard to the careful analysis conducted by Finlay Geoghegan J. it would, it seems to me, require a compelling change in circumstance, whether factual or legal, to justify me coming to a different view. Before going on to consider the change relied on by Mr. H. I should also add that I agree with each of the conclusions from the judgment in *Enright* which I have set out above and do not find it necessary to repeat in the course of this judgment the analysis which led to each of them.

7. The Alleged Change in Circumstance

7.1 This leads to what was, in essence, the central issue put forward on behalf of Mr. H. for his contention that I should come to a

different conclusion to that of Finlay Geoghegan J. in *Enright*.

7.2 In *D.P.P. v. N.Y.* [2002] 4 I.R. 308 the Court of Criminal Appeal had to consider an appeal against severity of sentence involving a sexual offence. As it happens the judgment in *N.Y.* was given on 19th December, 2002, one day after Finlay Geoghegan J. delivered judgment in *Enright*. In the course of considering the appropriate sentence Fennelly J., delivering the judgment of the court, said, at p. 317:-

> "The court considers it necessary, firstly, to advert to the significance of the Act of 2001. It is necessary to give a brief summary of those provisions which are relevant to the accused.
>
> The Sex Offenders Act 2001 is described, in the relevant part of its long title as "an act to require, in the interests of the common good, the notification of information to the Garda Síochána by persons who have committed sexual offences; in those interests to impose, or enable the imposition of, certain other requirements on such persons (including requirements the purpose of which is to assist in their rehabilitation) …
>
> The requirements of the Act apply (s. 7) to persons who have been convicted of certain sexual offences, including the two offences with which the accused was charged. The requirements imposed by s. 10 include obligations to notify An Garda Síochána of certain matters the essence of which can be paraphrased as follows:-
>
> (a) his name including any names by which he is known;
>
> (b) his home address;
>
> (c) any change of name or address;
>
> (d) any return to the State having been abroad for 7 days or more;
>
> (e) any intention to leave the State for 7 days or more together with the address at which he intends to stay;
>
> (f) having left the State for less than 7 days, the fact of a change involving an extension beyond 7 days, and the address at which he is residing."

7.3 Having considered the jurisprudence from cases such as *Conroy v. Attorney General* [1965] I.R. 411 as to the matters which can properly be taken into account in determining whether an offence is a minor offence triable summarily for the purposes of Article 38 of the Constitution, Fennelly J. went on at p. 318 to note that:-

> "As has been pointed out, the distinction between primary and secondary punishment relates to the constitutional distinction between minor and non minor offences (see *Sentencing: Law and Practice*, Thomas O'Malley, Round Hall Limited 2000 p. 128).

The judgment in Conroy does not say that the disqualification of him driving is not a punishment for the purposes of assessing the appropriate sentence on conviction. The courts are not prevented from taking into account all relevant circumstances when imposing sentence. In the same way, the court is entitled, in an appropriate case, to have regard to the implications of being subjected to the requirements of the Sex Offenders Act, 2001."

7.4 Similarly the Court of Criminal Appeal in *D.P.P. v. G.D.* gave reasons for its decision in that case on 13th July, 2004 with the judgment of the court being delivered by McCracken J. The case involved an appeal on behalf of the Director of Public Prosecutions on the grounds that the sentence was unduly lenient.

In the course of rejecting the appeal the court noted, as one of the matters which it took into account, that:-

> "In addition, he (the accused) has been placed on the Sexual Offenders Register which is in itself a punishment".

7.5 From the above authorities it is clear that the Court of Criminal Appeal has, on at least two occasions, taken into account the exposure of an individual to the obligations of Part 2 of the 2001 Act as a factor which can, in an appropriate case, be taken into account in assessing the appropriate sentence.

7.6 On that basis it is said that it is now clear that the burden imposed by the 2001 Act is treated as part of the punishment for the purposes of the criminal sentencing process.

7.7 I do not agree with that proposition. As was pointed out by Fennelly J. in *N.Y.* a court imposing a criminal sanction is entitled to take into account all relevant circumstances. The description of the imposition of the burden contained in the 2001 Act as a "punishment" in those cases, it seems to me, simply records the fact that, for the purposes of sentencing, it is an additional burden placed upon a convicted person which must be weighed in the balance in all the circumstances of the case in order to determine an appropriate sentence. The range of matters which can properly be taken into account in sentencing is, of course, extremely wide. For many years courts imposing sentence have properly taken into account the fact that conviction of the offence concerned may well have led to serious adverse consequences for the accused wholly independent of the criminal process.

7.8 Sometimes such adverse consequences are colloquially referred to as "punishments" even though they do not formally form part of the punishment imposed by the court. How many times has a sentencing judge noted that the accused has been severely punished by reason of (say) losing his job as a result of a conviction for a crime of dishonesty. It could hardly be said that the judge expressing himself in that way was implying that the loss of employment was part of the formal punishment or penalty for the offence. I am not satisfied that the Court of Criminal Appeal, in the judgments to which I have been referred, was doing anything other than indicating that the provisions of the 2001 Act were amongst the "relevant circumstances" (to use the words of Fennelly J.) which should be taken into account when imposing sentence.

7.9 Just as Fennelly J. drew attention to the fact that the criteria for determining primary punishment for the purposes of determining whether an offence may be a minor offence may properly differ from the matters that can properly be taken into account in the sentencing process so also, it seems to me, the matters that ought properly be considered to be part of the penalty for a criminal offence for the purposes of determining whether the Oireachtas has, in enacting legislation, breached the rights of an accused person

under Article 38.1 (or indeed Article 15.5.1) are again a separate matter.

7.10 In those circumstances I am not satisfied that anything contained in *N.Y.* or *G.D.* alters the position as found by Finlay Geoghegan J. in Enright to the effect that the imposition of the burden of Part 2 of the 2001 Act does not amount to the imposition of a penalty as properly construed. In those circumstances, and on the basis that no other grounds for departing from the reasoning in *Enright* have been advanced, I have come to the same view as Finlay Geoghegan J. and would propose, for the same reasons as she did, to dismiss the plaintiff's claim.