Neutral Citation [2015] IEHC 468

THE HIGH COURT

RECORD NO: 2012/2735P

IN THE MATTER OF SECTION 5(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003.

BETWEEN

J.F.

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE IRISH HUMAN RIGHTS COMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of July, 2015

Introduction

1. In these proceedings, the plaintiff challenges the constitutionality of various provisions of the Sex Offenders Act, 2001, (hereinafter "the Act") specifically section 8(3)(a), Section 11(2) and section 12 of that Act. In the proceedings as originally issued, the plaintiff also sought declarations pursuant to section 5 of the European Convention on Human Rights Act 2003 that each of those sections is incompatible with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but at the commencement of the trial of the action, the plaintiff withdrew application for any reliefs on these grounds.

Background Facts

2. The plaintiff in these proceedings was born on the 13th of November, 1983. The plaintiff encountered a difficult upbringing, with both of his parents suffering from severe alcoholism. The plaintiff himself began drinking alcohol when he was eight years old. On the 1st of December, 2003 the plaintiff was convicted of the offence of rape contrary to section 4 of the Criminal Law (Rape) Amendment Act 1990. The offence dated back to September, 1997, when the plaintiff was thirteen years of age. The circumstances of the offence were that the plaintiff grew up with his younger nephew, with whom he was very close. The plaintiff, while not having a full appreciation of his actions, engaged in a sexual act with his nephew.

3. Upon becoming aware of the offence, the plaintiff's family liaised with An Garda Síochana. It was arranged that provided the plaintiff attended and completed a two year course in Our Lady's Hospital for Sick Children, criminal proceedings would not be instituted. The plaintiff attended the course for eighteen months. However, upon gaining an insight into his actions and an appreciation of the gravity of the offence which he committed, the plaintiff found it difficult to cope and developed an addiction to heroin. As a result, the plaintiff was expelled from the course six months prior to its completion and charges were brought against him in relation to the incident.

4. On the 8th of March, 2004, when he was twenty years of age, the plaintiff pleaded guilty to rape contrary to section 4 of the Criminal Law (Rape) Amendment Act 1990 and was sentenced to thirty month's imprisonment. Having been convicted of a sexual offence, the plaintiff became subject to certain mandatory reporting requirements under Part 2 of the Sex Offenders Act 2001 ("the Act"). In particular, having been sentenced to a term of imprisonment of two years or more, the plaintiff was subject to the notification requirements (set out below) in section 10 of the Act for an indefinite period by virtue of s 8(3)a of the Act. This requirement took effect, pursuant to section 8(3) of the Act from the "relevant date" which, in turn, is defined in section 6 of the Act as being the date of conviction, which in this case was the 8th of March, 2004. As stated above, he was sentenced to thirty months imprisonment on 8th March, 2004, and he was released on 4th January, 2006.

5. Section 9 of the Act requires prison authorities to notify, in writing, a person to whom Part 2 of the Act applies that he or she is subject to the requirements of Part 2 of the Act before the person is released from prison.

6. On 25th June, 2011, the plaintiff was sentenced to imprisonment for six months for offences unrelated to these proceedings. On 29th November, 2011, prior to his release from prison in connection with that offence, the plaintiff signed an acknowledgment that he had been advised of his obligations under Part 2 of the Act and specifically under section 10 of the Act, of his obligation to notify An Garda Siochana of his name, address and date of birth within seven days from the date of his release from prison, and further of any subsequent changes in his name or address within a period of seven days. The plaintiff, who gave evidence in the proceedings, confirmed that he was aware of his obligations to notify An Garda Síochana and that he had received notification of these obligations (and that he had signed the form of acknowledgment of receipt presented to the Court) prior to his release from prison.

7. The plaintiff was released from prison on 2nd December, 2011. He took up temporary residence in Judge Darley's hostel, Dublin on 8th February, 2012. The Court was not told whether or not he had informed the authorities as to where he was between 2nd December, 2011 and 8th February, 2012. The plaintiff's evidence as to what happened after he took up residence in Judge Darley's hostel is confusing. On the one hand he appeared to say that he did notify Gardaí of his address; on the other hand he advanced excuses for not doing so. He stated that he was only made permanent in Judge Darley's hostel on his sixth day there i.e. 14th February, 2012. He also indicated that at this time his girlfriend was pregnant, his parents were sick and he was on methadone treatment. This latter factor he said clouded his judgement around that time. In any case, on 23rd February, 2012 the plaintiff was charged with an offence under section 12 of the Act 2001 alleging that he had not complied with his notification obligations under Section 10 of the Act. Those proceedings have been adjourned pending the outcome of the plaintiff's challenge to the constitutionality of the above mentioned provisions of the Act. The Court was informed that it is the intention of the DPP to prosecute the plaintiff on a summary basis, although the offence has been made indictable pursuant to section 13 of the Criminal Law (Human Trafficking) Act 2008.

8. The plaintiff has since spent the majority of his adult life in prison, with his offending linked to supporting his drug addiction. The plaintiff has not committed any other sexual offences.

Legislation

9. The Sex Offenders Act 2001, was enacted to require notification of information to An Garda Síochana and to enable certain requirements to be imposed upon individuals who have been convicted of sexual offences, in the interest of the common good. Part 2 of the Act of 2001 establishes the requirements of sex offenders to notify certain information to An Garda Síochana. Section 7 of the Act of 2001 states:

> "7.—(1) Without prejudice to *subsection (2)* and section 13 and 16 (7), a person is subject to the requirements of this Part if he or she is convicted of a sexual offence after the commencement of this Part…"

10. Section 8 of the Act of 2001 sets out the period for which a person is subject to requirements under Part 2 of the 2001 Act, and draws a distinction between individuals convicted and sentenced as adults, and those convicted and sentenced as minors:

> "8.—(1) A person who, by reason of section 7, is subject to the requirements of this Part shall be so subject for the period referred to in *subsection (3)* or, in the case of a person referred to in *section 7(2)*, so much (if any) of that period as falls after the commencement of this Part.
>
> (2) *Subsection* (1) is subject to *section 11*.
>
> (3) The period mentioned in *subsection (1)* is the period, beginning with the relevant date, of—
>
> (a) an indefinite duration if the sentence imposed on the person in respect of the offence concerned is one of imprisonment for life or for a term of more than 2 years,
>
> (b) 10 years if the sentence imposed on the person in respect of the offence concerned is one of imprisonment for a term of more than 6 months but not more than 2 years,
>
> (c) 7 years if the sentence imposed on the person in respect of the offence concerned is one of imprisonment for a term of 6 months or less, or
>
> (d) 5 years if the sentence imposed on the person—
>
> (i) is one of imprisonment for any term, the operation of the whole of which is suspended (but, if the operation of that term is revived by the court, whichever of the preceding paragraphs is appropriate shall apply instead of this subparagraph), or
>
> (ii) is otherwise than one of imprisonment.
>
> (4) If—
>
> (a) a sentence is imposed on a person in respect of a sexual offence, and
>
> (b) at the time of sentencing the person is aged under 18 years,
>
> *subsection* (3) shall have effect in relation to that person as if for the references to 10 years, 7 years and 5 years in that subsection there were substituted references to 5 years, 3½ years and 2½ years, respectively…"

11. Section 10 of the Act of 2001 sets out the requirement to notify An Garda Síochana of ones name, address and any change of address:

> "10.—(1) A person who is subject to the requirements of this Part shall, before the end of the period of 7 days beginning with the relevant date, or, if that date is prior to the commencement of this Part, that commencement, notify to the Garda Síochána—
>
> (a) his or her name and, where he or she also uses one or more other names, each of those names, and
>
> (b) his or her home address.
>
> (2) A person who is subject to those requirements shall also, before the end of the period of 7 days beginning with—
>
> (a) the person's using a name which is not the name, or one of the names, last previously notified by him or her to the Garda Síochána under this section,
>
> (b) any change of his or her home address,
>
> (c) the person's having resided or stayed, for a qualifying period, at any place in the State, the address of which has not been notified to the Garda Síochána under this section as being his or her current home address, or
>
> (d) the person's returning to an address in the State, having, immediately prior to such return, been outside the State for a continuous period of 7 days or more,
>
> notify that name, the effect of that change, the address of that place or, as the case may be, the fact of that return to the Garda Síochána…"

Section 12 of the Act creates an offence for failure to comply with the reporting requirements:

> "12.—(1) A person who—

(a) fails, without reasonable excuse, to comply with *subsection (1), (2), (3)* or *(4)* of section 10, or

(b) notifies to the Garda Síochána, in purported compliance with that *subsection (1), (2), (3)* or *(4)*, any information which he or she knows to be false or misleading in any respect,

shall be guilty of an offence."

The Pleadings
12. The plaintiff seeks the following declarations in the proceedings:

(1) A declaration that section 8(3)(a) of the Sex Offenders Act, 2001 is invalid having regard to Article 38 and/or Article 40 of Bunreacht na hÉireann;

(2) A declaration that section 11(2) of the Sex Offenders Act, 2001 is invalid having regard to Article 38 and/or Article 40 of Bunreacht na hÉireann; and

(3) A declaration that section 12 of the Sex Offenders Act, 2001 is invalid having regard to Article 38 and/or Article 40 of Bunreacht na hÉireann;

(4) A declaration that a child offender is entitled to a greater discretion in respect of the period of time to be imposed under the Sex Offenders Act, 2001; and

(5) Damages pursuant to common-law and/or section 3(2) of the European Convention on Human Rights Act, 2003, for loss, damage, inconvenience and expense.

13. In his statement of claim, the plaintiff pleads that Articles 38 and 40 of Bunreacht na hÉireann and Article 6 of the European Convention on Human Rights provide that child offenders be treated more favourably than their adult counterparts. Further, it is pleaded that it is a fundamental requirement of the right to trial in due course of law and the protection and vindication of the personal rights of a minor, that they are not subjected to arbitrary rules and/or mandatory sentences and/or like punishments as offences committed by an adult.

14. More particularly, it is pleaded that whilst section 8 of the Sex Offenders Act, 2001, does provide for a reduced period to be served in respect of persons who are under eighteen at the time of being sentenced, this does not apply to minors who receive sentences in excess of two years and nor does it apply to persons who, while under the age of eighteen at the time of the offence, were over eighteen at the time of conviction. Moreover, the provision for review and discharge of the period of notification only applies after ten years (from the date the period of notification takes effect) and there is no distinction drawn between those who committed the offence while under eighteen and those who where adults at the time of commission of the offence. In summary, it is claimed that the notification provisions as applicable to minors who commit offences to which the Act applies are disproportionate and are contrary to Articles 38 and 40 of Bunreacht na hÉireann (the Convention claim having been abandoned).

15. Neither the plenary summons nor the statement of claim indicate the right or rights which the plaintiff purports to invoke under Article 40 of Bunreacht na hÉireann. In a notice for particulars served by the defendants upon the solicitors for the plaintiff dated 23rd October, 2012, the plaintiff was asked to indicate the right or rights invoked by the plaintiff, and to indicate to which specific provision of Article 40 each right refers. In a reply delivered on behalf of the plaintiff, it is stated that the plaintiff relies on all of Articles 38 and 40 of Bunreacht na hÉireann as well as Article 6 of the Convention. The plaintiff further relies on all the rights guaranteed by Article 40, including the unenumerated rights guaranteed by Article 40(3) of Bunreacht na hÉireann.

16. Submissions
Submissions on behalf of the plaintiff.

16. Ms. McDonagh SC for the plaintiff submits that section 8 of the Act of 2001 is unconstitutional insofar as it imposes reduced periods of reporting on persons who are minors at the time of conviction and sentencing, but contains no such provisions for persons who were minors at the time of the commission of the offence (and who were convicted following the attaining the age of majority). Furthermore, counsel for the plaintiff submits that there is no reduced reporting period at all (for minors) in respect of sentences greater than two years and that therefore a person who commits a sexual offence as a minor, which results in a sentence of more than two years, is effectively subject to the requirements of the Sex Offenders Act, 2001 for life. Counsel accepts that there is provision, in section 11 of the Act, for a review of and discharge of the reporting period after ten years. However, this period is the same for both child and adult offenders. Ms. McDonagh SC submits that for these reasons, sections 8 and 11 of the Act of 2001 are disproportionate and repugnant to Article 38 and Article 40 of the Constitution.

17. Counsel for the plaintiff further argued that since ection 8(4) of Act of 2001 makes specific provision for child offenders by providing for reduced reporting periods, of effectively half the time applicable to adults. Since that this makes it clear that child offenders are in a different category to adult offenders. However, it was submitted that the section does not strike a proportionate balance between the child's right to fair procedures when weighed against the policy and aims of the legislation, because-:

1 It applies to persons who are 18 at the time of their conviction and sentence, not their age at the time of the offence;

2. There is no judicial or other discretion as to what length of period would be appropriate;

3. There is no distinction between the ages of such children;

4. There is no reduced period of reporting for sentences greater than two years imprisonment;

5. It applies for an indefinite period, subject to a review; and

6. Such a review can only take place after ten years.

In this case that period does not expire until 4th January, 2016.

18. Further, or in the alternative, counsel for the plaintiff submits that in respect of the reporting requirement, a period of indefinite duration, without any judicial discretion, or other mechanism of review is disproportionate to Articles 38 and 40 of the Constitution as well as being in violation of Article 6 of the European Convention on Human Rights.

19. Counsel for the plaintiff also argues that section 12 of the Act of 2001 is unconstitutional on the basis that the section creates an offence of strict liability. Ms. McDonagh SC submits that the offence created under section 12 does not require proof of intention of failure to comply with the requirements of the Act of 2001, and that such is unconstitutional by reason of the decision of the Supreme in *C.C. v. Ireland* [2006] 4 I.R. 1. She also submits that the offence created by section 12 of the Act of 2001 is impermissibly vague on the grounds that it imposes criminal liability on persons who, without "reasonable excuse," fail to comply with the reporting requirements contained in the Act. Counsel for the plaintiff argues that the section is identical, in terms of its operation and vagueness, to section 12 of the Immigration Act, 2004 which was deemed unconstitutional in *Dokie v. D.P.P* [2011] I.R. 805. It is the contention of counsel that the term "satisfactory explanation" used in the impugned section 12 of the Immigration Act, 2004 is identical in its effect as the term "without reasonable excuse" as contained in the Sex Offender's Act, 2001. On this basis, counsel for the plaintiff argues that a person cannot know from a reading of section 12 of the Act of 2001, what would or would not be considered a "reasonable excuse" and silence is equated with failure to provide a reasonable excuse, thereby becoming a proof of the offence, and also thereby offending the privilege against self incrimination. Counsel for the plaintiff also relies on *Douglas v. D.P.P* [2013] IEHC 343 in this regard.

Submissions on behalf of the defendant.

20. By way of preliminary objection, counsel for the defendant, Ms. Barrington SC, submits that the plaintiff was not a minor when he was convicted and sentenced for a sexual offence. Accordingly, she submits that the plaintiff does not have the standing to challenge the Act on the grounds of being a minor, on the basis that he was not a minor when charged with and convicted of an offence under the Act or at the time he was subject to the notification requirements under Part 2 of the Act. Counsel for the defendant further argues that the plaintiff's case is too vague to mount a constitutional challenge. Counsel for the defendant also submits that the plaintiff does not have *locus standi* to challenge the constitutionality of section 12 of the Act of 2001 on the basis that the plaintiff has not pleaded that he has been convicted of an offence under the section, nor has he set out whether he claims to have a "reasonable excuse" for failure to notify An Garda Síochana of his change of address.

21. Counsel for the defendant submits that the notification requirements under Part 2 of the Act of 2001 are not punitive in nature, in that they do not constitute a penalty, sanction or sentence and counsel relies on *DPP v. Cawley* [2003] 4 I.R. 321, *Enright v. Ireland* [2003] 2 I.R. 321 and *P.H. v. Ireland and Others* [2006] IEHC 40 in this regard.

22. The defendants deny that sections 8(3)(a) and 11(2) of the Sex Offenders Act, 2001 entail any interference with the plaintiff's constitutional rights. However, if there is any interference with the rights, counsel submits that the interference is legitimate and proportionate. In particular, counsel for the defendants rely on the purpose of the 2001 Act, namely the protection of the constitutional rights of other citizens, and in particular, the *dicta* of Finlay Geoghegan J. in *Enright* (referred to in more detail below) to the effect that the Act of 2001 seeks to guard against the risk posed to society by the tendency of sexual offenders to relapse. It is submitted that the intent of the legislature is that sex offenders should be subjected to the minimal burden of notification requirements in order to protect the public and to assist in the rehabilitation of the offender.

23. It is also submitted that the absence of judicial discretion or other derogation in respect of child offenders is proportionate and in keeping with the Constitution. Counsel for the defendant submits that the notification requirements not only pursue a legitimate aim, but are also proportionate in that the benefits to the common good and the public interest in the notification regime, outweigh the relatively minor inconvenience which the regime imposes on the offender. In addition, counsel points to the mechanism for review contained in s 11(2) of the Act of 2001.

24. Counsel for the defendant also submits that section 12 of the Act of 2001 does not create an offence of absolute or strict liability. In so far as the issue of *mens rea* arises, it is submitted that the plaintiff was manifestly aware of his notification obligations under section 10 of the Act of 2001 and therefore it follows that he had *mens rea* in his failure to notify An Garda Síochana of his change of address. Furthermore, it is submitted that the accused is afforded an opportunity to contradict the evidence and to demonstrate that he had a reasonable excuse for his failure to notify An Garda Síochana of his change of address, and that this is sufficient to negative the potential of absolute liability.

25. Finally, counsel for the defendant submits that the offence contained in section 12 of the Act of 2001 is clear and unambiguous and that the plaintiff in this instance was fully aware of the obligations to which he was subject. In addition, Ms. Barrington SC submits that the concept of "reasonable excuse" does not undermine the clarity or precision of the offence contained in section 12 of the Act and that the section is not similar in effect to section 12 of the Immigration Act, 2004 which was struck down in *Dokie*.

Relevant Case Law

26. In the case of *Enright v. Ireland and the Attorney General* [2003] 2 I.R. 321 the plaintiff challenged the retrospective application of the Act to offences committed prior to the commencement of the Act. Ms. Justice Finlay Geoghegan held that the imposition of registration requirements under part 2 of the Act does not constitute a penalty and in itself cannot therefore be inconsistent with a constitutional right under Article 38.1 of the Constitution not to have a penalty imposed which did not exist at the date of the offence. However, it is the proportionality of part 2 of the Act that is under challenge in this case, in particular insofar as section 8, while distinguishing between minors and adults where the sentence imposed in respect of the offence concerned is one of imprisonment for a term of less than two years, does not do so were the sentence is for a term of more than two years. The proportionality of part 2 of the Act was considered by Finlay Geoghegan J. in *Enright*. She stated:-

> "The purpose of the Act of 2001 is the protection of constitutional rights of other citizens. The express provisions of section 7(2) indicate an intention by the Oireachtas that the registration requirements should apply to persons who had been convicted of sexual offences prior to the passing of the Act. The Oireachtas in enacting the Act of 2001, appears to me to have been engaged in an exercise of balancing the constitutional rights of the convicted persons with the constitutional rights of other citizens who might be at risk of attack from the convicted persons following their release from prison. This type of balancing exercise appears similar to that envisaged by the decision of the Supreme Court in *Tuohy v. Courtney* [1994] 3 I.R. 1."

27. In *Tuohy*, a case which concerned the Statute of Limitations Act of 1957, Finlay CJ. said:-

> "the court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the

correct or desirable balance in substitution for the view of the legislator as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness and to constitute an unjust attack on some individual's constitutional rights".

28. In *Enright* Finlay Geoghegan J. went on to apply the proportionality test as articulated by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 in which the learned Judge said that the test to be applied when considering whether a restriction on the exercise of rights is permitted by the Constitution is as follows:

> "(i) are the impugned provisions rationally connected to the objective?;
>
> (ii) do they impair the plaintiff's constitutional rights as little as possible? and
>
> (iii) are they such that their effect on the plaintiff's constitutional rights are proportional to the objectives sought to be obtained by the Act?"

29. Finlay Geoghegan J. then went on to consider the public interest for which the Act was passed and concluded that section 7(2) of the Act did pass the proportionality test as set out above. She stated:

> "The imposition of the registration requirements on persons already convicted of sexual offences is rationally connected to the objective of the legislation of protecting society from convicted sex offenders who may relapse. The registration requirements are a minimal burden. They do not restrict the plaintiff in his movement nor do they contain any special notification provisions to the public and in particular none of the more far reaching notification provisions contained in the comparable American legislation. Whilst the existence of the obligations under section 10 is something to which a judge is probably entitled to have regard to when sentencing, given the minimal nature of the burden imposed, it is improbable that it is something which would materially affect the sentence imposed. The section 10 requirements appear therefore to impair the plaintiff's right to fair procedures as little as possible and to be proportionate to the objectives to be achieved".

30. In the case of *Regina (F (a child)) v. Secretary of State for the Home Department* [2011] 1 A.C., the Supreme Court of the United Kingdom was required to consider the imposition of notification requirements for an indefinite period in circumstances where the equivalent legislation in the United Kingdom did not have a review procedure as is provided for in Section 11 of the Act. For that reason i.e. by reason of the fact that no provision was made for individual review, it was held that the indefinite notification requirements constituted a disproportionate interference with the rights of the plaintiff under Article 8 of the European Convention of Human Rights. In the course of his judgment, Rodger LJ. noted:

> "Finally, the case of F shows that, where his offence has been of the most serious kind, a child will be subject to an indefinite notification requirement. That requirement will affect the whole of his adult life. Judges as individuals, may have views on whether children who offend in this way are likely to have a tendency to repeat that behaviour when they are adults, or will tend to "grow out of it". No doubt, in years to come, advances in genetic research may clarify the position. In the meantime it must be open to Parliament to take the view that, as a precaution against the risk of them committing serious sexual offences in the future, even such young offenders should be required to comply with the notification regime indefinitely. But that makes it all the more important for the legislation to include some provision for reviewing the position and ending the requirement if the time comes when that is appropriate."

31. In the case of *MD (a minor) v. Ireland* [2012] 1 I.R. 697 the Supreme Court considered sections 3 and 5 of the Criminal Law (Sexual Offences) Act 2006. The plaintiff sought a declaration that section 3(1) of that Act discriminated against him and was in breach of the Constitution in that on conviction he would be liable to receive a term of imprisonment of up to five years, whereas no penalty would be imposed on a female child under the age of seventeen years for the same activity. In dismissing the plaintiff's appeal, Denham CJ said:

> "The Oireachtas could have applied a different social policy but s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis and was not arbitrary…
>
> The Oireachtas made a choice, and such a legislative decision reflects a social policy on the issue. While the legislator could have enacted another social policy, it was an approach the legislator was entitled to take, it was an issue in society to which the legislator had to respond."

32. Counsel for the plaintiff acknowledges that *MD v. Ireland* confirms that the Oireachtas is entitled to set a social policy, but submits that where the social policy is set, such as in section 8 (4) of the Act, that a minor be treated more favourably when sentenced and subject to the provision of the Act, that the terms of the section should satisfy the proportionality test. Counsel submits that there is no rational or comprehensible basis to distinguish between those who are minors at the time of their sentence *i.e.* those who are prosecuted shortly after the offence, and those who are prosecuted at a later stage.

33. Counsel for the plaintiff also refers to the decision of *B.F. v. DPP* [2001] 1 IR 656. In that case the appellant was fourteen at the time in 1995 when it was alleged he committed certain offences of a sexual nature. The appellant subsequently moved with his family to live in England, and in February 1998 he was arrested for the purpose of having him extradited to Ireland. He sought an order preventing the respondent from proceeding with his prosecution on the grounds that he had been prejudiced by the excessive delay in the making of the extradition arrangements. In allowing the appeal, Geoghegan J. said:

> "I also take the view that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."

34. While the delay in bringing the plaintiff in these proceedings to trial was not explained, counsel for the plaintiff submitted that the special duty of the authorities is clear and the passage of time in respect of a child is more significant than that of an adult. The effect of that is that the plaintiff will be subject to the requirements of part 2 of the Act for at least until he is 28 years of age and could potentially still be subject to the same for the rest of his life, in respect of an offence which he committed at the age of thirteen, and it is submitted that this is disproportionate.

35. In the case of *Dokie v. DPP* [2011] 1 I.R. 805 the compatibility of section 12 of the Immigration Act, 2004 with articles 38 and 40 of the Constitution was challenged. Section 12 of the Immigration Act 2004 provided:

> "(1) Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing-
>
> (a) a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and
>
> (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
>
> (2) A non-national who contravenes this section shall be guilty of an offence."

Section 13 of the same act provided that:

> "A person guilty of the offence under the Act shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both."

36. The section was challenged on various grounds including:

> (i) the words purporting to create a criminal offence were too vague and imprecise;
>
> (ii) the section was a disproportionate interference with the equality provisions in the Constitution.

37. Having reviewed the authorities including *King v. the Attorney General* [1981] I.R. 233, Kearns P. found that section 12 of the Act of 2004 was:

> "not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. Furthermore, there is no requirement in this section to a warn of the possible consequences of any failure to provide a "satisfactory" explanation."

As a result he held that the section lacked the clarity necessary to legitimately create a criminal offence. He considered that the provision gave rise to arbitrariness and legal uncertainly. He further found that it offended the principle that a person should not be obliged to incriminate himself.

38. In giving judgment he compared the 2004 Act to the equivalent legislation in the United Kingdom as follows:

> "I have to say it would have been much more satisfactory if the draftsman had specifically identified the explanation as a defence, as occurred under legislation in the United Kingdom. Section 2(1) of the Asylum and Immigration (Treatment of Claimants) Act 2004 states that:
>
> "A person commits an offence if at a leave or asylum interview he does not have with him an immigration document which –
>
> (a) is in force, and
>
> (b) satisfactorily establishes his identify and nationalisation or citizenship.
>
> Section 2(4) then specifically provides as follows:-
>
> "It is a defence for a person charged with an offence under subsection (1) … (c) to prove that he has a reasonable excuse for not being in possession of a document of the kind described in subsection (1)".

The provision cited above sits more comfortably with the configuration of criminal offences with which our criminal law system is familiar. It is also noteworthy that under this British measure the defendant need only produce an explanation which is "reasonable" and thus susceptible to evaluation by an objective standard."

The learned judge also noted that there was no requirement (in the Irish legislation) to a warn of the possible consequences of any failure to provide a "satisfactory" explanation.

39. In the case of *Donnelly v. The judges of Dublin Metropolitan District Court, and ors* [2015] IEHC 125, the applicant sought a declaration that section 9(6) of the Firearms and Offensive Weapons Act 1990 were invalid having regard to articles 38.1 and 40.4.1 of the Constitution. Section 9 of that Act provides, insofar as is relevant:

> "(5) where a person has with him in any public place any article intended by him unlawfully to cause injury to, incapacitate or intimidate any person either in a particular eventuality or otherwise, he shall be guilty of an offence.
>
> (6) in a prosecution for an offence under subsection (5), it shall not be necessary for the prosecution to allege or prove that the intent to cause injury, incapacitate or intimidate was intent to cause injury to, incapacitate or intimidate a particular person; and if, having regard to all the circumstances (including the type of the article alleged to have been intended to cause injury, incapacitate or intimidate, the time of the day or night, and the place), the court (or the jury as the case may be) thinks it reasonable to do so, it may regard possession of the article as sufficient evidence of intent in the absence of any adequate explanation by the accused."

40. In *Donnelly*, Noonan J. conducted an extensive analysis of relevant case law dealing with the presumption of innocence in the context of what are often referred to as reverse onus provisions. He cited the decision of Costello J. in *O'Leary v. Attorney General* [1993] 1 I.R. 102, wherein he (Costello J.) stated:-

> "Whilst it may not be desirable or indeed possible to lay down any hard and fast rule for the construction of statutes involving the shifting of a burden of proof, it is clear that if the effect of the statute is that the court must convict an accused should he or she fail to adduce exculpatory evidence then its effect is to shift the legal burden of proof (thus

involving a possible breach of the accused's constitutional rights) whereas if its effect is that notwithstanding its terms the accused may be acquitted even though he calls no evidence because the statute has not discharged the prosecution from establishing the accused's guilt beyond reasonable doubt then no constitutional invalidity could arise."

41. In *The People (DPP) v. Smyth* [2010] 3 I.R. 688 Charleton J., in discussing reverse onus provisions said:-

> "A decision to reverse onto the accused an element of the proof of the commission of a crime that might normally be expected to be borne by the prosecution, or to set up a special defence such as insanity, is a matter of legislative competence. It is for the Oireachtas, in each case, to set the parameters of proof in a criminal charge; to decide whether there should be a reversed burden of proof in respect of any element of a crime; and to indicate expressly, or by implication, the nature of the burden of proof that is to be discharged by the defence."

Later, in the same judgment Charleton J. said:-

> "It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty."

42. The question as to whether or not a reverse onus provision was proportional to the objective of the statute was considered in *McNally v. Ireland* [2011] 4 I.R. 431. MacMenamin J., referring to the decision in *O'Leary* said:-

> "Furthermore, it has been held that rights under Article 38.1 are not absolute and a proportionality analysis may be applied to asses the legitimacy of restrictions on such rights."

43. He went on to refer to the three fold test of proportionality first identified by Costello J. in *Heaney v. Ireland* (supra) which was endorsed by the Supreme Court in *The Employment, Equality Bill*, 1996 [1997] 2 I.R. 321 where Hamilton CJ. reiterated and applied substantially the same test. The test was expanded upon by McMenamin J. in *McNally* wherein he stated:

> "I will identify the following principles as being applicable to the applicable test of proportionality;
>
> (a) the necessity to establish whether the means it employs to achieve its aim corresponds to the importance of the aim;
>
> (b) whether the means adopted are necessary for the achievement of the objective;
>
> (c) whether the means actually becomes the end in itself;
>
> (d) whether the objective can be obtained by other methods which may be more conveniently applied;
>
> (e) whether the method chosen is the least restrictive and the disadvantage caused is least disproportionate to the aim;
>
> (f) whether the means may be rationally connected to the objective and not be arbitratory, unfair or based on irrational consideration."

44. In *Donnelly*, Noonan J. while noting that, *prima facie*, a statutory reversal of the legal onus of proof onto the accused will be incompatible with constitutional guarantees of the right to silence and the presumption of innocence, stated that:

> "It is however well settled that it is legitimate to shift the evidential as distinct from legal burden onto the accused where the test of proportionality is satisfied."

He found at:

> "there is no basis for suggestion that the provision in issue is a disproportionate legislative response to the objective it seeks to achieve. The limitation it imposes on the right to silence of the accused could not be said to be oppressive, arbitratory or more than minimal. There is no compulsion on the accused to offer an explanation nor any requirement to find him guilty if he declines to do so. Indeed, the accused may well be able to elicit an adequate explanation through cross-examination or other means without necessarily having to give evidence."

For these reasons, *inter alia*, he dismissed the plaintiffs challenge.

45. The case of *King v. Attorney General* [1981] 1 I.R. 233 confirmed the need for legislation creating criminal offences to be clear and certain in their scope. More recently, in the case of *Douglas v. DPP* [2013] IEHC 343 Hogan J. found that the offences of causing scandal or injuring the morals of the community created by the Criminal Law (Amendment) Act 1935 were "totally unclear". He noted that the term "scandal" is highly subjective in its application and meaning and that the reference to "morals of the community" is equally unclear. Accordingly he found the impugned provisions of that Act unconstitutional.

46. The term "reasonable excuse" was subjected to scrutiny in the case of *R v.G; R v. J* [2010] 1 A.C. 43 in the context of section 58 of the Terrorism Act 2000 in the United Kingdom. In the course of the judgment Lord Rodger of the House of Lords stated:

> "so the courts have recognised that any decision on whether an accused had a reasonable excuse must depend on a particular circumstance of the case …. it is impossible to envisage everything that could amount to a reasonable excuse for doing what it prohibits. Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case. Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide. When doing so, if appropriate, the judge may indicate factors in the particular case which the jury might find useful when considering the issue …"

47. This rationale was endorsed in the context of The European Convention on Human Rights in the case of *Jobe v. United Kingdom* [app no. 48279/09], 14th June, 2011 where the court stated:

> "conferring discretion on a jury is not in itself inconsistent with the requirements of the convention, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity … this is no less true for the

concept of reasonableness. In any criminal justice system based on trial by jury many defences are left for the jury to decide. Frequently, those defences involve an assessment of reasonableness such as whether reasonable force has been used in self-defence. In any such case, any uncertainty is considerably lessened by the fact that the jury will have the benefit of full submissions from prosecution and defence counsel and the directions contained in the trial judge's summing up."

Mootness

48. *Cahill v. Sutton* [1980] I.R. 269 affirmed the proposition that, in order to maintain a constitutional challenge, the rights of the plaintiffs should either be infringed or threatened. Henchy J. stated:

> "the challenger must adduce circumstances showing that the impugned provision is operating, or is posed to operate, in such way as to deprive him personally of the benefit of a particular constitutional right."

49. The question of the plaintiff's standing was considered by Hogan J. in *Douglas*. In that case, the plaintiff challenged the constitutionality of section 18 of the Criminal Law (Amenment) Act, 1935 as amended by section 18 of the Criminal Law (Rape) (Amenment) Act, 1990, which section provided:

> "every person who shall commit, at or near and inside of any place along which the public habitually pass as of right or by permission, any act in such a way as to offend modesty or cause scandal or injure the morals of the community shall be guilty of an offence under this section and shall on summary conviction thereof be liable to a fine not exceeding IR£500 or, at the discretion of the court, to imprisonment for any term not exceeding six months."

The plaintiff was charged with the latter two offences created by section i.e. causing scandal and injuring the morals of the community, and so the case did not extend to the offence of offending modesty. Referring to *Cahill v. Sutton*, Hogan J. held that the mere fact that the plaintiff had been charged with two offences under section 18 of the 1935 Act was sufficient in itself to give him general standing to challenge the constitutionality of the relevant parts of the section and in this regard he referred to the decisions of the Supreme Court in *CC v. Ireland* [2006] 4 IR 1 and *Osmanovic v. Director of Public Prosecutions* [2006] 3 IR 504. However, he also held that it was equally clear that the plaintiff did not have standing to challenge the constitutionality of the offending modesty offence in respect of which he not been charged, because he was not imminently prejudiced by the operation of that part of the section, and so the plaintiff would in essence be advancing a case on a hypothetical basis. In this regard he again referred to *Cahill v. Sutton* and also the decision of Laffoy J. in *Maloney v. Ireland* [2009] IEHC 291. It had been argued on behalf of the defendant in Douglas that the plaintiff could not have standing to challenge the constitutionality of the section because, irrespective of any vagueness or uncertainty attaching to the section, the conduct of the plaintiff in that particular case necessarily would fit into any definition of the offence of causing scandal or injuring the morals of the community, but for the reasons giving above, Hogan J. dismissed that argument.

Analysis and Conclusions

50. I will first with the *locus standi* of the plaintiff to bring these proceedings. For this purpose the proceedings may be divided into two parts, firstly the challenge by the plaintiff to sections 8 and 11 of the Act, and secondly the challenge by the plaintiff to section 12 of the Act.

51. The plaintiff's challenge to sections 8 and 11 of the Act revolves around the fact that the plaintiff was just thirteen years of age when he committed the offence that gave rise to the application of Part 2 of the Act. While acknowledging that it is within the remit of the Oireachtas to determine the social policy, and that challenges to date have upheld the proportionality of Part 2 of the Act insofar as it impinges upon the constitutional rights of adults, it is the plaintiff's contention that the provisions of Part 2 of the Act are disproportionate insofar as they apply to persons who were under the age of eighteen years at the time of commission of the offence; but over 18 years at the time of sentencing and that while as Part 2 does impose lesser notification requirements on those who were under the age of eighteen years at the time of sentencing, it is disproportionate in its effect in relation to offences giving rise to a sentence greater than two years because it imposes a life long notification requirement upon the offender, subject only to a review after ten years. The defendants contend however, that since the plaintiff was over the age of eighteen years both when he was convicted and sentenced for the offence, he cannot avail of these arguments and he is therefore not entitled to challenge the validity of sections 8 and 11 of the Act on these grounds. In response to this, it was submitted on behalf of the plaintiff that he does have *locus standi* because the plaintiff has already been subjected to the notification requirement for an indefinite period, and he has an ongoing interest in the validity of the section in the event of a future review; and further that he has already been subject to the negative consequence of the section.

52. At the outset of consideration of this issue, it needs to be borne in mind that the plaintiff will be entitled to have the notification requirements reviewed in accordance with section 11 (1) at any time from 4th January, 2016 i.e. ten years from the date of his release from prison. One of the arguments set forth on behalf of the plaintiff is that, where minors are concerned, the imposition of the notification requirements under the Act for an indefinite period (even subject to review after ten years) is disproportionate both in permitting of an indefinite period of notification in the first place, and secondly in failing to permit of a review earlier than ten years from date of release from prison. If this argument were successful, this could lead to a declaration that sections 8(3)(a) and 8(4) of the Act are invalid having regard to the provisions of article 40.3 of the Constitution. If that were to occur, that must result in the proceedings issued against the plaintiff for an offence under section 12 of the Act being struck out on the grounds that the plaintiff could not be guilty of an offence under section 12 if the prosecutor can no longer establish that the plaintiff was subject to the notification requirements set out in part 2 of the Act. Moreover, as matters stand, the plaintiff is still subject to the notification requirements of the Act and will not be eligible to make application under section 11 of the Act for approximately another six months from the date of this decision, but, more relevantly, would not have been entitled to do so for a period of three years and ten months from the date on which the proceedings were issued (15th March, 2012). For these reasons I believe that the plaintiff has established that the impugned provisions are operating and are also poised to operate in such a way as to deprive him personally of the benefit of a particular constitutional right..

Proportionality of Section 8

53. The plaintiff accepts that it is a matter for the Oireachtas to set social policy, but argues that having done so, and having accepted that a minor be treated more favourably when sentenced and subject to the provisions of the Act, the terms of the section should satisfy the particular proportionality test advocated on behalf of the plaintiff which in effect amounts to a claim that the Oireachtas has not gone far enough in the concessions made to minor offenders. I cannot accept this argument. It is quite clear that the Oireachtas very deliberately chose to impose upon minors the same notification obligation as applies to adults in circumstances where the offence is sufficiently serious, and that the seriousness of the offence is to be measured by reference to the duration of the sentence. Having made that decision, it follows quite logically that both minors and adults would also be subjected to the same

period of notification under section 11 within which an application for the discharge of the notification obligations may not be made, because the public policy consideration driving the requirement is the seriousness of the offence All of this follows from the purpose of the Act in protecting members of the public from sex offenders and also from previous findings of this Court in *Enright, Cawley* [2003] 4 I.R. 321 and *PH v. Ireland and Others* [2006] IEHC 40, that the requirements are not penal in nature but rather constitute an additional burden placed upon a convicted person in the interests of the common good and for the purpose of protecting society at large. This is not a matter for the Courts but is a matter for policy to be set by the Oireachtas. I agree fully with the dictum of Rodger LJ. in *Regina (F (a child)) v. Secretary of State for the Home Department* [2011] 1 A.C referred to a paragraph 30 above.

54. In this particular case, it may well appear that the application of the Act to the plaintiff is particularly harsh, in view of the fact that he was not brought to trial for a period of more than six years from the date of the offence. However, eighteen months of that period is accounted for by the programme embarked upon by the plaintiff in Our Lady's Hospital for Sick Children which, had he completed the programme, would have resulted in no prosecution against him. There was clearly a significant delay in bringing the plaintiff to trial thereafter, and this was not explained to the Court, but in any case that delay was a matter to be addressed at the time. Even if the Oireachtas did not contemplate the possibility that a person would be so young at the time of commission of an offence, and that it would take so long to secure a conviction in relation to the same offence, these are not in my view grounds for the Court to set aside sections 8 or 11 because to do so would amount to no more than the Court saying that it disagreed with the policy set by the Oireachtas rather than a determination of some manifest and objective disproportionally in those sections. For those reasons in my view the provisions of Part 2 of the Act, as they apply to minors, meet the test posed by Costello J in *Heaney v. Ireland* and McMenamin J. in McNally and for the same reasons set out by Finlay Geoghegan J. in Enright.

Section 12 – Strict Liability or Reverse Onus Offence?

55. It is contended on behalf of the plaintiff that section 12 creates an offence of strict liability and that in view of the fact that the offence is now an indictable offence carrying a maximum penalty of €10,000 or five years imprisonment, or both, that such an offence offends the presumption of innocence and accordingly is inconsistent with Article 38 and 40 of the Constitution. Counsel relies upon the decision of the Supreme Court in *CC v. Ireland* in this regard, wherein Hardiman J. stated:-

> "it appears to us that to criminalise in a serious way a person who is mentally innocent is indeed "to inflict a grave injury on that person's dignity and sense of worth" and to treat him as "little more than a means to an end", in the words of Wilson J. quoted at para. 20 of this judgment. It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under article 40 of the Constitution. These rights seem fundamental in the sense of that word as used in *Wisconsin v. Jadowski* [2004] WI 68."

57. Counsel further submits that in view of the structure of section 12, the words "without reasonable excuse" form part of the offence rather than comprising a defence and that there is therefore no defence of making an honest and reasonable mistake in understanding one's obligations under the section. Counsel further submits that the words "without reasonable excuse" are imprecise and vague and relies on the authorities of *Douglas* and *Dokie* in this regard.

58. Counsel for the respondent however argues that the offence is not one of strict liability because:-

> 1. Firstly the defendant must prove in evidence compliance with section 9 of the Act *i.e.* the obligation to notify a person subject to the provision of Part 2 of the Act prior to his discharge from imprisonment that he is subject to the requirements of the same. Once such a person has been so notified, counsel submits, it is not possible to commit the offence without *mens rea* which means that the offence cannot be construed as one of strict liability. In this case the plaintiff confirmed in evidence that he had been so notified.
>
> 2. It is also necessary for the prosecutor to prove actual non compliance with the provisions of Part 2 and
>
> 3. Further, section 12(3) puts in place a constitutionally permissible "reverse onus" the constitutionality of which has been repeatedly upheld in *The People (DPP) v. Smyth* [2010] 3 I.R. 688 and *The People (DPP) v. PJ Carey* [2012] 1 I.R. 234.

59. There is no doubt that it is permissible for statutes to contain reverse onus provisions but it must also be said that these provisions have created difficulties and that each case must be assessed on its own merits. It is generally accepted that where the burden of proof on the accused is evidential in nature, it is likely to be acceptable, but where it imposes a legal or persuasive burden then it is less likely to be so. English authorities have analysed such provisions (in the context of the European Convention of Human Rights) to ascertain whether the measure in question is proportionate and seeks to advance a legitimate aim. Mr. O'Malley in *The Criminal Process* (Roundhall, Sweet & Maxwell, 1999) comments that

> "a legal burden should never be imposed on the accused if it creates any risk of a wrongful conviction … Fairness and proportionality must remain the principle criteria … The legitimate public interest in the prevention and prosecution of crime will often justify a reverse onus, but the extent of the burden placed upon the accused must be proportionate to the harm which is sought to be prevented. The overwhelming concern must be to ensure that what ever the undoubted social harm involved, an accused person is not left in a position where he is required to prove his innocence in circumstances where, by any reasonable standards, he will be ill equipped to do so."

60. In this case, I think it should first be observed that the onus that is put on the plaintiff to give a reasonable excuse is evidential in nature rather than legal. The measure in question *i.e.* the creation of an offence under section 12 of the Act is certainly a proportionate one in order to bring about compliance with what is a highly important obligation created by Part 2 of the Act. It may be said that the penalty set in the event of conviction on indictment is potentially harsh for non-compliance with obligations under Part 2 of the Act but nonetheless the creation of the offence itself is a proportionate measure, in pursuit of a legitimate aim.

61. While it has been argued that the manner in which section 12 is structured means that the words "without reasonable excuse" constitute an ingredient of the offence, in practical terms they really operate as a defence. Where an accused person elects to tender an excuse to An Garda Síochána, the DPP may consider the excuse to be reasonable in which case no proceedings will issue; alternatively the DPP may prosecute in which event the Court (or the jury, as the case may be) will consider whether or not the excuse is reasonable, and at that point the excuse operates as a defence. The onus will shift to the accused to satisfy the judge, in a summary prosecution, or the jury, in the case of prosecution an indictment that the excuse was reasonable.

62. There can be no doubt therefore that the offence could not be construed as one of strict liability because, in the first place, in order to succeed with a prosecution the prosecutor would not only have to prove a failure by the accused to comply with his

obligations under Part 2 of the Act, but she or he must also prove that the accused was informed of his or her obligations under the Act, and secondly the accused is afforded the opportunity to explain why he or she did not comply with his or her obligations under Part 2 of the Act.

63. Of course it is possible that a person to whom Part 2 of the Act applies might not give any excuse at all and to that extent it may be argued that the section offends the principle against self incrimination. While that point was not expressly argued in this case, it seems to me to follow that this is permissible where the legislation concerned legitimately imposes a reverse burden of proof upon an accused, as was the case in *Donnelly*. Here also, in my view, the burden of proof imposed on the accused is evidential and not legal in nature, and so the privilege against self-incrimination is not offended.

64. Insofar as the wording of the section has been criticized for creating an offence using impermissibly vague language, I do not agree with this submission for a number of reasons. Firstly the concept of reasonableness is an objective one and is one that is known to law. See *Jobe v. United Kingdom* at paragraphs 47 above.

65. In *Dokie* Kearns P. considered that legislation in the United Kingdom which created a similar offence to that created by section 12 of The Immigration Act, 2004, was more satisfactory because it provided that it is a defence for a person charged with an offence under the equivalent subsection in UK legislation to prove that he has a reasonable excuse. While there is not a separate subsection providing the defence in this instance, Kearns P. in *Dokie* commented that "it is also noteworthy that under this British measure the defendant need only to produce an explanation which is "reasonable" and thus susceptible to evaluation by an objective standard. The Court considered in *Dokie* that the term "satisfactory" was "not sufficiently precise to reasonable enable an individual to foresee the circumstances of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution". In contrast, the concept of a reasonable excuse is accepted as being an objective standard, susceptible to application by a judge sitting alone, or to the giving of guidance by a judge to a jury.

66. Also in *Dokie* there was no requirement contained in section 12 of The Immigration Act, 2004, to warn of the possible consequences of any failure to provide a "satisfactory" explanation for not producing the documents required by the section. Section 9 of the Act imposes a statutory obligation on the prison authorities to notify a person to whom Part 2 of the Act applies, prior to his or her release from imprisonment, that he or she is subject to the requirements of Part 2 of the Act, and the plaintiff confirmed that he received that notification in this instance.

67. So therefore, while at first glance section 12 may be very similar to the provisions struck down in *Dokie*, there are material differences between the impugned provisions in each case.

68. For these reasons, I dismiss the proceedings.

Counsel for the plaintiff:

Ms. McDonagh SC, instructed by Kelleher O'Doherty Solicitors.

Counsel for the defendant:

Ms. Barrington SC, instructed by Eileen Creedon Solicitors.