Neutral Citation No: [2023] NIKB 92	*Ref:* **FRI12259**
	ICOS No: **22/97557**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/09/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY MARTIN WARD FOR JUDICIAL REVIEW

_____

Mr Ronan Lavery KC and Mr Sean Mullan (instructed by Donnelly & Wall Solicitors) for the Applicant
Mr Tony McGleenan KC and Mr John Rafferty (instructed by the Crown Solicitor's Office) for the Respondent
Mr Tony McGleenan KC and Mr Philip McAteer (instructed by the Departmental Solicitor's Office) for the Notice Party

_____

FRIEDMAN J

Introduction

[1] By this claim for judicial review the applicant challenges that he remained subject to the notification requirements contained in Part 2 of the Sexual Offences Act 2003 ('SOA') in the period prior to his successfully appealing to the county court the underlying magistrates' court conviction and sentence that triggered the imposition of those requirements. All that follows is predicated upon the fact that he was eventually found not guilty, but not before the passing of several months of obligations to provide personal information under the notification regime.

[2] The applicant's Order 53 statement alleges illegality under domestic law and the European Convention of Human Rights ('ECHR') against the PSNI and otherwise by way of a declaration of incompatibility pursuant to section 4 of the Human Rights Act ('HRA') that the notification requirements should not have been enforced pending, as he described it, "the final determination of the criminal proceedings."

[3] As to the domestic law argument, the applicant contends that he was treated contrary to the provisions of Article 140 of the Magistrates' Courts (Northern Ireland) Order 1981 ('the 1981 Order') which affords an individual

prosecuted summarily a right to a rehearing de novo and Article 28(1) of the County Courts (Northern Ireland) Order 1980 ('the 1980 Order') which confirms with regard to the exercise of a statutory right of appeal that it is the decision of the county court judge which is to be treated as "final and conclusive." Pending the determination of the appeal he therefore submits that the status of the conviction and sentence was neither final nor conclusive, and therefore the notification requirements under Part 2 SOA should not have become operative.

[4] As to the human rights argument, the applicant claims violations under the ECHR of the presumption of innocence (article 6(2)) and a disproportionate interference with his right to private and family life (article 8). He argues that the continuance of the notification requirements while the de novo rehearing was pending constituted an adverse impact arising from the criminal proceedings in the lower court that impugned his innocence and disproportionately interfered with his private life notwithstanding that article 6 continues to apply to all stages of criminal proceedings including an appeal.

[5] The respondent PSNI defends the claim on the basis that its engagement with the applicant to establish that he was complying with the notification requirements was immaterial to their activation. They occurred automatically by the terms of the legislation applying to the applicant's particular combination of conviction and sentence. By reference to those terms and its broader safeguarding duties the respondent submits it had no discretion to suspend the claimant's obligations; or to disapply their effect by choosing not to record and monitor the requisite information.

[6] In granting leave on the papers, Mr Justice Colton foresaw that a court might hold as such and ordered amendment of the Order 53 statement to include the declaration of incompatibility and issuance of devolution notices. The Department of Justice appeared as a notice party.

[7] In both aspects of their defence of the human rights claim the respondent and the notice party relied jointly on Strasbourg jurisprudence adopted by the courts across the United Kingdom. In so far as there was no decision precisely on point by Strasbourg, it was submitted (by reliance on the *Ullah* principle) that in the absence of any or sufficient Strasbourg doctrine to support the claim, this court was precluded from allowing it.

Facts

[8] The applicant was convicted at Newtownards Magistrates' Court on 13 December 2021 of the complaint of exposure contrary to Article 70 of the Sexual Offences (Northern Ireland) Order 2008 ('the 2008 Order'). The elements of the offence are that the applicant intentionally exposed his genitals and at the time of doing so he intended that someone seeing them would be caused alarm or distress.

He was convicted of two further complaints of criminal damage on the same date and acquitted of a separate complaint of harassment.

[9] Following completion of a pre-sentence report, the applicant was sentenced by the District Judge on 23 March 2022 to imprisonment for a period of six months on the complaint of exposure (i.e., the statutory maximum for a summary conviction). The sentence was suspended for three years.

[10] Immediately upon being sentenced the applicant's solicitor orally indicated an intention to appeal and duly served a proforma Notice of Appeal against all three convictions and the sentences dated 6 April 2022. The Notice of Appeal requires no grounds of appeal to be given; and none were. The applicant was granted bail by the District Judge pending appeal on conditions that included entering a recognizance for £400, not to contact the named complainant directly or indirectly and not to enter a geographical boundary around the town of Bangor.

[11] At the same sentencing hearing on 23 March 2022, the clerk of the court handed the applicant an undated document with the title "Notice of Requirement to Register with the Police - Sexual Offences Act 2003" marked "To the Defendant" informing him, "You have been convicted in relation to an offence to which Part 2 of the Sexual Offences Act 2003 applies. The Court's decisions mean that you must, by law, comply with notification requirements in Part 2 of the 2003 Act" (emphasis in the original). The document went on to outline what the notice requirements were, including the obligation to provide a range of initial information to the police in the next three days, and concluded that "The duration of these arrangements are (sic) specified by law within section 82 of the Sexual Offences Act 2003 and will be formally notified to you in due course."

[12] As the applicant was in custody on an unrelated matter until 31 May 2022, he was informed in the notice that he was not required to provide that information until three days after his release (see SOA 2003, section 83(6)). Having been notified of the events of 23 March by the magistrates' court on the same day of the sentence, the PSNI contacted the applicant on 4 June to prompt him to comply with the requirements, which he did by 6 June.

[13] At some point, it is not clear, an undated document again headed "Notice of Requirement to Register with the Police - Sexual Offences Act 2003" was generated that repeated the points of the document given to the applicant on the day of his sentencing. It differed from the previous version in that it named the applicant at the top. It now confirmed in the section headed "Duration" that the requirements "apply to you from the date of the conviction/finding (unless they apply to you from the date of the sentence because of a sentencing threshold to the offence of which you were convicted) and shall continue to apply for 7 years" (emphasis in the original).

[14] Attached to this more detailed Notice of Requirement to Register was another undated document headed "Certificate of Conviction or Finding – Sexual Offences Act 2003 s. 92 – At Newtownards Magistrates Court on 23 March 2022" that was signed by the "Clerk of Petty Sessions" and marked "For immediate service" to the defendant and PSNI, noting "This form replaces any previous orders issued in this case." The body of text referred to the dates of conviction and sentencing as above and that the relevant charge was an exposure offence contrary to Article 70 of the 2008 Order. Although referred to in the body of the certificate as an "order", the wording of the statute that deals with certificates suggests that it was technically incorrect to refer to it as such (see SOA section 92(2)).

[15] The applicant continued to comply with the notification requirements notwithstanding that he issued these judicial review proceedings on 9 November 2022 claiming that the PSNI had acted unlawfully on 4 June and thereafter in requiring him to so comply while he awaited the determination of his county court appeal.

[16] Leave to bring these proceedings was granted by Colton J on 17 November 2022.

[17] The applicant succeeded in his appeal before Belfast County Court on 11 January 2023. The complaint of exposure, and the other complaints relating to criminal damage, were dismissed. The record of the hearing is that "the County Court ordered that the appeal be allowed, and the order of the Magistrates' Court be reversed, and the complaint be dismissed." If reasons were given, and one assumes they were, none were provided for the purposes of these proceedings. Thereafter, it is agreed that the applicant was automatically no longer subject to the notification requirements pursuant to the SOA as the underlying conviction and sentence were no longer in existence.

[18] Although no discrete relief was claimed before me, the unchallenged evidence showed that on 17 January 2023 the designated risk manager of the PSNI's Offender Investigation Unit went to the applicant's home on a routine unannounced visit to establish whether he was complying with the notification requirements in circumstances where that discrete purpose was no longer open to the police in the course of their duty.

[19] The affidavit of Detective Inspector David Hodge explained that the relevant unit that monitors compliance with the SOA in liaison with other parts of the relevant policing structure was not informed by the county court of the acquittal and that the PSNI was in ongoing communication with the Northern Ireland Courts and Tribunals Service ('NICTS') to address future potential reoccurrences of such incidents.

Sexual Offences Act 2003

[20] Statutory notification requirements for sex offenders were first introduced by section 1(3) of the Sexual Offenders Act 1997. Their common characteristic with the SOA is that they were imposed automatically upon conviction for specified offences, and they resulted in requirements to provide personal information to the police within specified days of the conviction and for subsequent changes to that information arising thereafter. The overall structure of the scheme remains unchanged albeit that additional notification requirements have been added.

[21] The relevant provisions of Part 2 of the SOA that were introduced, according to the Explanatory Note with an aim of "strengthening the protection against sex offenders", are as follows:

(i) Section 80(1)(a) and (2) mandate that a "relevant offender" becomes subject to the notification requirements for a period set out in section 82, if amongst other things, "he is convicted of an offence listed in Schedule 3."

(ii) Under Schedule 3 a conviction of the offence of exposure does not automatically trigger the notification requirements, but by paragraph 92U (b)(ii)(aa) of Schedule 3 it does when the relevant offender is sentenced to a term of imprisonment. By section 18(5) of the Treatment of Offenders Act (Northern Ireland) 1968 a suspended sentence that has not taken effect "shall be treated as a sentence of imprisonment" in this context.

(iii) Although section 82(6)(a) defines the relevant date for the purposes of notification requirements in the case of a person within section 80(1)(a) as being "the date of the conviction", section 132 provides that where an offence is listed in Schedule 3 subject to a sentencing condition being met a person is to be regarded as convicted of an offence for the purposes of the relevant date (as defined in section 82(6)) "at the time when the sentencing condition is met." For the applicant that date would have been 23 March 2022.

(iv) There is a "Table" contained in section 82 that stipulates that a sentence being six months or less, required the notification requirements to last for seven years beginning from the relevant date.

(v) Other notable aspects of that Table are that for those sentenced to between six months and 30 months the notification period will be 10 years. For those sentenced to any sentence of imprisonment of 30 months or more, the period will be indefinite, although there is a right to review after 15 years contained now for this jurisdiction in Schedule 3A to the SOA inserted by the Criminal Justice Act (Northern Ireland) 2013. Those provisions were introduced in response to the Supreme Court decision in *R (F (A Child)) v Secretary of State for the Home Department; R (Thompson) v Same* [2010] UKSC 17 [2011] 1 AC 331 that found the previous lifetime requirements without any review in any circumstances to violate article 8 ECHR.

(vi) Notification requirements are detailed in sections 83 to 87. These stipulate initial steps at section 83(5) that the relevant offender must within three days (disregarding any period in custody as per section 83(6)) notify the police of various matters including date of birth, his given and adopted names, national insurance number, home address, and the address of other premises in the United Kingdom at which he regularly resides or stays.

(vii) By regulation the required information can be supplemented and has been notably by the Sexual Offences Act 2003 (Notification Requirements) Regulations (Northern Ireland) 2014. Amongst other things such as the mandatory provision of passport and credit card details, it requires the relevant offender notify the police weekly if he does not stay or reside in one place and to tell the police if he has resided or stayed for a period of at least 12 hours at a household, or other private place, where a child under the age of 18 resides or stays; or whether he intends to stay there.

(viii) Section 84 makes provision to notify the police of changes to those matters initially disclosed pursuant to section 83(5) including the matters prescribed by regulation. Section 85 mandates periodic re-notification of information specified in section 83(5) which for this applicant was on an annual basis. Detailed information requirements pertaining to foreign travel are contained in regulations issued pursuant to section 86.

(ix) By section 87 the police, as the repositories to which all information under Part 2 must be provided, can receive the information at designated police stations or by the relevant offenders giving oral information to any police officer, or a person authorised for those purpose by the officer in charge of the station.

(x) There is an additional discrete police power under section 87(4) to request the provision of fingerprints or photographs of any part of the relevant offender for the purpose of identification.

(xi) By section 91 a person may commit a criminal offence for failing to comply with the notification requirements contained in sections 83 to 87, or by providing such information that he knows to be false. The maximum penalties are six months on summary conviction and five years for trial on indictment.

(xii) Section 92 concerns "certificates for the purposes of Part 2." It provides at section 92(2):

> "If the court by or before which the person is so convicted or found — (a) states in open court — (i) that on that date he has been convicted, … and (ii) that the offence in question is an offence listed in Schedule 3, and (b) certifies those facts, whether at the time or subsequently, the

certificate is, for the purposes of this Part, evidence … of those facts."

(xiii) As noted in the *Rawlinson* case at §37 (see below) the purpose of the section 92 certificate is to provide evidence in breach proceedings that at the time of the alleged breach the person concerned was subject to reporting requirements. I would add that it might also function as an evidential foundation for the police to efficiently establish, if need be, that they are acting under a power to request, record and retain information pursuant to Part 2.

(ix) Separate from the above provisions, but contained in Part 2, is the power of a court to make a "sexual offences prevention order" (a 'SOPO') under section 104 either as part of its sentencing (section 104(2)) or if an application is made by the Chief Constable (section 104(4) and (5)), only where it is established that a person's behaviour makes it necessary to protect the public or any members of the public from serious sexual harm (section 106(3)). A SOPO can be made where sentencing thresholds for automatic information requirements contained in Schedule 3 are not met (section 106(13) and (14)). A SOPO can prohibit or require activity above and beyond the notification requirements contained in Part 2 (section 107). It can be made on an interim basis pending the outcome of a full application (section 109). There is right of the defendant and the police to apply to review, vary or discharge the SOPO (section 108); as well as a right of a defendant to appeal the making of the order (section 110).

[22] The operation of Part 2 and its 1997 predecessor has been considered by the United Kingdom courts on many occasions giving rise to the following additional well-established points that are relevant to the applicant's domestic law challenge:

(i) The imposition of the notification requirements by section 80 of Part 2 is not an order of the court. They are statutory obligations placed upon a person that are automatically triggered by the combination of their conviction for a Schedule 3 specified sexual offence and sentence and continue until the end of the statutory period contained in section 82 with no basis for appeal or review. That legal characterisation was made in in *R v CK (a minor)* [2009] NICA 17 §45 and has been repeatedly made thereafter, for instance *R v Foley* [2019] NICA 44 §27, *R v Rawlinson* [2018] EWCA Crim 2825 [2019] 1 WLR 2565 §§25-26 and *R v Allon* [2023] EWCA Crim 204 §§17-18.

(ii) Following from that characterisation, it has often been observed in the Strasbourg jurisprudence, but in substance this is no more than a reflection of the terms of the domestic legislation, that the notification requirements are not a criminal "penalty", but a measure that is preventative and deterrent rather than punitive, for which see *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332, 334, *Adamson v United Kingdom* (1999) 28 EHRR CD 209, 210-211, both of which were adopted by domestic courts in *In re Gallagher* [2003] NIQB 26 §§16-17, 24-25, *R (F (A Child)) v Secretary of State for the Home Department* §§25-26, and *R v Foley* §§23-29.

(iii) The automaticity of the requirements is such that in no sense can it therefore be said that they have been made, imposed, or insisted upon by a court. As the Court of Appeal in England & Wales put it in *Rawlinson* §§30 and 36, the requirements arise by "*operation*" of the law and absent public law error in issuing a section 92 certificate, for instance because the offence and/or sentencing threshold is not contained in Schedule 3, or successful appeal against conviction and/or sentence whereby the qualifying foundation for the certificate is removed, there can be no basis to disapply the provisions of the SOA. As the Court of Appeal observed at §36, "allowing an appeal does not result in the conclusion that the certificate was unlawfully issued."

[23] The applicant submitted that there were some distinguishing features from the *Rawlinson* decision because in that case the certificate was issued when a relevant offender was resentenced for breaching a conditional discharge, it was not a public law case and did not consider the impact of these provisions upon an individual offender.

[24] In my view the judgment contains what has become an orthodox and well-established analysis of the statute. The respondent is correct that in both *Rawlinson* and the applicant's case notification requirements arose on foot of sentencing exercises which were both successfully appealed such that notification requirements no longer applied. The outcome of the appeals had no retrospective implications for the legality of the notification requirements existing by operation of the law prior to the determination of the appeal, or the legality of the issuance of the certificate to reflect the activating decisions made by the first instance court.

Role of the PSNI

[25] If the magistrates' court was not legally responsible for the notification requirements, absent legal error in the issue of the certificate, it must follow that the PSNI was in the same position. The Order 53 statement ascribes "a decision" to the respondent "to seek to include the applicant within the notification requirements." From the foregoing it is difficult to characterise its conduct as such in public law terms. Sections 83 to 86 of the SOA designate the PSNI as the recipients and repositories of the information contained in the notification requirements. Section 87 prescribes a method of notification which is by attendance at a designated police station or by oral communication with an officer or designated staff. There is a police power to take fingerprints and photographs to establish identification. Where a relevant person is suspected of committing a section 91 offence, when they fail to provide, or lie about, the required information, it would be incumbent on the police to take reasonable action either to prevent the commission of the offence, or if justified to charge the relevant offender.

[26] Detective Inspector Hodge explained that the PSNI plays a role in managing and interpreting the notification requirements and, where necessary, enforcing those provisions *as they exist*. His affidavit and exhibits described the operation of the Public Protection Arrangements for Northern Ireland ('PPANI') that is a

non-statutory multi-agency process that has been established to manage the risks of violent and sexual offenders pursuant to the Guidance issued by the Minister pursuant to Article 50 of Criminal Justice (Northern Ireland) Order 2008.

[27] Pursuant to that Guidance notification requirements are recorded on a database known as the Violent & Sexual Offenders Record ('ViSOR') that in Northern Ireland is only accessible to specific PSNI officers and staff, who are vetted and work by reference to and are otherwise regulated in accordance with discrete standards. The PSNI discharges its role in the PPANI multi-agency structure through its ViSOR Management Unit ('VMU') that ensures that certificates concerning the SOA Part 2 are populated on ViSOR, albeit that it appears to be dependent on the NICTS providing it information. To ensure compliance and enforcement of the notification requirements the PSNI has an Offender Investigation Unit ('OIU') and Public Protection Team ('PPT) and it would have been these two bodies which took steps to contact the applicant upon his release from prison and thereafter record and monitor the mandatory data that he was required to provide.

[28] Accordingly, I find the PSNI has no part, or indeed power, in the imposition of the notification requirements. While PSNI officers prompted the applicant to comply with his obligations and received his information that the law required them to be given, the requirements followed automatically, operatively and without the PSNI deciding anything. They flowed from the applicant being convicted by the magistrates' court for a Schedule 3 offence combined with the fact that when it came to sentencing him the District Judge imposed a requisite threshold sentence. This automatically led to the notification in open court by court staff on the day of the sentencing that the SOA applied and the subsequent administrative issuing of the section 92 certificate by the clerk of petty sessions. The magistrates' court was not a respondent in the case; neither was it suggested that the certificate duly issued was unlawful on its face.

[29] For all these reasons, while it might be said that the PSNI *decided* to engage with the applicant to check he was complying with his obligations, as apprehended by Colton J on granting leave, I find after the benefit of full argument that the PSNI had no discretion to act in any other way. Rather, as submitted by the respondent to me, it was acting in accordance with its general duties of policing under section 32 of the Police Act (Northern Ireland) 2000; and, I would add based on the analysis of Humphreys J in *Re Graham's Application* [2023] NIKB 66 §28, the common law.

[30] Moreover, although now academic, in so far as the applicant's domestic law argument is based on the discrete implications of his having exercised his right to a de novo rehearing, the better respondent in this case would have been the magistrates' court, because (assuming the argument is correct) then the public law error arose from its decision to issue the section 92 certificate in circumstance when the applicant announced his intention to appeal on the day of the sentence and had thereafter served a Notice of Appeal. For reasons I now turn to, it would still be problematic to describe the magistrates' court as deciding to do anything.

The common law right to a de novo rehearing

[31] The applicant's domestic law argument requires some overview of the system of summary justice that emerged from the common law of Britain and Ireland over centuries, which is now mostly contained in the 1981 Order that has a near but not exact equivalent in the Magistrates' Courts Act 1980 that applies in England and Wales.

[32] Most criminal practitioners know that an appeal from a magistrates' court conviction or sentence to a county court (and in England and Wales to a Crown Court) involves a right to a complete rehearing of the case. As the applicant put it in his skeleton argument, "defendants in Northern Ireland who are prosecuted have 'two bites of the cherry.'" However, the legal foundation of the right is less often discussed. Its critical place in the applicant's case both under domestic law and article 6(2) ECHR calls for some reflection on its origins and parameters:

(i) Once invoked the right to appeal generates a consequential right to the Latinate termed de novo hearing. That is a complete rehearing of the case in the higher court on all matters of law and fact, which can be distinguished from other rights of appeal that require leave or are jurisdictionally limited to points of law only.

(ii) Neither the 1981 Order nor the primary and secondary legislation that governs the county court mention that the hearing shall be de novo, or words to that effect (see §§33-36 below). In England and Wales, statute proclaims of the equivalent process that "The customary practice and procedure with respect to appeals to the Crown Court, and in particular any practice as to the extent to which an appeal is by way of rehearing of the case, shall continue to be observed." (Supreme Court Act 1981, section 79(3)).

(iii) Northern Ireland has no equivalent of the E&W provision. That the form of the hearing is de novo with the prosecutor having to prove the case is confirmed in Valentine's *All The Laws of Northern Ireland* in its section dealing with "Powers exercisable by county court on appeal" at §145, but without citation of authority. The same is true of Valentine, *Criminal Procedure in Northern Ireland*, Second Edition (2010) p. 565 §17.24. Echoing the terms of the Supreme Court Act, the Department of Justice as notice party before me characterised the legal source of the de novo procedure as "well settled customary practice."

(iv) English precedent for the practice is cited in O'Connor, *The Irish Justice of the Peace, A Treatise on the Powers and Duties of the Justices of the Peace in Ireland*, Volume 1, Second Edition (1915) Ch. X p. 320. In *R v Inhabitants of Newbury* (1791) 4 T.R. 475, p. 476 the failure of the respondent to produce any evidence in support of its case that a poor rate was legally imposed led to the appeal being allowed by the Quarter Sessions in the appellant's favour. On

subsequent appeal, Lord Kenyon CJ endorsed the process holding that "law, justice and convenience required that respondents should begin in cases of this kind." In agreement, Buller J described the Court as laying down "a general rule which may be a guide in future to all the Quarter Sessions." In *R v Justices of the Surrey and Bell* [1892] 2 QB 719, 721 where the prosecution failed to appear and the order of the Petty Session was quashed, Lord Coleridge CJ held that the reasoning in *Newbury* as regards rating cases applied equally to an appeal from a conviction as had become the "common practice." In agreement, Cave J focused upon the historical position that the Petty Sessions were not full courts of record where the trial evidence was captured for the purposes of appeal. As Lord Kenyon had starkly put it in *Newbury*, "the appeal comes on to be heard naked and destitute of all its evidence."

(v) Further mention should be made of *Ex Parte McFadden* (1888) Judgments of Superior Courts Ireland (Ir.) 165 (also cited in O'Connor, above), in which Lord Baron CJ examined aspects of the similar practice of the Court of Quarter Sessions in Ireland that "on hearing of the appeal, has to determine the whole case upon fresh evidence" (p. 169). He added (p. 171-172):

> "In a criminal case, the appeal is given, no doubt, only to the prisoner, and plainly is given for the sake of the prisoner … [It] appears to me that the real effect of the right of appeal is to give an option to the accused person to have a new trial in every case in which he has been found guilty by the inferior tribunal … I look upon it as nothing else than giving him a new trial … [By] the word 'appeal' that which is given is a jurisdiction to hear the case anew upon new evidence, and having the mind of a new tribunal applied to the consideration of the entire subject matter. <u>It is not…whether the decision made by the justices was right, upon the evidence laid before them. The question for the appellant tribunal is whether the party ought to be convicted, and for that reason the court must hear the evidence afresh</u> …" (Emphasis added)

(vi) The procedure for the conduct of the de novo appeal is summarised in Valentine, *Criminal Procedure in Northern Ireland*, §§17.24-17.33. The salient limitation upon the modern jurisdiction has emerged from the English case of *Garfield v Maddocks* [1974] QB 7 that the information on which the appellant was convicted may not be amended by the appellate court. Valentine postulates the application of the principle to Northern Ireland (§17.27). Otherwise, the evidence is judged as of the day of the appeal hearing, with both sides permitted to bring new evidence; and indeed, to offer new defences on fact and law.

[33] Parts XII of the 1981 Order deals with appeals. The following provisions are relevant to the applicant's argument:

(i) By Article 140(1) there is a right of appeal to the county court without the requirement of leave against a sentence, conviction and other orders passed as part of the sentencing process, as well as other specified orders. As noted above, no mention is made in that Article as to what form the hearing of the appeal shall take, or that the effect of the exercise of the right to appeal will function to invalidate or suspend the conviction, sentence, or other such order under appeal.

(ii) By Article 144 the "procedure for appeal" where an appeal is made to the county court requires the appellant, "in addition to complying with the provisions of this Part as to recognizances", that "within fourteen days commencing on the day on which the decision of the magistrates' court was made, give to the other party notice in writing of his appeal and shall within the said period lodge a copy of such notice so given with the clerk of petty sessions." That was the Notice of Appeal that the applicant's solicitor lodged on 6 April 2022. Other aspects of the Article concern preferable time-limits when the appeal may be heard, but of significance provide for expedition when the appellant "remains in custody pending the hearing of the appeal."

(iii) By Articles 148 and 149 where a person has given notice of appeal to the county court against the order of a magistrates' court he may apply to be released on bail if in custody with recognizances, and, if not in custody, otherwise be made subject to recognizances pending appeal.

(iv) Article 152 – which the applicant considered important – provides that after an appeal has been decided by the county court an order to enforce orders affirmed, reversed, or varied "may" be issued by the chief clerk of the magistrates' court.

(v) By Article 153 when the appellant has been admitted to bail pending his appeal before the county court, then the time during which the appellant is not detained in custody shall not count as part of any term of imprisonment under his sentence; but in the absence of any direction from the county court, the time during which the appellant is in custody pending the determination of his appeal shall be reckoned as part of any sentence to which he is for the time being subject.

[34] By Article 158A (contained in 1981 Order Part XIII) there is a power of magistrates' courts to "reopen cases to rectify mistakes" in the interest of justice, commonly known as the 'slip rule.' Of significance here is that by Article 158A(2) the power conferred by the Article shall no longer be exercisable if the county court has determined an appeal.

[35] The applicant placed considerable reliance on Article 28 of the 1980 Order which provides as follows:

> **Appeals and applications to county courts.**
>
> 28. – (1) A county court shall have jurisdiction to hear and determine in accordance with county court rules-
>
> (a) any appeal from an order of a magistrates' court;
>
> (b) any appeal from or application in respect of an order or determination of any other tribunal, authority, body or person whatsoever; duly brought under any statutory provision and the decision of the county court shall, except as provided by Article 61, be final and conclusive." (Emphasis added)

[36] The applicant submitted that the combination of Article 152 of the 1981 Order and Article 28 of the 1980 Order confirmed that in Northern Ireland the conviction in the magistrates' court is *not final and not conclusive*. He claimed that the combination of a statutory right of appeal, the fact that on appeal the hearing is de novo and the statutory words that the conviction is *inconclusive*, indicates that the status of the magistrates' court conviction should be that it is suspended pending final determination. By corollary, he argued that the notification requirements under Part 2 of the SOA should also be suspended.

[37] Despite the novelty of the challenge and the ingenuity with which it was presented, I do not find it to be correct for several separate and interrelated reasons.

[38] Firstly, when looked at as a whole rather than referring to isolated clauses in distinct provisions, Part XII of the 1981 Order read with the other aspects of the statute contains a right to appeal but pending the hearing of the appeal assumes the validity of the conviction, sentence or any other consequential orders; such that there is no right to bail, but bail must be applied for with recognizances, and bail could be denied; also time served in custody will count unless directed otherwise. By virtue of the conviction a person's status and rights are altered and his liberties are impinged upon.

[39] Secondly, the applicant has read too much into those provisions that deal with the finality of proceedings once the county court has given judgment. They foremost mean that there is no further appeal as of right subject to the facility to apply to the county court judge to state a case to the Court of Appeal pursuant to Article 61. The event of the county court determining an appeal also brings an end to the operation of the slip rule under Article 153A of the 1981 Order. Moreover, unlike in the magistrates' court there is no slip rule in the county court. It cannot review its own decision once it has disposed of a case: see *State (Dunne) v Martin*

[1982] IR 229, 233 cited in Valentine, *Criminal Procedure in Northern Ireland*, p. 572 §17.38. I accept the respondent and notice party submission that the words "final and conclusive" contained in Article 28 of the 1981 Order cannot be interpreted to mean, as the applicant would have it, that the first instance conviction and sentence are "not final and not conclusive" or "inconclusive" pending the outcome of the appeal.

[40] Thirdly, the terms of Article 152 of the 1981 Order do not support the applicant's interpretation. Myriad circumstances may arise that require amendment to first instance orders in the light of an appeal. For instance, in this case, the Article might have been relevantly engaged if the county court found the applicant guilty of the exposure offence on appeal but decided to vary the sentence to a non-custodial penalty such that the qualifying threshold under Part 2 SOA was no longer met. However, a provision envisaging that something "may" happen, if required, can hardly operate to invalidate, or suspend the orders that were made by the District Judge pending the appeal.

[41] Fourthly, the one clearcut example relied upon by the affidavit of the applicant's solicitor in which a first instance order can be suspended by a Notice of the Appeal is Article 44 of the Road Traffic Offenders (Northern Ireland) Order 1996, which provides that:

> "Any court (whether a court of summary jurisdiction or another) which makes an order disqualifying a person may, if it thinks fit, suspend the disqualification pending an appeal against the order."

The fact that suspension of enforcement of the order pending appeal in that context is specifically provided for by statute positively undermines a submission that there is a general power to suspend other such orders.

[42] Fifthly, no part of the proceedings in the magistrate' court involved making an order in relation to the SOA. The applicant's submission (as framed in his skeleton argument) makes too great a leap in arguing "if the conviction is not conclusive pending an appeal to the county court, then the applicant should not be deemed a 'relevant offender' pending the outcome of his appeal hearing." This entirely overlooks the separate, automatic, and preventative (as opposed to penal) status of the SOA. What happened in the magistrates' court as to the fact of the conviction and sentence triggered the information requirements under section 92. However, bar that singular provision, there is no procedural relationship between the operation of this aspect of Part 2 and the criminal justice process. The point is underscored by the different arrangements arising for a court to make a SOPO contained in section 104 ff.

[43] Sixthly, *Rawlinson* is on point. As indicated above that judgment reflects a wider body of decided cases which have disentangled criminal proceedings from notification requirements notwithstanding that the former creates the foundation for

the latter. I consequently agree with the submission of the Department of Justice that the notification requirements under section 80 are independent of the provisions relating to appeal, do not change or breach the provisions relating to appeal and are themselves unaffected by them.

[44] Seventhly, there are provisions in the SOA 2003 (section 81) and its predecessor the Sexual Offenders Act 1997 (section 1(3)(a)) to do with the transition between them, that anticipate that the notification requirements will apply in instances when a person is "on bail pending an appeal" (by implication, an appeal of any kind).

[45] Finally, I find that the argument overstates the implication of the right of appeal involving a complete rehearing that "law, justice and convenience" have required since Lord Kenyon in the *Newbury* case proclaimed a rule from the practices developed by the Quarter Sessions in the 18th century. Lord Baron's analysis in *Ex Parte McFadden* pertinently distinguishes that the jurisdiction to hear the case anew "is not … whether the decision made by the justices was right, upon the evidence laid before them" but whether the party before the appellate tribunal "ought to be convicted, and for that reason the court must hear the evidence afresh." From the case law and older textbooks, it can be appreciated that as with the slip rule to correct errors before the magistrates' court, there is a great deal to be said for a right to a complete rehearing before a higher court and more senior tribunal as part of an overall scheme of summary justice. It is one feature of what emerged historically as the relationship between the Petty and Quarterly Sessions, with different judges and processes adjudicating over different levels of offending, and with different capacities to analyse and record evidence. Some of those distinctions have fallen away especially with the rise of the professional District Judges, although in England and Wales the system remains far more dependent on the work of lay magistrates. Without an extensive and robust system of summary justice no complex and populated society can guarantee the adequate enforcement of its criminal law, but errors can be made under the pressure of speed and volume. Hence multiple jurisdictions both common law and civil across the world have used and continue to use de novo hearing appellate devices from their first-tier local courts, and sometimes with even greater safeguards than exist here. However, the fact that these safeguards exist to correct injustice, if that is what has occurred, does not mean that convictions are incomplete or inconclusive pending the appeal.

[46] In his submissions before me Mr Lavery KC suggested that the mere fact of initiating the de novo appeal functioned as an annulment of the outcome of the summary proceedings pending the appeal. The submission is unsupported by authority, and for reasons outlined above has no support in the statutory framework. With respect, I also find it to be wrong in principle. It goes too far in undermining the legitimacy of summary justice and legal certainty. It also seeks to draw a substantive right from a procedural protection when there is no basis to do so.

[47] Accordingly, I dismiss the domestic law aspect of the claim.

Article 6(2): the presumption of innocence

[48] The applicant also argues in his Order 53 statement that the PSNI's "decision to include him within the notification requirements" is contrary to article 6 ECHR, and in particular the presumption of innocence contained in article 6(2), which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Counsel relies on Strasbourg jurisprudence that article 6 applies to all stages of criminal proceedings, and where pertinent, article 6(2) does not cease to apply solely because first-instance proceedings have resulted in a defendant's conviction when the proceedings continue on appeal.

[49] As to the general proposition that the fair determination of a criminal charge shall include its appellate stages, article 6 does not guarantee a right to appeal. However, where domestic law provides for an appeal against conviction or sentence, then the appellate processes must be conducted fairly albeit that the requirements of fairness shall depend upon the features of the proceedings involved, seen in their domestic law context, and taking account of the role and functions of the appeal court: see *Archbold Criminal Pleading Evidence and Practice* (2023 Edition) §16-127 p. 2130 and the cases cited therein.

[50] As to the presumption of innocence contained in article 6(2), its primary application will ordinarily be to the conduct of the trial, or in this context, the appeal. The applicant relied on *Konstas v Greece*, App. No. 53466/07, Judgment 24 May 2011, §36 and its holding that the presumption could not be displaced in the Greek de novo appeal proceedings under review by virtue of the conviction at first instance:

> "To conclude otherwise would contradict the role of appeal proceedings, where the appellate court is required to re-examine the earlier decision submitted to it as to the facts and the law. It would mean that the presumption of innocence would not be applicable in proceedings brought in order to obtain a review of the case and have the earlier conviction set aside."

[51] The applicant made no suggestion that the conduct of his appeal was unfair. Instead, he relied on the finding of a breach of article 6(2) in *Konstas* due to what was said publicly by two of "the highest representatives of the State" (§38) about an appellant associated with a rival political party and a high-profile fraud involving a national university. With the de novo appeal still pending the Deputy Minister of Finance publicly referred to him and politicians who supported him as "crooks" adding "you even steal from each other" and the Minister of Justice declared that the Greek Courts had "boldly and resolutely" convicted those in the case. The court found the "imprudent" language of the Deputy Minister of Finance "likely to influence public opinion" reflecting his view of the charges and "prejudging the

future judgement of the Court of Appeal." The court found the comments of the Minister of Justice reflected his satisfaction with the first instance decision and his desire it should be upheld, that were especially inappropriate given his position as "*par excellence*, the political authority responsible for the organisation and proper functioning of the courts." It was particularly incumbent on him to be "careful not to say anything that might give the impression that he wished to influence the outcome of proceedings pending before the Court of Appeal." He too appeared to prejudge the decision (§§42-43). Hence both Ministers' statements "went beyond a mere reference to the applicant's conviction by the judgment [of the first instance court]" (§45).

[52] *Konstas* was applying a well-established line of Strasbourg case law that pre-trial publicity by high-ranking officials and police officers that an accused person is in effect guilty of an offence charged may amount to a violation of article 6(2): see, for an earlier exposition of the principles cited in *Konstas*, *Allenet de Ribemont v France* (1995) 20 EHRR 557 §§32-41 and most recently, *Bavčar v. Slovenia*, App. No. 17053/20, 7 September 2023, §§104-108, 112-114. The repeated features of these cases are the seniority of the rank of the statement makers, the high-profile public context in which the statements are made, and the content of what is said inappropriately prejudging the outcome of the pending case, as opposed to referencing matters with "discretion and circumspection" (*Allenet de Ribemont* §38).

[53] There are very powerful reasons why this line of case law should protect accused persons from political interference in their trials. But it cannot feasibly apply to what occurred with this applicant when the clerk of the petty sessions and the dedicated PSNI unit drew his attention to the fact of his first instance conviction and sentence in accordance with the operation of the law. As the *Konstas* judgment itself notes at §34, "The Court considers that Article 6(2) of the Convention by no means prevented the competent authorities from referring to the applicant's existing conviction when the matter of his guilt had not been finally determined." Therefore, I do not accept that the *Allenet de Ribemont* line of authority is available to this applicant on the facts of his case.

[54] However, on the applicant's behalf Mr Lavery pressed a much more radical extension of the presumption of innocence. He argued that notification requirements for an offence prosecuted summarily which is under appeal in Northern Ireland ought to be suspended or stayed pending final determination in the county court to be compatible with article 6. This argument again collapses the distinction between the operation of criminal procedure and the preventative aspect of the notification requirements. It also overlooks that article 6(2) will not necessarily apply to events arising from a sentence, even when they form part of the "penalty" because "the right to be presumed innocent … arises only in connection with the particular offence 'charged'": see *Philips v United Kingdom* (2001) 11 BHRC 280 §35. That case concerned statutory presumptions that operate in post-conviction confiscation proceedings that deem all property connected to an offender to be derived from the proceeds of crime unless he can prove otherwise and irrespective of any connection with the offence that triggers the process. However, unlike in *Philips*, notification

requirements under Part 2 are not a "penalty", nor do they generate any post-conviction process, findings, or an order by the criminal court, and as concluded in *Ibbotson v United Kingdom*, p. 334 they "operate completely separately from the ordinary sentencing procedures."

[55] In its cumulative and far-reaching endeavour, I therefore find this part of the applicant's claim to be wrong; and indeed, with respect, unarguable. Firstly, it treats the notification requirements as part of the criminal process when they are not. Secondly, no aspect of the administrative issuance of a certificate or the management of the operative notification requirements, where there was no discretion to act otherwise, constitutes a breach of the presumption of innocence in the sense described in *Konstas* (as relied upon before me). Thirdly, in so far as no other Strasbourg case supports the argument, it substantially contravenes the '*Ullah* principle', for which now see *R (AB) v Secretary of State for Justice* [2021] UKSC 28 [2022] AC 487, per Lord Reed §§54-60.

[56] The notice party pressed this third point and I agree with it. Section 2 of the HRA requires a domestic court to "take account" of, and in the case of "clear and constant" jurisprudence apply, the caselaw of the European Court of Human Rights. However, the applicant's argument would require very considerable judicial extension beyond the frontiers of decided Strasbourg cases; and based on the well-established principles in that case law, as they currently stand, it is impossible to conclude the Strasbourg court would extend them to find a violation of article 6(2) arising from a complaint like the one that was made in these proceedings. That is especially as it would involve frustrating the operation of preventative measures introduced by parliament as part of the state's human rights duties to protect vulnerable members of the public (see further §§64-67 below). Thus, even if a court in Northern Ireland were intellectually persuaded by the strength of the argument, it would not be open to a judge to accept it under the HRA.

Article 8: Right to Private and Family Life

[57] The conclusions in earlier parts of this judgment invariably impact on the way the applicant put his case on article 8. The Order 53 statement claimed that inclusion of personal data under Part 2 of the SOA "pending final determination of criminal proceedings" was "premature" and as such a disproportionate interference with article 8. His skeleton argument objected to any inclusion of any record on the ViSOR database until the "final and conclusive" hearing in the county court. I have already held that those submissions overinterpret the meaning of the right to the de novo hearing. It was thereafter urged that a system that breached article 6(2) could not of itself be proportionate; but I have found no such breach.

[58] The essence of Mr Lavery's remaining argument focussed upon the adverse impact of the notification requirements on the applicant with no basis to appeal or seek a review; and where he claimed that their benefit in preventing further crime by his client could have been tolerably controlled through bail conditions.

Alternatively, if more were needed to make it necessary to protect the public, the police could have made an application for a SOPO under section 104 of Part 2.

[59] For anyone the notification requirements, colloquially known as the 'sexual offenders register', a term which courts have not disavowed as inaccurate, would constitute an unwelcome interference with a person's private life. They mandate ongoing registration of identify, address, and relocation on pain of criminal penalty and subject to police powers to record that data and examine potential breaches of compliance. The additional requirements introduced by regulations pursuant to the SOA, which were absent from the 1997 Act version of the regime, include weekly notification if a person is not staying or residing in one place; and 12 hourly notifications when he stays in an additional household where there is a child.

[60] Given that the requirements arise from the criminal justice process but are not imposed by individualised sentencing or amendable to subsequent review (in this case lasting for a default seven-year period had they not been cut short by the acquittal) makes them contrary to ordinary approaches to punishment and rehabilitation. Aside from the conviction itself the requirements carry the stigma of past sexual offending being discovered, even though registers of this nature are not open to the public to look at. However, information can be disclosed to other agencies within the PPANI structure. For these and other reasons the scheme can cause what the Supreme Court has accepted can be a "significant interference with article 8 rights": *R (F (A Child) v Secretary of State*, §§42-43.

[61] For this applicant, the six months of imposed notification requirements caused him a range of associated anxieties. His affidavit explained that as someone from the Travelling community he would ordinarily not have resided in one place, the requirements posed potential risks to his accommodation, he was especially loathed to stay at the homes of his four grandchildren for fear of causing undue police attention, and generally concerned about other investigation by the Housing Executive and social services.

[62] Although not directly part of the claim, the incident on the 17 January 2023 after his acquittal, when police went to the applicant's home to check that he was complying with the obligations that were no longer in force, are indicative of the diminishment of human dignity that can arise from being in this type of system. Even if the proportionality of the regime should be judged on its working properly (see, Lord Rodger in *R (F (A Child) v Secretary of State* at §64), it is apparent, at least from this case, that optimistic comments in the *Rawlinson* judgment (at §37) were too sanguine about the risk of maladministration.

[63] At the same time, it is important to recognise the purpose of the notification regime. Parliament's justification for legislating in this area cannot seriously be doubted. The "starting point" of the Supreme Court analysis in *R (F (A Child) v Secretary of State* at §24 was to recognise the positive obligation owed by states under the ECHR to protect individuals against sexual abuse. For authority Lord Phillips

cited the statement by the European Court of Human Rights in *Subbings v United Kingdom* (1996) 23 EHRR 213 §62 which he held extended to the duty to takes such steps as are reasonable to prevent the commission of sexual offences:

> "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to state protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives."

[64] To that can be added the consistent case law concerning the positive obligation on states to adopt measures that prevent the commission of both violent and sexual offences that take place within the private sphere, especially the home, such that privacy assists in obscuring such abuse, hence its labelling as 'domestic': see, for example, *Opuz v Turkey* (2010) 50 EHRR 28 §132, *Bevacqua and S. v. Bulgaria*, App. 71127/01, 12 June 2008 §65 and *Hajduová v Slovakia*, App. No. 2660/03, 30 November 2011, §41. In *Opuz* the Court held at §132:

> "It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly."

[65] Notification requirements are consequently a form of public deterrence and monitoring that impact on the private sphere for reasons described in the decision of *Adamson v United Kingdom* at p. 211:

> "… the purpose of the measures in question is to contribute towards a lower rate of reoffending in sex offenders, since a person's knowledge that he is registered with the police may dissuade him from committing further offences and since, with the help of the register, the police may be enabled to trace suspected reoffenders faster."

[66] The foregoing demonstrates that there is a range of norm conflicts at stake in this type of case: between the rights of the community and the individual, between the protection of privacy and the positive duty to prevent privacy enabling the commission of crime and the violation of the protected ECHR rights of others. The duty on states to operate in this area and to proportionately qualify the public/privacy divide is well-established under the ECHR, but it extends to the positive duties of the United Kingdom under other international human rights law, including article 19 of the UN Convention on the Rights of the Child ('UNCRC') and article 1 of the UN Convention on the Elimination of Discrimination Against Women

('CEDAW'): see also the UN and Council of Europe initiatives cited in *Opuz* at §§72-82. Apart from the United Kingdom, many other jurisdictions have adapted their criminal and civil law accordingly, for reasons explained by Sachs J in *State v Godfrey Baloyi* [CCT29/99] 2000 (2) SA 425 (CC) §11 in a decision of the South African Constitutional Court:

> "All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished."

[67] The complaint at this juncture requires the court to determine whether the degree of interference provided for under the automatic notification requirements in Part 2 was proportionate.

[68] The test for proportionality is contained in *Bank Mellat* [2013] UKSC 39 [2014] AC 700, 771 §20 (per Lord Sumption) but agreeing with §§68-76 (per Lord Reed) that has now been comprehensively analysed in this jurisdiction in *Department of Justice v JR123* [2023] NICA 30. Of the measure that gives rise to the impugned situation the court must determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. I take each of the criteria in turn, although as explained in *Bank Mellat* and *JR123*, the criteria overlap, especially criteria (iii) and (iv):

[69] Firstly, for reasons developed in §§63 to 66 above the importance of the objective is critical. Not only does it aim to prevent crime, but it seeks to protect the rights and freedoms of others, "by protecting the general population from sexual and other violent offenders": see *Minter v United Kingdom* 65 EHRR SE6 §50. That the scheme discharges the state's positive obligation to protect human rights was confirmed in *R (F (A Child)) v Secretary of State* §24 having been previously underscored by the Court of Appeal in England and Wales in *R v Forbes* [2006] EWCA Civ 962 [2006] 1 WLR 3075 §17.

[70] For other case law recognition of justification, see for example, *R (F (A Child) v Secretary of State* at §45, regarding it as "obvious that it is necessary for the authorities that are responsible for the management and supervision of those convicted of sexual offences to be aware of the whereabouts of those who are subject to active management and supervision." In so finding, Lord Phillips relied on the early analysis of the scheme by Kerr J in *In re Gallagher* [2003] NIQB 26 §25. Lord Rodger agreed (at §64), "… having regard to the important and legitimate aim of preventing

sexual offending … these requirements were not to be seen in isolation, but as underpinning the scheme of multi-agency public protection arrangements which are designed to manage the risk of re-offending."

[71] Secondly, the rational connection between the measures chosen by Parliament and the objective was rightly characterised by the Supreme Court in *R (F (A Child)* at §51 again as "obvious" relating as they do to the enablement of the authorities to "*keep tabs*" on those whom they are supervising and managing because the conviction for a sexual offence would warrant that they do. *Adamson v United Kingdom* p. 211 underscores the rationale behind the method of notification requirements in that they cause the relevant offender to know they can be traced and monitored by public authorities and as such deter his actions especially in the private sphere.

[72] The third criterion (whether there are "less intrusive measures") and the fourth criterion (whether "a fair balance has been struck") require recognition that with norm conflicts of this nature it is reasonably open to those engaged in analysis of such provisions to reach different opinions about them. To echo Lord Reed in *Bank Mellat* (at §75) citing Blackmun J in *Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188-189, a judge would be "unimaginative indeed" not to contemplate "something a little less drastic or a little less restrictive in almost any situation." There is here genuine room for debate as to whether someone who is sentenced to six months' imprisonment for a less serious sexual offence in the canon of offending must be automatically subject to the full gamut of the notification regime for seven years without any individualised assessment that they should. As to the best approach to judgement on the matter, there is still much to be said for what Kerr J held some 20 years ago in the *Gallagher* case about the predecessor 1997 version of the SOA:

> "It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance." (§22)

[73] The updated version of this approach is now grounded in extensive and nuanced jurisprudence. Especially when the balancing of the rights of individuals and the community are at stake it is Parliament that is in the best position constitutionally and practically to resolve how and where the general lines of a scheme should be drawn. In a judicial assessment of the *Bank Mellat* third and fourth criteria, which both invariably involve value judgement, it is therefore right for a court to afford a margin of appreciation to choices that the legislature has made. In *Gallagher* Kerr J relied (at §20) on an early statement of the doctrine by Lord Bingham in *Brown v Stott* [2000] UKPC D3 [2003] 1 AC 681, 703C-D. The full body of case law

on the issue was considered by the Court of Appeal in *Department for Justice v JR123* §§37-44 with the helpful distillation by McCloskey LJ at §§56-57.

[74] In *Gallagher* Kerr J acknowledged that for statutory schemes of this nature to be viable they must contain general provisions that will be universally applied to all who come within its purview, but with inescapable hard cases. Elaborated confirmation of this can be found in the jurisprudence on so-called "predetermined categories" or "bright line rules" that is summarised in *JR123* at §§39-44. Its evolution is contained in the following case law: *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 [2015] WLR 3820 (§§36, 38 per Lady Hale and §§88-91, and 98 per Lords Sumption and Reed), *Animal Defenders International v United Kingdom* (2013) 57 ECHR 21 (§§106-110) and *R (P) v Secretary of State for the Home Department for the Home Department* [2019] UKSC 3 [2020] AC 185 (§§48, 50, 55 and 75-77).

[75] One of the important features of the doctrine is that general categories (more pejoratively referred to as 'blanket' ones) are not necessarily bad things from a human rights law perspective; and indeed, a system can become arbitrary because it relies on the vagaries of individual assessment. It can also cause a state to flounder in the discharge of its positive obligations to protect rights, as too much is left to individual judgement and institutional functioning.

[76] Hence, in *Evans v United Kingdom* (2007) 22 BHRC 190 (§89), the Grand Chamber of the Strasbourg court recognised that such general measures could serve "to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis." The Grand Chamber followed in *Animal Defenders International v United Kingdom* by reference to citation of extensive previous case law to provide:

(i) "[A] State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases" (§106).

(ii) Relevant to such decisions is the "risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess" (§108).

(iii) That can be especially so where such measures are "a more feasible means of achieving a legitimate aim than a provision allowing case-by-case examination, where the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay, as well as discrimination and arbitrariness" (§108).

(iv) While the application of the general measure to the facts of a case "remains … illustrative of its impact in practice and thus material to its proportionality ... the more convincing the general justifications for the general measure are the less importance … will attach to its impact in the particular case" (§109).

(v) The "central question" as regard such measures "was not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (§110).

[77] From the foregoing I am therefore bound to approach the third and fourth *Bank Mellat* criteria in this particular context on the basis that unless there is some reason to object to the blanket and indiscriminate nature of a general measure (as the Supreme Court did in *R (F (A Child) v Secretary of State* for lifetime notification requirements), or its otherwise human rights obtuse nature (which can always potentially happen), then Parliament's choices can be taken to constitute an appropriate designation of where the reasonable least intrusive and fair balance should be struck. Put another way, although not the *last word* as regards independent judicial oversight, the legislative choices must be taken to have *written proportionality in*; and especially so when what is at stake is interfering with rights to protect rights of others where significant positive obligations upon the state are in play.

[78] For my part I take Lady Hale's observations in *Tigere* at §36 to remain that there may be legislative choices that are unjustifiably indiscriminate in their generality that will require human rights correction, just as lines may be drawn by legislative schemes that must be respected because the nature of the scheme requires such lines, even though there may be hard cases which sit on the wrong side of them. *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 41 is a good example of the former. Kerr J's analysis of the Sexual Offenders Act 1997 is a good example of the latter.

[79] Here I find that the scheme contained in Part 2 SOA constitutes Parliament's assessment as to the necessary and proportionate design of an important measure that has been carefully built and evolved over time to prevent sexual offending, especially in the private domain. It has been developed to discharge the state's positive obligations to protect persons in vulnerable situations and potential victims. It is part of a national and global human rights endeavour in this area.

[80] To be practical and effective, the scheme must rely on a degree of broad pre-defined categorisation and automaticity to viably achieve the scale of supervision and deterrence that it aspires to. The generality of the measures avoids arbitrariness, uncertainty, delay, and discrimination, and enables resources to be focussed on protection rather than qualifying applications and reviews.

[81] Although dealing with a different context of retaining records of 'spent' convictions and cautions for the purposes of vetting for certain types of employment, I would particularly emphasise what was said by Lord Sumption in *P v Secretary of State* at §55:

> "Although it may be possible to abandon category-based disclosure in favour of a system which allowed for the examination of the facts of particular cases, there would be a cost in terms of protection of children and vulnerable adults, foreseeability of outcome by candidates, consistency of treatment, practicality of application, and delay and expense...Once it is accepted that a category-based scheme of disclosure is justifiable, it must inevitably follow that some candidates will find themselves in a category apparently more serious than the facts of their particular case really warrant …"

[82] Those observations are relevant to whether, as the applicant principally submitted, a reasonably less intrusive approach would have been either for magistrates to impose enhanced bail conditions pending appeal, or for the police to apply for a SOPO. That submission inverts the "central question" as defined at §110 in *Animal Rights Defenders*, because it scales the system down into individualised assessment and applications. Here, there cannot reasonably be half measures, for if this applicant requires individual treatment for his de novo appeal, why not for others in different hard case contexts? If accepted, the argument comprehensively unravels the system.

[83] It also overlooks the rationale of making the requirement automatic and for extended periods without the right to appeal or review. In *Main v Scottish Ministers* 2015 SC 639 [2015] CSIH 41 §63 the Court of Session in Scotland characterised this as a "precautionary principle" holding that the timescales in Part 2 are based on "the uncertainties involved in risk assessment" and so "allow [for] consideration of the offenders behaviour over a substantial period while living in the community." That justification for time scales in the *Main* case concerning the 15-year period for review inserted after *F (A Child)* was adopted by the Divisional Court in England & Wales in *Halabi v Crown Court at Southwark* [2020] EWHC 1053 (Admin) [2020] 1 WLR 3830 §61 and I adopt it here in relation to the seven-year time scale that applied to this applicant.

[84] Having reached those decisions independently, I would defer to Parliament in its discrete decisions as to the precise threshold for sentencing of a term of imprisonment of six months or less that produced the fixed seven-year period without review, but not before. If it were reasonably arguable that it could be less; and knowing that there will be hard cases arising from the fact that it cannot be, it is not for a court to act upon such claims where the lines chosen were within the reasonable range that the legislature, as primary decision maker, might select (*Animal Rights Defenders* §110; and see, to similar effect, *Main* §53). Moreover, out of respect to him I have outlined the anxieties that the applicant experienced in this case. It is also permitted to consider individual hardship as illustrative of the impact of a measure in practice and thus material to its proportionality (*Animal Defenders*

§108). However, I must equally emphasise that the scheme operates impersonally once the thresholds are met. The applicant may therefore have felt individually penalised, but to the extent that the requirements operate as part of a generalised preventive system for the good of society based on pre-determined lines, this was not a penalty in fact, or law.

[85] I would only add that although notification requirements may be a hardship for those who live under them, they could also be harder, in that much of the required information is reasonably mundane and most, but not all of it, could be otherwise collected and stored by the police. For those who have been convicted of criminal offences, it will remain within the discretion of the police to visit but not enter their known addresses, run checks on them, and within certain confines conduct surveillance upon them. Part 2 creates no automatic powers of entry, search or additional disclosure requirements unless specified by secondary legislation. It therefore coordinates much of what could be done by other means but enables it to be done in an efficient fashion that also functions as a deterrent. Undeniably, the SOA has introduced a system that interferes more substantially into private life than its predecessor, but its critical innovations focus upon the protection of children and from those who reside or stay in multiple places – i.e., an obvious and well-known situation by which abuse can be perpetrated under the cover of privacy.

[86] Overall, I do not find that the differences are such as to alter the view of the proportionality of the previous system as expressed in *Gallagher* in this jurisdiction and the Strasbourg Court in *Adamson* and the later decision of *Massey v United Kingdom*, App. No. 14399/02, 25 March 2002, p. 12. My conclusion is supported by the analysis of features of Part 2 recently conducted in England and in Scotland. Those judgments confirm that this is "a single scheme for the protection of vulnerable persons from sex offenders and proportionality should be considered in relation to the scheme as a whole" (*Halabi* §75); and its general measures fall to be analysed by the above referred to dicta in *Animal Rights Defenders* (*Main* at §§38, 54-55 and 65 adopted in *Halabi* at §§71-73). Moreover, Lord Phillips' declaration of incompatibility concerning lifetime requirements in *F (A Child)* was decided on a "narrow" basis because there was no review at all. Otherwise, the judgment takes it as given that the scheme would be article 8 compatible notwithstanding that "the features of the notification requirements that have the potential to be potentially onerous" (§§41). That is not least because the human rights endeavour behind the scheme is so important (§§24-26, 59, 64).

[87] The amended scheme that now allows for review for those initially subject to indefinite requirements after 15 years, but not before, was upheld as proportionate in *Main* and *Halabi*. It was also the subject of the admissibility decision of the Strasbourg Court in *Minter v United Kingdom* 65 EHRR SE6 that held the provisions of the SOA to be necessary "in view of its findings in *Massey* and *Adamson*" and having regard to the recently added review mechanism (§56). In doing so it affirmed the importance of such schemes "in view both of the gravity of harm which may be caused to victims of sexual offences and the duty that States have under the

Convention to take certain measures to protect individuals from such grave forms of interference" (§52).

[88] For all those reasons I find the scheme to be proportionate in the circumstances in which it arose for consideration in this claim. As I understand it, no other domestic or Strasbourg case has decided the challenge that the applicant has brought, which is effectively a challenge to the other end of the regime, where neither his conviction, nor sentence would characterise him as the more serious of offenders, even though the offence is serious enough that its commission could cause damage to vulnerable persons and potential future victims. Much of what is said about the functioning of the system in the caselaw cited to me is relevant to this case. It is also part of the precautionary principle that one offence can lead to another. However, as a matter of law, if a court cannot find in any aspect of the Strasbourg case law such features of its general principles or approach that could reasonably avail in the applicant's favour were the complaint to be considered on point before the international court, then the domestic court cannot do what it apprehends Strasbourg would not. Mr Lavery's case relied heavily on article 6(2) to suggest that there was such a principle, that once there was a breach of presumption of innocence then the scheme could not be article 8 proportionate. However, once that argument is dismissed as I have found it right to do at §56 (above), then the guidance of Lord Reed in *R (AB) v Secretary of State for Justice,* especially at §59, is binding. For that additional reason, I must also refuse this part of the claim.

[89] Accordingly, I find there was no violation of the applicant's article 8 rights as no incompatibility arose out of any of the matters complained of. Having reached that conclusion I make no further findings about the making of declarations pursuant to section 4 of the HRA, upon what evidential threshold, and the interrelationship between remedies under section 8 of the HRA and the common law discretionary remedy of declaratory relief. These are important issues, some of which are dealt with in *JR123.* It is better for them to be further resolved after full argument and in a case where their outcome would matter.

Conclusion

[90] For all the above reasons the claim must be dismissed. I am grateful to the parties for their submissions orally and in writing.