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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **11/09/2019**

2015 No. 32860

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

EAMON FOLEY

Before: Treacy LJ, Sir Paul Girvan & Sir Ronald Weatherup

TREACY LJ ***(delivering the judgment of the Court)***

Introduction

[1] Following a contested jury trial at Dungannon County Court the applicant was convicted on 17 May 2017 of failing to make an annual re-notification contrary to section 91(i)(a) of the Sexual Offences Act 2003 ("the 2003 Act"). A determinate custodial sentence of one year (6 months custody/6 months licence) was imposed. The applicant sought leave to appeal against his conviction only. Leave was refused by the single judge Mr Justice Colton on 4 October 2017.

[2] The Applicant renews his application before this court. The applicant was not legally represented during his trial or before this court and he has submitted in support of his appeal a series of handwritten documents containing his arguments which he has supplemented with his oral submissions.

[3] In the present case the grounds of appeal have not been particularised in the manner required and there is no proper skeleton argument clearly identifying the issues.

Factual Background

[4] The particulars of the offence of which the applicant was convicted are that on 1 February 2015 being a person to whom the notice requirement of section 80 of the

2003 Act applied, he failed without reasonable excuse to comply with section 85(1) of the 2003 Act because he did not make an annual re-notification of information set out in section 83(5) of the 2003 Act including his name, home address and date of birth.

[5] At his trial the prosecution successfully contended that as a result of his conviction for rape on 12 January 2001 the applicant is subject to the notification requirements under the 2003 Act indefinitely. [He is also subject to the conditions of a Sexual Offences Prevention Order dated 31 January 2008]. Consequently, the Court accepted that the applicant is required to report to a police station and notify certain information at least once per year in accordance with section 85 of the 2003 Act.

[6] The court requested submissions on the following matters:

(a) whether the provisions of section 91(1)(a) ("section 91") of the Sexual Offences Act 2003 ("the 2003 Act") are compatible with the European Convention on Human Rights ("the Convention") and if not, whether the court ought to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 ("the first question");

(b) whether a determination that section 91 is not compatible with the Convention rights of the Applicant may afford a "reasonable excuse" as provided for by section 91 of the Act for non-compliance with the requirements of that section, and a defence to the charge ("the second question"); and

(c) if not, whether the sentencing judge may have regard to such declaration of incompatibility in determining the appropriate sentence for the offence ("the third question").

First Question - Is Section 91 Convention Compliant?

[7] Section 91(1)(a) provides that a person commits an offence if he fails without reasonable excuse to comply with the requirements of a number of provisions including section 85(1).

[8] Section 85(1) provides for periodic notifications and stipulates that a relevant offender must, within 1 year after each event within sub-section (2), notify to the police the information set out in section 83(5). There is a proviso to that requirement which has no application to the present case.

[9] By reason of the applicant's conviction for rape in 2001, he was required to sign the Sex Offenders Register pursuant to the Sex Offenders Act 1997 ("the 1997 Act"), and accordingly was subject to the annual notification requirements pursuant to Part 1 of the 1997 Act.

[10] Section 81 of the 2003 Act provides that persons formerly subject to Part 1 of the 1997 Act are subject to the notification requirements of Part 2 of the 2003 Act from the date of its commencement (in May 2004).

[11] We agree that section 91 applies to the Applicant by virtue of the provisions of section 81(1)(a) of the Act which, so far as is relevant, provides:

> **"81 Persons formerly subject to Part 1 of the Sex Offenders Act 1997**
>
> (1) A person is, from the commencement of this Part until the end of the notification period, subject to the notification requirements of this Part if, before the commencement of this Part—
>
> (a) he was convicted of an offence listed in Schedule 3;"

[12] The Applicant as a person convicted of rape and formerly subject by reason of that conviction to the requirements of Part 1 of the 1997 Act became subject to the notification requirements of Part 2 of the 2003 Act upon the date of the commencement of Part 2 in 2004.

[13] The Applicant is subject to the notification requirements under section 91 because:

(i) he was convicted of rape - an offence listed in schedule 3;
(ii) that conviction occurred in 2001 - before the coming into force of that Part of the Act in 2004;
(iii) pursuant to the table set out in section 82, he received a sentence of 16 years; being greater than 30 months, the notification period was "an indefinite period".

[14] The notification requirements in force at the time of his conviction, by virtue of section 2 of the Sex Offenders Act 1997, were as follows:

> **"2. Effect of notification requirements**
>
> (1) A person who is subject to the notification requirements of this Part shall, before the end of the period of 14 days beginning with the relevant date or, if later, the commencement of this Part, notify to the police the following information, namely—
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> (a) his name and, where he also uses one or more other names, each of those names; and
>
> (b) his home address.

(2) A person who is subject to those requirements shall also, before the end of the period of 14 days beginning with—

(a) his using a name which has not been notified to the police under this section;

(b) any change of his home address; or

(c) his having resided or stayed, for a qualifying period, at any premises in the United Kingdom the address of which has not been notified to the police under this section,

notify that name, the effect of that change or, as the case may be, the address of those premises to the police.

(3) A notification given to the police by any person shall not be regarded as complying with subsection (1) or (2) above unless it also states—

(a) his date of birth;

(b) his name on the relevant date and, where he used one or more other names on that date, each of those names; and

(c) his home address on that date.

(4) For the purpose of determining any period for the purposes of subsection (1) or (2) above, there shall be disregarded any time when the person in question—

(a) is remanded in or committed to custody by an order of a court;

(b) is serving a sentence of imprisonment or a term of service detention;

(c) is detained in a hospital; or

(d) is outside the United Kingdom.

(5) A person may give a notification under this section—

(a) by attending at any police station in his local police area and giving an oral notification to any police officer, or to any person authorised for the purpose by the officer in charge of the station; or

(b) by sending a written notification to any such police station.

(6) Any notification under this section shall be acknowledged; and an acknowledgment under this subsection shall be in writing and in such form as the Secretary of State may direct.

(7) In this section—

- "home address", in relation to any person, means the address of his home, that is to say, his sole or main residence in the United Kingdom or, where he has no such residence, premises in the United Kingdom which he regularly visits;
- "local police area", in relation to any person, means the police area in which his home is situated;
- "qualifying period" means—

(a) a period of 14 days; or

(b) two or more periods, in any period of 12 months, which (taken together) amount to 14 days.

(8) The definition of "local police area" in subsection (7) above shall apply as if Northern Ireland were a police area."

[15] The requirement under the 1997 Act related to the Applicant's name, date of birth and address. He would also have had to notify of change of name, change of address or staying at any addresses at which he stayed for 14 days or more. Notification could have been orally at a police station, or in writing.

[16] Following his conviction, "the relevant date" under section 1(8) of the 1997 Act was the date of his conviction, however by virtue of sub-section 4 any period in custody is disregarded. The applicant was in custody until 2007 and thus the initial notification requirement could not be effected until then.

[17] During the period the Applicant was in custody serving his sentence, Parliament replaced the requirements of the 1997 Act with a new regime under the Sexual Offences Act 2003. Upon release, in 2007 the Applicant was required to make an initial notification under the 2003 Act – the time period for notification had been reduced from 14 days to 3 days.

[18] The notification requirements also contained additional requirements not part of the requirements in the 1997 Act. Those to which he became subject by virtue of

the 2003 Act (as relevant to the applicant) are set out in sections 83, 84, 85, 85A and 86 of 2003 Act.

[19] The notification requirements applicable by virtue of the 2003 Act now include details of National Insurance number, passport details, the period of residence at any other address has been reduced from 14 days to 7 days; notification must now be made annually, additionally notification is required if the Applicant will be absent from his home for more than three days.

[20] The prosecution recognises that the number of matters in respect of which notification is required has increased, and the requirements overall are more extensive than heretofore. Furthermore, the penalty for non-compliance with the requirements has been increased from 6 months maximum to a potential 5 year maximum sentence on Indictment.

[21] The issue arises as to whether the imposition of these more onerous requirements by the 2003 Act – on an offender such as the applicant who was convicted of a crime before the coming into force of the 2003 Act requirements – is Convention compliant. Article 7 of the Convention provides as follows:

> "Article 7
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> No punishment without law
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> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[22] The issue came before the European Court in Ibbottson [1998] ECHR 119 in which the applicant upon conviction in 1996 received three and a half years imprisonment for offences of possession of obscene and indecent material. On 1 September 1997 the Sex Offenders Act introduced registration requirements which extended to those "serving a sentence of imprisonment… in respect of sexual offences to which this Part applies". By this stage the Applicant had been released from the custodial element of his sentence (although his sentence had not expired)

and the issue was whether the registration requirements constituted a breach of Article 7.

[23] The Court held that they did not. Whilst recognising that a "penalty" under Article 7 is an autonomous term to be interpreted by the European Court within the meaning of Article 7 the Court held that given in particular the way in which the measures imposed by the Act operate completely separately from the ordinary sentencing procedures, and the fact that the measures do not, ultimately, require more than mere registration, it cannot be said that the measures imposed on the applicant amounted to a "penalty" within the meaning of Article 7 of the Convention.

[24] The prosecution referred the Court to the similarities between the situation in Ibbotson and this case and submitted that in both cases, the applicant was already convicted by the time the legislative requirements came into force. It is clear that the registration requirements to which the Applicant is now exposed are both more extensive and failure to adhere to them carry a greater maximum penalty. We agree that the registration requirements are not in themselves a penalty under Article 7 and further, that the registration requirements under the Act are not any more part of the sentencing regime/procedure, than were the registration requirements of the 1997 Act.

[25] In Adamson [1999] ECHR 192 the applicant had also been convicted of crime before the coming into force of the 1997 Act. The Court in Adamson approached the issue in the same way as Ibbotson stating:

> "The Court notes that the measures complained of are imposed as a matter of law, with no additional procedure, following conviction for a sexual offence. Beyond the requirement to register, no further procedures are involved in their implementation… In the case of the Act, independent criminal proceedings would have to be brought against a defaulter, in which his degree of culpability in defaulting would be taken into account in sentencing."

[26] In Adamson the Court noted the situation to be different to that found by the Court in Welch [1995] Application No.17440/90 in which it held that the confiscation scheme under the Drug Trafficking Offences Act 1986 which required the applicant to pay £66,914 or face 2 years imprisonment in default, amounted to a penalty under the terms of Article 7. The court in Adamson held that Welch could be distinguished on the grounds that the default period was set as part of the sentencing stage of the process whereas in Adamson (or any defaulter under the Sex Offenders Act) independent criminal proceedings would have to be brought against a defaulter, in

which his degree of culpability in defaulting would be taken into account in sentencing.

[27] We agree with the prosecution that there is a very significant difference between the situation in Welch, and the situation of this applicant. Whilst the notification requirements to which this applicant is subject are now more extensive it remains the case that they are obligations of notification. The notification requirements arise by operation of law and do not form part of the sentencing process. The Trial Judge has no role to play in their imposition. This obligation to notify does not constitute a penalty within the meaning of Article 7. As noted in Adamson, independent criminal proceedings are necessary in the event of a default, where if convicted, a penalty and the extent of the penalty will be fixed by the Trial Judge in the light of all relevant circumstances.

[28] In Gardel Application No. 16428/05 the Court held that similar provisions under French law did not violate Article 7:

> "42. As to the legal characterisation in domestic law, the Court observes that according to the Constitutional Council the measure in question constitutes a "public-order measure" rather than a sanction and that, in accordance with the unequivocal provisions of Article 706-53-1 of the CCP, the Sex Offenders Register is designed to prevent persons who have committed sexual offences or violent crimes from reoffending and to ensure that they can be identified and traced (see paragraphs 18 and 19 above).
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> 43. As regards the purpose and nature of the measure complained of, the Court notes that the applicant regarded the fresh obligation imposed on him as punitive. However, the Court considers that the main aim of that obligation was to prevent reoffending. In that regard, it considers that the fact that a convicted offender's address is known to the police or gendarmerie and the judicial authorities by virtue of his or her inclusion in the Sex Offenders Register constitutes a deterrent and facilitates police investigations. The obligation arising out of placement on the register therefore has a preventive and deterrent purpose and cannot be considered to be punitive in nature or as constituting a sanction.
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> 44. Furthermore, the Court notes that, while the applicant faces a two-year prison sentence and a fine

> of 30,000 euros (EUR) if he fails to comply with that obligation, another set of proceedings, completely independent of the proceedings leading to his conviction on 30 October 2003, would then have to be initiated, during which the competent court could assess whether the failure to comply was culpable (see, conversely, Welch, cited above, § 14).
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> 45. Lastly, as regards the severity of the measure, the Court reiterates that this is not decisive in itself (see Welch, cited above, § 32). It considers, in any event, that the obligation to provide proof of address every six months and to declare any change of address within fifteen days at the latest, albeit for a period of thirty years, is not sufficiently severe to amount to a "penalty".
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> 46. In the light of all these considerations, the Court is of the view that placement on the Sex Offenders Register and the obligations arising out of it do not amount to a "penalty" within the meaning of Article 7 § 1 of the Convention and should be considered as a preventive measure to which the principle set forth in that provision, namely that the law should not have retrospective effect, does not apply.
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> 47. Accordingly, the applicant's complaint under Article 7 of the Convention must be rejected as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4 of the Convention."

Conclusion on the first question

[29] The primary focus of the first question was whether Section 91 of the 2003 Act infringed Article 7 of the Convention. It is clear from the jurisprudence referred to that the imposition of the enhanced notification requirements does not constitute a penalty within the meaning of Article 7. The provisions reflect the need for an effective scheme for preventative and deterrent purposes rather than punitive penalty. In this respect see Gallagher [2003] NIQB 26 at paragraphs [24] and [25].

Would a Declaration of Non-Compatibility amount to a "reasonable excuse" under Article 91?

[30] Since this court has concluded that Section 91 of the 2003 Act is Convention compliant this question does not arise for determination. However out of deference to the parties we note the different possible approaches to this interesting question had it arisen on the facts of this case. In the event that the court had concluded that the 2003 Act was not Convention compliant, the prosecution submitted that the applicant is still guilty of the offence by virtue of the provisions of section 4(6) of the Human Rights Act 1998:

> "(6) A declaration under this section ("a declaration of incompatibility")—
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> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
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> (b) is not binding on the parties to the proceedings in which it is made."

[31] Since the validity of the 2003 Act is not affected by any such declaration of incompatibility, the prosecution argued that it cannot be the case that it meets the sole test – namely "is the conviction unsafe "- applicable under the Criminal Appeal (NI) Act 1980 (c.47).

> **"Grounds for allowing appeal against conviction**
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> (1) Subject to the provisions of this Act, the Court of Appeal-
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> (a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and
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> (b) shall dismiss such an appeal in any other case.
>
> (2) If the Court allows an appeal against conviction it shall quash the conviction.
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> (3) An order of the Court quashing a conviction shall, except when under section 6 of this Act the appellant is ordered to be retried, operate as a direction to the chief clerk acting for the court of trial to enter, instead of the record of Conviction, a judgment and verdict of acquittal."

[32] The defence of "reasonable excuse" is provided for in the Act:

> **"91 Offences relating to notification**

(1) A person commits an offence if he–

(a) fails, without reasonable excuse, to comply with section 83(1), 84(1), 84(4)(b), 85(1), 85A(2) or (6), 87(4) or 89(2)(b) or any requirement imposed by regulations made under section 86(1); or

(b) notifies to the police, in purported compliance with section 83(1), 84(1), 85(1) or 85A(2) or (6) or any requirement imposed by regulations made under section 86(1), any information which he knows to be false."

[33] The prosecution relied on the fact that the applicant did not seek to argue any reasonable excuse. The question therefore arises whether it is possible for an excuse to afford a defence if it did not operate as a reason why the applicant chose not to act. It was submitted that this defence could be engaged at two levels – either the applicant offers an excuse which the prosecution fails to demonstrate was not a reasonable excuse, or the court objectively identifies a matter that could potentially afford an excuse – and again, the prosecution fails to prove it is not a reasonable excuse.

[34] The prosecution submitted that it can never afford a reasonable excuse to fail to comply with an obligation imposed by law so long as that law remains valid. By virtue of section 4(6) of the Human Rights Act, the notification provisions remain legally binding notwithstanding any declaration of incompatibility and therefore such declaration cannot act as a defence to non-compliance with a lawful enactment.

[35] As noted above it is unnecessary to decide this interesting point.

May a Sentencing Court take into account a finding that a valid legislative provision offends a provision of the European Convention on Human Rights?

[36] Again, this interesting question does not arise in this case since the court has already concluded that the impugned provision does not offend the Convention. Again, out of deference to the parties we record below, without deciding, the submissions made by the prosecution.

[37] In this case the maximum penalty on conviction is 5 years imprisonment. It is clear from the fact that such a sentence is prescribed that parliament considered the failure to adhere to the notification requirements a serious matter.

[38] The prosecution contended that even if the court concluded that the notification requirements under the Sexual Offences Act 2003 are not Convention

compliant, they remain nevertheless lawfully required of sex offenders, and courts dealing with such offenders are obliged to follow ordinary sentencing principles unless and until parliament alters the law to make it Convention compliant.

Further Grounds of Appeal

[39] We can deal shortly with the other grounds of appeal raised by the applicant who contended:

(i) That the law imposing the annual re-notification requirement did not apply to him;

(ii) That the jury selection process was flawed;

(iii) That he was "rushed" and had insufficient time to prepare his defence;

(iv) That the prosecution, unlawfully, failed to call or tender a witness called Robert Curry;

(v) That the judge wrongly excluded as inadmissible the advices and opinion he had received from two solicitors;

(vi) That the trial judge was partisan/biased and that the summing up was biased, prejudiced and unfair to him.

[40] In relation to the first ground that the applicant was not legally obliged to make an annual re-notification we consider that the point is without substance for the reasons earlier set out.

[41] In relation to all the other grounds we are in full agreement with the Single Judge, for the reasons given in his Ruling, that the other reasons relied upon are wholly devoid of merit. And, for the reasons given above, we are satisfied that no issue of Convention incompatibility arises. Accordingly, the application for leave is refused.