Judicial Communications Office

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COURT DISMISSES CHALLENGE TO SEX OFFENDER NOTIFICATION REQUIREMENTS

Summary of Judgment

The Divisional Court[1] today dismissed a challenge to the sexual offences notification requirements and held that the current arrangements are compatible with the ECHR.

Stuart Lee Johnston ("the applicant") was convicted on 11 October 1996 of the rape and indecent assault of a female. He was sentenced to 12 years' imprisonment in respect of the rape and 6 years in respect of the indecent assault with the sentences to run concurrently. When he was released from custody on 21 November 2001, he was subject to the notification requirements under the Sexual Offences Act 2003 ("the 2003 Act"). Section 82 of the Act provided that a person imprisoned for a term of 30 months or more was subject to notification requirements for an indefinite period. The applicant challenged the 2003 Act, and subsequent amending legislation, as being incompatible with the European Convention on Human Rights and outside the legislative competence of the Northern Ireland Assembly.

Legislative Framework

In April 2010, the UK Supreme Court decided that the existing indefinite notification arrangements were incompatible with Article 8 ECHR as they did not contain any mechanism for review of the justification for continuing the requirements in individual cases. The Criminal Justice Act (Northern Ireland) 2013 ("the 2013 Act") inserted a new Schedule 3A into the 2003 Act to provide such a mechanism.

The Department of Justice ("the Department") submitted evidence to the Divisional Court about the steps it took to introduce the review mechanism. The initial policy proposals, which were submitted to the Minister of Justice on 9 December 2010, described how the preferred option for Northern Ireland departed from the proposed process for England and Wates at that time in that it provided for the applicant to have a right of access to a court in the event of a police decision not to remove the requirements. The Minister agreed with the proposal but, following consultation with the Office of Legislative Counsel and the Attorney General, the Department did not include a right of appeal to the Divisional Court in light of a conclusion that it was unnecessary for the purposes of compliance with the ECHR. Draft clauses were presented to the Assembly on 23 February 2011 and discussed by the Justice Committee the following day. There was considerable debate in the Assembly on the review clauses with the parties being split in their view as to whether or not there should be a court review. The DUP lodged a petition of concern as they objected to the inclusion of an application for review to the Crown Court as providing "a second bite of the cherry and an example of being soft on sex offenders".

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[1] The Divisional Court panel was Lord Justice Deeny, Lord Justice Treacy and Mrs Justice Keegan. Mrs Justice Keegan delivered the judgment of the Court.

Following this unsuccessful attempt to legislate, the Department published a further consultation paper in July 2011. The subsequent draft clauses did not contain a right of appeal to the Divisional Court and this issue did not figure in the ensuing scrutiny by the Justice Committee or the Assembly. The new provisions were commenced on 1 March 2014.

Schedule 3A to the 2013 Act provides for an offender to apply to the Chief Constable to discharge him from the notification requirements at the end of an initial review period of 8 years (if the offender was under the age of 18 when made subject to the initial notification) or 15 years (if over the age of 18). The Chief Constable will discharge the notification requirements unless he is satisfied that the offender poses a risk of sexual harm and that the risk is such as to justify the notification requirements continuing. Schedule 3A paragraph 3(2) sets out the factors that the Chief Constable must take into account when making his decision. If the Chief Constable decides not to discharge the notification requirements, the offender may apply to the Crown Court for an order discharging him from the notification requirements. There is no review of the Crown Court's decision. If, however, at any time after the end of 8 years (or 4 years if the offender was under 18) from the date of service of a notice of refusal to discharge the notification requirements, the offender may make a further application to the Chief Constable.

Arguments of the Parties

Counsel for the applicant contended that the Crown Court judge had made an error in his decision making which affected his Article 8 rights and as such he should have a right of appeal in order to correct this. Counsel for the Department questioned the legitimacy of the challenge and said it was effectively a judicial review of a Crown Court decision which was impermissible by virtue of section 1 of the Judicature (Northern Ireland) Act 1978. He said this was simply a case where the applicant disagreed with the result and that there was no obligation to provide an appeal in these circumstances. The Attorney General submitted that the 2013 Act provides a procedure that was not available beforehand, namely a review, and as such this cannot be contrary to any rights protected by the ECHR as the Act is beneficent to the applicant. He further contended that section 6(2)(c) of the Northern Ireland Act 1998 ("the 1998 Act") states that a provision of an act of the Northern Ireland Assembly is not law only if that provision is itself incompatible with the ECHR – it does not address or condemn inaction or omission.

Consideration

The Divisional Court said the issue of mandatory notification for sex offenders is one of high public importance. It commented that while the applicant argued that the regime breaches his Article 6 and 8 rights and is also discriminatory in contravention of Article 14, the issue in this case was not the loss of liberty but the ongoing imposition of notification requirements directed to the preservation of public safety and the reduction of risk from a repeat offender. The Court said it was a settled principle that the Crown Court is not amenable to judicial review and that it would therefore proceed to examine the core issue of whether the current statutory notification regime offends ECHR rights.

The Court firstly considered the reasoning of the UK Supreme Court which led to a change in the law. In 2010, the Supreme Court had decided that a scheme which imposed notification requirements for life without any review was incompatible with the ECHR[2]. It commented that

[2] *R (F a Child) v Secretary of State for the Home Department* [2011] 1 AC 331

there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that continuance of the notification requirements is unjustified. It held that it was open to the legislature to impose an appropriately high threshold for review.

The Divisional Court noted that the 2013 Act, which was enacted to regularise the disproportionate interference identified by the Supreme Court, provided for a review of notification requirements both by the Chief Constable and by a Crown Court judge. The core question was therefore whether the legislation is compatible with Convention rights. To answer that, the Court considered section 6 of the 1998 Act which is the governing legislation in relation to whether a provision contained in an Act of the Assembly is outside its legislative competence. It firstly noted that the Department had "clearly and comprehensively" consulted on the provisions to be contained in the 2013 Act commenting that it was clear there was a lack of consensus about the issue of a review of notification requirements:

> "In our view it is clear that full consideration was given by the Department as to the compatibility of the legislation and in particular consideration was given as to how the Supreme Court judgment could be respected within the legislative structure. We agree with the assessment that there is no breach of Article 8."

The Court then considered the argument based upon Article 14 discrimination and the difference of treatment between jurisdictions. It noted that it does not follow that because one jurisdiction follows a particular course that the legislative structure in another jurisdiction that takes a difference course falls foul of human rights requirements. The Court observed that whilst an applicant in Great Britain can apply to the Magistrates' Court for review, in this jurisdiction the applicant has the benefit of a review by a higher tier of court and an experienced Crown Court judge. It said that, in its view, this accords with the report of the UK Parliament's Joint Committee on Human Rights (October 2011) which considered that an appropriate tribunal in these circumstances should be a court of "sufficient seniority such as the High Court or the Crown Court". The Court further repeated the well-established principle that Article 6(1) of the ECHR does not guarantee a right of appeal from a decision of a court of first instance:

> "In our view it is significant that this issue was debated at length by the legislature after which the legislative body settled upon a review by the Chief Constable with one further court review. Taking into account the margin of appreciation afforded to the State in this regard and the subject matter we can see no breach of Article 6(1) by virtue of the chosen appeal route. Having considered all of the above we consider that the [2013] Act itself is compliant with Convention rights and as such we do not accede to the applicant's primary case to strike down the legislation or declare the legislation incompatible."

In concluding, the Divisional Court made a number of comments on the facts of this individual case which it considered may be of general application and assistance to practitioners dealing with this type of case under the relatively new regime in the future. The Court firstly commented that in a case of this nature, the applicant should be afforded the right to test the evidence and to give evidence before the Crown Court. It considered that reference to a change of circumstances is appropriate as a tool to assist the judge in applying the statutory test and that the judge should ask the applicant what has changed between this application and the past circumstances. The Court also highlighted that there is strong European jurisprudence to the effect that it is not necessary for a judge to record each and every part of his or her reasoning but added that it was appropriate in this type of case that the judge gave a written ruling which set out the essential elements of the decision.

The Court said it did not discern any injustice that required correction in this case. It noted that the applicant was afforded a full and detailed hearing before the judge who had all of the relevant information before him. It said it was not sufficient to ground a case upon the fact that the judge did not specifically mention lack of recent convictions or that he referred to the fact that the applicant *is* non-cooperative rather than *was* non-co-operative. In the Court's view these arguments were weak:

> "It is our clear view that the applicant has been afforded a Convention compliant procedure but he simply does not agree with the result. As such we do not consider that any relief is merited in this case. Accordingly, the application for judicial review is dismissed."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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