Neutral Citation No: [2019] NIQB 47	*Ref:* KEE10949
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 10/05/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

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IN THE MATTER OF AN APPLICATION BY STUART LEE JOHNSTON FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT (NORTHERN IRELAND) 2013

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Before: Deeny LJ, Treacy LJ and Keegan J

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KEEGAN J (delivering the judgment of the court)

Introduction

[1] The applicant in this case is a convicted person who is subject to indefinite notification requirements under Part II of the Sexual Offences Act 2003 as amended by the Criminal Justice Act (Northern Ireland) 2013. Pursuant to the leave of this Court granted on 15 February 2019 the applicant seeks the following relief, namely:

(i) If Schedule 3A to the Sexual Offences Act 2003 (as inserted by section 1 in Schedule 1 of the Criminal Justice Act (Northern Ireland) 2013, cannot be read and given effect in a way that is compatible with Convention rights as appears above, a declaration that section 1 in Schedule 1 of the Criminal Justice Act (Northern Ireland) 2013 is outside the legislative competence of the Northern Ireland Assembly and therefore "not law" under section 6 of the Northern Ireland Act 1998.

(ii) An order of certiorari to bring up to this Honourable Court and quash section 1 and Schedule 1 of the Criminal Justice Act (Northern Ireland) 2013.

(iii) If section 1 and Schedule 1 of the Criminal Justice Act (Northern Ireland) 2013, cannot be read and given effect in a way that is compatible with

Convention rights, a declaration that the failure to provide a right of appeal from the Crown Court in respect of the review procedure created by section 1 and Schedule 1 of the Criminal Justice Act (Northern Ireland) 2013 is not compatible with Article 6 of the ECHR pursuant to section 4 of the Human Rights Act 1998.

(iv) Damages for breach of the applicant's rights under the ECHR.

(v) Such further or other relief as this Honourable Court shall deem met.

(vi) All necessary and consequential direction.

(vii) Costs.

[2] The applicant was represented by Mr McDowell QC and Mr Stuart Magee BL. Dr McGleenan QC and Mr Philip McAteer BL appeared on behalf of the respondent, the Department of Justice. The Attorney General and Mrs Louise Maguire also appeared pursuant to the devolution notice issued in this case given the challenge to the legislation. We are grateful to all counsel for their helpful written and oral submissions.

Factual Background

[3] On 11 October 1996 the applicant was convicted after a trial by jury of rape and indecent assault of a female (along with driving whilst disqualified and driving without insurance). Exhibited to his affidavit of 25 September 2018 are the sentencing remarks of the learned trial judge. The applicant was sentenced to 12 years' imprisonment in respect of the rape, 6 years in respect of the indecent assault, 12 months in respect of driving whilst disqualified and he received a £200 fine in respect of driving without insurance. These sentences were made concurrent with one another. At the time of the offence on 23 September 1995 the applicant was 20 years of age and the victim was 17. In his sentencing remarks the learned judge, having dealt with the facts of the case and the circumstances stated as follows:

> "I have no doubt from your record and your behaviour on this occasion that not only have you a strong sexual appetite which you cannot control but you are a dangerous and violent young man."

[4] The applicant was released from custody on 21 November 2001. In his affidavit the applicant confirms that he was informed by police that he was subject to notification requirements under the relevant legislation at that time. This meant that he was required to notify to police indefinitely his date of birth, name, home address, bank accounts and credit cards, passport and identification documents held. In his affidavit the applicant accepts that he did not initially notify police until October 2002 which he says was due to the difficulty he had in securing permanent

accommodation. As a result of this conduct the applicant was arrested for the offence of failure to notify and on 26 May 2004 he was bound over to keep the peace and be of good behaviour. Since then the applicant has complied with the notification requirements.

[5] In his affidavit the applicant cites the fact that prior to the index offences he was previously convicted of indecent assault on a male in and about 14 June 1988 and unlawful carnal knowledge of a girl under 17 years in or about 23 May 1995. He states that by virtue of his age at the time of those offences (12 and 19 respectively) they were not offences giving rise to notification.

[6] The applicant then states that since 2006 he has been assessed by the Public Protection Arrangements for Northern Ireland pursuant to Article 49(1) of the Criminal Justice (Northern Ireland) Order 2008 as representing a category 1 risk, that is "someone whose previous offending and/or current behaviour and/or current circumstances present little evidence that they would cause serious harm through carrying out a contact sexual or violent offence".

[7] The right of review of indefinite notification came into being following the enactment of Schedule 3A of the Sexual Offences Act 2003 as inserted by the Criminal Justice (Northern Ireland) Order 2013. The applicant states that following this change in the law he made an application to the Chief Constable to have his indefinite notification requirement reviewed. That was on 1 October 2017.

[8] By letter dated 4 January 2018 the Chief Constable refused the application. The letter states that the applicant had "failed to satisfy the Chief Officer of police that it is not necessary for the purposes of protecting the public or any particular members of the public from sexual harm for you to remain subject to the indefinite requirements."

[9] On 7 February 2018 the applicant served notice on the Chief Constable that he wished to have the decision reviewed by the Crown Court as is also provided for in the legislation. The matter was then heard before the Crown Court over two days on 5 and 7 June 2018 before His Honour Judge Grant sitting in Downpatrick. The applicant states that the court heard evidence from Detective Inspector Michelle Shaw of the Public Protection Unit. The applicant also confirms that it was accepted by all parties at the outset of the hearing that the decision letter from Detective Superintendent Henderson had misapplied the burden of proof in the case which properly rested on the Chief Constable to show that he was a risk of sexual harm such that continued notification was both necessary and proportionate.

[10] The applicant confirms that the learned trial judge had the benefit of further documentary evidence including a risk assessment report. Also, the applicant explains that after the first day of the hearing, when it became apparent that some of the factors relied upon by the designated risk manager were contained in documents

that had not been provided to the court or his legal team, the hearing was adjourned for these to be served.

[11] The applicant confirms that the court had the benefit of skeleton arguments and following the conclusion of DI Shaw's evidence His Honour Judge Grant heard submissions from his counsel and counsel for the Chief Constable. The court reserved the decision and issued a written judgment on 4 July 2018. In this the court determined that the applicant should be subject to indefinite notification requirements on the basis of risk of sexual harm and the fact that continued notification was justified in the interests of the prevention or investigation of crime and the protection of the public.

[12] The respondent's evidence in reply is contained in an affidavit of 25 March 2019. This is an affidavit of Amanda Patterson, who is the current Head of Criminal Policy Branch in the Department of Justice ("the Department"). In this affidavit Ms Patterson addresses the background leading up to the enactment of the impugned provisions, namely the Criminal Justice Act (Northern Ireland) 2013 which amended the Sexual Offences Act 2003. Ms Patterson explains that the first policy development phase for introducing a review mechanism for indefinite notification took place in 2010 after the Supreme Court ruled in *R(on the application of F (by his litigation friend F) and another (FC)) v Secretary of State for the Home Department* [2010] UKSC 17 on 21 April 2010 that the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 were incompatible with Article 8 of the European Convention on Human Rights ("the Convention") because they did not contain any mechanism for the review of the justification for continuing the requirements in individual cases.

[13] Ms Patterson then refers to the various steps that the Department took including consultation with all interested stakeholders. She refers to the fact that initial policy proposals for a mechanism to remedy the incompatibility were submitted to the Minister of Justice, then David Ford, on 9 December 2010. The summary of advice given at that time was that there was a primary and most urgent need to respond to the Supreme Court ruling. Ms Patterson states that the policy advice offered options to legislate for a review mechanism to meet the incompatibility issue. The documentation exhibited to this affidavit sets out a number of options that were mooted at this time drawing on proposals already made for other UK jurisdictions and taking account of responses to the consultation with criminal justice stakeholders.

[14] At paragraph 13 of the affidavit Ms Patterson explains that the advice to the Minister described how the preferred option for Northern Ireland departed from the proposed process for England and Wales at that time. The advice set out a preference in Northern Ireland for the applicant to have a right of access to a court in the event of a police decision not to remove the requirements. This was different to the Home Office proposal to allow a further approach to the police by the applicant to make further representations which would then be amenable to judicial review.

The Minister agreed the submission on 13 December 2010. The affidavit states that following consultation with, and input from the Office of the Legislative Counsel and the Attorney General, the Department did not proceed with proposals for the inclusion of a right of appeal to the Court of Appeal in light of a conclusion that it was unnecessary for the purposes of compliance with the European Convention on Human Rights to make such provision.

[15] Thereafter, draft clauses for a review mechanism were presented to the Assembly as an amendment to the Justice Bill at consideration stage on 23 February 2011. Ms Patterson states that in the event, the clauses were not moved because the Justice Committee expressed a desire to consider the matter further. The legislative proposals were then discussed by the Justice Committee on 24 February 2011 but no conclusion was reached. At further consideration stage of the Justice Bill on 7 March 2011 there was considerable debate on the review clauses but the parties remained split in their view in relation to whether or not there should be a review mechanism by way of a court review. There was a petition of concern in relation to this matter lodged by the DUP and there was clearly considerable political objection to the provision of an application to the Crown Court as "this was considered to provide a second bite of the cherry and an example of being soft on sex offenders."

[16] Ms Patterson states that following the unsuccessful attempt to legislate in the 2011 Justice Bill a second policy development stage started in July 2011 when the Department published a consultation paper for legislative proposals to amend sex offender notification and to introduce violent offence orders. Included in this paper were proposals for a review mechanism for indefinite notification. These proposals did not include any reference to a right of appeal from the Crown Court. Also in October 2011 the Westminster Joint Committee on Human Rights reported on the proposal for a Sexual Offences Act 2003 (Remedial) Order 2011 in England and Wales. Ms Patterson sets out the conclusion as follows:

> "However, together with the changes set out at paragraphs 37-38 below, amendments of the draft order to provide for a full statutory appeal to an independent and impartial court or tribunal would be the minimum required to ensure that the government's proposals will remove the violation identified by the Supreme Court. We consider that an appropriate tribunal in these circumstances should be a court of sufficient seniority such as the High Court or the Crown Court (following the model proposed in Northern Ireland)."

[17] On 3 November 2011, a submission was provided to the Minister seeking clearance on legislative proposals for a review mechanism to be added to the Criminal Justice Bill and for a paper to be provided to the Justice Committee. On 11 November 2011 the Minister agreed to the proposals and a policy paper was sent to the Justice Committee. Proposals for a Criminal Justice Bill were finally agreed by

the Executive on 14 June 2012 for introduction to the Assembly. The Bill was introduced and received its second reading on 3 July 2012. The draft clauses for a review mechanism did not contain a right of appeal to the Court of Appeal but this issue did not figure in the ensuing scrutiny of the Bill by the Justice Committee or in the debate by the Assembly. The Bill passed its final stage on 9 April 2013 and became law on 25 April 2013. The provisions for review of indefinite notification were commenced on 1 March 2014.

[18] In concluding her affidavit Ms Patterson states as follows at paragraph 38:

> "The sequence of events in relation to how the policy was developed demonstrates the Department had originally proposed a right of appeal to the Court of Appeal. However, following consultation with legislative counsel and the Attorney General, it was concluded that a right of appeal to the Court of Appeal was unnecessary in order to make the review mechanism Convention compliant and the Department did not pursue the inclusion of such a right of appeal in the final draft legislative proposals."

Legislative Framework

[19] Section 80 of Part II of the Sexual Offences Act 2003 reads as follows:

> **"80 Persons becoming subject to notification requirements**
>
> (1) A person is subject to the notification requirements of this Part for the period set out in section 82 ("the notification period") if—
>
> (a) he is convicted of an offence listed in Schedule 3."

[20] Section 82 sets out in tabular format the notification period:

> **"82 The notification period**
>
> (1) The notification period for a person within section 80(1) or 81(1) is the period in the second column of the Table opposite the description that applies to him.

Description of relevant offender Notification	Notification Period
A person who, in respect of the offence is or has been sentenced to imprisonment for life, to imprisonment for public protection under section 225 of the Criminal Justice Act 2003, to an indeterminate custodial sentence under Article 13(4)(a) of the	An indefinite period beginning with the relevant date

Criminal Justice (Northern Ireland) Order 2008 or to imprisonment for a term of 30 months or more	

[21] Schedule 1 to the Criminal Justice Act (Northern Ireland) 2013 inserted Schedule 3A to the Sexual Offences 2003 from 1 March 2014:

> ***"Introductory***
>
> 1(1) This Schedule applies to a person who, on or after the date on which section 1 of the Criminal Justice Act (Northern Ireland) 2013 comes into operation, is subject to the notification requirements for an indefinite period.
>
> (2) A person to whom this Schedule applies is referred to in this Schedule as "an offender".
>
> (3) In this Schedule—
>
> "risk of sexual harm" means a risk of physical or psychological harm to the public or any particular members of the public caused by an offender doing anything which would constitute an offence listed in Schedule 3 if done in any part of the United Kingdom;
>
> "the notification requirements" means the notification requirements of Part 2 of this Act;
>
> "relevant event", in relation to an offender, is a conviction, finding or notification order which made the offender subject to the notification requirements for an indefinite period.
>
> ***Initial review: applications***
>
> 2(1) Except as provided by sub-paragraph (2), an offender may, at any time after the end of the initial review period, apply to the Chief Constable to discharge the offender from the notification requirements.
>
> (2) Sub-paragraph (1) does not apply at any time when—
>
> (a) the offender is also subject to a sexual offences prevention order or an interim sexual offences prevention order; or

(b) the offender is also subject to the notification requirements for a fixed period which has not expired.

(3) Subject to sub-paragraph (4), the initial review period is—

(a) in the case of an offender under the age of 18 at the date of the relevant event, 8 years beginning with the date of initial notification;

(b) in the case of any other offender, 15 years beginning with the date of initial notification.

Initial review: determination of application

3(1) On an application under paragraph 2 the Chief Constable shall discharge the notification requirements unless the Chief Constable is satisfied—

(a) that the offender poses a risk of sexual harm; and

(b) that the risk is such as to justify the notification requirements continuing in the interests of the prevention or investigation of crime or the protection of the public.

(2) In deciding whether that is the case, the Chief Constable must take into account—

(a) the seriousness of the offence or offences—

(i) of which the offender was convicted,

(ii) of which the offender was found not guilty by reason of insanity,

(iii) in respect of which the offender was found to be under a disability and to have done the act charged, or

(iv) in respect of which (being relevant offences within the meaning of section 99) the notification order was made,

and which made the offender subject to the notification requirements for an indefinite period;

(b) the period of time which has elapsed since the offender committed the offence or offences;

(c) whether the offender has committed any offence under section 3 of the Sex Offenders Act 1997 or under section 91 of this Act;

(d) the age of the offender at the time of the decision;

(e) the age of the offender at the time any offence referred to in sub-paragraph (a) was committed;

(f) the age of any person who was a victim of any such offence (where applicable) and the difference in age between the victim and the offender at the time any such offence was committed;

(g) any convictions or findings made by a court (including a court in England and Wales or Scotland or a country outside the United Kingdom) in respect of the offender for any other offence listed in Schedule 3;

(h) any caution which the offender has received for an offence (including an offence in England and Wales or Scotland or a country outside the United Kingdom) which is listed in Schedule 3;

(i) any convictions or findings made by a court (including a court in England and Wales, Scotland or a country outside the United Kingdom) in respect of the offender for any offence listed in Schedule 5 where the behaviour of the offender since the date of the conviction or finding indicates a risk of sexual harm;

(j) whether any criminal proceedings for any offences listed in Schedule 3 have been instituted against the offender but have not concluded;

(k) any assessment of the risk of sexual harm posed by the offender which has been made by any of the agencies mentioned in Article 49(1) of the Criminal

Justice (Northern Ireland) Order 2008 (risk assessment and management);

(l) any information presented by or on behalf of the offender;

(m) any other information relating to the risk of sexual harm posed by the offender; and

(n) any other matter which the Chief Constable considers to be appropriate.

Initial review: notice of decision

4(1) The Chief Constable must, within 12 weeks of the date on which an application under paragraph 2 is received, comply with this paragraph.

(2) If the Chief Constable discharges the notification requirements—

(a) the Chief Constable must serve notice of that fact on the offender, and

(b) the offender ceases to be subject to the notification requirements on the date of service of the notice.

(3) If the Chief Constable decides not to discharge the notification requirements—

(a) the Chief Constable must serve notice of that decision on the offender; and

(b) the notice must—

(i) state the reasons for the decision; and

(ii) state the effect of paragraphs 5 and 6.

Initial review: application to Crown Court

5(1) Where—

(a) the Chief Constable fails to comply with paragraph 4 within the period specified in paragraph 4(1), or

(b) the Chief Constable serves a notice under paragraph 4(3),

the offender may apply to the Crown Court for an order discharging the offender from the notification requirements.

(2) An application under this paragraph must be made within the period of 21 days beginning—

(a) in the case of an application under sub-paragraph (1)(a), on the expiry of the period mentioned in paragraph 4(1);

(b) in the case of an application under sub-paragraph (1)(b), with the date of service of the notice under paragraph 4(3).

(3) Paragraph 3 applies in relation to an application under this paragraph as it applies to an application under paragraph 2, but as if references to the Chief Constable were references to the Crown Court.

(4) The Chief Constable and the offender may appear or be represented at any hearing in respect of an application under this paragraph.

(5) If on an application under this paragraph the Crown Court makes an order discharging the offender from the notification requirements, the appropriate officer of the Crown Court must send a copy of the order to the offender and the Chief Constable.

(6) If on an application under this paragraph the Crown Court refuses to make an order discharging the offender, the appropriate officer of the Crown Court must send notice of that refusal to the offender and the Chief Constable.

Further reviews

6(1) Except as provided by sub-paragraph (2), where a notice is served on an offender under paragraph 4(3) or 5(6), the offender may, at any time after the end of the further review period, apply to the Chief Constable to

discharge the offender from the notification requirements.

(2) Sub-paragraph (1) does not apply at any time when—

(a) the offender is also subject to a sexual offences prevention order or an interim sexual offences prevention order; or

(b) the offender is also subject to the notification requirements for a fixed period which has not expired.

(3) The further review period is—

(a) in the case of an offender under the age of 18 at the date of the relevant event, the period of 4 years beginning with the date of service of the notice (or the last notice) served on the offender under paragraph 4(3) or 5(6);

(b) in the case of any other offender, the period of 8 years beginning with that date.

Arguments of the Parties

[22] Mr McDowell on behalf of the applicant made focussed submissions to the court which we summarise as follows:

(i) In essence Mr McDowell submitted that the Crown Court Judge had made an error in his decision making which affected the Article 8 rights of the applicant given the notification requirement and as such he should have a right of appeal in order to correct this.

(ii) During the course of the argument Mr McDowell distilled his critique of the judgment of Judge Grant into three main points. Firstly, he submitted that the judge had failed to take into account the opinion of Constable Hanvey contained as part of the risk assessment and management report and this offended (k) on the checklist of factors that had to be taken into account by the judge. Secondly, he made the case that the judge had failed to mention the absence of convictions as required by (g) of the factors to be taken into account. Mr McDowell contended that this should have been stated specifically. Thirdly, he said the judge failed to refer to the fact that 8 sessions of protective work had been undertaken albeit some 20 years ago and that this

did not comply with the legislative requirements as this was an example of co-operation which the judge had not taken into account.

(iii) Mr McDowell also submitted that the judge had applied incorrect tests in the body of his judgment by effectively requiring a change of circumstances before a notification would be listed rather than simply applying the statutory test.

(iv) Mr McDowell referred to the regime in England and Wales where decisions of this nature were taken in the Magistrates' Court and are subject to judicial review or case stated. He pointed to a number of cases as examples of where an error had been examined by the court and corrected for example in *R (E) and R (M) v Birmingham Magistrates Court* [2015] EWHC 688 and *Hamill v Chelmsford Magistrates Court* [2015] 1 WLR 1798.

(v) Mr McDowell accepted that no appeal lay under the Criminal Appeal (Northern Ireland) Act 1980. He argued that as the notification emanates from statute and is not imposed by a court it cannot be considered as a sentence and as such it is distinguishable from the Sexual Offences Prevention Order ("SOPO") regime and does not come within the provisions of the Criminal Appeal Act.

(vi) Mr McDowell also accepted that there was no appeal possible by way of challenge to the order of the Crown Court Judge accepting the principles set out in *R v McGreechan* [2014] NICA 5. He accepted that in Northern Ireland, the Crown Court, by virtue of section 1 of the Judicature (Northern Ireland) Act 1978 is part of the Court of Judicature and therefore it is not possible for the High Court to review its decisions as the respective courts are of equal standing.

(vii) Mr McDowell submitted that reliance on the provisions of section 49(1) of the Judicature Act 1978 are not of assistance in this case given the various errors that he has identified in the Crown Court Judge's decision.

(viii) Overall, Mr McDowell made the case that these notification requirements placed a considerable burden upon his client which interfered with his Article 8 rights as such given that there was an error in how the judge reached his decision, his client should have a right of appeal.

[23] On behalf of the respondent Dr McGleenan made the following points:

(i) Dr McGleenan questioned the legitimacy of this challenge. He said that it was effectively a judicial review of a Crown Court decision which was impermissible on established authority. In particular, he relied on *Racal Communications* [1982] All ER 634 and also the cases of *The Law Society of*

Northern Ireland v Monteith [2012] NICA 15 and *McDaid's Application* [2016] NICA 5.

(ii) The argument made by Dr McGleenan was that the decision was not unlawful or flawed in any way. He made the case that there is no evidence that the judge left any relevant matters out of account in any way. He raised the argument that failure to specifically record and address every fact and submission arising on hearing in the judgment does not establish a failure to take into account see *Van De Hurk v The Netherlands* [1994] ECHR 16034/90, *Taxquet v Belgium* [2010] ECHR 926/05 and *Ruiz Torija v Spain* [1994] ECHR 18390/91.

(iii) Dr McGleenan contended that there was no breach of Article 6 in this case. He pointed out that the applicant has availed of an initial application by the Chief Constable and he has had a full hearing before a judge. Dr McGleenan submitted that this was simply a case where the applicant disagreed with the result. He stressed that there is no obligation to provide an appeal in these circumstances. He pointed to the need for finality and in assessing that need he made the point that the court will have regard to the fact that the issue in this case is not the loss of the applicant's liberty but the ongoing imposition of notification requirements directed to the preservation of public safety and the reduction of risk from a repeat offender.

(iv) Dr McGleenan pointed out that there can be no challenge to the lawfulness and compatibility of the actual legislation in that it enables a notification requirement to be reviewed following the Supreme Court case and that the introduction of a review mechanism, even one which imposes an appropriately high standard for review, is proportionate.

(v) Dr McGleenan contended that this case really amounted to a disagreement regarding the merits and that that had no basis in law. He made the point that the fallacy of the argument in this case is made out by virtue of the fact that the relief sought would actually take away the review mechanism provided.

(vi) Dr McGleenan also referred to the careful policy consideration of this issue as demonstrated by the affidavit filed on behalf of the Department. He made the case that the Department had pushed hard for a court scrutiny, this was in turn debated by politicians and did not win widespread support but eventually found its way into the legislation after considerable debate and a petition of concern.

[24] The Attorney General made the following points in his oral and written submissions:

(i) The impugned legislative provisions provide for a procedure that was not available before enactment, namely a review and as such the Attorney submitted that this cannot be contrary to any rights protected by the Convention. He made the case that the legislation is in fact beneficent to the applicant.

(ii) The Attorney General made the point that section 6(2)(c) of the Northern Ireland Act 1998 which is the *vires* provision under scrutiny states that a provision of an act of the Northern Ireland Assembly is not law by virtue of this section only if that provision is itself incompatible with the Convention. This section does not address or condemn inaction or omission.

(iii) The Attorney General made the point that this case is not framed like the *F* case which went to the Supreme Court which was based on a human rights challenge.

(iv) The Attorney General submitted that properly analysed the applicant's case is directed at the decision of the learned Crown Court Judge, however such a decision is not susceptible to judicial review given the provisions of section 1 of the Judicature (Northern Ireland) Act 1978.

(v) The Attorney General submitted that the applicant cannot meet the requirements of section 7 of the Human Rights Act as he has not made a case that he is the victim of an unlawful act by the respondent Department.

(vi) The Attorney General also referred to the fact that there can be no case made on the basis of discrimination law relying on *R (A) v Secretary of State for Health*, *Magee v UK* [2000] 31 EHRR 35. The Attorney General also pointed to the lack of a general right of appeal in the European Law.

(vii) Finally, in relation to a concern about a potential injustice the Attorney General referenced the fact that paragraph 88 of *Ashers* pointed to an opening in relation to this. He also tentatively suggested that the applicant could make another request for review and then argue in relation to the time limits in the legislation. He also argued that section 49(2) of the Judicature (Northern Ireland) Act 1978 would allow the applicant to return to a Crown Court judge if there was an error of law.

Consideration

[25] The context of this case is the mandatory notification requirements for sex offenders pursuant to statute. This is clearly an issue of high public importance. The applicant bases his case upon human rights considerations, arguing that the regime breaches his Article 6 and 8 rights and is also discriminatory in contravention of Article 14. The Court will examine these arguments based upon the Convention whilst also bearing in mind the fact that the issue in this case is not the loss of the

applicant's liberty but the ongoing imposition of notification requirements directed to the preservation of public safety and the reduction of risk from a repeat offender.

[26] The applicant has not argued that the notification requirements come within the Criminal Appeal Act (Northern Ireland) 1980 by virtue of being a sentence. Mr McDowell has also realistically accepted that the Crown Court is not amenable to judicial review. The Crown Court forms part of the Court of Judicature (section 1 of the Judicature (Northern Ireland) Act 1978) and is a superior court of record by virtue of section 46. It is a settled principle that the Crown Court is not amenable to judicial review, see *Racal Communications* [1980] 2 All ER 634, *McDaid's Application* [2016] NICA 5. We therefore proceed to examine the core question at issue in this case which is whether the current statutory scheme offends Convention rights. First we turn to the reasoning of the Supreme Court which led to a change in the law.

[27] In *R(on the application of F (by his litigation friend F) and another (FC)) v Secretary of State for the Home Department* [2010] UKSC 17 the Supreme Court decided that a scheme without any review was incompatible with the Convention. Lord Phillips gave the lead judgment from which we quote paragraphs 56-57:

> "[56] No evidence has been placed before this court or the courts below that demonstrate that it is not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who pose no significant risk of re-offending. It is equally true that no evidence has been adduced that demonstrates that this is possible. This may well be because the necessary research has not been carried out to enable firm conclusions to be drawn on this topic. If uncertainty exists can this render proportionate the imposition of notification requirements for life without review under the precautionary principle? I do not believe that it can.
>
> [57] … I think that it is obvious that 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 notification requirements is unjustified. As the courts below have observed, it is open to the legislature to impose an appropriately high threshold for review. Registration systems for sexual offenders are not uncommon in other jurisdictions. Those acting for the first respondent have drawn attention to registration requirements for sexual offenders in France, Ireland, the seven Australian States, Canada, South Africa and the United States. Almost all of these

have provisions for review. This does not suggest that the review exercise is not practicable.

[28] Furthermore, we have been referred to the opinion of Lord Rodgers particularly paragraphs 64 and 65 as follows:

> "[64] Thirdly, I see no basis for saying that, in themselves, the notification requirements, including those relating to travel are a disproportionate interference with the offender's Article 8 rights to respect for their family life, having regard to the important and legitimate aim of preventing sexual offending. That is particularly the case where as Lord Phillips PSE explains, these requirements are 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. Of course, it is possible that the information which offenders provide to the police will be wrongly conveyed to third parties in circumstances where disclosures are not appropriate. The same can be said of the information which we have to supply say to Her Majesty's Revenue and Customs, or to the Social Security authorities. The proportionality of the requirement to provide that information has to be judged by reference to its proper use, not by reference to its possible misuse.
>
> [65] Fourthly, the need for an offender to give the notification in person at a police station does, of course, impose a burden on him and entails some additional risk of his status becoming known. But it also helps to eliminate the familiar excuses (such as letters allegedly going astray, or real or imaginary delays in the post) which can bedevil the operation of a system which depends, for its effectiveness, on notification being given within short, fixed, time limits – limits which those affected may be understandably reluctant to comply with and astute to avoid. Again, I see nothing disproportionate in the requirement."

[29] Subsequent to the oral hearing we were provided with a helpful note which sets out a summary of sex offender notification requirements in Northern Ireland. This refers to the initial notification of personal information which must be given to the police and other requirements which include periodical notification on an annual basis, except in the case of no sole or main residence, then notification required every week. It also refers to the provision of further details if they reside, or stay, for a

period of at least 12 hours, at a household or other private place where a child resides or stays. There is further requirement for travel notification and notification requirements on other absence from main residence (within the UK). We note that a person in the position of this applicant would have to wait a further 8 years before he could seek another review. We accept that these requirements represent an interference with Article 8 rights. The only issue the Supreme Court had was in relation to the proportionality of lifelong notification without review.

[30] The legislation in issue came into being in Northern Ireland to regularise the disproportionate interference identified by the Supreme Court. In mapping the way forward the Supreme Court clearly said that it was open to the legislature to impose an appropriately high threshold for review. In this jurisdiction the legislature provided for a review of notification requirements both by the Chief Constable and by a Crown Court Judge. The core question is whether the legislation is compatible with Convention rights. To answer that question the court has to consider the provisions of the Northern Ireland Act 1998 which is the governing legislation in relation to *vires*. The relevant provision is section 6 which reads as follows:

> "6(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly
>
> (2) A provision is outside the legislative competence if any of the following paragraphs apply-
>
> (c) it is incompatible with any of the Convention rights."

The argument here is that the legislation in the legislative amendment contained in the Criminal Justice (Northern Ireland) Order 2013 was outside the legal competence of the Assembly on the basis of section 6(2)(c).

[31] In examining this question we firstly note the considerable gestation of the legislation which is set out in the comprehensive affidavit of Ms Patterson. From examination of that it is clear to us that this issue was clearly and comprehensively consulted upon and then debated by elected representatives before the legislative assembly before becoming law. It is clear that 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.

[32] We have also considered the argument based upon Article 14 discrimination and difference of treatment between jurisdictions. Of course, it does not follow that because one jurisdiction follows a particular course that the legislative structure in another jurisdiction thereby falls foul of human rights requirements if it takes a

different course. This was clearly explained in the case of *Magee v United Kingdom* [2000] 31 EHRR 35 at paragraph [50]:

> "[50] … For the Court, in so far as there exists a difference in treatment of detained suspects under the 1988 Order and the legislation of England and Wales on the matters referred to by the applicant, that difference is not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained. This permits legislation to take account of regional differences and characteristics of an objective and reasonable nature. In the present case, such a difference does not amount to discriminatory treatment within the meaning of Article 14 of the Convention."

[33] In *R v Secretary of State of Health* Lord Reed also refers to this principle at paragraph [44]:

> "It is not entirely clear from that passage whether the court meant that differences in treatment based on the jurisdiction to whose laws a person is subject by reason of his geographical location were not based on the person's status within the meaning of Article 14 or whether it meant that such differences required to be, and were in that case, objectively justified. The former interpretation is, in my view, to be preferred for three reasons. First, the court's general approach at that time to issues of status within the meaning of Article 14 was based on personal characteristics (I say at that time because in later cases the court has tended to refer instead to identifiable characteristics). In response to arguments that personal characteristics are necessarily immutable and inherent; and a person's geographical location cannot readily be regarded as a personal characteristic. Secondly, there are strong constitutional arguments against treating differences in the laws of different jurisdictions internal to a state as necessarily requiring justification, as was recognised by Judge Matscher in the *Dudgeon* case 4 EHRR 149 and by the Commission in the cases mentioned earlier. This has also been accepted by the Court of Justice in the European Union: *R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs* (see 428/07) [2009] ECHR 1-6355 where the constitutional system of a member state provides that devolved

> administrations are to have legislative competence, the mere adoption by those administrations of different … standards … does not constitute discrimination contrary to Community Law:
>
> [58] Thirdly, and most importantly, that is how the *Magee* case 31 EHRR 35 was interpreted by the *Grand Chamber in Carson v United Kingdom* 51 EHRR 13 paragraph [70] to which I turn next."

[34] In any event we observe that whilst an applicant in Great Britain can apply to the magistrate's court for review, here the applicant has the benefit of a review by a higher tier of court and an experienced Crown Court judge. In our view this accords with the report of the Human Rights Committee which we have been referred to and which is referenced at paragraph 16 above.

[35] Finally, we repeat the well-established principle that Article 6(1) of the Convention does not guarantee a right of appeal from a decision of a court of first instance. This point was not seriously challenged by the applicant and rightly so. In *Miloslavsky v UK* 1995 ECHR 181139/91, the ECtHR reiterated the general principles as follows:

> "59. The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see for instance *Fayed v United Kingdom* judgment of 21 September 1994, Series A no 294-B, pages 49-50, para 65).
>
> It follows from established case-law that Article 6(1) does not guarantee a right of appeal. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6 (see, in particular, the *Delacourt v Belgium* judgment of 17 January 1970, Series A no 11, pages 14-15 para 25). However, the manner of application of Article 6 to proceedings before such courts depends on the special

> features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appellate court therein (see for instance *Monnell and Morris v United Kingdom* judgment of 2 March 1987, Series A no 115, page 22, para 56; and the aforementioned *Halmers* judgment, page 15, para 31)."

[36] 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 and 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.

[37] Having considered all of the above, we consider that the 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.

[38] As we have said it is impermissible to have a judicial review of a Crown Court decision, or indeed, a merits review. However, we do recognise the point made that theoretically there could be a case where an injustice is apparent. We also note that this is a relatively new regime and we consider that some points have emerged in argument which may be of general application and of assistance for practitioners dealing with this type of case in the future. We therefore make some further comments upon the facts of this case as follows.

[39] Firstly, we note that the learned judge heard evidence in this case and invited submissions. He also adjourned the hearing for further information. The applicant did not give evidence but it is clear that course was open to him. We consider that all of these steps were proper. 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.

[40] In our view the arguments that Mr McDowell makes are not sustainable in terms of application of the statutory test. In particular, we consider that reference to a change of circumstance is appropriate as a tool to assist the judge in applying the statutory test. Put simply in assessing risk a judge cannot be blinkered as to what happened in the past and validly he or she should ask - what has changed?

[41] We also take this opportunity to highlight the 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. In particular, we refer to the case of *Ruiz Torija v Spain* [1994] ECHR 18390/91 at paragraph 29 where the following guidance is found:

> "29. The Court reiterates that Article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every

> argument (see the *Van de Hurk v the Netherlands* judgment of 19 April 1994). The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case."

[42] Further in *Taxquet v Belgium* the ECtHR made the following observations:

> "While courts are not obliged to give a detailed answer to every argument raised (see *Van De Hurk v The Netherlands* [1994] ECHR 16034/90 paragraph 61, it must be clear from the decision that the essential issues of the case have been addressed (see *Boldea v Romania* [2007] ECHR 19997/02 para 30)."

[43] In this type of case the judge should refer to the statutory test and consider the checklist of factors as the judge did in this case. It was also appropriate that this judge gave a written ruling which sets out the essential elements of the decision.

[44] We do not discern any injustice that requires correction in this case. The applicant was afforded a full and detailed hearing before the judge who had all of the relevant information before him. The judge heard evidence from DI Shaw who highlighted the stark facts of this case and the lack of remorse. The designated risk manager, Ms Hanvey's, opinion is part and parcel of the final risk management report but it did not translate into the final recommendation for the reasons given by DI Shaw. It is 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 co-operative rather than *was* non co-operative. In our view these arguments are weak.

[45] It follows that we do not need to resort to the Attorney General's helpful arguments about potential avenues if there were a situation of apparent injustice in particular the interesting point emanating from paragraph 88 of *Lee v Ashers Baking Co Ltd & Others* 2018 [UKSC] 49. We also note the helpful reference to section 49(2) of the Judicature Act which now allows for 56 days for orders to be corrected. However, that is not a provision which we consider is truly directed towards a disagreement on the merits. Errors of law and of fact could be pointed out to a judge but we accept that there may be a limit to this provision whereby the applicant in a

case simply disagrees with the decision. In essence that is what has happened in this case as we see it. 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.

[46] Accordingly, the application for judicial review is dismissed.