

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KEVIN GALLAGHER FOR
JUDICIAL REVIEW

KERR J

Introduction

[1] The applicant was convicted of three offences of indecent assault at Londonderry Crown Court on 23 November 2000. He was sentenced to two years imprisonment on the first count, to nine months on the second count and to another term of nine months on the third count. The sentence on the second count was ordered to be consecutive on the sentence imposed on the first count and the sentence on the third count was ordered to be concurrent with the sentences on the first two counts. The effective total sentence was thirty-three months, therefore.

[2] The Sex Offenders Act 1997 provides that a person convicted of a sexual offence who has been sentenced to a period of thirty months or more shall become subject to the notification provisions contained in the Act for an indefinite period. In effect this means that the applicant is required to notify police within 14 days of his conviction of his name and address and date of birth. If he changes his name or address he must notify police of the change within 14 days of its taking place. As a consequence of recent changes in the law he will also have to notify police of certain travel arrangements that he might undertake.

[3] By this application the applicant seeks a declaration that section 1 of the 1997 Act (which is the provision that imposes the notification requirements) is incompatible with the European Convention on Human Rights.

The statutory provisions

[4] Section 1 (1) of the 1997 Act provides: -

“A person becomes subject to the notification requirements of this Part if, after the commencement of this Part—

- (a) he is convicted of a sexual offence to which this Part applies;
- ...”

[5] Section 2 deals with the notification requirements: -

“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 [three days] beginning with the relevant date or, if later, the commencement of this Part, notify to the police the following information,
- (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.

[6] As amended by section 66 of and Schedule 5 to the Criminal Justice and Court Services Act 2000 section 2 (5) provides: -

“(5) A person may give a notification under this section by-

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

and a notification under subsection (2) above may also be given by sending a written notification to any such police station.”

[7] The 2000 Act also added the following (among other) provisions to subsection (6) of section 2: -

“(6A) A person giving a notification under subsection (1) above shall also, if requested to do so by the police officer or other person referred to in subsection (5)(b) above, allow the officer or person to take his fingerprints and his photograph, or either of them.

(6B) The power to take fingerprints in pursuance of subsection (6A) above is exercisable for the purpose of verifying the identity of the person giving the notification by checking the fingerprints against any other fingerprints to which the officer or person has access.

...

(6D) In relation to persons subject to the notification requirements of this Part who leave the United Kingdom, or any description of such persons, the Secretary of State may by regulations make provision for requiring them-

(a) to give in accordance with the regulations, before they leave, a notice under subsection (6E) below, and

(b) if they subsequently return to the United Kingdom, to give in accordance with the regulations a notice under subsection (6F) below.

(6E) A notice under this subsection must disclose-

(a) the date on which he will leave the United Kingdom, the country to which he will travel (or, if there is more than one, the first country) and his point of arrival, determined in accordance with the regulations, in that country,

(b) any other information prescribed by the regulations which the person holds about his departure from or return to the United Kingdom or his movements while outside the United Kingdom.

In this subsection, "country" includes territory.

(6F) A notice under this subsection must disclose any information prescribed by the regulations about the person's return to the United Kingdom.

(6G) The power to make regulations under subsections (6D) to (6F) above is exercisable by statutory instrument, and no such regulations shall be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament."

[8] The Secretary of State made regulations relating to the matters dealt with in subsections (6D) to (6F) in the form of the Sex Offenders (Notice Requirements) (Foreign Travel) Regulations 2001. It is common case that the

applicant is now subject to the requirements contained in subsections (6D) to (6F) and to the regulations. Regulation 5 provides: -

“Additional information to be disclosed in a notice under section 2(6E) of the Act

5. In addition to the information required to be disclosed under section 2(6E)(a) of the Act, a notice under section 2(6E) must disclose, where a person holds such information at least 48 hours prior to his intended departure from the United Kingdom -

(a) where he intends to travel to more than one country outside the United Kingdom, his intended point of arrival in each such additional country,

(b) the identity of any carrier or carriers he intends to use for the purposes of his departure from and return to the United Kingdom, and of travelling to any other point of arrival,

(c) details of his accommodation arrangements for his first night outside the United Kingdom,

(d) in a case in which he intends to return to the United Kingdom on a particular date, that date, and

(e) in a case in which he intends to return to the United Kingdom at a particular point of arrival, that point of arrival.

[9] Regulation 6 provides: -

“Change to information disclosed in a notice under section 2(6E) of the Act

6. - (1) Where -

(a) a person has given a notice under section 2(6E) of the Act, and

(b) at any time earlier than 48 hours prior to his intended departure from the United

Kingdom, the information disclosed in that notice becomes inaccurate or incomplete as a statement of all the information mentioned in section 2(6E)(a) of the Act and regulation 5 above which he currently holds,

the person must give a fresh notice under section 2(6E) of the Act.

(2) A fresh notice under paragraph (1) above must be given at least 24 hours prior to the person's intended departure from the United Kingdom."

[10] Regulation 7 provides: -

"Notice to be given on return to the United Kingdom

7. - (1) This regulation applies to persons who -

(a) were required to give a notice under section 2(6E) of the Act,

(b) have left the United Kingdom accordingly, and

(c) have subsequently returned to the United Kingdom.

(2) Except as provided by paragraph (3) below, every person to whom this regulation applies must give notice under section 2(6F) of the Act within eight days of his return to the United Kingdom.

(3) A person to whom this regulation applies need not give a notice under section 2(6F) of the Act in any case in which he gave a relevant notice under section 2(6E) of the Act which -

(a) disclosed a date under the provisions of sub-paragraph (d) of regulation 5 above, and

(b) disclosed a point of arrival under the provisions of sub-paragraph (e) of regulation 5 above,

and in which his return to the United Kingdom was on that date and at that point of arrival.”

[11] The material part of section 3 of the Act is as follows: -

“3 Offences

(1) If a person—

- (a) fails, without reasonable excuse, to comply with section 2(1) or (2) above; or
- (b) notifies to the police, in purported compliance with section 2(1) or (2) above, any information which he knows to be false,

he is guilty of an offence.

[12] Section 1(4) provides a table by reference to which the period of notification requirement can be determined. In the case of a person sentenced to thirty months or more the applicable period is defined as ‘an indefinite period’. The applicant is therefore required to comply with the notification provisions throughout the rest of his life.

The arguments

[13] For the applicant Mr Treacy QC submitted that the provisions of the Act which required the applicant to comply with the notification requirements were in breach of article 8 of the European Convention on Human Rights. He drew attention to the fact that the requirements were automatic and that the trial judge had no discretion to disapply them or to alter the applicable period. The applicant was prevented from arguing that the particular circumstances of his offence were such that the Act ought not to apply to him. The trial judge was likewise prevented from disapplying the notification provisions even where it was clear to him that these were unnecessary or inappropriate. Mr Treacy suggested that the imposition of a lifetime notification requirement without any possibility of a review at any time could not be regarded as Convention compliant.

[14] For the respondent Mr Maguire accepted that the legislative scheme requiring the applicant to notify the police of his personal details and movements interfered with the applicant’s right to respect for a private life. He submitted, however, that the interference was in accordance with law, pursued a legitimate aim and was proportionate. The underlying purpose of the legislation was to prevent crime by ensuring that the whereabouts of a sex

offender were known. The measures were proportionate in that they applied only to those who had committed certain types of sexual offence and the period of notification was calibrated to reflect the severity of the punishment imposed. The obligations imposed were not particularly severe or onerous.

Are the measures proportionate?

[15] There was no dispute that the notification requirements had been introduced according to law and that they pursued a legitimate aim. The focus of the applicant's challenge was to the proportionality of the measures. Mr Treacy pointed out that in the Republic of Ireland the Oireachtas in the Sex Offenders Act 2001 had imposed a lifetime reporting requirement where an offender was sentenced to a term exceeding two years imprisonment but had allowed for an application by a person subject to the requirements that he be discharged from them on the grounds that "the interests of the common good are no longer served by him being subject to them". Similarly in the Child Protection (Offender Registration) Act 2000 of New South Wales, an offender may apply for an order suspending his reporting obligations on the grounds that he no longer poses a threat to children.

[16] The Strasbourg institutions have considered challenges to the 1997 Act in the cases of *Ibbotson v United Kingdom* Application No. 40146/98 and *Adamson v United Kingdom* Application no. 42293/98. In the first of these cases the European Commission on Human Rights dealt with a claim by an individual who had been convicted of and sentenced on a number of sex offences before the coming into force of the Act. He claimed that the requirement to register with the police under the reporting provisions of the Act amounted to the imposition of a heavier penalty than that which was applicable at the time the criminal offence was committed contrary to article 7 of the Convention. The Commission considered the reporting provisions to be preventative rather than punitive "in the sense that the knowledge that a person has been registered with the police may dissuade him from committing further offences" and the application was rejected.

[17] In the *Adamson* case the applicant complained of violations of articles 3, 5, 7 and 8. All were dismissed. The European Court of Human Rights held that the reporting requirements amounted to an interference with the applicant's private life but considered that this was proportionate to the legitimate aim of the prevention of crime and the protection of the rights and freedoms of others. On the subject of proportionality the Court said: -

"In this connection the Court refers to its above finding that there is no evidence before it to suggest that the applicant is at particular risk of public humiliation or attack as a result of his obligations under the Act. Thus, it will examine

the proportionality of the impugned measures on the basis that the interference with private life in issue in the present case extends only to the requirement to register with the police.

The Court notes that the Act requires the applicant, upon being released from prison, to inform the police of *inter alia* his name, any other names he uses, his date of birth and his home address, and, during an indeterminate period, to notify them of any subsequent changes of name or home address within 14 days of any change.

It is necessary to weigh against this the importance of the aims pursued by the Act. The Court has previously referred to the gravity of the harm which may be caused to the victims of sexual offences (see the *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, *Reports* 1996-IV, p. 1505, § 64) and has held that States are under a duty under the Convention to take certain measures to protect individuals from such grave forms of interference (*ibid.*, §§ 62 and 64).

Against this background, the Court does not consider that the requirement to provide information to the police can be said to be disproportionate to the aims pursued.”

[18] It was pointed out by Mr Treacy that the requirements as to reporting are much more onerous than those that obtained at the time of the *Adamson* decision. In particular the amendments to the 1997 Act and the introduction of the 2001 Regulations imposed much more substantial obligations on the applicant than heretofore. The applicant regularly moves across the border to the Republic of Ireland, usually for very short periods and the requirement that he make regular reports about his movements is clearly disproportionate, Mr Treacy argued.

[19] It is undoubtedly the case that the range of reporting requirements has been significantly extended by the amendments to the 1997 Act and the 2001 Regulations. It is also undeniably true that these give rise to considerable inconvenience for the applicant. The proportionality of the measures is not to be judged by their impact on a particular individual, however. The scheme as a whole must be examined to see whether it goes beyond what is necessary to achieve the aim of protecting the public and deterring sex offenders from engaging in further criminal behaviour.

[20] In this context it is relevant that the scheme was introduced by a democratically elected Parliament and that the Regulations required to be approved by resolution of both Houses of Parliament. In *Brown v Stott* [2001] 2 All ER 97, 114a Lord Bingham of Cornhill said: -

“Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies (see Lester and Pannick *Human Rights Law and Practice* (1999) pp 73-76 (paras 3.20-3.26). The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from ‘The heart-ache and the thousand natural shocks That flesh is heir to’.”

[21] The task of deciding whether the measures are proportionate must be approached circumspectly, therefore, recognising that Parliament has determined what is required for the protection of the public from sex offenders and what is necessary to deter such offenders by having in place a system whereby their movements are monitored. In approaching this task the enactments of legislatures in other jurisdictions, while interesting as examples of alternative methods, cannot automatically provide the answer. It is trite to say that legislation should reflect the perceived needs of the particular society it is designed to serve and the experience in other jurisdictions may not be mirrored here.

[22] It is also the case that the absence of a dispensing provision whereby the applicant might apply to be relieved of the reporting requirements after a stipulated period will not render the provisions automatically disproportionate. That feature is undoubtedly relevant to the issue but it alone cannot dictate the outcome of the examination of a scheme’s proportionality.

[23] 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.

[24] The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour one's attitude to the measures necessary to curtail such criminal behaviour. A scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender.

[25] The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime. If individual offenders were able to obtain exemption from the notification requirements this could – at least potentially – compromise the efficacy of the scheme.

[26] By the same token the fact that the notification requirements persist indefinitely does not render the scheme disproportionate. While this is unquestionably an inconvenience for those who must make the report, that inconvenience must be set against the substantial benefit that it will achieve of keeping the police informed of where offenders are living and of their travel plans so that further offending may be forestalled both by rendering detection more easily and deterring those who might be tempted to repeat their offences.

[27] I am therefore satisfied that the notification requirements are proportionate and the application for judicial review must be dismissed.