

**THE HIGH COURT**

[2021] IEHC 567  
[2020 2815 P]

**BETWEEN**

**NICOLAE DUMITRAN**

**PLAINTIFF**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 27th day of August 2021.**

**Introduction**

1. This case involves a challenge to the constitutionality of s. 78 (5)(a) of the Finance Act, 2005 as amended. Under this subsection, a person convicted of an offence under s. 78 (3) or (4) of that Act is liable, on summary conviction, to a fine of €5,000 or, at the discretion of the court, to imprisonment of a term not exceeding twelve months, or to both. Subsection 78 (3), in respect of which the plaintiff has been charged with an offence, relates to various offences concerning dealings with tobacco products to which a tax stamp has not been affixed.
2. The plaintiff is charged by way of summons with an offence under s. 78 (3) and (5) of the Finance Act, 2005 as amended in December 2019. The statement of claim sets out at length the circumstances in which the plaintiff alleges that he came to be charged. The Director of Public Prosecutions, a notice party in this case, reserves her position in relation to the circumstances surrounding the alleged commission of the offence. However, the parties agreed that it would not be necessary to call evidence in the matter, and that the issues as to constitutionality could be argued in principle, without findings as to the veracity or otherwise of the matters set out in the statement of claim regarding the circumstances alleged by the plaintiff.
3. The relevant relief sought in the statement of claim is as follows:

*"A Declaration that s. 78 (5)(a) of the Finance Act 2005 (as amended) is invalid having regard to Article 34.1 and/or Article 35.1 and/or Article 38.1 and/or Article 40.3.1 of Bunreacht na hÉireann."*
4. In the statement of claim, a declaration was also sought to the effect that the impugned subsection was incompatible with Article 6 of the European Convention for Human Rights. In addition, the plaintiff claimed damages pursuant to common law and/or s. 3 (2) of the European Convention on Human Rights Act, 2003. However, these reliefs were not pressed at the hearing before me, in which the only issue canvassed in either oral or written submissions was the constitutionality of s. 78 (5) (a). I received very detailed written submissions in advance of the hearing, during which counsel for both sides made further helpful submissions.

5. Before dealing with the factual background to the matter and proceeding on to the issues before the court, it is necessary to set out the impugned section, and the other legislative provisions which have direct relevance to the issues.

**The legislative provisions**

6. Section 78 (3) of the Finance Act, 2005, as amended by s. 56 (b) of the Finance Act, 2013, provides as follows:

*"(3) With the exception of cases where payment of tobacco products tax is permitted under section 73 (2) to be subject to the provisions governing other tobacco products it is an offence under this subsection to invite an offer to treat for, offer for sale, keep for sale or delivery, sell or deliver, or be in the process of delivering specified tobacco products otherwise than in a pack or packs to which a tax stamp, by means of which tobacco products tax at the appropriate rate has been levied or paid in respect of such tobacco products, is affixed to each such pack in the prescribed manner unless such invitation, offer, sale or delivery takes place under a suspension arrangement."*

7. Section 78 (5) of the Finance Act, 2005, as amended by s. 82 of the Finance Act, 2006, s. 77 of the Finance Act, 2008 and s. 101 (a) of the Finance Act, 2010 sets out the penalty for an offence under subsection (3) as follows:

*"(5) Without prejudice to any other penalty to which a person may be liable, a person convicted under subsection (3) or (4) is liable—*

- (a) on summary conviction, to a fine of €5,000 or, at the discretion of the Court, to imprisonment for a term not exceeding 12 months or to both, or*
- (b) on conviction on indictment, to a fine not exceeding €126,970 or, at the discretion of the Court, to imprisonment for a term not exceeding 5 years or to both."*

8. Section 130 of the Finance Act, 2001 (as amended by section 78(2) Finance (No. 2) Act 2013) provides as follows:

*"130. A trial judge may in his or her discretion mitigate any fine or penalty incurred for any offence under or by virtue of excise law, provided that the amount so mitigated is not greater than 50 per cent of the amount of the fine or penalty."*

9. Section 78(5A) of the Finance Act, 2005 (as inserted by s. 101 (b) of the Finance Act, 2010) provides that the penalty to be imposed by the offence is dealt with under s. 13 of the Criminal Procedure Act, 1967 (as amended) as follows:

*"Section 13 of the Criminal Procedure Act 1967 shall apply in relation to an offence under this section as if, in place of the penalties specified in subsection (3) of that section, there were specified in that subsection the penalties provided for by subsection (5)(a) of this section, and the reference in subsection (2)(a) of section*

*13 of the Criminal Procedure Act 1967 to the penalties provided for in subsection (3) of that section shall be construed and apply accordingly."*

Section 13 of the Criminal Procedure Act 1967 deals with the procedure applicable where an accused pleads guilty in the District Court to an indictable offence.

10. Pursuant to s. 126 (6) of the Finance Act, 2001, s. 1 of the Probation of Offenders Act, 1907 does not apply to prosecutions for offences contrary to s. 78 (3) of the Finance Act, 2005 (as amended).
11. Finally, s. 3 of the Criminal Justice (Community Service) (Amendment) Act, 2011 provides as follows:

*"Section 3 of the Principal Act [the Criminal Justice (Community Service) Act, 1983] is amended—*

*(a) by the substitution of the following subsection for subsection (1)—*

*'(1)(a) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of 12 months or less, the court shall, as an alternative to that sentence, consider whether to make an order (in this Act referred to as a 'community service order') in respect of the offender and the court may, if satisfied, in relation to the offender, that the provisions of section 4 have been complied with, make a community service order in accordance with this section.*

*(b) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of more than 12 months and, it is satisfied, in relation to the offender, that the provisions of section 4 have been complied with, the court may make a community service order in accordance with this section..."*

#### **Background to the alleged offence**

12. The plaintiff was charged by way of summons dated 18th December, 2019. According to the statement of claim, the summons sets out the alleged offence as follows:

*"That you, the above named accused, on the 5th December 2018 in the Artane Castle Shopping Centre car park, Artane, Dublin 5, within the Dublin Metropolitan District, did offer for sale specified tobacco products to with [sic] 1Kg of tobacco for the rolling of cigarettes otherwise than in a pack or packs to which a tax stamp by means of which tobacco products tax at the appropriate rate has been levied or paid in respect of such tobacco products, had been fixed to each such pack, contrary to s. 78 (3) and (5) of the Finance Act, 2005 as amended by s. 77 of the*

*Finance Act, 2008, s. 101 of the Finance Act, 2010 and s. 56 of the Finance Act, 2013”.*

13. The statement of claim states that on 4th March, 2020, the return date of the summons, the court accepted jurisdiction by determining that the offence was minor and thus fit to be tried summarily, and accordingly directed summary disposal. The plaintiff was granted legal aid, and the case was then adjourned for disclosure to 22nd April, 2020.
14. The plaintiff's position is that he intends to plead guilty to the offence. The sentence will be a fine of €5,000 and/or a sentence of imprisonment not exceeding twelve months. The trial judge has discretion to mitigate the fine of €5,000 pursuant to s. 130 of the Finance Act, 2001 as amended, but only to the extent of a maximum of 50% of the applicable fine. If the District Court therefore decides that a fine is appropriate, that fine will not be less than €2,500. It is accepted by the parties that the sentencing judge has discretion as to the choice of penalty provided by s. 78 (5) (a), and also has discretion as to whether all or part of any term of imprisonment imposed will be suspended, or community service imposed.
15. The circumstances of the plaintiff are set out in the statement of claim. The plaintiff is a security guard, and has worked in his current position for approximately five years. His take home pay is approximately €470 per week. His wife works as a cleaner; she is a qualified nurse, but unfortunately her English is said to be not yet good enough to allow her to practise. The plaintiff supports three children between the ages of ten and 24, the two youngest of whom live at home. The plaintiff has no previous convictions.
16. The plaintiff is from Romania, and his parents who reside in that country occasionally send him packages containing food and other items. The plaintiff is a heavy smoker but finds the price of cigarettes in Ireland to be very high, apparently three to four times that of the price of cigarettes in Romania.
17. The statement of claim asserts that the plaintiff decided to try rolling his own cigarettes from tobacco bought in Romania as a considerably cheaper way of maintaining his tobacco habit. In or around late November 2018, he ordered two 1kg packs of rolling tobacco on a Romanian website, to be delivered to his parents, who in turn sent them and other items to the plaintiff in Ireland. The plaintiff paid approximately €180 for each of the kilogram packs of tobacco which the plaintiff asserts is more than three times cheaper than the cost of a kilogram of tobacco in Ireland.
18. The plaintiff tried rolling his own cigarettes with the tobacco but found it very difficult and did not like smoking the badly rolled cigarettes that he had made himself. He asserts that he gave away the open pack of tobacco to a friend, and decided to sell the unopened pack. He says that he advertised the pack for sale on a Facebook page called Marketplace for the same price for which he bought it, and that he was not aware that, in doing so, he was committing an offence.

19. The plaintiff was contacted through Facebook by a woman who said that she wanted to buy the tobacco, and they arranged to meet in a car park at a shopping centre near the plaintiff's house in Coolock, Dublin 5. On 5th December, 2018, the plaintiff met the woman and gave her the pack. She then identified herself as being from the Revenue Commissioners and told the plaintiff that he had committed an offence. The plaintiff gave the woman his personal details and identified himself by his driving licence. He states that the woman told him that if he did this again he would end up in court.
20. The summons was subsequently delivered to the plaintiff by hand in December 2019. It is asserted that the plaintiff was shocked and upset, as he had never come to the attention of the Gardaí before, and was "devastated" at the prospect of having a criminal conviction, particularly as he is studying at night to become a taxi driver, and fears that a criminal conviction would prevent him from being granted a taxi licence.
21. The plaintiff pleads that his financial circumstances are such that he and his family would "find it a very considerable struggle to pay a fine of €5,000", and that he fears not being able to pay the fine. He also asserts that it has been estimated by the Revenue Commissioners that the loss to the Revenue Commissioners in relation to the 1kg of tobacco for use in hand rolled cigarettes, which is the amount and type of tobacco concerned in this case, is €360.

#### **The issues**

22. The plaintiff contends that a fine of €5,000 in all the circumstances "... *would be unjust and disproportionate to the circumstances of the offence and the offender. The alternative is to impose a sentence of imprisonment which, even if suspended, would be a disproportionate penalty for a first offender in the circumstances of the case*". [para. 23].
23. In all the circumstances, it is asserted that:
  - "25. *The failure to establish a rational relationship between the permitted fine and the justice of the case and/or the failure to establish a rational connection between the penalty imposed and the wrong that is aimed [sic] to address, constitutes an impermissible breach of the plaintiff's constitutional right to be sentenced in due course of law and/or fails to comply with the constitutional doctrine of proportionality in terms of sentencing.*
  26. *The requirement by the Oireachtas for the sentencing judge to impose a penalty that has no regard to proportionality is an impermissible breach of separation of powers and/or fundamentally contravenes the constitutional administration of justice.*"
24. The defendants join issue with the matters set out in the statement of claim and, as we have seen, reserve their position, particularly as regards the future prosecution, in relation to the matters pleaded in the statement of claim touching upon the plaintiff's personal situation.

25. The defendants plead that the general parameters of punishment for offences in relation to s. 78 (3) have been specified in s. 78 (5), and that ... *"the Oireachtas is entitled, when enacting legislation, to specify, in relation to any offence, a range of penalties or sentences which a sentencing court may, in its discretion, impose on a convicted person ..."* [para. 15]. It is pleaded at para. 16 that the issue of whether the range of penalties is unjust and disproportionate to the circumstances of the offence and the plaintiff is "non-justiciable", and without prejudice to that contention, it is pleaded that the range of penalties as specified in s. 78 (5) is in fact reasonable, just and proportionate. It is further pleaded that the penalties *"are rationally connected and proportionate to the requirements of justice regarding the punishment of offences arising pursuant to Section 78 (3) ..."* [para. 17]. It is denied that the constitutional doctrine of proportionality has any application to the imposition by a sentencing judge of an appropriate sentence following the criminal conviction of a person [para. 18].

### **Relevant case law**

26. The plaintiff contends that the penalty for the offence is akin to a mandatory penalty in that there is a fine of €5,000 which can be mitigated by as much as 50%, but no more, so that there is a "floor" of €2,500 beneath which the fine may not go. The defendants do not accept that the fine can be regarded as mandatory, in circumstances where there is the alternative of a prison sentence.
27. Notwithstanding this, it is accepted by both parties that the Oireachtas is entitled to prescribe a fixed or minimum penalty for any offence. The plaintiff contends however that any fixed or minimum penalty *"is subject to the constitutional limitation of reasonable or rational connection with the requirements of justice ..."* [para. 25 written submissions].
28. In *Ellis v. The Minister for Justice and Equality* [2019] 3 IR 511, the Supreme Court found that s. 27A (8) of the Firearms Act, 1964, which imposed a mandatory sentence of not less than five years as a minimum term of imprisonment to be served by certain persons specified in that section, was unconstitutional, in as far as it applied only to a limited class of persons who committed a specified offence. In her judgment in that case, Finlay Geoghegan J. referred to the judgment of Murray C.J. in *Lynch & Whelan v. Minister for Justice* [2012] 1 IR 1, in which he stated at para. 49 as follows:

*"The Court is satisfied, as Ó'Dálaigh C.J., explained in that case [Deaton v. The Attorney General & The Revenue Commissioners [1963] IR 170], that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory, penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified."*

29. In this regard, Finlay Geoghegan J. commented in *Ellis* as follows:

- "72. ...Deterrence may form part of such requirements of justice. As it is prescribed in legislation which applies generally, irrespective of the circumstances in which the offence is committed or the personal circumstances of the offender, it must be justifiable by reference to the gravity of the offence or possibly, in the *Heaney v. Ireland* [1994] 3 I.R. 593 public law sense, proportionate to the gravity of the offence, irrespective of the circumstances in which it was committed or the personal circumstances of the offender. There may be other permissible policy objectives such as deterrence which apply generally which are relevant to justification.
73. The judgments cited, *Deaton v. The Attorney General and the Revenue Commissioners* [1963] I.R. 170, *P.C. v. Min. for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M. 369 and others, however also indicate that the selection of the punishment to be imposed on a particular person convicted of a particular offence forms part of the administration of justice which, pursuant to Articles 34.1 and 38, is exclusively a matter for judges sitting in courts. The convicted person also has the constitutional right, identified *inter alia* by Henchy J. in *The State (Healy) v Donoghue* [1976] I.R. 325, in the passage in *The People (Director of Public Prosecutions) v. Begley* [2013] IECCA 32, [2013] 2 I.R. 188 quoted above, to receive a sentence 'appropriate to his degree of guilt and his relevant personal circumstances'. The precise manner in which the above are reconcilable, or where the dividing line between the roles of the Oireachtas and the Courts lies, is less clear.
74. Notwithstanding, it is important to distinguish the constitutional principles at issue in *Lynch & Whelan*... in application of what the Court then understood to have been decided by *Deaton*.... First there is the separation of powers, which is not breached by the Oireachtas, in exercise of its legislative power, prescribing by law a fixed or mandatory penalty, including imprisonment, for a particular offence which applies to all persons convicted of the offence. Such legislation is not considered an impermissible encroachment upon the exclusive jurisdiction of the courts.
75. Second, such law making is subject to the constitutional limitation of rational connection with the requirements of justice set out in *Lynch & Whelan v. Minister for Justice*...".
30. In *Osmanovic v. Director of Public Prosecutions* [2006] 3 IR 504, the Supreme Court considered whether s. 89 (b) of the Finance Act, 1997 was unconstitutional. This section provided *inter alia* that the penalty for conviction on indictment on charges of the illegal importation of goods was a fine of treble the value of the goods, or €12,700, whichever was the greater, or at the discretion of the court imprisonment for a term not exceeding five years, or both the fine and imprisonment. The applicant argued that the subsection was unconstitutional in that it provided for a fixed penalty which was contrary to the doctrine of the separation of powers, that there was a wealth-based discrimination in the provision, and that it infringed the constitutional principle of proportionality.

31. The court held that the section did not provide for a fixed penalty, as there was a “multiple choice” available to the sentencing judge. *Deaton* was authority for the proposition that the Oireachtas had “powers to lay down general parameters within which a sentence is to be imposed ...” [Murray C.J. at para. 26].

32. In dealing with the “wealth discrimination” argument, Murray C.J. stated as follows:

“28. ...Crudely put, the argument more or less runs that the rich are fined and the poor are sent to prison. There are several fallacies in this argument. First of all, there is nothing at all unusual about statutory offences of any kind providing for a prison sentence and / or fine. In this instance what is provided for is a fine and/or prison sentence. There is that slight difference of juxtaposition but that would be normal in a revenue offence. In the case of an ordinary offence a judge might well be dealing with somebody who had no money and would, therefore, form the view that some kind of custodial or suspended sentence would be more appropriate as otherwise there would be no punishment. If, on the other hand, the person he is sentencing has money the fine becomes a real option. Normally, there is no element of unconstitutional discrimination in this process.”

33. In relation to the nature of the offence, Murray C.J. said as follows:

“32. ... it has to be borne in mind that s. 89(b) of the Act of 1997 is concerned with a conviction for a revenue offence. Money should have been available to pay the duty and in those circumstances a financial penalty is not unjust. If, however, it is unrealistic or impracticable, the judge has other options as already pointed out. These kind of sentences involving substantial fines have been traditionally a feature of revenue offences and in considering what is fair or unfair or discriminatory or non-discriminatory, the court should take this factor into account. ...”

### **Proportionality of sentence**

34. As we have seen above, the Supreme Court in *Lynch & Whelan* suggested that a fixed penalty could be called into question “... if there was no rational relationship between the penalty and the requirements of justice with regard to the offence specified”. The plaintiff argues that “on summary conviction, it is reasonably conceivable that an offence under this section by an offender in particular circumstances would not reasonably or rationally merit that penalty...” [written submissions, para. 32].

35. There is some discussion in the cases of what exactly is meant by the “proportionality” of a sentence. The plaintiff refers to the formulation by Costello J. in *Heaney v. Ireland* [1994] 3 IR 593. In that case, Costello J. stated as follows:

“In considering whether a restriction on the exercise of rights as permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimum restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society ... [T]he objective of the impugned provision must be of



*sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
- (b) impair the right as little as possible, and*
- (c) be such that their effects on rights are proportional to the objective ...” [at p. 607]*

36. In *Lynch & Whelan*, the court considered the applicability of this test to the issue of imposing an appropriate prison sentence:

*“54. ... the question of sentencing a person to a term of imprisonment only arises after the person concerned has been convicted of a criminal offence. It is not a deprivation of liberty in some broad public interest but a deprivation of liberty because of the criminal culpability of the person to be sentenced. The exercise of a judicial discretion then is a consequence of that. That the doctrine of proportionality as stated in *Heaney v. Ireland* ... has no application to, and indeed would be inapplicable to, the exercise of imposing an appropriate or proportionate prison sentence in a criminal case is probably self-evident but is in any event evident from the innumerable cases which make reference to the principle of proportionality in sentencing and refers to proportionality in its ordinary meaning... there are many other judicial dicta [in addition to various cases cited in the paragraph quoted], including those of *Denham and Hardiman JJ.*, cited in the arguments of the plaintiffs above from which it is apparent that when a court is obliged to impose a sentence which is proportionate, it means proportionate or appropriate to the circumstances of a case.*

37. In *Ellis*, Finlay Geoghegan J. stated that the Supreme Court appears to have concluded in *Lynch & Whelan* that, in relation to *the crime of murder and the mandatory sentence for that offence of life imprisonment*, *“... there was a rational relationship between the penalty prescribed and the requirements of justice with respect to the punishment of the offence specified ... [W]hilst not expressed as passing the public law test of proportionality as set out in *Heaney v. Ireland*..., it is difficult to see any difference of substance ...” [para. 64].*

38. In *People [Director of Public Prosecutions] v. Begley*, the Criminal Court of Appeal addressed the question of proportionality in sentencing as follows:

*“29. The essential principles of sentencing law are firmly established as part of our criminal jurisprudence and have been consistently applied, as a matter of course, for many years. At the level of generality, it can be said that all sentences will result from a consideration of the gravity of the offence and of the circumstances in*

*which it has been committed: from an appraisal of the personal situation of the accused person and from the assignment, to all mitigating factors, of a fitting value. Such an exercise should result in the sentence being proportionate to the crime and the person: if the result is otherwise, it must be adjusted so that at the end of the process an appropriate sentence is imposed*

30. *There are many elements involved in sentencing both at a general and specific level. Each has its own justifying reason. Some evidently are more influential than others: some may apply in isolation whilst others are best suited to have a cumulative effect. Not all will arise in any given case but all are part of an overall armoury, designed to deal with a multitude of different circumstances, relative to both crime and criminal, which when properly used, will result in the imposition of a just sentence in all circumstances."*
39. Counsel for the plaintiff made reference to a number of passages from "Sentencing Law and Practice", 3rd ed., 2016 by Thomas O'Malley, a distinguished academic and practising barrister. In the interests of brevity, I would summarise the points made by Mr. O'Malley as relied on by counsel as follows:
  1. Imprisonment is the most severe sanction available under Irish law for adult offenders, and "should be reserved for the more serious cases ... otherwise the principle of proportionality is scarcely being observed". [Paragraph 21.04]
  2. "A court should not impose a suspended sentence unless satisfied that the offence is sufficiently serious to merit imprisonment ... it would scarcely be just if an offender were then imprisoned for an offence that did not call for a custodial sentence in the first place..." [para. 22.08].
  3. "Fines, like all other criminal penalties, must be selected according to the principle of proportionality..." [para. 23.03].
  4. "It has long been part of our law that a court, when imposing a fine, must have regard to the offender's means, and there has long been a provision to this effect in the District Court Rules. The principle is now enshrined in more elaborate form in the Fines (Payment and Recovery) Act, 2014 s. 5, which applies to all courts..." [para. 33.05].
40. In this latter regard, s. 5 (3) (b) of the Fines (Payment and Recovery) Act, 2014 provides that

*"...A court shall not, in any case, impose a fine that is—*

  - (i) greater than the maximum fine (if any), or*
  - (ii) less than the minimum fine (if any),*

*to which a person would be liable upon conviction of the offence concerned."*

The Act does not therefore permit the court to impose a fine which is less than the minimum prescribed for the offence by virtue of the person's lack of means.

41. The plaintiff contends that the submission of the defendants that the Oireachtas is entitled to determine that Revenue offences are always of at least a minimum level of gravity that merits a substantial fine does not sit well with other serious offences where no minimum penalty is imposed, even where a trial on indictment is mandatory. The offence of rape is offered as an example of a heinous offence which must be prosecuted on indictment, and yet has no minimum penalty. A presumptive mandatory minimum sentence of ten years is stipulated in respect of offences under s. 15A of the Misuse of Drugs Act, 1977 (as amended), but a judge retains discretion to impose the sentence he or she deems appropriate, including suspended sentences. Indeed, while a conviction on indictment for the offence in the present case may result in liability to a fine not exceeding €126,970 or, at the discretion of the court to imprisonment for a term not exceeding five years, or to both, there is no minimum penalty, whereas, as we have seen, there is in effect a minimum penalty of €2,500 for a summary conviction where a fine is imposed.
42. It is suggested that a penalty imposed by a judge, even within the statutory parameters, may be unreasonable or disproportionate; as counsel put it, "...[e]ither a penalty imposed is unreasonable or disproportionate or it is not. It does not stop being unreasonable or disproportionate because it arises from a minimum penalty required by statute ..." [para. 46 written submissions]. It is also suggested that the minimum fine is "too significant" for it to be said that such a fine could never be disproportionate or unreasonable, and that it "breaches principles of equality, whereby a destitute person would be much more heavily penalised than a person of means for the same offence". [para. 47 written submissions].
43. The defendants submit that the Supreme Court in *Ellis*, and in particular at paras. 70 to 75 of the judgment of Finlay Geoghegan J., finds that, as regards the imposition of minimum mandatory penalties by the Oireachtas, it is permissible as a matter of principle for the Oireachtas to impose a fixed or mandatory penalty for a particular offence, but this penalty must apply to all citizens, and there must be a rational relationship between the fixed penalty and the requirements of justice.
44. In this regard, it is submitted that s. 78(5), even if it is considered to propose a fixed penalty, has universal application to all persons convicted of the offence. It is further submitted that there is a rational relationship between the penalties set out and the requirements of justice. In this regard, it is submitted that:

*"Revenue offences are not victimless minor crimes ... such offences are against the community and strike at the ability of the State to function. Without taxes, the State cannot operate or provide services to its citizens. It is imperative that the Revenue Commissioners effectively collect revenue by means of excise duty and other taxes on substances such as tobacco and alcohol. As such, it is reasonable, rational and proportionate that offences which relate to the avoidance of such taxes would attract punitive sanction which has the potential to deter prospective*

*offenders. Given the nature of the offence, it is wholly reasonable that such sanction would include financial penalties.” [para. 33 written submissions].*

45. The defendants submit that the rational relationship required between the penalties set out in s. 78 (5) and the requirements of justice is observed by allowing for summary prosecution or for prosecution on indictment, and by providing the sentencing judge with a range of sentencing options “...including the imposition of a reduced fine or the imposition of [a] partially or wholly suspended sentence”. [para. 34 written submissions].

#### **Discussion**

46. It is no part of the function of this court to determine or even pronounce upon the facts of the matter as set out in the statement of claim as they relate to the plaintiff. As the plaintiff intends to plead guilty to the offence, the consideration and determination of the facts for the purpose of sentencing are solely a matter for the trial judge in the District Court. Having said that, the parties were agreed that this court could consider the plaintiff’s circumstances as context for the issues to be decided.
47. If the plaintiff pleads guilty, he will be convicted under s. 78 (3) of the Finance Act, 2005. He will not obtain the benefit of s. 1 of the Probation Act, 1907, and will either be fined or imprisoned under s. 78 (5) (a), or both. If fined, the amount of that fine will be €5,000, although this can be mitigated to a figure of not less than €2,500. If imprisoned, he will serve a term not exceeding twelve months.
48. It is implicit in the facts set out in the statement of claim, and the submissions on behalf of the plaintiff, that he is very likely to be considered, as an offender under s. 78 (3), as being at the lower end of the scale of seriousness. He contends that he is simply a heavy smoker who came into possession of tobacco for which he ultimately had no use, and that he sought to defray the expense of acquisition of the tobacco by advertising it for sale, not in a clandestine fashion, but openly on social media and in ignorance of the fact that, in doing so, he was committing an offence. He says that he has no “track record” in this regard, and indeed has never been in trouble with the law. He has been in regular employment for five years, but is unlikely to be able to discharge even the minimum possible fine of €2,500. The loss to the Revenue Commissioners arising from the failure of the plaintiff to pay the appropriate tax is estimated at €360.
49. It is submitted on the plaintiff’s behalf that the circumstances, if proven or accepted at trial, do not warrant a custodial sentence; however, the minimum fine is not in accordance with the plaintiff’s means. Counsel submits therefore that the penalty will not meet the justice of the case, and relies on the dicta of Charleton J. in *Ellis* in this regard:

*“In very many cases, the legislative arm of the State may well be accurate in fixing a mandatory minimum standard to appropriate punishment, but it is their responsibility in embarking on such a process to find a minimum sentence that always meets the justice of the case. The danger is in the rigidity which that approach imposes on the courts. What is not apparent in that approach is what O’Higgins C.J. stated in *The State (Healy) v. Donoghue* [1976] I.R. 325 at p. 348,*

*which was that judges are severely limited in what they can do since no 'court under the Constitution has jurisdiction to act contrary to justice'. And there the problem lies. The Oireachtas is not entitled to prescribe a potentially unjust mandatory minimum sentence."* [para.21]

50. The plaintiff has already had the benefit of a determination by the District Court that his case should be tried summarily. It is acknowledged that the offence which he is alleged to have committed is not so serious as to warrant a trial on indictment. He draws attention to the fact however that summary conviction would expose him to a minimum fine, whereas a conviction on indictment would not, which the plaintiff's counsel submits is an *"incongruity... which again highlights the unfairness of the penalty on summary conviction..."* [written submissions para. 48].
51. However, I think that the juxtaposition of penalties is capable of a very different interpretation. One cannot but infer that, in imposing a mandatory fine of €5,000 for a summary offence – subject to a possible abatement of 50% - the intention of the legislature was to deter the commission of this offence by the imposition of a particularly heavy fine, and to ensure the consistent application of a heavy penalty by depriving courts imposing sentences for this offence of any ability to reduce the fine beyond a maximum of 50%, or to apply the Probation Act. It would seem that the Oireachtas took the view that, even in cases subsequently deemed suitable to be dealt with in a summary manner, the objective of deterrence in relation to tax evasion with respect to tobacco products – essentially a financial crime – could only best be achieved through heavy financial penalties which would cause prospective offenders to reason that the risk of offending would outweigh the reward. Such a minimum penalty would not be necessary for a trial on indictment, which is reserved for more serious crimes, in respect of which the Circuit Court might require a latitude in sentencing that the Oireachtas did not deem suitable for lesser offences.
52. However, the plaintiff argues that, if the court deems that the plaintiff's offence does not warrant a custodial sentence, the only alternative is that he be fined, in circumstances where he cannot afford the minimum fine. As Mr. O'Malley suggests, imprisonment should only apply to the most serious cases, and a suspended sentence should only be imposed where the court first considered imprisonment to be an appropriate sanction. It seems clear from the wording in s. 3 of the Criminal Justice (Community Service) (Amendment) Act, 2011 quoted at para. 11 above, that the option of community service is also available only where the court is of the opinion *"... that the appropriate sentence in respect of the offence of which this offender is convicted would, but for this Act, be one of imprisonment for a period of 12 months or less..."*.
53. The defendants do not accept this line of reasoning, and rely on the dicta of Murray C.J. in *Osmanovic* at paras. 28 and 32 of that judgment as quoted at paras. 32 and 33 above. They also submit, in relation to the suggestion of "wealth discrimination" in the offence, that this is addressed at para. 31 of the judgment of Murray C.J. in *Osmanovic* as follows:

*"A second argument against any suggestion of wealth discrimination is that the option of suspended sentence is open to the judge in any given instance where in all the circumstances that might appear to him or her to be just".*

54. In effect, the Supreme Court in *Osmanovic* did not accept the proposition that the imposition of a fine must occur only in conjunction with a custodial sentence, or when a custodial sentence is in the first instance deemed inappropriate. In dealing with a financial crime, the Supreme Court considered that a sentencing court could first seek to impose the prescribed financial penalty, and if the accused were unable to pay it, instead impose *"some kind of custodial or suspended sentence ... as otherwise there would be no punishment"*. Whereas it is submitted on behalf of the plaintiff that a custodial sentence must be considered inappropriate before the court will consider only imposing a fine, the Supreme Court is of the view, as set out in *Osmanovic*, that consideration of a custodial sentence as a means towards imposing a suspended sentence or perhaps community service is in fact appropriate in respect of a person who is unable to pay the fine.
55. It would seem that the options open to the trial judge in the District Court, when sentencing a person under s. 78 (5) (a) of the Finance Act, 2005, may be summarised as follows (in the order in which they appear in that subsection):
- A fine of €5,000, which the sentencing judge "may in his or her discretion" mitigate to not less than €2,500; the convicted person may opt to pay the fine by instalments, the final instalments of which must be paid not later than twelve months after a period of 42 days from the date on which the fine was imposed: see s. 6 Fines (Payment and Recovery) Act, 2014; or
  - At the discretion of the court, a term of imprisonment not exceeding twelve months; or
  - Both a fine and a term of imprisonment;
  - Where the court sentences the person to a term of imprisonment under the section, "...that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order ..." [s. 99 (1) Criminal Justice Act, 2006]. The sentence may be suspended for a period longer than the sentence itself: see *DPP v. Vajeuskis* [2014] IEHC 265;
  - Where the court "is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted, but for this Act, be one of imprisonment for a period of twelve months or less, the court shall, as an alternative to that sentence, consider whether to make [a community service order] in respect of the offender ..." [s. 3(1)(a) of the Criminal Justice (Community Service) Act, 1983 as amended].

56. In these circumstances, it seems clear that even the lowest possible fine of €2,500 cannot be regarded as mandatory as there is a range of possible sentences which can be imposed on summary conviction. It seems to me that the only way in which the fine could be regarded as mandatory would be if the court, in deciding to impose a fine, must be regarded as having first considered and rejected the option of imprisonment, so that it is left only with the option of a fine. In such circumstances, the plaintiff argues that there is no rational relationship between the fine and the justice of the case, or any rational connection between the penalty imposed and the wrong which the section seeks to address. It is said that such a lack of proportionality as regards sentencing breaches the plaintiff's constitutional right to be sentenced in due course of law.
57. As regards the concept of proportionality, I agree with the view expressed by Finlay Geoghegan J. in *Ellis* (see para. 37 above) that it is "...difficult to see any difference in substance ..." in relation to whether the sentence imposed must pass a public law test of proportionality as set out in *Heaney*, or whether, as Murray C.J. acknowledged in *Lynch & Whelan* (at para. 49 of the judgment, quoted at para. 28 above), a legislative provision which imposed a mandatory penalty might have its constitutionality called into question if there was no rational relationship between the penalty prescribed and the requirements of justice with regard to the punishment of the offence specified. As Finlay Geoghegan J. put it in *Ellis*:

*"...the selection of the penalty in accordance with law is fixed by the Oireachtas and the Court is obliged to select that penalty. That is not in breach of the separation of powers. However, the Oireachtas in enacting such a law, is limiting the constitutional right of an individual to have the appropriate sentence for the offence of conviction determined by a court in accordance with his relevant personal circumstances for the reasons stated, inter alia, by Henchy J. in The State (Healy) v. Donoghue [1976] IR 325. That interference with the constitutional right of the offender is subject to a rational relationship between the penalty and the requirements of justice with regard to the punishment of the specified offence, as stated at para. 49... of Lynch & Whelan..." [para. 84].*

58. Is there a rational relationship in the present case between the penalty and the requirements of justice with regard to the punishment of the specified offence? The plaintiff appears to imply that it is overwhelmingly likely that he would in the normal course, given his circumstances, be fined rather than receive a sentence of imprisonment if he pleads guilty. While this is not stated in the statement of claim, the written submissions on behalf of the plaintiff express his position concisely:

*"Even if reduced to the minimum fine permissible in law which is €2,500, in all the circumstances, it is submitted that this would be unjust and disproportionate to the circumstances of the offence and the offender. The alternative is to impose a sentence of imprisonment which, even if fully suspended or very short, would be a disproportionate penalty for a first offender in the circumstances of the case."*  
[para. 20]

59. However, in my view, there is no obligation on the court to consider and reject the imposition of a prison sentence before deciding that a fine is appropriate. There may be some significance in the fact that s. 78 (5) (a) refers to "...a fine of €5,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both...", i.e. that the fine is placed first in the list of possible sanctions. It may be that the view of the Oireachtas was that a heavy financial penalty should be the more usual means of penalising a person for this particular financial crime, and that such a penalty would act as a deterrent to prospective offenders.
60. It is not apparent to me that there is any reason why a court should only consider the imposition of a fine if it were satisfied that a prison sentence was not appropriate. The section itself presents a clear choice between the two, or that both a fine and a prison sentence might be imposed. While it may well normally be the case that a fine is preferable to the deprivation of liberty which a prison sentence represents, that may not always be the case, particularly where the sentence may be suspended or community service may be imposed as an alternative.
61. In this latter regard, s. 99 of the Criminal Justice Act, 2006 as amended makes it clear that the court, when sentencing a person to imprisonment, may suspend the execution of that sentence "in whole or in part". The court has complete discretion both as to the length of the sentence, subject to the upper limit of twelve months, and as to the period of suspension, which may cover the whole sentence. Under s. 99 (3) of that Act, conditions may be attached to any such suspension; an obvious one which might suggest itself would be restoration to the Revenue Commissioners of the tax which has been lost in the alleged commission of the offence. I see no reason why, if the plaintiff is unable to discharge even the lowest possible fine but is considered by the sentencing court to be deserving of leniency, a suitable penalty cannot be fashioned by the court in this manner which would not be unjust or disproportionate.
62. In *Osmanovic*, the Supreme Court appeared to be of the same view. As that case involved a challenge to the constitutionality of s. 89 (b) of the Finance Act, 1997, the decision of the court, pursuant to the provisions of Article 26.2.2 of Bunreacht na hEireann, was pronounced by a single member, in that case, Murray C.J. As we have seen, at para. 28 of his judgment, the Chief Justice, in dealing with the submission that the impugned section discriminated between those who could pay the fine and those who could not, stated that "... [i]n the case of an ordinary offence a judge might well be dealing with somebody who had no money and would, therefore, form the view that some kind of custodial or suspended sentence would be more appropriate as otherwise there would be no punishment. If, on the other hand, the person he is sentencing has money the fine becomes a real option. Normally, there is no element of unconstitutional discrimination in this process ...", and went on to comment at para. 31 that "... the option of a suspended sentence is open to the judge in any given instance where in all the circumstances that might appear to him or her to be just".



63. While the plaintiff is “devastated” that he will now have a criminal conviction, the conviction is inevitable given his intention to plead guilty, regardless of the penalty imposed. No evidence was presented before me which would suggest that his intention to become a taxi driver would be imperilled by a summary conviction of this nature. If, having heard the evidence of the prosecution, and that submitted on the plaintiff’s behalf, the sentencing judge is of the view that a prison sentence is warranted, such a sentence can be imposed. If, on the other hand, the court is of the view that leniency should be shown, the sentencing judge can give a sentence of any length less than twelve months, and suspend the whole or part of that sentence, or require the plaintiff to perform community service. The sentencing judge has a full range of options in addition to a fine, and in my view is in a position to fashion a just sentence appropriate to the circumstances of the case.
64. For the reasons set out above, I do not consider that the fine is a fixed penalty, as there is a range of options open to the sentencing judge; nor do I accept that there is no rational relationship between the penalty prescribed in the section and the requirements of justice with regard to the punishment of the offence specified. In any event, the judgment of the Supreme Court in *Osmanovic* makes it clear that the imposition of a suspended sentence of imprisonment – or perhaps a period of community service under the Criminal Justice (Community Services) Act, 1983 as amended – can be an appropriate alternative to a fine. Also, as regards the argument that the section is discriminatory on the basis of wealth, it seems to me that the reasons for rejecting that argument in *Osmanovic*, set out by the Supreme Court at paras. 28 to 32 in its judgment, are of equal application to the present case.
65. In all the circumstances, I do not consider it appropriate to grant the declaration sought in the statement of claim, the text of which is set out at para. 3 above.
66. I will invite the parties to make a brief written submission – no more than 500 words – to me within fourteen days of delivery of the judgment in relation to any orders to be made, in particular in relation to the question of costs, after which I will make an appropriate order without further reference to the parties.