The High Court

JUDICIAL REVIEW

[2023] IEHC 588

Record No: 2018/144 JR

Between: -

Darragh Galvin

Applicant

And

The Director of Public Prosecutions, the Attorney General and Ireland

Respondents

And

The Irish Human Rights and Equality Commission

Notice Party

Ex Tempore Judgment of Mr Justice Oisín Quinn

Delivered this 24 October 2023

Issues

1. The claim involves a challenge to the constitutionality of section 78(3) of the Finance Act 2005 as amended (which creates an offence of offering for sale specified tobacco products otherwise than in a pack to which a tax stamp is affixed) and of section 126(6) of the Finance Act 2001, which removes from the trial judge the option of applying the provisions of s.1 of the Probation of Offenders Act 1907 in circumstances where a person is found guilty of the offence in question. There are related complaints that the

said sections violate various provisions of the European Convention on Human Rights and the right to work.

2. The Plaintiff's claim raises three issues: -

(i) it is claimed that section 78(3) is too complex for a reasonable person to understand and consequently they would not know that an offence is being committed and it is accordingly said to be unconstitutional;

(ii) there is no requirement in the relevant legislative provisions for the prosecution to prove *mens rea* and this, it is claimed, is unconstitutional in circumstances where the Applicant did not know he was committing an offence and in particular given that the provision creating the offence is said to be so complex.

(iii) finally, it is claimed that the removal of the option of applying the Probation Act is unconstitutional in a scenario where the alleged offender did not know that what he was doing was wrong. Allied to this, was an argument that the combination of the above infringed the Applicant's constitutional right to work as it created the real risk of him losing his job if convicted.

3. These issues are described in more detail in the Applicant's written submissions in Section II and in the judgment of Ms Justice Ní Raifeartaigh in the Court of Appeal in this matter (in the context of an earlier important procedural issue); see *Galvin v DPP* [2020] IECA 319 at para.s 7 to 12.

Background

4. The Plaintiff was charged with the offence of offering for sale a specified tobacco product otherwise than in a pack to which a valid tax stamp was affixed, contrary to s.78(3) and (5) of the Finance Act 2005 as amended. A summons charging the applicant with the offence issued against him on the 20 September 2017.

5. In evidence the Applicant said that in 2016 a friend who was travelling to Turkey bought fifteen packets of Virginia Gold, a fine cut tobacco for making rolled cigarettes, for him. The Applicant explained that when his friend returned from Turkey and gave him the tobacco, for which he paid €10 per pack, he tried one pack and did not like the taste or

the smell. He explained that he decided to sell the remaining fourteen packets for €10 each and on the 16 November 2018, he placed an advertisement in an online Facebook group called "Ballyfermot, buy, sell or swap goods". His attempted sale of the goods was intercepted by a customs officer posing as a customer.

6. The Applicant co-operated immediately with the undercover customs officer and explained why he was selling the packs and he also explained that he did not realise that he was doing anything wrong.

7. At the time, the Applicant was 27 years old and was unemployed due to circumstances related to the downturn in the economy following the financial crisis. However, he has subsequently started a job with An Post which he enjoys, and which provides him with a livelihood which in turn helps him support his daughter. These events, he explained, have caused him considerable anxiety, and worry. He has no previous convictions and came across as a conscientious young man. He explained that he was very concerned that An Post might terminate his employment if he received a conviction for an offence of this nature even though the relevant events occurred before his employment began. It should be noted that there was no challenge to the fact that the Applicant said he was unaware that what he was doing was wrong.

The Proceedings

8. After some initial dates in the District Court, a hearing date in respect of the criminal charge was set down for the 21 February 2018. Leave to bring judicial review proceedings was obtained on the 19 February 2018 and an Order was made staying the District Court proceedings.

9. The Respondents brought a motion seeking that the matter proceed by way of plenary hearing, as a result of which the High Court made an order converting the proceedings to plenary proceedings. That order was upheld by the Court of Appeal [2020] IECA 319.

10. Accordingly, while these proceedings commenced by way of Judicial Review they were heard, following a successful application on the part of the Respondents, by way of plenary hearing on the 19 and 20 October 2023.

11. In the course of the hearing, it should be noted that the Court circumscribed the ambit of the cross-examination of the Applicant. Sufficient evidence was introduced to establish an adequate factual context to ground the entitlement of the Applicant to challenge the statutory provisions in question. The Applicant's evidence established on a sufficient basis that he had unwittingly committed the conduct in question without realising that he was committing an offence. Counsel for the Respondents confirmed that he was not seeking to cross-examine the Applicant on whether he knew that what he was doing was an offence. He did however seek to cross-examine the Applicant on 'why' he did not know this.

12. Having heard submissions, I declined to allow this for two reasons. Firstly, on the basis that I was not persuaded as to why such a line of cross-examination would be relevant. Secondly, because I was concerned that it might potentially tend to cast a doubt on the credibility of the Applicant's assertion that he did not know that what he was doing was an offence. In that regard I followed the approach indicated by Collins J. in *Galvin* [2020] IECA 319 at para.s 33 to 37 and the dicta of Hardiman J. in *A. v Governor of Arbour Hill Prison* [2006] 4 IR 88 at para 195. Those *dicta* confirm that in a case challenging the constitutionality of a statutory provision creating a criminal offence where there is still a criminal prosecution pending that, while it is necessary for the Applicant to introduce sufficient evidence to establish a basis for the particular challenge (such as that they can or would be able, absent the challenged provision, to plausibly raise a particular argument or defence at the pending trial) that it is not necessary that they definitively establish this factually in the constitutional case.

13. In addition, these *dicta* suggest that given that it is not necessary to establish the factual basis definitively at the constitutional hearing, that it may be preferable to delimit cross-examination on such matters as same may prejudice the same issue being run at the trial which is the proper forum for same to be resolved.

14. Accordingly, cases like this can often proceed based on affidavit evidence in a judicial review or even by means of the State respondents, accepting for these limited purposes, a narrative as set out in a Statement of Claim; see *CC v Ireland* [2006] 4 IR 1 for an example of the former and *Dumitran v Ireland* [2021] IEHC 567 for the latter.

Relevant Legal Principles

Issue (i)

15. The relevant legal principles in relation to this issue are contained in *King v Attorney General* [1981] IR 233, *Dokie v DPP* [2011] 1 IR 805, *Douglas v DPP* [2013] IEHC 343, *Cox v DPP* [2015] IEHC 642 and *Bita v DPP* [2020] 3 IR 742. These cases indicate that in certain circumstances where a law creating a criminal offence is 'unclear' that law can be declared unconstitutional. There are two primary reasons for this. First, a criminal offence with an ambiguous or highly subjective descriptor (for example the phrase a 'reputed thief', see *King*) can create a risk of abuse or arbitrary prosecution by the authorities, and secondly, it infringes against the principle that a person should know or be able to know and understand, with some clarity, what the law decides to criminalise.

16. This jurisprudence does not extend to the principle that the Courts can strike down legislation creating a criminal offence that is simply said to be too complex. An *obiter dictum* of MacMenamin J. in *Dunnes Stores v Revenue Commissioners* [2020] 3 IR 480 was said on behalf of the Applicant to widen the principles underpinning the aforementioned jurisprudencea. I do not agree. MacMenamin J. referring to the statutory provisions that introduced the plastic bag tax stated *obiter* as follows at para. 119:-

"*While I consider the legislative intent is discernible as explained in McKechnie J.'s comprehensive judgment, the process of detailed consideration which the court has had to give to the levy regime implicitly poses a question which may well have to be answered in another case. That question is as to whether some statutory provision, which in the future may fall for consideration by a court, is so unclear in its wording,*

or confusingly cross-referenced to other statutes, amendments, or statutory instruments, as not to possess the defining indicia of the law itself."

17. When closely analysed, each of the potential problems referred to by MacMenamin J. are versions of the idea that the law to be struck down must contain a critical lack of clarity. While excessive complexity may not be desirable, the authorities do not support the proposition that it is fatal.

Issue (ii)

18. The jurisprudence recognises that it is permissible to legislate for what are sometimes called 'regulatory offences' and to provide that where it is proved that the required factual components have been committed by the accused person that they will be guilty of the offence on a strict, or in some cases, absolute liability basis. In other words, without the necessity to prove any actual deliberate intent to commit the offence; see *CC v Ireland, Reilly v Patwell* [2018] IEHC 446, *Waxy O'Connors Ltd. V Riordan* [2016] IESC 30 and the very helpful discussion of this issue, sometimes described as the taxonomy of offences, in the judgment of Charleton J in *CW v Minister for Justice & Ors* [2023] IESC 22 and in particular see para.s 17, 28, 29 and 33 where he states:-

"*Where the offence is regulatory, not true criminal offences but offences designed to properly regulate society, reversed burdens occur more frequently*", para 17

…

"*Criminal offences, properly so called as opposed to regulatory offences, are an attack on the moral order of society*", para 28

…

"*In DPP v Murray [1977] IR 360 the general presumption was reaffirmed that for serious criminal offences, the elements which externally make up the commission of a crime (the theft, the hijacking of an aeroplane, the assault, the homicide) also presumptively require a mental element*", para 29

…

"*This general standard does not apply to regulatory crime, which is a different species. Of their essence, these (usually) summary offences require the proof of fact. Inferences from such facts, and the ordinary way of proving intention or knowledge or recklessness, become irrelevant as there is no mental element … examples are multiple,*

as to traffic regulation, as to food preparation, as to pollution, as to planning compliance ...", para 33.

19. It was agreed in this case, that the relevant offence was a strict liability offence. Indeed, it is the Applicant's case, that absent knowledge of the statutory offence, there was no reason for him to believe that he was doing anything wrong. Strict liability means actual *mens rea* will not have to be proved, but that it may be open to the accused to defend the charge on the basis of having exercised all due diligence in relation to trying to ensure that the offence was not committed, see MacMenamin J at para 40 of *Waxy O'Riordan*, citing with approval from the judgment of Keane J. in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267.

20. In cases where there is a high degree of moral opprobrium (for example murder, assaults, theft, sexual offences) much closer scrutiny arises in respect of any legislation reducing the burden on the prosecution to prove *mens rea*, see for example *CW v DPP* Supreme Court [2023] IESC 22.

Issue (iii)

21. The jurisprudence in this regard is very helpfully summarised and discussed by Sanfey J. in *Dumitran v Ireland* [2021] IEHC 567. This case also helpfully discusses this issue in the context of this same offence. Essentially it is clear that, with a regulatory offence, it is open to the legislature to set down by statute restrictions on the range of sentences that can be imposed.

22. Only in very extreme scenarios where there is "no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified" (per Murray CJ in *Lynch & Whelan v Minister for Justice* [2012] 1 IR 1) should statutory provisions of this sort be declared unconstitutional; see *Ellis v. Minister for Justice* [2019] 3 IR 511 and *Lynch & Whelan v Minister for Justice*.

23. In *Dumitran*, a case involving a similar factual background, albeit where the accused intended to plead guilty, no issue was even raised that the statutory exclusion of the Probation Act was somehow unconstitutional.

Submissions and Conclusions

Issue (i)

24. In relation to issue one it was submitted on behalf of the plaintiff that the relevant statutory provision contained in section 78(3) was too complex. Section 78(3) 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, 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."

25. A close examination of section 78 (3) indicates that it can be analysed in three parts.

26. First there is the provision for an exception to the offence: -

"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…"

Counsel for the Respondents indicated that no such exemption had ever been granted by the Revenue. The Applicant did not suggest that he thought his transaction had the benefit of any exemption. In any event, Counsel for the Applicant was not able to point to any lack of clarity in relation to this element of the sub-section.

27. Next, then follows the core of the subsection which sets out the offence as follows: -

"… it is an offence under this subsection to invite an offer to treat for, offer for sale, keep for sale or delivery, 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 …"

There is nothing unclear or complex about this portion of the sub-section. While it is correct to say that some degree of reading statutory definitions is required to ascertain the precise meaning of, for example, "specified tobacco products" there is nothing unusual in that and nor was there any lack of clarity in relation to those definitions.

28. Finally, there is then provision for a second exception: -

"*…unless such invitation, offer, sale or delivery takes place under a suspension arrangement."*

Again, while there is some limited complexity to ascertaining the meaning of a 'suspension arrangement', no lack of clarity was demonstrated. In addition, the Applicant did not make any suggestion that he thought he might be operating under a 'suspension arrangement'.

29. In summary the two exceptions can by way of shorthand be understood as providing for an arrangement whereby the revenue can exempt someone from selling tobacco with the tax stamp or secondly providing for a suspension arrangement. The Applicant did not contend for either exception, and on an *jus tertii* basis it was not strictly possible for him to advance a case based on a criticism of these two exceptions. In other words, he did not claim to have any belief that some exemption had been granted by the revenue and nor to claim to have any belief that he was selling the tobacco pursuant to a suspension arrangement.

30. Even so, when the wording of these two exceptions was analysed during the hearing no lack of clarity was demonstrated. While it is true that these two exceptions had some complexity and involved looking at definitions and provisions elsewhere in the Act and in other legislation this exercise was properly done by Counsel on behalf of the Applicant and ultimately there was no lack of clarity demonstrated.

31. In addition, from a practical point of view, the criticism of these two exceptions was unpersuasive in circumstances where it is not unreasonable to expect a person who believes they have a specific exemption granted by the revenue or have a specific suspension arrangement agreed with the revenue to take efforts to ensure that same are in place. Even allowing for that, there would be scope for a 'due diligence' defence in the context of this offence given that it was conceded on behalf of the Respondents that it was a strict liability offence as opposed to an absolute liability offence.

32. In other words, if an accused came before the court claiming that he had sold tobacco without a tax stamp and he claimed to have a reasonable belief that there was an exemption granted or suspension arrangement in place then it would be open to that person to advance the details of that reasonable belief in an effort to persuade the District Judge that he was entitled to a defence.

33. However, aside from the complexity relating to the two exceptions, the actual core of the subsection is neither unclear nor complex. It provides in clear terms that it is essentially an offence to sell or offer for sale fine cut tobacco that does not have a tax stamp. Indeed, the core of this section could be readily understood by any reasonable person without any legal assistance whatsoever.

34. The submission on behalf of the Applicant that the aforementioned *obiter dictum* of MacMenamin J in *Dunnes Stores* constitutes a sufficient widening of the jurisprudence established in *King, Dokie* and *Douglas* to enable the court to strike down this provision was not well founded in my view. A close analysis of the *obiter dictum* in question indicates in truth a number of variations on the underlying principle that a statute creating a crime must be clear.

35. There is nothing to suggest that the jurisprudence of the courts has now been extended to enable a court to strike down legislation creating a criminal offence on the grounds that it is complex or even very complex. In any event, I am of the view that this particular legislative provision is not very complex and indeed the core provision, aside from the two exceptions, is not complex.

Issue (ii)

36. Turning now to issue (ii), the criticisms of the legislation on the basis that it creates a strict liability offence and is therefore unconstitutional due to the lack of clarity in the offence by virtue of its complexity, is also not well founded. It is clear from the case law referred to above that the courts recognise that it is appropriate for legislation to create what is sometimes called regulatory offenses and that it is appropriate to describe the offence created by section 78(3) as a regulatory offence in the sense that many people would not otherwise consider the sale of tobacco to another adult without a tax stamp to be morally wrong. In other words, it is only wrong because of the section that makes it an offence. However, it is clear from the jurisprudence mentioned above that the courts have recognised that it is appropriate for legislation to provide for regulatory offences on a strict liability basis. Indeed, a modern society could not function otherwise.

37. Regulatory offenses are common in the revenue area. This is one such scenario. It was not disputed that an absence of knowledge of the law is not a good defense. It was argued on behalf of the Applicant that because this statutory offence is alleged to be complex it would be far better if proof of *mens rea* were required. A well-researched argument was advanced by reference to case law in Canada and the United States and in particular the US Supreme Court decision in *Cheek v US* 498 U.S. 192 (1991) that in complex tax offence cases it can be appropriate to insert a requirement that the prosecution prove that the offence was committed willfully.

38. However, pointing out that there is an option for the legislature to require proof of willfulness in certain complex revenue offences does not make legislation creating a regulatory offence that does not have such a requirement, unconstitutional. The Applicant's references to the *CW* case does not advance the position either. The *CW* case clearly involved an offence (the offence of defilement of a child under 17) to which significant moral opprobrium is attached. In those circumstances the real issue in CW was whether or not it was unconstitutional to allow for a conviction where the essential facts were proved unless the accused person could prove a mistake on the balance of probabilities about the child's age. This of course allowed a person to be convicted where there may well have been a reasonable doubt. There is nothing in the judgments in *CW* which extend that rationale to the idea of a regulatory offence such as the one in

this case. Accordingly, I am not satisfied that the provisions are unconstitutional by virtue of the absence of a requirement on the prosecution to prove *mens rea*.

Issue (iii)

39. Turning next to the third issue I'm satisfied that the matter can be dealt with by applying the rationale of the judgment of Sanfey J. in *Dumitran*. Having considered the sentencing restrictions for this offence in the context of a similar background to that which occurred to Applicant here, Sanfey J. at para 64 concludes: - "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."

40. Whilst it is correct that in *Dumitran* that the plaintiff had indicated that he would plead guilty that does not materially distinguish the validity of the analysis of the sentencing limitations imposed by this legislation. Indeed, Counsel for the Applicant accepted that no criticism was being made of the rationale applied by Sanfey J. in *Dumitran*.

41. Sanfey J. proceeds to undertake a comprehensive consideration of the statutory limitations on the penalties that can be imposed where a conviction is secured for selling fine cut tobacco without a tax stamp. Those limitations include the removal of the statutory option of applying the Probation Act. They also provide that the fine on conviction in the District Court should be €5,000 but that this can be reduced to €2,500 if there are appropriate reasons to mitigate. Next, there is provision for a custodial sentence of up to 12 months but same can be suspended and/or community service ordered instead.

42. In my view the Applicant did not come close to meeting the test required in the jurisprudence that there be no rational connection between these sentencing restrictions and the underlying offence. That is not to say that there is any dispute in relation to the Applicant's assertion that he was not aware that he was doing anything wrong. He said as much immediately to the revenue official at the time he was apprehended attempting to sell the tobacco. Nonetheless a much higher bar must be reached before provisions of this sort can be declared unconstitutional.

43. While criticism was made on behalf of the Applicant as against the Respondents in relation to an alleged lack of evidence, the starting position is that the legislation is presumed to be constitutional. Evidence is not required for the court to be satisfied that it is appropriate for the legislature to create a regulatory offence that makes it unlawful to offer for sale fine cut tobacco in relation to which tax has not been paid. The fact that this is a strict liability offence and carries certain sentencing restrictions of the type described, including the removal of the option of the Probation Act, is clearly not irrational or disproportionate in the sense meant by the authorities mentioned above. Nor does a lack of advertising or public information about the offence make the legislation unconstitutional. Accordingly, I am satisfied that the Applicant's argument in this regard must also fail.

44. Finally, the argument was advanced that one or more of the foregoing or all of the foregoing when combined together created a real risk that the Applicant would lose his job. It was explained that if he was convicted - as opposed to having the Probation Act applied –that this would imperil his job and that, therefore, this in effect unconstitutionally infringed his right to work as set out in *NVH v Minister for Justice* [2018] 1 IR 246.

45. I am not satisfied that this is a good argument. Firstly, it is of course the case that anyone convicted of a regulatory offence in respect of which strict liability applies could face difficulties at work. Whether or not the significance of the underlying conduct is appropriately viewed by an employer as sufficient to justify a decision to dismiss will obviously be a matter for consideration in any particular case. In this case evidence was given on behalf of the Applicant by a very experienced former trade union official and industrial relations expert, George Maybury. Mr. Maybury has a long and experienced track record representing employees - many in the public sector - and more recently sitting on various industrial relations bodies considering employment cases and considering decisions made by employers on appeal. When he was advised of the underlying facts in this case (in particular that the relevant events occurred before the Applicant had taken up employment with An Post and that it involved the Applicant unwittingly selling tobacco unaware of the fact that in the absence of a tax stamp he was committing an offence) Mr. Maybury was of the view that any decision by an

employer in those circumstances to dismiss would be disproportionate and harsh. His evidence in that regard was compelling. Nonetheless if the Applicant's employer takes an interest in the matter in the event that he is convicted then it will be a matter for the Applicant to take such steps either by being represented by his union or otherwise to make his case in that regard.

46. However, there was another difficulty with the argument advanced on behalf of the Applicant, namely that the critical difference would be between a conviction on the one hand or the Probation Act (if it could be applied) on the other. This would be to ignore the fact that in cases where the Probation Act is applied it arises in circumstances where the "charge is proved" (per section 1(1) of the Probation Act, 1907). In other words, once an employer looks into the matter it is not clear how material or materially different the application of the Probation Act would be to the situation. In any event I am not satisfied that the fact of a conviction alone in the context of this provision creates an unconstitutional infringement of the right to work as described in *NVH.* If there is a conviction it will be because the constituent elements of the offence have been proven or admitted to have occurred.

47. Finally, to the extent that the Applicant's arguments invoked any related and overlapping provisions of the European Convention on Human Rights I am not satisfied that there are any extra jurisprudential principles that alter the analysis above.

48. Accordingly for the foregoing reasons I propose to make an order dismissing the Applicant's claim and I will hear the parties in relation to costs.