Approved Judgment

No Redaction Needed

THE COURT OF APPEAL

Record No. 2023 297

Neutral Citation Number [2024] IECA 256

Edwards J.

McCarthy J.

Kennedy J.

Between/

DARRAGH GALVIN

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS,

THE ATTORNEY GENERAL, and IRELAND

Respondents

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

JUDGMENT of Mr. Justice Edwards delivered on the 29th of July 2024.

Introduction

1. The subject of the present judgment is an appeal brought by Mr. Darragh Galvin (i.e., "the appellant") against the judgment of the High Court (Quinn J.) dated the 24th of October 2023 and consequent order thereto, perfected on the 25th of October 2023, by which judgment and consequent order the appellant's claim for certain reliefs sought by way of judicial review was dismissed.

2. The reliefs which the appellant sought included *inter alia* declarations to the effect that s. 78(3) of the Finance Act 2005 (i.e., "the Act of 2005"), as amended, as well as s. 126 of the Finance Act 2001 (i.e., "the Act of 2001") and/or s. 78 of the Finance Act 1984 (i.e., "the Act of 1984") are unconstitutional and are incompatible with certain provisions of the European Convention of Human Rights (i.e. "ECHR"). The precise reliefs which the appellant sought will be described in greater detail in the course of this judgment.

Factual Background

3. The factual background giving rise to the present proceedings may be ascertained from the sworn affidavit of Mr. Galvin dated the 16th of February 2018, the evidence of Mr. Galvin tendered in the court below on the 19th of October 2023, as well as the various statements of evidence which were disclosed by the prosecution on the 1st of December 2017, the amended Statement of Grounds filed the 26th of February 2018, and the Replies to Notice for Particulars filed the 3rd of September 2021. The facts of the case are as such:

4. The appellant is a postal operative and employee of An Post since in or around April 2017. In or around July 2016, a friend of the appellant had returned from a trip to Turkey and had brought with him tobacco product, to wit fifteen packets or pouches of Golden Virginia fine cut rolling tobacco, which he provided to the appellant in exchange for €150 (on average €10 per packet). The appellant, having opened one of the fifteen said packets and being

dissatisfied with the smell of the tobacco (he stated in his oral testimony before the court below on the 19th of October 2023 that the tobacco smelt like "*chocolate*"), sought to dispose of the remaining fourteen packets and recoup the money that he had paid. On the 19th of July 2016, he placed an advertisement on an online marketplace page or group on Facebook, which page was entitled "*Ballyfermot, buy, sell or swap goods*". The appellant marketed the goods on this page by way of a post advertising same, attached a photograph of the tobacco packets and added the following comment thereto:

> "*Golden Virginia 50 grams got them as a present but got the wrong tobacco 140 for 14 packs pm me if interested*".

5. The advertisement was responded to by way of private message by a Facebook user operating under the alias of "*Jade Brady*" on the 19th of July 2016. Unbeknownst to the appellant at this remove, this "*Jade Brady*" was in fact a Mr. John Carolan, Officer of Customs and Excise. In his statement of evidence dated the 21st of July 2016, which has been furnished to this Court, Mr. Carolan stated that he was acting in his capacity as an Authorised Officer of the Revenue Commissioners, within the meaning of s. 858 of the Taxes Consolidation Act 1997, at the material time. He stated that he became aware of the appellant's advertisement on Facebook on the "*Ballyfermot, Buy Sell or Swap Goods*" page on the 19th of July 2016. At approximately 07:55 on that date he contacted the appellant under the false alias of "*Jade Brady*" purporting to express interest in purchasing the tobacco. At approximately 12:49 that same day, he arranged with the appellant to purchase the tobacco from a McDonalds premises in Tallaght at midday on the 20th of July 2016. He passed on the details of this arrangement to his colleagues, a Ms. Jennifer Wall, and a Mr. Michael Costello, both Officers of Customs & Excise, who agreed to carry out the test purchase.

6. Ms. Wall, in her statement of evidence dated the 22nd of July 2016, which has been furnished to this Court, stated that on the 20th of July 2016 she attended at the McDonalds

premises in Tallaght on foot of an arrangement made by her colleague Mr. Carolan to meet the appellant to purchase 14 pouches of tobacco for €140. She stated that she was acting in her capacity as an Authorised Officer of the Revenue Commissioners within the meaning s. 858 of the Taxes Consolidation Act 1997 at the material time. She stated that she was asked by Mr. Carolan to carry out a test purchase. At approximately 12:00 on the 22nd of July 2016 she was approached by the appellant who was carrying a beige material bag marked with the word "*Emirates*". She asked him if he had the tobacco, to which he replied in the affirmative and handed her the beige bag. Ms. Wall said that she checked the contents of the bag and found fourteen by 50 grammes pouches of Golden Virginia inside. She confirmed the agreed price of the tobacco which was €140 in total. Ms. Wall stated that at this remove in time she produced her Revenue identity card and identified herself to the appellant as an Authorised Officer of the Revenue Commissioners and an Officer of Customs and Excise. Ms. Wall was joined by her colleague Mr. Costello who also produced his Revenue identity card and informed the appellant that he too was an Authorised Officer of the Revenue Commissioners. Mr. Costello also provided a statement of evidence, of which this Court has had sight, and its content is supportive of Ms. Wall's account. Ms. Wall stated that she asked the appellant if he would like to accompany the two officers to their vehicle and he made no objection. The appellant was cautioned, and the following notes were compiled by Ms. Wall from the exchange that subsequently ensued:

"[Ms. Wall:] *Why did you meet me today?*

[Mr. Galvin:] *To get rid of tobacco.*

[Ms. Wall:] *Where did you get it?*

[Mr. Galvin:] *Turkey, a friend got it for me. I didn't go.*

[Ms. Wall:] *How much did you pay?*

[Mr. Galvin:] *15 packs €150*

[Ms. Wall:] *How did you advertise?*

[Mr. Galvin:] *Facebook.*

[Ms. Wall:] *Have you ever sold tobacco before?*

[Mr. Galvin:] *No*

[Ms. Wall:] *How much were you hoping to sell for?*

[Mr. Galvin:] *€140 what I paid for it*

[Ms. Wall:] *Reconfirm phone number?*

[Mr. Galvin:] [Number redacted]

[Ms. Wall:] *Do you smoke yourself?*

[Mr. Galvin:] *Yes.*

[Ms. Wall:] *Are you currently working?*

[Mr. Galvin:] *No.*

[Ms. Wall:] *When did you get the tobacco?*

[Mr. Galvin:] *Monday.*

[Ms. Wall:] *I believe an offence has been committed under Section 78(3) Finance Act 2005 and I am therefore seizing this tobacco under Section 141 Finance Act 2001*

Do you understand?

[Mr. Galvin:] *Yes*".

7. Ms. Wall's notes then record that she had asked if the appellant wanted to add anything further. Her notes of what he said in addition record "*and he stated he didn't realise he was doing anything wrong*". The appellant refused to sign the notes as a true reflection of the interview. The notes were signed by Ms. Wall and co-signed by Mr. Costello. The interview concluded at approximately 12:20, and Ms. Wall then returned to the New Customs House bringing with her the seized tobacco, which was bagged, sealed, assigned a seal number and was subsequently placed in the Revenue's secure lock-up.

8. The appellant, in his evidence to the court below on the 19th of October 2023, stated that he had started smoking at the age of 16 years. He was aged approximately 27 years in 2016 when the events giving rise to the present proceedings occurred. At the time he was unemployed, and he told the court below that he was on social welfare and had borrowed the money to pay his friend for the packets of tobacco. He said he placed the advertisement on Facebook to sell the remaining fourteen packets because he was "*fairly poor at the time*" and he "*hadn't really got another option* (sic)". In cross-examination, he stated that this marked the first occasion that he had asked someone to get him tobacco from abroad. He further stated that he was alive to the fact that tobacco products may be cheaper to purchase abroad than they are at home. In his testimony, he maintained that at the time he really did not know that he was doing anything wrong. In cross-examination, he stated that he had never seen any public information notices published by the Revenue Commissioners in respect of revenue-related regulations or offences such as the Mineral Oil Regulations. He stated that he was not

aware at the time of the event that it was an offence to sell unstamped tobacco, and that he did not make any enquiries in respect of whether it was an offence to do so in advance of the placement of the advertisement on Facebook. He further stated that he was "*in shock*" that so many people were being prosecuted in relation to this type of offence.

Procedural History

The summons

9. On the 20th of September 2017, the Director for Public Prosecutions applied for a summons pursuant to s. 1 of the Courts (No. 3) Act 1986, which summons was returnable for the 29th of November 2017. On that date, the appellant's solicitor successfully applied for disclosure, which disclosure, furnished on the 1st of December 2017, included *inter alia* the statements of the aforenamed revenue and customs officers, a facsimile of the Facebook advertisement, and a copy of Ms. Wall's notes. On the second District Court date, the 17th of January 2018, the appellant applied for a hearing date and the matter was set down for hearing on the 21st of February 2018.

10. The summons of the 20th of September 2017 alleges that the appellant:

> "[...] *on the 20th of July 2016 in the car park outside McDonalds Restaurant, The Square Shopping Centre, Tallaght, Dublin 24, within the Dublin Metropolitan District, did offer for sale specified tobacco products to wit 0.70 KGMs of fine cut 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 products, had been affixed, contrary to Section 78 (3) and (5) of the Finance Act, 2005 as amended by Section 77 of the Finance Act, 2008, Section 101 of the Finance Act 2010 and Section 56 of the Finance Act 2013*".

11. I should interject here to mention that in or around the 10th of April 2017, the appellant commenced employment with An Post as a postal operative. At the time of the hearing in the court below, the appellant's evidence to that court was that he still had not, as of the 19th of October 2023, informed his employer of his pending criminal prosecution in the District Court on foot of the above summons. He said that he had applied for "*four years straight*" in an effort to get his position with An Post. He told the court below that his functions as a postal operative include both delivery and depot work. He averred to having experienced a work-place related injury which rendered him unable to perform delivery functions, and that accordingly he was assigned to work in postal depots. He told the court below that there is an office for the Revenue Commissioners in each postal depot, and that his work involves contact with customs officials of the Revenue Commissioners. He stated that he had to be Garda vetted to get his employment with An Post. He told the court below that he was "*terrified*" that he would lose his employment with An Post as a result of the District Court prosecution on foot of the summons of the 20th of September 2017; he stated that the experience has caused him "*serious anxiety*". In his affidavit sworn on the 16th of February 2018, the appellant deposed that he "*loved*" his job, and that he had no previous convictions.

Relevant Provisions

12. In ease of the reader, the following provisions relevant to the herein appeal are set out below.

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

> "*(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".

14. Section 78(5) of the Act of 2005, as amended by s. 82(1) of the Finance Act 2006, by s. 77(1) of the Finance Act 2008, and by s. 101(a) of the Finance Act 2010, provides for a range of penalties to which a person may be liable, depending on how such a person is convicted:

"*(5) Without prejudice to any other penalty to which a person may be liable, a person conviction under subsection (3)* [...] *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".

15. Further to the foregoing, and relevant in the immediate case, is s. 78(6) of the Act of 2005, which provides:

"*(6) In a prosecution for an offence under subsection (3), it shall be presumed until the contrary is shown—*

(a) That tobacco products tax had not been paid in respect of any pack or packs which do not have a tax stamp affixed thereto,

(b) that in respect of any pack or packs which do not have a tax stamp affixed thereto—

(i) section 104 (2), of the Finance Act 2001 does not apply [which provision exempts from excise duty excisable products released for consumption in another Member State which (i) have been acquired by a private individual in such another Member State for his or her own use and not for commercial purposes, and (ii) are transported into the State by such private individual, and accompanied by him or her during such transportation],

(ii) the pack or packs are not being held under a suspension arrangement, and

(iii) the Commissioners have not permitted, under section 73(2), payment of the tax to be subject to the provisions governing tobacco products other than specified tobacco products,

(c) in the case of a prosecution for keeping for sale or delivery, that the tobacco products concerned were so kept and were not kept for private use.

(d) That a thing is a cigarette or other tobacco product where, in the opinion of an officer of the Commissioners, it is contained in any form of packaging which, by virtue of any wording thereon, its shape and other characteristics, is indicative of the contents consisting of one or more than one cigarette or of another tobacco product and the officer so states that opinion".

16. It should be noted that at the time of the events giving rise to the present proceedings, S.I. No. 146 of 2010 - Control of Excisable Products Regulations 2010 was in force, which regulations provided at regs. 24-25 thereof that for the purposes of s. 104(2) of the Act of 2001, referred to above, the Revenue Commissioners could have regard to ten factors to

determine whether or not any excisable products brought into the State for a commercial purpose or are held or used for such purpose, which such factors included *inter alia* the reasons given by a person having control or possession of the excisable products, the nature of the excisable products including the nature or condition of any package or container in which they are packed or contained, and the quantity of the excisable products, taking account of specified quantities listed in a table. These regulations have since been revoked, and in their place, as of the 1st of February 2024, S.I. No. 36 of 2024 – Control of Excisable Products Regulations 2024 has been made. Regs. 47 and 48 thereof are analogous in terms to the aforementioned regulations contained in S.I. No. 146 of 2010.

17. Insofar as s. 73(2) of the Act of 2005 may be relevant, it is quoted below:

> "*(2) Payment of tobacco products tax in respect of specified tobacco products shall be by means of the purchase of tax stamps issued by the Commissioners except where the Commissioners, in exceptional circumstances, permit payment to be subject to the provisions governing other tobacco products*".

18. Also relevant in the immediate case, and directly impugned by the appellant, is s. 126 of the Finance Act 2001 which, entitled "*Proceedings in relation to offences*", provides *inter alia*:

> "*(1) This section is concerned with proceedings in relation to any offence under or by virtue of the statutes which relate to the duties of excise or to the management of such duties or under any instrument relating to the management of such duties made under statute.*
>
> [...]
>
> *(6) Section 1 of the Probation of Offenders Act, 1907, shall not apply to offences to which this section relates*".

19. The above provision, in particular subsection (6) thereof, is analogous to s. 78 of the Finance Act 1984, still in force, which stipulates:

> "*Section 1 of the Probation of Offenders Act, 1907, shall not apply in relation to offences under the statutes which relate to the duties of excise and to the management of those duties*".

20. The appellant, in his sworn affidavit of the 16th of February 2018, deposed that he had been advised that even if, having found the facts proved, the District Court were to accept that he did not realise that he was doing anything illegal, it would not be open to that court to apply section 1 of the Probation of Offenders Act 1907 and/or discharge him from the offence in order to leave him without a conviction. He averred that in these circumstances, he was very concerned that An Post would terminate his employment if he received a conviction for an offence contrary to s. 78(3) of the Act of 2005.

Ex-parte application for leave to apply

by way of application for judicial review

21. On the 19th of February 2018, upon motion of counsel for the appellant made *ex parte* unto the High Court, and grounded upon the sworn affidavit of Mr. Galvin dated the 16th of February 2018, the appellant applied for leave to apply by way of an application for judicial review, and thereby sought the following reliefs:

> "*1. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are inconsistent with the Constitution, in particular Articles 38.1, 40.4.1, 40.1, 40.3 and 40.6.1° thereof;*
>
> *2. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are incompatible with the European Convention on Human Rights, in particular articles 6, 7 and 10 thereof;*

3. *A declaration that the provisions of section 126 of the Finance Act 2001 are inconsistent with the Constitution, in particular Articles 6, 34, 37 and 40.3 thereof and/or Articles 6 and 8 of the ECHR;*

4. *A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are incompatible with the European Convention on Human Rights, in particular article 6 thereof, interpreted in light of article 1, Part 1 of the European Social Charter;*

5. *A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended read together with the provisions of section 126 of the Finance Act 2001 are inconsistent with the Constitution, in particular Articles 6, 34, 37, 38.1, 40.4.1, 40.1, 40.3 and 40.6.1° thereof and/or with the ECHR, in particular Articles 6,7,8 and 10 thereof, whether interpreted in light of article 1, Part 1 of the European Social Charter or otherwise;*

6. *An order of prohibition restraining the first respondent from proceeding with the prosecution of the applicant for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on 20 September 2017;*

7. *An injunction, including if necessary an interim or interlocutory order, restraining the first respondent from taking any further steps in the prosecution of the applicant for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on 20 September 2017;*

8. *If necessary, an extension of time within which to make this application;*

9. *Further or other order;*

10. *Costs*".

22. Noonan J., by order perfected the 20th of February 2018, granted the appellant leave to apply by way of application for judicial review for the above reliefs; and he further ordered

inter alia that the Director be restrained from taking any further steps in the prosecution of the appellant for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on the 20th of September 2017 "*until the determination of the application for judicial review or until further Order or until the stay of proceedings shall have lapsed by reason of the Applicant's failure to serve an originating Notice of Motion herein within the proper time*".

23. The proper time within which to serve an originating Notice of Motion was within seven days of the date of the order's perfection; the order of Noonan J. prescribing a return date for such originating Notice of Motion of the 24th of April 2018. The appellant was ordered to serve with this originating Notice of Motion copies of the amended Statement Required to Ground an Application for Judicial Review, the verifying affidavit, and the Order perfected the 20th of February 2018, on the Chief Prosecutions Solicitor on behalf of the Director, and the Chief State Solicitors Office on behalf of the second and third named respondents and on the notice party.

Amended Statement of Grounds

24. In the amended Statement of Grounds filed the 26th of February 2018, the following pleadings were advanced on behalf of the appellant under the heading "*(f) Grounds upon which relief is sought*". It was said that s. 78(3) of the Act of 2005 is unconstitutional because its vagueness and its dense legal nature together with the requirement to read or interpret it in conjunction with other equally dense and complex provisions of the same Act is such as to fail basic requirements for the creation of a criminal offence. It was pleaded that the impugned provision fails to give fair and adequate notice of the type of conduct prohibited and it thereby breaches the fundamental value that a person subject to the criminal law should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful. It was said that s. 78(3) purports to create a

criminal offence that is void by reason of its vagueness and/or its legal uncertainty and/or its dense legal nature.

25. It was further said that despite this complexity and/or dense legal nature, s.78(3) fails to provide that the conduct, if any, prohibited must amount to an intentional violation of a known legal duty; it fails to provide for a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law; it does not contain a safeguard in the form of a requirement that individuals be adequately informed of the existence of this regulatory offence; it fails to provide for a disposal/sentencing option, amounting to an absolute discharge, to be exercised in exceptional/extenuating circumstances, thereby disproportionately interfering with an accused's constitutional and/or ECHR right to a good name and/or to earn a living.

26. It was also said that s. 78(3) amounts to a disproportionate interference with the right to communicate and the right to freedom of expression. This ground was expanded upon by way of the following sub-grounds:

"*i.* *Micro-trading and online trading are recent phenomena given the increasing ease with which it is possible for individuals to sell goods to other individuals online, e.g. ebay, facebook, amazon, bonanza etc.;*

ii. *Selling goods online is not inherently immoral – this offence depends on the categorisation of types of products;*

iii. *The intentional movement of goods and people can be done with increasing ease;*

iv. *Unlike reg. 32 of the Irish Mineral Oil Tax Regulations 2012, in respect of the keeping of marked oil, there is no requirement on the Revenue Commissioners to publish notices informing the general public that it is an offence to sell*

tobacco products which, while bearing a tax stamp of another country, does not bear an Irish tax stamp;

v. *Under Irish law, the principle that 'ignorance of the law is not an excuse' applies even to complex regulatory offences;*

vi. *This offence is one of strict if not absolute liability and does not have a clear mens rea element such as to soften the impact of the principle that 'ignorance of the law is not an excuse';*

vii. *There is no clear and accessible source to which citizens may go to determine the elements of regulatory offences in force;*

viii. *Advertising for the sale of goods online is a form of exercise of the right to communicate and the right to freedom of expression*".

27. In the amended Statement of Grounds, it was also said that s. 78(3) of the Act of 2005 is incompatible with Articles 6, 7, and 10 of the ECHR because its vagueness is such as to fail basic requirements for the creation of a criminal offence. It was said that the provision, as drafted, gives rise to arbitrariness and legal uncertainty; that there is no safeguard in the form of a requirement that individuals be adequately informed of the existence of this regulatory offence; that it amounts to a disproportionate interference with the right to communicate and the right to freedom of expression, and in relation to this reliance was placed on the same sub-grounds quoted at para. 22 above.

28. As regards s. 126 of the Act of 2001, it was pleaded that this provision is inconsistent with Articles 6, 34, 37, and 40.3 of the Constitution and/or Articles 6 and 8 of the ECHR because it amounts to the absolute removal of a sentencing option and/or a disposal option from a hearing/sentencing court amounting to an undue encroachment by the legislature on the judicial function, in the light of the separation of powers between the legislative, executive and judicial function. It was further contended that there is no rational relationship

between this absolute removal and the requirements of justice. It was further stated that the provision unfairly and disproportionately discriminates between offending of a regulatory nature and other "*ordinary*" offending. Section 126 was further said to fail to acknowledge the different levels of offending behaviour and the different capacities and circumstances of offender that may commit the various offences covered by its provisions. It was further advanced that there is no safeguard by way of a possibility of an exception to be made in exceptional circumstances, such as when a person's livelihood is at stake; this point was particularised as follows:

"*i.* *Selling goods online is not inherently immoral – this offence depends on the categorisation of types of products;*

ii. *While the exclusion of the application of the Probation of Offenders Act 1907 is not a presumptive or mandatory minimum sentence, it does remove in a blanket fashion a sentencing option otherwise available to a sentencing court;*

iii. *It therefore disproportionately interferes with the applicant's constitutional right to work and/or to his good name;*

iv. *There is no provision for an exception to this by reason of exceptional and specific circumstances relating to the circumstances of offence and/or the person convicted of it and in the interests of justice;*

v. *There is no provision for an exception to this by reason of the minimum blameworthiness of an individual who may genuinely not have been aware that they were committing an offence;*

vi. *There is no provision for an exception to this by reason of the disproportionate effect of a conviction on a person's right to their livelihood, in circumstances where there is a risk they would lose their employment on*

account of receiving a conviction and where they have no previous convictions, such as in the present case".

29. Relying on the foregoing particulars, the appellant also contended that s. 78(3) of the Act of 2005 is incompatible with Articles 6 and/or 8 of the ECHR, interpreted in the light of Article 1, Part 1 of the European Social Charter.

30. In relation to the relief sought at para. (d) 5 of the Amended Statement of Grounds, the appellant relied on all of his foregoing grounds. For clarity, the relief being sought states:

"*5. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended read together with the provisions of section 126 of the Finance Act 2001 are inconsistent with the Constitution, in particular Articles 6, 34, 37, 38.1, 40.4.1, 40.1, 40.3 and 40.6.1° thereof and/or with the ECHR, in particular Articles 6,7,8 and 10 thereof, whether interpreted in light of article 1, Part 1 of the European Social Charter or otherwise*"

31. In relation to the injunctive relief sought "*including if necessary an interim or interlocutory order, restraining the first respondent from taking any further steps in the prosecution of the application for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on 20 September 2017*", the Amended Statement of Grounds concluded as follows:

"*If any further steps are taken in the proceedings entitled Director of Public Prosecutions v. Darragh Galvin the greatest risk of injustice lies against the applicant, such that the interlocutory injunctive relief sought above is appropriate. He is a gentleman of limited means and has found the said criminal proceedings very stressful. No public interest would be served in allowing a prosecution to continue pending the determination of the within judicial review proceedings. Damages would not be an adequate namely for the applicant*".

Originating Notice of Motion and

High Court order directing a plenary hearing

32. This originating Notice of Motion was filed on the 26th of February 2018, pursuant to which counsel for the appellant on the 24th of April 2018 applied to the High Court for leave to apply by way of an application for judicial review for the reliefs set forth at para. 21, above. As may be gleaned from the text of the resulting order of O'Regan J. (made the 21st of May 2019 and perfected the 1st of July 2019), at the hearing of the motion counsel for the respondents brought their own motion, filed the 18th of October 2018, seeking *inter alia* an order striking out the judicial review proceedings on the grounds that the appellant's claim would be more properly brought by way of plenary summons, or in the alternative an order pursuant to Order 84, Rule 27(5) and/or Rule 27(7) of the Rules of the Superior Courts that the within proceedings should continue as if they had begun by Plenary Summons. This motion was grounded upon the affidavit of a Ms. Catriona Keane. On hearing the parties respectively, and delivering an *ex tempore* ruling, O'Regan J. *inter alia* directed a plenary hearing of the proceedings within the context of the within judicial review proceedings, and she further made a number of ancillary directions with respect to case-management matters arising therefrom.

Appeal against order of O'Regan J.

and subsequent developments

33. The appellant appealed against the order of O'Regan J. to the Court of Appeal (Court of Appeal Record No. 2019 352). On the 19th of November 2020 this Court (Ní Raifeartaigh J; Edwards and Collins J.J. concurring) dismissed the appeal against the High Court's direction that the proceedings be heard by way of plenary hearing (see judgment bearing

neutral citation [2020] IECA 319). The order of this Court was perfected on the 6th of January 2021.

34. Following the dismissal by this Court of the appellant's appeal against the Order of O'Regan J. in January 2021, the parties, as directed by O'Regan J., exchanged Notice for Particulars and Replies to Notice for Particulars on the 20th of May 2021 and 3rd of September 2021, respectively. The respondents jointly delivered a Defence on the 20th of December 2021. The matter was ultimately set down for hearing on the 19th and 20th of October 2023 before Quinn J. in the High Court.

Defence

35. In the Defence delivered the 20th of December 2021, the respondents made a number of preliminary pleas. In the first place it was said that the appellant lacks *locus standi* to institute and/or maintain and/or prosecute the within proceedings. Second, it was said that all of the appellant's contentions in his amended Statement of Grounds about the impugned statutory provisions are not "*ripe in law*" and/or do not arise for adjudication or determination as a matter of law in the proceedings and/or in the nature of a moot such that they should not be determined by the High Court. Third, it was said that to the extent that the appellant argues about the merits of the prosecution, it remains open to him to plead not guilty and contest the offence alleged against him on the merits. It was said the proceedings brought by the appellant are premature and/or are in the nature of a moot in such circumstances. It was further said, in relation to the appellant's complaint regarding the non-applicability of the Probation of Offenders Act 1907, that the implicit contention advanced on his behalf, to the effect that he would or might be considered an appropriate candidate for a discharge pursuant to Section 1(1) of the Probation of Offenders Act 1907, is wholly speculative and without any foundation in fact.

36. The respondents denied that the provisions impugned by the appellant are repugnant to the Constitution and/or incompatible with the State's obligations under the ECHR as incorporated into the domestic law of the State by the European Convention on Human Rights Act 2003 (i.e., "ECHR Act 2003" or "the Act of 2003"), as alleged by the appellant or at all. Further, it was denied that s. 78(3) of the Act of 2005 is incompatible with the State's obligation under the ECHR as incorporated into the domestic law of the State by the "ECHR Act 2003" in particular Article 6 of the ECHR interpreted in the light of Article 1, Part 1 of the European Social Charter, as alleged by the appellant or at all. It was further denied that the impugned provisions "*read together*" are repugnant to the Constitution and/or incompatible with the State's obligations under the ECHR, as alleged by the appellant or at all. It was denied that the appellant was entitled to any of the reliefs claimed or at all.

37. The respondents admitted certain facts, namely: that the appellant placed an advertisement on the Facebook page "*Ballyfermot, Buy Sell or Swap*" by which he tendered tobacco products for sale; the Revenue Officers responded to same on the 19th of July 2016 and an arrangement was made to meet the appellant the following day; that the appellant agreed to sell the tobacco products for €140 to Revenue Officer Wall on the 20th of July 2016, whereupon she identified herself as a Revenue Officer and duly seized the said products; that the said tobacco products were seized pursuant to s. 141 of the Act of 2001; that a summons issued to the appellant, applied for on the 20th of September 2017 for an offence contrary to s. 78(3) and (5) of the Act of 2005 as amended; and that the appellant applied for disclosure on the first return date of said summons (the 29th of November 2017) which disclosure was furnished by the prosecution, and that the appellant applied for a hearing date on the second occasion the matter was before the District Court (the 17th of January 2018) whereupon the matter was set down for hearing on the 21st of February 2018. The respondents further admitted the appellant's recall of events as they transpired in the

Revenue vehicle only insofar as Ms. Walls notes are exhibited as DG2 to the appellant's sworn affidavit (and transcribed at para. 6, above).

38. The respondents denied that the appellant was unaware of the fact that it is illegal to sell tobacco in respect of which duty has not been paid and/or in respect of which no tax stamp had been affixed. They further denied the facts and circumstances pleaded by the appellant as to how he came into possession of the tobacco and his reasons for deciding to sell same. Further to this, it was pleaded that ignorance of the law is not a defence to the criminal charge which the appellant faces.

39. At the time the respondents delivered their Defence it was stated therein that they were "*strangers*" to what the appellant had pleaded in respect of his employment, namely that he is currently employed with An Post as a postal operative, and further that he is very concerned that An Post would terminate his employment in the event he received a conviction for an offence of this nature. The respondents denied such matters in the absence of proof and pleaded that the fact of subjective concern on the part of the appellant as regards his employment cannot give rise to any plea as regards the constitutionality of the impugned provision.

40. I should interject here to say that such matters were the subject of evidence in the court below. The appellant gave evidence in relation to his employment with An Post; the approximate date upon which he commenced said employment; the functions he performs as part of his employment; with whom he has regular contact in the course of his employment (i.e., customs officials); where he works; that he had not, as of the hearing in the court below, informed An Post of his impending District Court prosecution; that he had applied for "*four years straight*" to get his current position; that he had to be Garda vetted; his weekly pay for both part time and full time work; and that he was "*terrified*" that he would lose his job. Further, a copy of his contract of employment with An Post was tendered as documentary

evidence to the court below, as was the An Post disciplinary procedure, and the application form for An Post. The appellant told the court below in cross-examination that he was not aware of anyone else in An Post being prosecuted for an offence like the present alleged, and further that he was not aware of anyone in An Post losing their job as a result of such an allegation being made.

41. Further to the foregoing, evidence was adduced from a Mr. George Maybury, former Garda Sergeant and industrial relations expert, to the effect that a conviction under s. 78(3) would have implications for the appellant's employment; that if An Post were to learn that an employee of the organisation was convicted and fined in respect of such an offence, they would take an interest in same and would consider the implications of this news as regards potential damage to the organisation's reputational damage; that the seriousness of the offence would be "*a prime metric*" or factor to be considered in the course of any disciplinary proceedings arising, and that the sanction imposed by the employer would be proportionate; that the questions of trust and reputation may become a big issue for an employer; and that owing to the sensitivity of the working relationship between An Post and Customs and Excise, An Post would "*more than likely*" take a serious view of the appellant's alleged offending. Mr. Maybury further averred that notwithstanding that the appellant is alleged to have committed the offence seven years earlier, were An Post to learn of the appellant's offending for the first time if he is convicted, the clock would start at that point from their perspective. He said that An Post have a "*fairly elaborate disciplinary process*", and he referred to how the appellant would have the opportunity of being heard and represented and that there is an appellate process available. Mr. Maybury stated that while the appellant could not be accused of doing anything wrong while he was an employee of An Post, his feeling or view "*is that they will be very concerned about their reputation and having an employee that if were to be convicted of that particular offence*". Mr. Maybury averred that if the appellant

was to be dismissed, and he was to sit on an appeals board hearing the appellant's case, he would regard such dismissal as being "*harsh*" and "*disproportionate*", and he would recommend a lesser penalty. Mr. Maybury could not rule out dismissal as an option for the employer, and he could not rule out that the appellant would at the very least be subjected to a disciplinary process even if he ultimately was not dismissed. He stated that the appellant might be obliged to inform his employer at this stage of his pending District Court prosecution.

42. The respondents denied in full the grounds upon which the appellant sought the reliefs set out at para. 21, above. They expressly denied that s. 78(3) of the Act of 2005 and s. 126 of the Act of 2001 are repugnant to the Constitution either as alleged by the appellant or at all. It was further denied that the offence amounts to a disproportionate interference with the right to communicate and the right to freedom of expression as pleaded by the appellant in the amended Statement of Grounds. At para. 33 of the Defence, the respondents pleaded that:

> "*the sale of tobacco products and the duties and taxes applied to same fulfil the important public interest in regulating the sale of the particular product concerned, and the imposition of appropriate taxes and duties to the sale of same. Accordingly, the offence contained in Section 78(3) of the Finance Act, 2005 is a lawful and proportionate measure in the common good and as part of the revenue raising jurisdiction of the State*".

43. It was further said that the terms of the offence are clear and/or clearly understood by the general public. It was denied that s. 126 of the Act of 2001 unfairly and disproportionately discriminates between offending of a regulatory nature and other offending.

44. The respondents did not admit the concern expressed at para. (e) 9 of the amended Statement of Grounds to the effect that the appellant was concerned that he would lose his

employment with An Post were he to be convicted of the alleged offence. In relation to the issue of the applicability (or lack thereof) of the Probation of Offenders Act 1907 in the instant case in the event of a conviction, in net it was pleaded at para. 44 of the Defence:

> "*There is no constitutional right conferred on an accused person (or to somebody convicted of an offence) to the benefit of the Probation of Offenders Act 1907, and no constitutional obligation to apply it to any or all offences. It is in the nature of a statutory and discretionary additional sentencing option, which said option is conferred on the Courts and may be regulated by the Oireachtas. Moreover, the availability or otherwise of the possibility of an absolute discharge in respect of a criminal offence is a matter which manifestly falls within the margin of appreciation of contracting states for the purpose of the European Convention of Human Rights*".

High Court Judgment

45. By *ex tempore* judgment delivered by Quinn J. in the High Court on the 24th of October 2023, the appellant's claim was dismissed. The reasons for the said dismissal of the appellant's claim are summarised below.

46. At the outset, Quinn J. distilled what the appellant's claim was about, and he identified three issues which were raised:

> "*(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 constitutional;*
>
> *(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".

Issue No. (i) – alleged complexity of s. 78(3) of the Act of 2005

47. In relation to the first issue – that of alleged complexity of s. 78(3) such as to preclude a reasonable person to understand and consequently know that an offence contrary to this impugned provision is being committed – the High Court judge considered the following authorities: *King v. Attorney General* [1981] I.R. 233; *Dokie v. DPP* [2011] 1 I.R. 805; *Douglas v. DPP* [2013] IEHC 343; *Cox v. DPP* [2015] IEHC 642; and *Bita v. DPP* [2020] 3 I.R. 742. The learned High Court judge distilled from these authorities the principle that in certain circumstances where a law creating a criminal offence is "*unclear*", that law can be declared unconstitutional. He observed that there are two "*primary reasons*" for this principle: first, a criminal offence with an ambiguous or highly subjective descriptor can create a risk of abuse or arbitrary prosecution by the authorities (the High Court judge referenced in this context the authority of *King* and the reference therein to the phrase "*reputed thief*"); and second, 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.

48. The High Court judge held that the above jurisprudence did not extend to this principle that the courts can strike down legislation creating a criminal offence that is simply said to be too complex. He did not agree with counsel for the applicant/appellant's suggestion that the *obiter dicta* of MacMenamin J. in *Dunnes Stores v. Revenue Commissioners* [2020] 3

I.R. 480 to widen the principles underpinning the aforementioned jurisprudence. The *Dunnes Stores* case concerned statutory provisions introducing a tax levy on plastic bags. MacMenamin J. stated *obiter* at para. 119 of his judgment:

> "***[119]*** *The legislation which the court has been asked to interpret in this appeal is drafted in an overly complex way. The effect of the provisions upon which reliance is placed may, potentially, expose Dunnes Stores to a considerable financial liability, perhaps running into millions of euro. 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 considered 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*".

49. The High Court judge in the present case closely analysed the above passage, and he noted that each of the potential problems referred to by MacMenamin J. therein are "*versions of the idea that the law to be struck down must contain a critical lack of clarity*". Accordingly, he held "*[w]hile excessive complexity may not be desirable, the authorities do not support the proposition that it is fatal*".

50. Later turning to submissions made on behalf of each respective party in respect of issue no. 1, the High Court judge noted that s. 78(3) of the Act of 2005 may be analysed in three parts. He deconstructed the section as follows, and addressed the parties' respective submissions in respect of each part:

"*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* [...]".

51. The High Court judge observed that this part of s. 78(3) provides for an exception to the offence. He noted that counsel for the respondent had indicated that no such exemption had ever been granted by the Revenue; and that counsel for the appellant/applicant did not suggest that he had thought his transaction had the benefit of any exemption. The High Court judge further noted that in any event counsel for the appellant/applicant was not able to point to any lack of clarity in relation to this element of the sub-section.

52. The next part of s. 78(3) of the Act of 2005 was isolated by the High Court judge as follows:

"[...] *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* [...]"

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

54. The focus of the High Court judge then turned to the final portion of the impugned subsection:

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

55. The High Court judge remarked that while there is some limited complexity to ascertaining the meaning of a "*suspension arrangement*", no lack of clarity was demonstrated. The High Court judge further observed that the appellant/applicant did not make any suggestion that he thought he might be operating under such a "*suspension arrangement*".

56. The High Court judge summarised that the two exceptions applicable to s. 78(3) can be identified as either an arrangement whereby the revenue can exempt someone from selling tobacco with the tax stamp or where a suspension arrangement is provided. He observed that the applicant/appellant did not contend for either exception, and he remarked that on an *ius tertii* basis it was not possible for the appellant to advance a case based on a criticism of these two exceptions. He stated that, that being so, when the wording of the two exceptions was analysed during the hearing in the High Court the appellant did not demonstrate lack of clarity. The High Court judge remarked:

> "*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*".

57. The High Court judge regarded the criticism in respect of the two exceptions to be "*unpersuasive*" in circumstances where, the High Court judge remarked "*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*". He stated that, even allowing for this, there would be scope for a 'due diligence' defence in the context of this particular offence given that it was conceded on behalf of the respondents that what is at issue is a strict liability offence as opposed to an absolute liability offence. The High Court expounded upon this:

"*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*".

58. The High Court judge held that aside from the complexity relating to the two exceptions, the actual core of the subsection is "*neither unclear nor complex*". He stated that it provides "*in clear terms*" that it is an offence to sell or offer for sale unstamped fine cut tobacco, and that this could be readily understood "*by any reasonable person without any legal assistance whatsoever*". The High Court judge regarded as "*unfounded*" the submission advanced on behalf of the appellant to the effect that MacMenamin J.'s *obiter dictum* in *Dunnes Stores* (referred to earlier at para. 45, above) constitutes a sufficient widening of the jurisprudence established in *King*, *Dokie* and *Douglas* such as to enable the court to strike down s. 78(3) of the Act of 2005. The High Court judge held that a close analysis of this *obiter dictum* "*indicates in truth a number of variations on the underlying principle that a statute creating a crime must be clear*". The High Court found that there was nothing to suggest that the jurisprudence has 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. He concluded, in relation to issue no. (i):

"*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 no. (ii) – no requirement for prosecution to prove mens rea

59. In relation to issue no. (ii), the High Court judge noted that 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, and he referenced in this regard *C.C. v. Ireland* [2006] IESC 33, *Reilly v. Patwell* [2018] IEHC 446, *Waxy O'Connors Ltd. v. Riordan* [2016] IESC 30, and *C.W. v. Minister for Justice & Ors* [2023] IESC 22.

60. The High Court judge noted that it was agreed in this case that the relevant offence was a strict liability offence; and he further noted that it was 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. The High Court judge observed that "*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*", and he referenced in this regard the dicta of MacMenamin J. at para. 40 of his judgment in *Waxy O'Connors Ltd. v. Riordan*. The High Court judge continued, noting that in cases where there is a high degree of moral opprobrium (such as, *inter alia*, murder, assaults, theft, or sexual offending) much closer scrutiny would arise in respect of any legislation reducing the burden to prove *mens rea*, and he referred to *C.W. v. Minister for Justice & Ors* as an example.

61. The High Court judge noted that the criticisms advanced on behalf of the applicant in respect of the impugned legislation were premised in the belief that what is purported to be created is a strict liability offence which is unconstitutional for want of clarity. This lack of clarity was said to be rooted in the offence's purported complexity. The High Court judge rejected this line of submission as being unfounded. He stated that it is clear from the

jurisprudence, to which he had referred, that the courts recognise that it is appropriate for legislation to create regulatory offences, and that the offence contained in s. 78(3) of the Act of 2005 could be characterised as such an offence because many people would not consider the sale of unstamped tobacco to be morally wrong. In other words, the behaviour sought to be regulated under s. 78(3) is only wrong because that statutory provision made it an offence. The High Court judge further observed that it is clear from the jurisprudence that the courts have recognised that it is appropriate for legislation to provide for regulatory offences on a strict liability basis; and that if it was not appropriate for legislation to do so, a modern society could not otherwise function.

62. The High Court observed generally that regulatory offences are common in the area of revenue and that the within case presented such a scenario in which such an offence could be found. He noted that the principle of *ignorantia juris non excusat* was not in dispute. While it had been argued on behalf of the applicant that because s. 78(3) is alleged to be complex it would be far better if proof of *mens rea* was a requisite component to the offence (which argument was advanced in reference to the U.S. Supreme Court decision in *Cheek v. U.S.* 498 U.S. 192 (1991)), the High Court judge was not persuaded. He observed that merely pointing out that the legislature had the option of requiring proof of wilfulness in certain complex Revenue offences does not render legislation, creating a regulatory offence without that requirement, unconstitutional. Insofar as the applicant had also sought to rely on *C.W.* (referred to previously), the High Court judge observed that this case offered the applicant limited assistance inasmuch as it concerned offending conduct to which significant *moral opprobrium* is attached. He said that there was nothing in the judgments of the Supreme Court in *C.W.* which extends the rationale of *C.W.* to the idea of a regulatory offence such as the one presently being impugned.

63. As such, the High Court judge was not satisfied that the provisions were unconstitutional by virtue of the absence of a requirement on the prosecution to prove *mens rea*.

Issue no. (iii) – removal of sentencing option to apply the Probation of Offenders Act 1907

64. The starting point for the High Court judge was *Dumitran v. Ireland* [2021] IEHC 567, a judgment of Sanfey J. He noted that Sanfey J. had summarised the law with respect to this issue, and that the said High Court judge had done so in the context of the same statutory offence as that presently being impugned. Quinn J. noted that the essence of Sanfey J.'s judgment in *Dumitran* is 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. He did note, however, that while the facts which were obtained in *Dumitran* were similar to those in the present case, noticeable distinguishing features included that the accused in *Dumitran* had intended to plead guilty and that there was no issue raised in *Dumitran* that the statutory exclusion of the Probation of Offenders Act 1907 was somehow unconstitutional.

65. The High Court judge also observed that, as per Murray J. in *Lynch & Whelan v. Minister for Justice* [2012] 1 I.R. 1, it is 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*" should statutory provisions purporting to establish regulatory offences be declared unconstitutional, and he further referenced in this regard the case of *Ellis v. Minister for Justice* [2019] 3 I.R. 511.

66. The High Court judge ultimately regarded Sanfey J.'s rationale in *Dumitran* as being dispositive of issue no (iii). He observed that whilst it is correct that in *Dumitran* the plaintiff had indicated that he would plead guilty, this does not materially distinguish the validity of Sanfey J.'s analysis of the sentencing limitations imposed by the legislation; and further he noted that counsel for the present applicant had intimated that no criticism was being made of

Sanfey J.'s rationale. The rationale in question was identified at para. 64 of Sanfey J.'s judgment in *Dumitran*, in which he 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*".

67. Quinn J. observed that Sanfey J. in *Dumitran* undertook 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; which such penalties include the removal of the statutory option of applying the Probation of Offenders Act 1907, and further include the summary imposition of a fine of €5,000 which can be reduced to €2,500 if there are appropriate reasons to mitigate, as well as custodial disposal for up to 12 months which is capable of being suspended and/or community service ordered instead.

68. Insofar as the present case was concerned, the High Court judge was not disposed to find in favour of the applicant on this issue, as the applicant had failed to demonstrate that there is no rational connection between the above sentencing restrictions and the underlying offence. He stated that this was not to say that there is any dispute in relation to the applicant's assertion of ignorance of the law, and he observed that the applicant had asserted as much immediately to the revenue official at the time he was apprehended attempting to sell the tobacco. Nonetheless, the High Court judge held that a much higher bar must be reached before statutory provisions such as s. 78(3) can be declared to be unconstitutional.

69. The High Court judge held that the starting point is the presumption of constitutionality which the impugned statute enjoys. He observed that evidence was not required for the court below 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. He remarked that in the sense of the authorities referred to, the fact that what the statute provides for is a strict liability offence carrying certain sentencing restrictions is clearly not irrational or disproportionate. And the High Court judge further stated that the legislation was not rendered unconstitutional for want of advertising or public information regarding the offence. As such, he was not prepared to find for the applicant in this regard.

70. Dealing with the argument that the applicant faced a real risk that he would lose his current employment with An Post if convicted, as there would be no possibility of him benefiting from the Probation of Offenders Act 1907, and that this peril which he faced amounted to an unconstitutional impairment of his right to work having regard to the Supreme Court's decision in *NVH v. Minister for Justice* [2018] 1 I.R. 246, the High Court judge was not persuaded by this. He regarded it as being the case that any person convicted of a strict liability regulatory offence could face difficulties at work, and that whether or not the significance of the underlying conduct is appropriately viewed by an employer as comprising sufficient reason to justify dismissal will be a matter for consideration in any particular case. The High Court judge referred to the evidence of Mr. Maybury, an industrial relations expert, and noted that Mr. Maybury, having been apprised of the circumstances underlying the applicant's case, was of the view that dismissal by An Post in the circumstances would be disproportionate and harsh. The High Court judge also noted what Mr. Maybury had stated regarding what steps were open to the applicant; that notwithstanding that dismissal in the circumstances would be disproportionate and harsh, if the applicant's employer were to take an interest in the matter in the event he is convicted, then it would fall to the applicant to take such steps either by being represented by his union or otherwise to make his case. The High Court judge considered Mr. Maybury's evidence in this regard to be compelling.

71. Another difficulty identified by the High Court judge with respect to the applicant's argument that his right to work under the Constitutional was being infringed, was that even if the Probation of Offenders Act 1907 could be applied in the event of conviction, it is not clear how material or materially different its application would be to the situation as s. 1(1) of the said Act makes clear that its application is in circumstances were the "*charge is proven*". In other words, once an employer looks into the matter, it may be the case that it will learn that the constituent elements of the offence with which the applicant had been charged were proven or admitted to have occurred; and that such a revelation would come about irrespective of the application of the Act of 1907.

72. Insofar as the applicant had sought to invoke any related or overlapping provisions of the ECHR, the High Court judge was not satisfied that there were any extra jurisprudential principles that altered his analysis in respect of issue no. (iii).

Conclusion

73. For the foregoing reasons, the High Court judge dismissed the applicant's claim.

Notice of Appeal

74. By a Notice of Appeal dated the 21st of November 2023, the appellant has advanced sixteen grounds of appeal. Owing to the length of these grounds, and the degree of overlap which some of them share, it is not proposed to quote *ad longum* from the Notice of Appeal to state what those grounds are; rather, the said grounds may be conveniently grouped under four headings which each relate to a specific theme, topic, or line of argument to which the grounds taxonomised thereunder relate.

I. That the High Court judge erred in finding that s. 78(3) of the Act of 2005 was not complex or unclear (ground nos. 1 to 6);

II. That the High Court judge erred in finding that the appellant's fair trial rights under the Constitution and the ECHR would not be infringed by the strict liability nature of the offence and absence of a requirement on the prosecution to demonstrate *mens rea* (ground nos. 7 to 10);

III. That the High Court judge erred in finding that the removal of the applicability of s. 1(1) of the Probation Act was not irrational or disproportionate and that its inapplicability or otherwise would not have a material difference to a conviction in the circumstances of the case (ground nos. 11, 12, 15 and 16);

IV. That the High Court judge erred (i) in failing to taking account of all the evidence adduced by or on behalf of the applicant in relation to the possibility that a conviction for an offence contrary to s. 78(3) of the Act of 2005 could lead to the applicant's dismissal from his employment, and (ii) in failing to acknowledge or accept that a sentencing court need only be satisfied in relation to this potential consequence that there was a reasonable doubt that the appellant's employment might be at risk as a result of a conviction (ground nos. 13 and 14).

Submissions to the Court of Appeal

75. The Court has had the benefit of written submissions filed on behalf of each party in advance of the hearing of the within appeal, as well as submissions made orally at the said hearing. The thrust of those submissions is now outlined.

Topic No. I – Alleged complexity / lack of clarity

76. In relation to this first topic, counsel for the appellant submits that in order to construe s. 78(3) of the Act of 2005, the definitions of certain words and phrases need to be cross-

referenced with other legislation (which has itself been amended) and with various statutory instruments. The point which counsel sought to make on behalf of the appellant was that a citizen must be able to understand the elements of the offence with which they are charged, including any exceptions, such as to know whether their conduct is prohibited or not, and in this regard counsel says that the High Court judge erred in forming the view that what he described as the "*two exceptions*" were only relevant if an accused person sought to rely on them, in which reliance cannot be possible absent understanding.

77. She submits that the defence bear no burden in relation to establishing the components of the offence; but that the prosecution benefit from a list of presumptions provided at s. 78(6) of the Act of 2005. She contends that the said list of presumptions set out under s. 78(6) support the appellant's claim that s. 78(3) is an exceedingly complex provision; counsel states that in providing for these presumptions, the Oireachtas recognised that because of the complex and technical definitions underpinning many elements of the offence, it would not have been possible, or feasible, for the prosecution to establish to the criminal standard those elements without assistance by way of the provision of statutory presumptions.

78. Another complaint which counsel for the appellant makes in respect of s. 78(3) of the Act of 2005 is that the core prohibition at the heart of the impugned provision, namely "*to invite an offer to treat of, 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 vague and unclear. She contends that the meanings of some of the phrases are not clear, except with reference to other legal instruments and that this is liable to give rise to confusion. For example, counsel drew the Court's attention at the hearing of the appeal to the definitions of "*fine-cut tobacco for the*

rolling of cigarettes" and "*smoking tobacco*" under s. 71 of the Act of 2005, and noted that these definitions require a reader to consult several EU Directives, namely Council Directive 95/59/EC of 27 November 1995 (no longer in force as of the 31st of December 2010), Council Directive 2010/12/EU of 16 February 2010 (no longer in force as of the 12th of February 2023), and Council Directive 2011/64/EU of 21 June 2011 on *"the structure and rates of excise duty applied to manufactured tobacco (codification)"*, (still in force). She noted that in 2016, when the events giving rise to the present proceedings took place, there was no reference in the Irish provision to whether, and if so which of, these EU Directives were in force, and contends that the reader was left in the dark as to whether the codifying legislation formed part of the provision. Counsel submitted that these EU directives and their provisions are part of what needs to be construed in order to know whether the behaviour in the present case is criminal. The resulting complexity of the matter, which is said to be compounded by the contended for difficulty that a person charged may face in terms of gauging whether their circumstances fall within the various definitions comprising core ingredients of the offence, is what counsel submits causes s. 78(3) to fall foul of the Constitution.

79. In support of her submissions in this regard, counsel referred the Court to a number of authorities in written submissions, including *King v. Attorney General* [1981] I.R. 233, *DPP v. Cagney and McGrath* [2008] 2 I.R. 111, *Byrne v. Minister for Defence* [2021] 1 I.R. 359, and the judgments of McKechnie and MacMenamin J.J. in *Dunnes Stores v. Revenue Commissioners* [2020] 3 I.R. 480.

80. In reply, counsel for the respondent submits that there is nothing unusual about the various aspects of a statutory provision requiring cross-referencing in relation to defined terms. He observes that no authority has been cited by the appellant to the effect that such a style of parliamentary drafting can give rise to invalidity on constitutional grounds. He

further notes that the existence of a provision establishing rebuttable presumptions is not unusual and he says that many criminal statutes provide for such presumptions. He contends that the criticism made by the appellant could easily be levelled against many criminal offences and statutory provisions, in particular those dealing with Revenue offences, regulatory offences, or offence contrary to the Companies Acts.

81. Counsel for the respondents points to what he describes as "*a contradiction at the heart of the plaintiff's case*". He observes that, on the one hand, the appellant invokes legal authorities which establish the need for criminal statutes to be certain and which hold those statutes to be unconstitutional due to being vague; and on the other hand, the appellant's complaint about s. 78(3) of the Act of 2005 is not that it is too vague but rather that it is too complex, or "*too specific*" as the respondent puts it. Counsel is critical of the appellant for not citing any authority to support the proposition that complexity or specificity can give rise to uncertainty such that a statute would be declared unconstitutional for that reason.

82. Counsel for the respondent then engages in a review of key authorities relating to uncertainty in statutory offences. The result, he submits, is that the test is concerned with vagueness or lack of precision, not complexity. The authorities to which he refers the Court in this regard are the judgments of Henchy and Kenny J.J. in *King v. Attorney General* (previously cited); *Dokie v. DPP (Garda Morley)* [2011] 1 I.R. 805; *Douglas v. DPP* [2013] IEHC 343; *McInerney v. DPP* [2014] 1 I.R. 536; *Cox v. DPP* [2015] IEHC 642; and *Bita v. DPP* [2020] 3 I.R. 742. Counsel submits that a consistent throughline in all of the named cases is that aspects of the relevant offences were alleged to be vague, imprecise, ambiguous or otherwise lacking in clarity. He says that it is striking that the appellant identifies no such shortcomings and makes no such allegations in the present case. Instead, he submits, the challenge is ostensibly made on the basis that the impugned statutory offence is dense and

therefore difficult to understand. He argues that a challenge on such a basis is not known to Irish law.

83. Counsel is also critical of the selection of authorities to which the appellant had referred the Court. Inasmuch as the appellant had sought to rely upon specific excerpts of the judgment of Hardiman J. in *Cagney*, it is said that these comments must be viewed in the context in which they were made, which did not relate to the precision or clarity of the words of the statutory provision being impugned. Second, counsel submits that to the extent to which the appellant relies on observations made in judgment of Donnelly J. in *Byrne v. Minister for Justice*, such observations were *obiter* and cannot be taken to possibly establish a new approach to criminal statutes whereby complexity, rather than vagueness, is transmuted into a factor giving rise to unconstitutionality. Further, criticism is taken of the appellant's reliance on the respective dicta of McKechnie and MacMenamin J.J. in the *Dunnes Stores* case. Counsel says that these dicta do not amount to anything more than an exhortation that statutory provisions should be drafted clearly and precisely; and he again regards such comments as *obiter* and not intended to establish a new standard for invalidating an offence on the grounds of unconstitutional vagueness. In this regard, he submits that the appellant's reliance on the *Dunnes Stores* decision is misplaced. He says that the fact that the appellant seeks to rely on such authorities serves to highlight the extremity of the argument being made, which he characterises as being little more than the "*startling*" proposition that there is a constitutional limit to the complexity, specificity, or density of legislation. Counsel submits that such a proposition as being afflicted by "*sheer unworkability*", and he argues that given this, it is unsurprising that the appellant has made no attempt to identify where such a limit or threshold is to be found.

Topic No. II – Strict Liability / Absence of Requirement to prove Mens Rea

84. In written submissions, drawing on a line of jurisprudence from *CC v Ireland* [2006] 4 IR 1, through *McNally v Ireland* [2011] 4 I.R. 431 to *CW v Minister for Justice* [2023] IESC 22 counsel for the appellant seeks to construct an argument to the effect that because the offence under s.78(3) of the Act of 2005 ostensibly imposes strict liability, and does not therefore require proof of *mens rea*, it must be regarded in the circumstances of the case as a disproportionate interference with his right to a trial in due course of law. As counsel put it, in the course of oral submissions to the Court, *"[o]ur argument is that this offence, if it is to be compatible with the fairness required by the Constitution and Convention in relation to the prosecution of offences, should have included a requirement that it be knowingly or wilfully committed."*

85. Referencing the fact that ignorance of the law is not normally a defence, counsel invited us to consider the argument she was advancing to have regard to certain jurisprudence of the US Supreme Court, i.e., *Cheek v United States* 498 U.S. 192 (1991), in which that court was said to have been prepared to ameliorate the strict application of that rule in its application to complex regulatory offences in the United States. We were further referred to *Ratzlaf v United States* 510 U.S. 135 (1994), *Bryan v United States* 524 U.S. 184 (1998), *Stark v Superior Court of Sutter County* 52 Cal 4th 368 (2011) and, most recently, *United States v Kukushkin* 22-666-cr (2023) in which that approach was further considered, followed in some cases, and distinguished in others (typically involving non-revenue offences), with the court in *Kukushkin* noting that amelioration had been considered necessary in *Cheeks* and *Ratzlaf* because both of those cases had involved *"highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct"*.

86. Counsel for the appellant noted that it had been observed in McAuley and McCutcheon *Criminal Liability: A Grammar* (Round Hall Sweet & Maxwell, 2000) at p. 327 that customs and revenue offences have traditionally attracted strict liability. Moreover, the said authors had observed that the arguments in favour of this practice regard conviction for such offences as "*more as a quasi-administrative matter which lies beyond the bounds of 'real' crime*"; which argument is described as "*superficially compelling but misleading*". They had further commented that to classify an offence as merely regulatory "*involves a value judgement which is dependent on contingent ethical and social factors. Public attitudes on the issue are apt to differ greatly and are likely to change over time*".

87. In the context of those remarks, counsel for the appellant observed that the range of penalties that can be imposed on conviction on indictment for a s. 78(3) offence are situate within the definition of an "*arrestable offence*" within the meaning of that phrase in s. 2 of the Criminal Law Act 1997. Counsel further observed that an offence contrary to s. 78(3) is deemed a "*serious offence*" under the Communications (Retention of Data) Acts 2011, and further is designated a "*revenue offence*" for the purpose of the Criminal Justice (Surveillance) Act 2009. Counsel further observed that if prosecuted summarily, a conviction for a s. 78(3) offence carries with it a mandatory minimum fine of €2,500. Taken together, counsel submitted that the offence connotes dishonest behaviour on the part of the person who commits it.

88. In this context, counsel questioned why, when the Oireachtas had ensured that other revenue offences included an express *mens rea* requirement, the legislature had taken the view that the offence impugned in the present proceedings should be one of strict or absolute liability (it is appropriate to digress momentarily to observe that while paragraph 8(6) of Mr. Galvin's statement of grounds pleads that the offence is one *"of strict if not absolute liability"*, the concentration in argument was on strict liability, reflecting ostensible

acceptance that it was most likely to be construed as an offence of the former type rather than one of the latter type). She said that had the offence included a *mens rea* component, it would have been open to the appellant to argue that, having regard to the offence's complexity, the prosecution would have to establish a breach of a known legal duty on his part before a conviction could be rendered. Counsel submitted that there is nothing inherently criminal about a young person attempting to dispose of tobacco for the price he had paid for it by means of an online sale or swap group in his local area. She described such conduct as "*seemingly innocent*".

89. Contrast was made by counsel for the appellant with the requirement under reg. 32 of the Mineral Oil Tax Regulations 2012 by which permanent, clearly legible notices must be fixed, in prominent positions, to vessels and pumps in which red diesel is stored or supplied, by which notices it is stated unequivocally that it is an offence to keep marked gas oil in the fuel tank, or use it in the engine of a motor vehicle. She observed that no equivalent requirement had been statutorily imposed on the Revenue Commissioners to publish notices informing the public that it is an offence to offer for sale unstamped tobacco products, even among neighbours at cost price.

90. In net, counsel says that the character of the offence being one of *malum prohibitum*, the strict liability attaching to an offence under s. 78(3) is a disproportionate intrusion on an accused person's right to a fair trial under Article 38.1 of the Constitution and Article 6 ECHR. Whereas other revenue offences have a *mens rea* requirement, no justification for the absence of such a requirement in respect of the impugned offence was put before the High Court. In her submission, the offence fails to distinguish between persons selling unstamped tobacco products for commercial gain, and persons such as the appellant; and further it fails to account for the fact that young Irish people now regularly travel abroad.

91. Counsel submitted that the respondents have not sought to demonstrate that to include some form of *mens rea* requirement would render s. 78(3) unworkable or unduly difficult to implement effectively, or that without strict liability, there would be a real risk that the legitimate aims pursued would not be adequately safeguarded. She argued that it is possible to achieve any such aims by means which are, borrowing the language of O'Donnell C.J. at para. 222 of his judgment in *C.W. v. Minister for Justice* (already cited), "*less intrusive of the rights of the defence which relates in turn to the essential fairness of any trial*".

92. Counsel's submissions on behalf of the appellant on this issue conclude by saying that the legally complex and unclear nature of the impugned offence both calls for some element of *mens rea* and exacerbates the unfairness created by its absence.

93. In reply, counsel on behalf of the respondents submitted that the appellant's submissions in relation to offences of strict/absolute liability are in the nature *a non sequitur*. The appellant states that most Revenue offences are regarded as ones of strict liability, identifies a number of Revenue offences which include express mens rea requirements, and goes on to cite several US authorities dealing specifically with tax offences and the interpretation of the requirement of wilfulness - i.e., a concept that necessarily imports the requirement not only to prove criminal intent, but the requirement to prove specific intent. Counsel for the respondents says that it remains unclear what precisely the appellant's submission on the nature of the offence is said to give rise to. The relevant Irish authorities on strict liability offences relate to the imputation of defences of reasonable care or lack of knowledge of relevant facts/circumstances.

94. Furthermore, he submitted, much of the argument set out in the appellant's submission proceeds on the basis that the decisions of the legislature to make certain offences strict liability, but not others, can be subjected to the type of analysis that applies in judicial review of administrative decisions. It was submitted that the Oireachtas is not subject to the *O'Keeffe*

rationality principles or simpliciter proportionality analysis in the manner suggested. Insofar as the appellant would appear to derive his argument from the recent joint judgment in *C.W. v. Ireland* [2023] IESC 22, counsel for the respondent submitted that this is based on a clear misunderstanding of the nature of that particular case. There the challenge was to the imposition of a legal burden on the accused - a pointedly rare and exceptional legislative intervention which had the effect of significantly interfering with the presumption of innocence. The issue that fell to be decided by the Supreme Court was whether or not such a significant inroad into the presumption was proportionate.

95. It was submitted that here, the issue is whether or not the Oireachtas is entitled to determine which offences are strict liability in nature and which are not. In the respondents' contention, as with much in the appellant's case this serves to underline the sheer novelty and extremity of the argument.

96. Counsel for the respondents has contended that the appellant essentially overlooks the presumption of constitutionality and argues, without irony, that there is a burden on the State to put forward evidence to support the decision to criminalise certain matters and the manner in which offences are then formulated. He submitted that such a position turns the presumption of constitutionality on its head and essentially asserts a starting point to the effect that all strict liability offences (which must number in the thousands) are presumptively unconstitutional in the absence of some form of evidential justification.

97. In counsel for the respondents' submission, the appellant fundamentally fails to identify how the offence under section 78(3) of the Act of 2005 interferes with his rights under the Constitution or under the ECHR, this being the necessary precursor to conducting this sort of analysis. It is said that his arguments are focussed on the freestanding "*proportionality*" of the provision where they should be focussed on whether the provision's purported interference with his right(s) is proportionate. Insofar as he may advance the

general right to trial in due course of law, he again falls foul of the *jus tertii* issue, in that he establishes no factual foothold to say that, for example, the presumptions in the legislation, if they were subject to an ordinary burden of proof, would result in his acquittal. It was submitted that on any view of the provisions in question and the evidence in this case the presumptions are essentially irrelevant to the appellant as they arise in respect of various technical defences that are simply not available to him.

98. The respondents say that the appellant appears to elide all of these concepts with ignorance of the law, an entirely different concept that has no basis in this or other common law jurisdictions. It is well established that *ignorantia juris non excusat*.

99. With respect to the judgments of the US Supreme and Circuit Courts relied upon by the appellant, the respondents' position is that it is difficult to see how they have any application to these proceedings. First, they point out that the offence under section 78(3) of the 2005 Act contains no express requirement of "*wilfulness*", similar to that discussed in the US authorities. The section contains no mental element, whether of wilfulness or otherwise, required to be proven by the prosecution. The respondents say that wilfulness imports a crime of specific intent and, conspicuously, not a crime of strict liability. They further say that, in truth, there is no comparison less apposite than that offered by the appellant between crimes of specific intent and crimes of strict liability which do not require proof of intent at all.

100. Counsel for the respondents submitted that the comparison was a clear example of a "category error" on the part of the appellant. He observes, in passing, that Irish law bears some similarity with the relevant provisions of the US Penal Code insofar as the provisions of Section I078 of the Taxes Consolidation Act 1997 create various offences of knowingly mis-declaring one's tax liabilities. In other words, he submitted, the Oireachtas has pointedly distinguished between various types of revenue offences and has chosen to specify an active intent (i.e. something more than wilfulness) for some offences whilst providing that other

offences should attract strict liability. Whilst a comparison may be made between the offences discussed in *Cheek v. United States* (previously cited) and the offences under Section I078 it is essentially nonsensical to attempt to draw a comparison with Revenue offences of strict liability.

101. Counsel for the respondents submitted that, moreover, the proposition that appears to be advanced i.e., that a defence of ignorance of the law must be interpreted into strict liability offences, would have a profound effect on the Irish legal order. He maintained that it represents a profound misinterpretation of the relevant Irish authorities to contend that any offence must impute a *mens rea* type defence, or that ignorance of the law - not ignorance of relevant facts or circumstances - was elevated to a defence. Given the extent to which strict liability offences are used in the area of regulatory law such an approach would place a premium on ignorance. It would essentially introduce a requirement to prove something akin to *mens rea* - i.e., the prosecution would have to prove that the accused knew and understood the relevant law and, by extension, that his or her conduct contravened that law. The practical effect of this would be to abolish the very concept of strict liability.

Topic No. III – Restriction of the applicability of s. 1(1) the Probation Act

102. The complaint here relates to the removal of the "probation" sentencing option, and the possibility of either an absolute or conditional discharge under the Probation Act 1907 ("the Probation Act" or "Act of 1907"), in respect of an offence to which section 78 (5) of the Act of 2005 (specifying the available penalties in respect of offences committed under ss. (3) and (4) of s. 78 of the Act of 2005) applies, which removal was effected by the enactment of section 126 of the Finance Act 2001 ("the Act of 2001"). It is suggested that the effect of section 126 of the Act of 2001, in precluding a judge from applying the Probation Act, was to render the appellant liable to a substantial fixed penalty without possibility of mitigation, or sufficient mitigation, and exposure to a disproportionately heavy sentence. It was said that

this constituted interference with the constitutional right of the offender to a rational relationship between the penalty and the requirements of justice with regard to the punishment of the specified offence.

103. The submissions on behalf of the appellant acknowledged the existence of authorities which, on one view of it, would seem to be against him, namely the Supreme Court's decision in *Osmanovic v DPP* [2006] 3 I.R. 504 and, more recently, the decision of Sanfey J. in the High Court in the case of *Dumitran v Ireland* [2021] IEHC 567 (in which Sanfey J followed *Osmanovic*), both of which counsel for the appellant has sought to distinguish from the circumstances of the appellant's case.

104. In reply to the appellant's argument, counsel for the respondent relies strongly on *Dumitran* (and by implication *Osmanovic*), and says that the High Court judge was correct as a matter of *stare decisis* to follow the decision in *Dumitran.* It was submitted that the judgement in *Dumitran* was a complete answer to this aspect of the appellant's case, and citing Clarke J. in *Re Worldport Ireland Ltd. (in liquidation)* [2005] IEHC 189, it was further submitted that where there is a recent on-topic judgment of a court of coordinate jurisdiction, which a party suggests was either wrongly decided or is capable of distinguishment, it is incumbent on the party advancing that suggestion to satisfy the court that it was either decided *per incurium* or that there is little legitimate basis for distinguishment. It is the respondent's position that the appellant had failed in both respects.

105. It was further submitted by counsel for the respondent that while there was little to disagree with in the appellant's submissions on the authorities which provide that sentences must be proportionate, it is an entirely different proposition to say that there could be a constitutional imperative to expand the scope of a statutory sentencing provision, i.e., section 1(1) of the Probation of Offenders Act. It was suggested that the appellant's submissions wholly overlook that the Probation Act is a statutory device and that it is within the gift of the

legislature to apply it as it sees fit. The appellant's arguments, if followed to their natural conclusion, would see this Court extending the application of the Probation Act to any offence that meets an undefined threshold of "seriousness". In that regard and bearing in mind that Section 1(1) of the Act of 1907 only applies in courts of summary jurisdiction, it would seem to follow that the threshold of "seriousness" must logically only apply to minor or non-serious offences that might otherwise be required to be tried on indictment.

Topic No. IV – The possibility of the appellant's dismissal from his current employment were he to be convicted

106. The complaints made by the appellant in grounds of appeal nos. 13 and 14 are based on the submission that a corollary of the constitutional freedom to seek work is the personal fundamental right not to have the job that one has unnecessarily put in jeopardy by the state.

107. We were referred to various authorities by the appellant in support of this argument, including *NVH v. Minister for Justice* [2018] 1 IR 246 where the Supreme Court spoke of a constitutionally protected *"freedom to seek work"* which, it was suggested, *"implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification."*

108. Another case to which we were referred in that context was the decision of the Court of Appeal of England and Wales in *International Transport Roth GmBH v. Secretary of State* [2002] EWCA Civ 158, which case had concerned rules introduced by the British Home secretary regarding the liability of HGV drivers entering the United Kingdom with illegal persons on board their vehicles. Sizeable fixed penalties were imposed on guilty parties. The claimants requested a judicial review of the Home Secretary's right to do so contending, inter-alia, that the measure breached Article 6 ECHR and also Article 1 of the First Protocol to the ECHR, and also that it was inconsistent with EU community law. Sullivan J, sitting in

the Queen's Bench division of the High Court upheld the challenge in full, which was then appealed to the Court of Appeal. The Court of Appeal allowed the appeal in part, upholding the High Court's findings with respect to breaches of the Convention and of the first protocol thereto, but rejecting the finding of inconsistency with EU community law. In concurring with the judgments of Simon Brown, L.J., and Laws LJ , finding that the scheme was unfair and that the extent of the unfairness was such as to constitute a breach of Article 6, and also that the scheme fell foul of Article 1 of the First Protocol, Jonathan Parker L.J. [at para 187] made the following observations that are heavily relied upon by the appellant in the present case:

> *"[187]… Moreover, as the judge correctly pointed out, the detention regime lacks an effective and speedy system for determining whether a vehicle should continue to be detained. This omission could be crucial in cases where the detention of a vehicle deprives an owner/driver of his means of livelihood (and possibly also his temporary living accommodation). The Secretary of State contends that it would be open to the owner or driver to apply for a declaration that the penalty notice on which the detention is based should not have been issued. However, as pointed out earlier, there is no provision for that in the scheme, and it must be highly doubtful whether the court would be persuaded to make such a declaration, at least until the prescribed period of 60 days under section 32(3) has expired; and by that time, serious losses may have been sustained by the owner/driver."*

109. Counsel for the appellant points to the evidence on the issue of the risk to the appellants employment, which I have reviewed earlier in this judgement. In the appellant's submission, the High Court erred in the manner in which it arrived at *"conclusions in law"* from the evidence of Mr. Maybury, contrary to the principles established in *Hay v. O'Grady* [1992] 1 IR 210 or otherwise and/or in failing to address the correct conclusion of law to be

drawn from the combination of primary fact and proper inference. It was submitted that in essence, the issue before the Court was not whether the applicant's dismissal for conviction of this offence would be disproportionate. The issue before it was whether the applicant had laid a sufficient evidential basis to assert that the sentencing court might be satisfied (in relation to the potential effect of a conviction on him) that there was a reasonable doubt that his job might be at risk as a result. This, it was submitted, is a general principle of sentencing.

110. We were referred for its persuasive influence to an unfair dismissals case, namely *Gregory Crowe v. An Post,* UDl 153/2014, wherein the EAT upheld, as fair, the dismissal of a postman because he had been convicted of drugs offences (gardai had found drugs at his home and his conviction had been reported in a newspaper). In respect of when a conviction could amount to grounds for a dismissal, the EAT said that while usually an employer's jurisdiction over misconduct of the employee ends at the company gate, a dismissal for misconduct outside the workplace could be justified where there is sufficient connection between the crime committed and the employee's work, inter alia, if it was "*capable of damaging the employer's reputation*". The EAT considered that the connection must be such that: it leads to a breach of trust and/or causes reputational and/or other damage to the company; the employee's behaviour risks bringing the employer's name into ill repute; and dismissal is more likely to be fair if the conviction is reported in the press.

111. It was submitted that the trial judge erred in failing to conclude that the sentencing court could come to the view that there was a reasonable doubt as to whether a conviction for this offence would have implications for the appellant's employment.

112. In response to these submissions, counsel for the respondent has argued that it is incumbent upon the appellant to establish, as an evidential baseline, that his conviction will, as a matter of probability, interfere with his right to work and it is suggested that he has not done so.

113. Further, and as a matter of principle, it is suggested that his submissions would appear to lead to an absurdity as, for example, any person whose occupation might be affected by a conviction could claim to be immune from prosecution: professional drivers could exempt themselves from offences carrying mandatory disqualification. An alternative corollary of the plaintiff's argument is that mandatory driving disqualifications are of themselves unconstitutional as they may lead to the accused losing his or her livelihood in the event of conviction.

114. The respondent has further submitted that there is also a contradiction between the appellant's classification of the relevant offence as being one of strict liability for the purpose of testing its constitutionality, but thereafter classifying it as being a "*theft and fraud*" offence - offences involving significant *mens rea* burdens - when concerned about how his employer might treat a conviction. He submitted that as a matter of definition the offence under consideration here is not an offence of dishonesty. This is because it is not necessary for the prosecution to prove any criminal intent, much less a specifically dishonest intent or motive.

115. Counsel for the respondent contended that the appellant’s analysis of this issue is misconceived from the outset. He is not a person who’s right to work is directly affected by the operation of legal provision. At most, the alleged interference with his right to work is secondary to the fact that he was charged with a criminal offence and is facing a conviction. The fact of a criminal conviction has the potential to be viewed by any number of employers as grounds for dismissal (whether such dismissal would be valid or otherwise in any given case). The appellant's argument is that this is something that ought to be legislated for. It might be said that the passing of the Unfair Dismissals Act 1977 discharges that alleged burden.

116. Counsel for the respondent goes on to note in passing that the fact of conviction has the capacity to have secondary impact upon a number of constitutional rights. A fine

interferes with the right to property; a custodial sentence with the right to liberty; the public nature of conviction with the right to a good name. There could be no constitutional imperative for these rights to the subject of special protections for a convicted person in the manner in which the appellant argues his right to work ought to be so protected. It is a novel and unusual proposition to argue that a sentencing regime should take account of how third parties might react to the fact of conviction, depending on the particular circumstances of the person convicted. Counsel suggests that it is not clear how any such sentencing regime could be formulated.

Analysis & Decision

Alleged undue complexity / lack of clarity

117. The provision at issue enjoys a presumption of constitutionality. That, of course, is not the end of the matter. It purports to create a revenue obligation. It might still be impugned if it was incapable of being operated constitutionally, either by reason of it being so unduly complex and/or so vague and/or so confusing that an individual person or persons, or a corporate or other legal entity, was prevented from determining and appreciating, through the exercise of reasonable due diligence, whether they were subject to the obligation so created. However, I am in complete agreement with the High Court judge view that the provision at issue is neither so unduly complex nor so vague nor so confusing, as to be incapable of constitutional operation.

118. I accept as being correct the submission of the respondent that the provision of certainty in regard to what is being prohibited (in terms of the creation of a criminal offence), or in regard to what a potential taxpayer's obligations are (in terms of the creation of a revenue obligation) is a fundamental value. However, such certainty can only be provided through precise specification of what is prohibited/demanded as an obligation. The need to be precise in specification may unavoidably introduce complexity in terms of requiring recourse

to be had, by a person concerned with construing the provision at issue, to definitions either in the instrument itself or in other instruments. However, while having to navigate such complexity may often be inconvenient, it will rarely in and of itself prevent a person, who is prepared to exercise due diligence, from determining or appreciating with reasonable certainty whether they may be subject to a revenue liability and/or criminal liability.

119. Counsel for the appellant has cited the following passage from the judgment of Hardiman J in *The People (DPP) v. Cagney and McGrath* [2008] 2 IR 111 (at p.263 of the report), in support of her argument that the provision at issue here ought to be impugned for over complexity, and/or vagueness and/or for giving rise to confusion:

> *"From a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful".*

120. I consider that emphasis must be placed on the subclause in that sentence which states **"*or at least be able to find out*".** In that regard I am satisfied that legislation which enjoys a presumption of constitutionality is not to be condemned as unconstitutional simply because it is complex or even very complex. I agree with the observation of the High Court judge at paragraph 35 of his judgement that 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, or indeed I would suggest a revenue obligation, on the grounds that it is complex or even very complex. Notwithstanding such complexity it may well be capable of constitutional operation. I consider that for a legislative provision to be condemned as being incapable of constitutional operation on the grounds of excessive complexity it would have to be demonstrated that a person seeking to understand and construe it could not, notwithstanding the exercise of reasonable due diligence, understand it due to its complexity. A requirement to have regard to definitions elsewhere within the legislation, or within other

instruments, and to cross-reference them, might well be tedious and inconvenient, but being subject to tedium and inconvenience does not equate to being unable to understand or, in the words of Hardiman J., *"to find out"*. In particular, I regard the observations *obiter dicta* of Donnelly J. in *Byrne v. Minister for Justice*, and those of MacMenamin J. in *Dunnes Stores v. Revenue Commissioners*, which the appellant relies upon, as having been very context specific in each case, and that they may not be interpreted as a general invitation to courts enjoying full original jurisdiction to strike down legislation creating a criminal offence, and enjoying a presumption of constitutionality, on grounds that it is too complex.

121. Moreover, in regard to exercising reasonable due diligence "*to find out*" what one's obligations might be, I take judicial notice of the availability of open access online legal resources such as the Irish statute book, and the EurLex database, amongst many others, which in recent years has greatly eased the task of cross-referencing legislative instruments for anybody interested in doing so. Anybody interested in doing so can readily access the necessary material on a home computer. That is not to gainsay that sometimes legal skill may be required to fully appreciate all the nuances of complex legislation. It is undoubtedly true that sometimes it might be necessary to seek legal advice on an issue of statutory interpretation. Where that arises it is part of what is expected of a person in terms of exercising reasonable due diligence. The important thing is to "***at least be able to find out***."

122. I have carefully considered the grounding affidavit of the appellant sworn on the 16th of February 2018. It does not contain any assertion by the appellant that he attempted to find out what his obligations were under the law in question but that notwithstanding the exercise of due diligence he was unable to do so due to the complexity of the legislation. There is no reference anywhere in his affidavit, or in his subsequent viva voce evidence given before the High Court on the 19th of October 2023, to seeking to ascertain in advance of offering for sale the tobacco in question what his obligations were, and being faced with a difficulty in

understanding what his obligations were based on complexity of the legislation in question. While, in the course of being cross-examined by counsel for the respondents, he did testify that he looked at s. 78 (of the Act of 2005) after he was charged with the offence, and did not understand it, that was after the fact. He conceded in the course of that cross-examination that he did not in fact make any enquiries in advance of being charged. Moreover, in so far as he claimed to have had a difficulty in understanding the provision at issue when he looked at it after the fact, he did not specify or particularise in what respect he found it difficult to understand, or if he sought legal advice or other assistance in his efforts to understand.

123. Neither is there any reference in his affidavit or in his viva voce evidence to being faced with a problem in interpreting s. 78(3) of the Act of 2005 on account of vagueness. Vagueness, which is not a legal term of art, in its ordinary quotidian meaning imports the idea of something which is not clearly stated, described, or explained. The appellant has not identified what it was that was not clearly stated, described, or explained so as to cause him a difficulty in knowing what his obligations were. Indeed, it is clear from his evidence that he had had no regard to the legislation at all prior to offering the tobacco for sale and being intercepted in doing so by revenue officials. Undoubtedly some cross-referencing of definitions both within the Act of 2005, and in other instruments, might have been required if he had done so but the mere fact that some cross-referencing might have been necessary does not equate to vagueness, and in any event the issue simply did not arise in his case because he never looked at the legislation.

124. Turning then to the assertion in the statement of grounds that the provision was also "*confusing*", it again bears commenting upon that there is no reference in the appellant's evidence, both on affidavit and viva voce, to consulting the legislation and finding it, or some term or provision of it, to be confusing. Once again, it is clear on his own evidence before the High Court that he had no regard to the legislation at all, and made no enquiries, prior to

offering the tobacco for sale and being intercepted; and there is nothing to suggest that he had attempted in any way to determine what his obligations were only to find that he was frustrated in doing so due to engenderment of confusion in his mind on some issue, either as to the meaning of the applicable legislation or its correct interpretation. Further, quite apart from failing to identify any actual confusion on his part, his evidence was also completely silent as to any steps taken by him in the exercise of due diligence to resolve any confusion that he might have had, such as taking legal advice, or querying the position with the Revenue.

125. It is trite law that *ignorantia juris non excusat*, or in translation that ignorance of the law is no excuse. While strict application of that legal maxim might in some circumstances be considered harsh, e.g., if one was dealing with legislation regulating something unusual or esoteric about which there was not common knowledge (including knowledge of the fact of its regulation); in this case it cannot be disregarded that it is widely known amongst the populace that cigarettes attract excise duty. In advance of every budget there is discourse in the print and broadcast media concerning whether excise duty on tobacco will be raised. Moreover, in this day and age there are very few people who have not travelled internationally themselves, or have had somebody belonging to them travel internationally. Anybody who has had occasion to go through an Irish airport, or sea port, knows they have to clear customs on re-entering the State (or if they have not personally had that experience, they are likely to know somebody who has had to do so), and will be aware that there are duty-free limits on the importation of tobacco (amongst some other products) from outside of the EU, and that if you import a quantity of tobacco exceeding those limits you may be stopped by customs on returning to this country and face a revenue liability. These are matters of such ambiguity and notoriety that I have no hesitation in taking judicial notice of the fact that it is widely known that tobacco is an excisable product. Moreover, the evidence

of Mr. Lynch, a witness called by the respondents, established, *inter alia*, the prevalence of prosecutions, nationally, for the illegal selling of unstamped tobacco in 2016, 2015 and 2014 respectively; his evidence being that the figures in those years were 90, 79 and 60, respectively and that therefore such prosecutions were by no means a rarity.

126. It will be for another court to determine definitively whether a person in the appellant's position could be expected to have known enough to at least put him on enquiry. Whether or not that is so, I am satisfied that the fact that tobacco imported from Turkey, which the appellant subsequently attempted to sell, would be liable to excise duty in this country in circumstances where it was unstamped, was something that was capable of being discovered by the exercise of reasonable due diligence. On the evidence before the High Court the fact that the appellant failed to discover his exposure to such liability, was not due to legislative complexity, or to vagueness, or to the confusing nature of the legislation, but ostensibly because he neither made any enquiry, nor sought to check in any way, as to what his obligations might be.

127. I therefore find no error on the part of the High Court judge in so far as he dealt with the claims of alleged complexity, vagueness and tendency to confuse. I agree completely with him that the particular legislative provision at issue is not very complex and that its core components, aside from the two exceptions provided for within it, are not complex. Moreover, the High Court judge was correct in saying that in so far as the exceptions are concerned it is not unreasonable to expect a person who believes they may qualify for a specific exemption to make efforts, and take steps, to ensure that it in fact applies to them. There is no evidence in this case that this appellant operated on the basis that he believed that one or other of the exceptions applied to him, and that he was in some way misled in that belief due to complexity and/or vagueness and/or by reason of having been confused in some way by either the wording or structure of the legislation. Quite simply, and in truth, in

asserting constitutional inoperability of s. 78(3) of the Act of 2005 on the basis of complexity and/or vagueness and/or confusion, this appellant has been attempting to assert a *jus tertii,* something that he cannot do - per *Cahill v Sutton* [1980] I.R 269, elaborated on further in *P.P. v Judges of the Dublin Circuit Court* [2020] 1 I.R. 123.

128. In the circumstances I have no hesitation in dismissing so much of the appeal, being grounds 1 to 6 inclusive, as is based upon a contention that the section at issue is incapable of being operated constitutionally due to its alleged complexity and/or its alleged vagueness and/or an alleged tendency for it to engender confusion.

Absolute or Strict Liability / Absence of requirement to prove mens rea

129. Irish criminal law recognises a tripartite division of offences. That much is clear from *CC v Ireland* [2006] 4 IR 1. In that case the Supreme Court held that criminal law offences in this country could be grouped into three categories, ordinary offences where the State was obliged to prove *mens rea*, offences of absolute liability, where there was no such obligation, and an intermediary category of offences of strict liability, which freed the prosecution from having to prove *mens rea*, but afforded an accused an opportunity to prove that he had used all due diligence to avoid the criminal liability in question. In arriving at that view, the Supreme Court had considered the earlier case of *Shannon Regional Fisheries v. Cavan County Council [1996] 3 I.R. 267* and the Canadian case of *R v. City of Sault St Marie* [1978] 2 S.C.R. 1299.

130. It is common case that the offence created under s. 78(3) of the Act of 2005 is not an offence in respect of which the State is required to prove *mens rea*. The controversy, so to speak, insofar as its correct classification is concerned, is as to whether it is an offence of strict liability or offence of absolute liability. Further, the issue is raised as to whether having regard to the indicia or essential features of the offence, the appellant could ever receive a

trial in due course of law as required by Article 38 of the Constitution, in circumstances where there is no requirement on the prosecution to prove *mens rea* on his part.

131. I have already observed that while the appellant has not abandoned a contention made in his pleadings that it is possibly an offence of absolute liability, the overwhelming concentration of the argument before us was advanced on the basis that it was most likely an offence of strict liability. Relevant also in that context is the position adopted by the respondents that it is a strict liability offence, and the finding of the High Court judge that it is a strict liability offence, for the reasons stated by him at para 32 of his judgment (quoted previously at para 57 above).

132. Assistance as to how to approach correctly classifying an offence is to be found in the High Court's decision in *Reilly v. Patwell* [2008] IEHC 446. In that case McCarthy J. considered whether an offence created under s 6(4) of the Litter Pollution Act 1997 was a strict liability offence or an absolute liability offence. He reviewed in great detail the jurisprudence on such controversies and distilled from it a list of factors (which he did not contend was necessarily exhaustive) that were potentially relevant. These were:

(i) the moral gravity of the offence;

(ii) the social stigma attached to the offence;

(iii) the penalty;

(iv) the ease (or difficulty) with which a jury is discharged or the law obeyed;

(v) whether or not absolute liability would encourage obedience;

(vi) the ease or difficulty with which the law might be enforced;

(vii) the social consequences of non-compliance;

(viii) the desideratum to be achieved when considering the statute.

133. In their written submissions, the respondents have suggested that many of these in this year are applicable to the present case, and I agree.

134. Applying these criteria to the present case, it can be said that selling unstamped tobacco does not offend against any moral law, but that it is a breach of the social contract pursuant to which citizens to whom tax laws apply are expected to pay their taxes. Associated with that is the fact that there is some social stigma attached to being a tax defaulter. The penalty provided for in respect of an offence committed under s. 78(3) of the Act of 2005, in the case of summary conviction, is a mandatory fine of €5,000 or, at the discretion of the court, imprisonment for a term not exceeding 12 months, or both. In the case of conviction on indictment, the penalty provided for is a fine not exceeding €126,970 or, at the discretion of the court, imprisonment for a term not exceeding five years, or both.

135. Insofar as the ease (or difficulty) with which a duty is discharged or the law obeyed, the applicable law provides that if tobacco products are to be offered for sale they must bear a tax stamp, being a label issued by the Revenue Commissioners for the purpose of collecting tobacco products tax under s. 73 of the Act of 2005, and that to offer them for sale without such a tax stamp is an offence, unless the intended seller is exempted (i.e., payment of tobacco products tax is permitted under s. 73(2) of the Act of 2005 to be subject to the provisions governing other tobacco products), or they are subject to a suspension arrangement. A simple inspection of the packaging of any tobacco products to be offered for sale to see if the required tax stamp is affixed thereto would alert the intended seller as to whether or not tax has been paid. If it does not bear such a stamp, it is then incumbent on the intended seller, through the exercise of reasonable due diligence, to take all reasonable steps to avoid the commission of an offence – *Waxy O'Connors Ltd v. Riordan [2016] 1 I.R. 215*. In practical terms that requires him to do one of two things, neither of which is difficult. He must either not offer the tobacco products in question for sale, or alternatively satisfy himself that he can avail of a lawful exemption or of a suspension arrangement, so as to be able to

lawfully offer the products in question for sale. If he is neither exempted, nor able to avail of a suspension arrangement, he cannot lawfully sell those products.

136. I opined earlier in this judgment that the statutory obligations of a person with regard to the sale of unstamped tobacco was something that was capable of being discovered by the exercise of reasonable due diligence in circumstances where it is widely known that tobacco is an excisable product. However, in having said that I am not to be taken as suggesting that proving lack of intention or knowledge would, *per se*, represent a defence to a charge under s. 78(3) of the Act of 2005. It would not. The ability of a person to ascertain their obligations through the exercise of reasonable due diligence is only relevant in the context of a judicial consideration of whether the section was capable of constitutional operation in the particular circumstances of the case. For the avoidance of confusion, or conflation of issues, it is important to emphasise that this is a different thing to the taking of all reasonable steps to avoid the commission of an offence in circumstances where it has been possible, in the words of Hardiman J, *"to find out"*. Where, through the exercise of reasonable due diligence, it would have been possible for a person to ascertain their obligations, it is not a defence to either a strict or absolute liability offence to demonstrate lack of intention or lack of knowledge of one's obligation.

137. The social consequences of non-compliance with s. 78(3) of the Act of 2005 are readily stated. Reference has already been made to the social contract which requires that citizens to whom tax laws apply must pay their taxes. It is essential in the public interest that taxation laws are uniformly and indiscriminately applied, and it would be inimical to public confidence in the financial governance of the State if such laws were not enforced across the board such that some could disregard them with impunity.

138. In my view, in considering the statute immediately at issue, namely the Finance Act of 2005, and the statutory taxation code more generally, the main desideratum that the

Oireachtas has sought to achieve in the taxation measures therein provided for, is to ensure that revenue is raised for the benefit of the state in circumstances by the imposition of revenue obligations on taxpayers generally, or certain classes of taxpayers, and ensuring that those obligations are applied and enforced equitably, and in accordance with law, amongst those who are subject to them.

139. Having considered these factors, I am satisfied that the offence created by s. 78(3) of the Act of 2005 must be regarded as an offence of strict liability. I am completely satisfied that there is nothing unconstitutional about the fact that such an offence is a strict liability offence. Very many Revenue offences are in fact strict liability offences. It is open to a defendant to raise a due diligence defence, but only in the sense that I have spoken about in paragraph 130 above. Notwithstanding the potentially significant penalties to which a person accused of that offence may be exposed, the possibility of relying upon a due diligence defence in the sense spoken about, ensures that a person charged with such an offence can receive a trial in due course of law as required by Article 38 of the Constitution. Such a defence could succeed where the defendant was in a position to demonstrate that he reasonably believed, having exercised due diligence, that he was in a position to avail of one of the two exceptions provided for in the subsection.

140. There are therefore defences potentially open in principle to a person charged under section 78(3) of the Act of 2005. Of course, this is subject to such a person being in a position to avail of them on the facts of their individual case. The fact that neither of these defences are in fact capable of being availed by this appellant, because of the circumstances of his case, does not mean that he is deprived of his right to a trial in due course of law. A person charged with murder could have possible defences open to them in principle based on self-defence, or insanity, or provocation (to name but some), but be unable due to the circumstances of their individual case to avail of some, or indeed any, of them. The fact that

such a person might be unable to avail of possible defences open in principle to a person charged with the offence with which they are charged, due to the circumstances of their individual case, does not mean that they cannot get a trial in due course of law.

141. On the contrary, it seems to me that there is no reason why this appellant cannot obtain a trial in due course of law. The problem for him, however, is that he has never suggested either (i) that he had a reasonable belief that he was in a position to avail of one of the two exceptions provided for in the subsection, or (ii) that steps were taken by him in exercise of reasonable due diligence to avoid the commission of an offence. That being so, so much of his claim as is based on inability to obtain a trial in due course of law, and which is being attributed to the absence of a *mens rea* component to the offence, is in my view nothing more than an attempt, once again, to assert a *jus tertii,* i.e., to position himself as someone for whom there was no legal defence that could, in principle, be potentially availed of. However, he is not a person in that position.

142. For all these reasons I have no hesitation in rejecting grounds of appeal 7 to 10 inclusive.

Restriction of the applicability of s. 1(1) of the Probation Act

143. It is appropriate in considering the complaints under this heading to set out the relevant statutory provisions.

144. Section 78(5) of the Act of 2005 provides:

> *"(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.".

135. Section 130 of the Act of 2001 provides that "*a trial judge may ... 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*.".

136. Section 126 of the Act of 2001 provides that s. 1 of the Act of 1907 "*shall not apply to offences to which this section relates,*" that is any offence "under or by virtue of the statutes which relate to the duties of excise". (S. 78 of the Finance Act 1984, which does not appear to have been repealed, contains a similar provision.).

137. Section 1(1) of the Act of 1907 ("the 1907 Act") provides:

"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either-

(i) *dismissing the information or charge; or*

(ii) *discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."*.

138. In *Osmanovic v. DPP* (previously cited) the Supreme Court was concerned with an argument that s. 89(b) of the Finance Act 1997 ("the Act of 1997") was unconstitutional, on the basis *inter-alia* that it provided for a fixed penalty which was contrary to the doctrine of the separation of powers constitutionality. The section provided for was a penalty upon conviction on indictment on charges of the illegal importation of goods consisting of a fine amounting to treble the value of the goods, including the duties payable thereon, 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 the imprisonment. In addressing the constitutional challenge and giving a single judgment on behalf of the Supreme Court, Murray C.J. stated that s. 89(b) of the Act of 1997 did not provide for a fixed penalty. On the contrary, it provided for a choice of penalties, i.e. a fine of treble the value of the goods including the duties payable thereon, 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 the imprisonment. He stated that there was clearly a multiple-choice there. Even within the power to impose a prison term there was clearly the implied power to suspend all or part of that term. The prison sentence whether custodial or suspended or partly custodial and partly suspended might be the only sentence, or it might be combined with the fine. There was therefore no question of either the legislature or the executive fixing the punishment. Only the Court exercising its judicial power does that. The court expressly rejected any suggestion that because there was a legislative prescription in relation to the fine option that there was a breach of the principal of separation of powers. It has always been accepted, as was expressly acknowledged in *Deaton v. The Attorney General and the Revenue Commissioners* [1963] IR 170 that, within reason at least, the Oireachtas has the power to lay down general parameters within which the sentence is to be imposed.

139. The late Chief Justice further observed:

"Thirdly, 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 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.".

140. Moving to consider the argument that the impugned provision was unconstitutional on grounds of alleged infringement of the constitutional principle of proportionality, the Supreme Court acknowledged the statements of principle concerning the constitutional principle of proportionality to be found in the judgment of Flood J. in *People (DPP) v. W.C* [1994] 1 ILRM 321, and in that of Hardiman J. (giving judgement for the Court of Criminal Appeal) in *People (DPP) v. Kelly* [2005] 2 I.R. 321, but held that those passages must be read in context. As had already been pointed out, there were reasonable options open to the trial judge in sentencing Mr. Osmanovic and insofar as there were limitations (a) they were not unreasonable and (b) they were the kind of limitations which were normal in revenue offences. Accordingly, the principle that sentences must be proportionate to the personal circumstances of the appellant was perfectly capable of being applied. The Court was therefore satisfied that s. 89(b) of the Act of 1997 was consistent with the separation of powers doctrine and with the constitutional principle of proportionality, and the court held that it was not invalid having regard to the Constitution.

141. The appellant in the present case seeks to distinguish *Osmanovic* on the basis that a different statutory provision was at issue in that case from the provision with which we are concerned in the present case. Moreover, there was no consideration of the availability or otherwise of the sentencing options provided for in the Probation Act in *Osmanovic.*

142. In *Dumitran v. Ireland* (previously cited) the High Court was concerned with a challenge to the constitutionality of s. 78(5) of the Act of 2005. As we have seen, 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 in that case had been charged with an offence, related to various offences concerning dealings with tobacco products to which a tax stamp has not been affixed. The plaintiff contended that a fine of €5,000 in all the circumstances of the case would be unjust and disproportionate to the circumstances of the offence and the offender. The alternative was to impose a sentence of imprisonment which, even if suspended, would, it was said, be a disproportionate penalty for a first offender in the circumstances of the case. As in the present case, it was asserted that:

> *"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."*.

Further, that:

> *"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."*.

143. In a comprehensive judgment, Sanfey J. considered various authorities (to which we were also referred) including *Ellis v. Minister for Justice* [2019] 3 I.R 511; *Lynch & Whelan v. Minister for Justice* [2012] 1 I.R. 1 and *Osmanovic v. DPP*. Having done so, and accepting

the facts set out in the statement of claim, and submissions on behalf of the plaintiff that Mr. Dmitran was *"very likely to be considered, as an offender under s. 78 (3), as being at the lower end of the scale of seriousness"*, he observed:

> *"51. ... 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.".

144. In paragraph 55 of his judgment Sanfey J. considered the options open to a trial judge in the District Court when sentencing a person under s. 78 (5) (a) of the Act of 2005 and determined that there were five which he particularised. He concluded that even the lowest possible fine of €2,500 could not be regarded as mandatory as there was a range of possible sentences which could be imposed on summary conviction.

145. Moving then to consider the issue of proportionality, Sanfey J considered whether there was a rational relationship in the case before him between the penalty and the requirements of justice with regard to the punishment of the specified offence. He concluded that there was stating:

> *"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".

146. Sanfey J. found support for his view in the Supreme Court's judgment in *Osmanovic*.

147. In conclusion, he refused the relief sought by the plaintiff, stating:

"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".

148. I am in no doubt that *Dumitran* was correctly decided. That being the case, I do not consider that the appellant in this case has sufficiently distinguished the *Osmanovic* / *Dumitran* line of jurisprudence, and I agree with counsel for the respondent that it provides a complete answer to the appellant's complaint under this heading. The fact that the appellant cannot avail of the Probation Act does not mean that there is no rational relationship between the penalty prescribed in the section and the requirements of justice, nor does it mean that there has been a breach of the separation of powers. It remains for whatever court is seized with having to sentence Mr Galvin to determine the appropriate penalty in the circumstances of Mr Galvin's individual case. It is not the function of the Court of Appeal to determine

what the appropriate penalty might be. However, it is sufficient to state that the sentencing court will have a range of sentencing options open to it as correctly determined by Sanfey J. in *Dumitran*, and there is no reason to suppose that they will not be adequate for the task. That being the case, I am satisfied that there was nothing irrational or disproportionate and nothing unconstitutional, or comprising a breach of the appellant's rights under the ECHR, in the Oireachtas providing that a person guilty of an offence under s. 78(3) of the Act of 2005 should not be able to rely on the provisions of s. 1(1) of the Probation Act.

149. I would therefore also reject the grounds of appeal upon which these complaints are based, namely grounds nos. 11, 12, 15 and 16.

The possibility of the appellant's dismissal from his current employment were he to be convicted

150. It is complained in ground of appeal nos. 13 and 14 that the High Court judge erred (i) in failing to taking account of all the evidence adduced by or on behalf of the applicant in relation to the possibility that a conviction for an offence contrary to s. 78(3) of the Act of 2005 could lead to the appellant's dismissal from his employment, and (ii) in failing to acknowledge or accept that a sentencing court need only be satisfied in relation to this potential consequence that there was a reasonable doubt that the appellant's employment might be at risk as a result of a conviction. I also reject these complaints for the following reasons.

151. I have no hesitation in accepting the submissions of counsel for the respondents as to untenability of the arguments advanced by the appellant with respect to alleged disproportionate interference with, and potential prejudice to, his right to work. There is nothing disproportionate about imposing a penalty, such as any of those provided for in s. 78(5) of the Act of 2005, on a person who is convicted of an offence under s. 78(3). It is a matter for his employers as to what view they ultimately may take of his having been so

convicted, if that transpires to be the situation. The approach of the High Court judge on this issue was entirely correct. The evidence adduced on behalf of the appellant did not in fact establish that his dismissal was a certainty. The high water mark of it was, perhaps, that he would be at risk, and possibly high risk, of dismissal. That unfortunately is often a secondary consequence of being convicted of a crime. It is certainly a factor that a sentencing court can take into account in assessing the appropriate penalty to apply, but it is not correct to say that a sentencing court need only be satisfied in relation to this potential consequence that there was a reasonable doubt that the appellant's employment might be at risk as a result of a conviction, to regard the recording of such a conviction, and the imposition of an appropriate penalty from the range provided for by law, as being in some way a disproportionate measure, or as something which is prohibited by the Constitution or by the ECHR. The argument is quite simply untenable, and I reject it *in limine*.

152. It follows that I also reject these grounds of appeal.

Conclusion.

153. In circumstances where I have not seen fit to uphold any of the appellant's complaints, I would dismiss the appeal.

McCarthy J: I agree.

Kennedy J: I also agree.