[2019] IEHC 625

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 1067 J.R.

BETWEEN

MARK MOONEY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 23 August 2019.

Summary

1. These judicial review proceedings raise issues as to the jurisdiction of a sentencing judge to impose restrictions upon the location at which a person convicted of a criminal offence may lawfully reside. The Applicant has been convicted of an offence of harassment pursuant to section 10 of the Non-Fatal Offences against the Person Act 1997. The District Court imposed a custodial sentence of nine months, but made an order suspending seven months thereof on condition *inter alia* that the Applicant is not to reside within a distance of eight kilometres of the injured party for a period of three years. The Applicant has declined to enter into the recognisance necessary to avail of the suspended sentence.

2. The District Court has also purported to make a parallel order pursuant to section 10(3) of the Non-Fatal Offences against the Person Act 1997 stipulating that the Applicant is not to reside within a distance of eight kilometres of the injured party. This restriction is, seemingly, intended to apply for the remainder of the Applicant's life. The Applicant submits that the practical effect of this restriction is to exclude him from residing within the town in which he has always lived.

3. The Applicant submits that the orders of the District Court are unreasonable and disproportionate in their effect upon his constitutional rights. It is further submitted that the orders were made in excess of jurisdiction, and, accordingly, that an application for judicial review is a more appropriate remedy than an appeal to the Circuit Court.

4. On behalf of the Director of Public Prosecutions, it is submitted that these matters are all better dealt with by way of appeal to the Circuit Court. In particular, it is submitted that the Circuit Court will have a wider jurisdiction to assess all relevant matters than the High Court would have through the narrow prism of judicial review proceedings.

5. For the reasons set out hereinafter, I have concluded that this is one of those exceptional cases where judicial review is the more appropriate remedy. The District Court orders were made in excess of its statutory jurisdiction under both section 10 of the Non-Fatal

Offences against the Person Act 1997 and section 99 of the Criminal Justice Act 2006. The residence restriction is disproportionate in that it involves an unjustified and excessive interference with the Applicant's right to liberty and/or his right to free movement within the State.

Factual background

6. The Applicant pleaded guilty to and has been convicted of an offence of harassment under section 10 of the Non-Fatal Offences against the Person Act 1997. The statutory offence of harassment is defined as follows.

> "10.(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
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> (2) For the purposes of this section a person harasses another where—
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> (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
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> (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other."

7. The circumstances giving rise to the offence in the present case are as follows. The Applicant has, in effect, admitted that over the course of a period of some eight years he had been surreptitiously taking photographs of his next-door neighbour ("*the injured party*") while she was in the garden of her house. The injured party had been unaware at the time that she was being photographed. The Applicant took more than 12,000 photographs over this period. The photographs were taken using one or other of two digital cameras owned by the Applicant. The images were then transferred by the Applicant to a personal computer. These images have since been recovered from the hard drive of the Applicant's computer by An Garda Síochána through the use of forensic software.

8. When confronted by the Gardaí, the Applicant made admissions. Thereafter, the Applicant entered a guilty plea to the charges against him.

9. A detailed plea in mitigation was made before the District Court (Judge Gerard Haughton) on 1 October 2018. The District Court judge reserved judgment on the matter, and delivered a ruling on 8 October 2018. A transcript of this ruling has since been prepared.

10. In brief, the District Court judge indicated that the headline or tariff for the offence would be a twelve-month sentence of imprisonment. A discount of three months was then applied to reflect the fact that the Applicant had co-operated with the Gardaí and had entered a plea of guilty. The District Court judge next considered whether all or part of the sentence should be suspended. The District Court judge concluded that the appropriate order was to suspend seven of the nine months of imprisonment imposed, subject to certain conditions.

11. The key passages from the transcript of the District Court judge's ruling read as follows (page 2, from line 20 onwards)

> "I have to balance all of those things. This offence carries a maximum sentence of 12 months' imprisonment here. It is a serious matter insofar as the number of the images and nature of the images and the period of time over which the matter continued. And in those circumstances, giving him the discount for the fact that he's no previous, pleaded guilty at an early stage, because of the seriousness of the matter I am facing a sentence of nine months' imprisonment for him.
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> Now, starting at that point, I want to go back to the fact that he has now exited the area and has given an undertaking to dispose of his house. As I have said that, in itself, is a very substantial penalty on Mr. Mooney. Getting him out of the area and getting him away from the injured party is probably the best comfort that the injured party can have and what I am trying to do again is to take that into the mix, so to speak, and see how the best way of ensuring that that actually happens is.
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> In all of the circumstances, what I am going to do is suspend seven months of the nine months. I think it is essential that Mr. Mooney spend some time in custody to bring home to him the seriousness of the matter and what he did. But I need a substantial part of the sentence hanging over his head to ensure that he complies with the remainder of the order that I am going to make.
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> So, I am suspending seven months of the nine months sentence. His own bond of €1,000 for three years on the following conditions: that he's not to communicate by any means with the injured party, not to approach within two kilometres of her place of residence, or within 500 metres of her place for employment if they are different and not to reside within eight kilometres, that is five miles, of where the injured party resides."

12. The formal order of the District Court provides as follows.

> "The Court hereby orders that subject to the said offender entering into recognisance to comply with the conditions of, or

imposed in relation to this order, the execution of the part of the sentence of imprisonment comprising the term of 7 months be and is hereby suspended until further order of this Court.

It is a condition of this order that the said offender shall keep the peace and be of good behaviour during the period of suspension of the sentence. It is a condition of this order that ENTER BOND OF 1000 EURO FOR 3 YEARS

NOT TO COMMUNICATE BY ANY MEANS WITH [*NAMED OF INJURED PARTY REDACTED*] AND NOT TO APPROACH WITHIN 2 KILOMETRES OF HER PLACE OF RESIDENCE OR 500 METERS OF HER PLACE OF EMPLOYMENT IF DIFFERENT AND NOT TO RESIDE WITHIN 8 KILOMETRES OF THE INJURED PARTY, THAT THE DEFENDANT COMPLIES AS SOON AS IS PRACTICABLE WITH HIS UNDERTAKING TO THE COURT TO DISPOSE OF HIS PROPERTY AT [*ADDRESS OF PROPERTY REDACTED*] TO SOMEONE OTHER THAN A FAMILY MEMBER, NOT TO OWN OR POSSESS A STILLS OR VIDEO CAMERA OR MOBILE PHONE WITH SUCH CAMERA, TO HAND OVER TO THE SUPERINTENDENT IN CHARGE, WEXFORD GARDA STATION ALL IMAGES OF THE INJURED PARTY WHETHER DIGITAL OR PRINTED OR ON FILM AND ALL COPIES THEREOF FOR DESTRUCTION INCLUDING COMPUTER HARD DISKS, DIGITAL STORAGE MEDIA AND/OR FILM ON WHICH SUCH IMAGES ARE STORED WITHIN 7 DAYS"

13. In addition to imposing these conditions in purported reliance on section 99 of the Criminal Justice Act 2006, the District Court judge also made the following orders pursuant to section 10(3) of the Non-Fatal Offences against the Person Act 1997.

> "ORDER UNDER SECTION 10(3) IN THE FOLLOWING TERMS NOT TO COMMUNICATE BY ANY MEANS WITH [THE INJURED PARTY] AND NOT TO APPROACH WITHIN 2 KILOMETERS (*SIC*) OF HER PLACE OF RESIDENCE OR 500 METERS (*SIC*) OF HER PLACE OF EMPLOYMENT IF DIFFERENT AND NOT TO RESIDE WITHIN 8 KILOMETERS (*SIC*) OF THE INJURED PARTY FOR LIFE ACCORDING TO NON FATAL OFFENCES AGAINST THE PERSON ACT, 1997."

14. In the event, the Applicant chose not to enter into the requisite recognisance to avail of the suspended sentence. The Applicant's position in this regard is explained as follows in his affidavit of 14 December 2018.

> "4. I confirm that I refused to enter the bond required of me by the District Court Judge due to the nature and severity of the terms of the suspended sentence and the impossibility by me of compliance with the order imposed under Section 10(3) of the Non Fatal Offences against the Person Act 1997.
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> 5. In this regard, I specifically say and believe that the effect of the orders would be to ban me for life from living in the town of

> Wexford which is no more than 8 kms in diameter, and is a town where I grew up and all my family life is there. I say in this regard that my siblings are also from Wexford town and reside therein, to be unable to live in the town or its environs, or to traverse the town without encroaching on a zone within 2 kilometres of [Address redacted] the injured parties address for a lifetime would make it impossible for me to carry out my daily business."

15. The Applicant instead entered into a recognisance for the purposes of an appeal to the Circuit Court and has filed an appeal. This had the effect of staying the sentence of the District Court. In parallel, the Applicant also instituted the within judicial review proceedings.

Adequate alternative remedy?

16. The Director of Public Prosecutions ("*the DPP*") has raised an objection that judicial review should be refused in circumstances where it is said that the pending appeal to the Circuit Court represents an adequate alternative remedy for the Applicant.

17. The dividing line between the type of error which should be corrected by way of an appeal and the type of error which is amenable to judicial review has been considered in detail by the Supreme Court in *Sweeney v. Fahy* [2014] IESC 50.

18. Clarke J. (as he then was) drew the following distinction between errors which render a decision unlawful, and those errors which merely make the decision incorrect.

> "3.4 In the light of that observation, it seems to me that it may be more helpful to describe the overall role of the High Court in judicial review (and the role of this Court, and indeed the Court of Appeal, when it comes into existence, as appellate courts exercising constitutional jurisdiction on appeal from the High Court's judicial review jurisdiction) as concerned with whether a decision of a person, body or statutory court which affects legal rights (arising from the law conferring on that person, body or court the legal power to make a decision of a particular type) is lawful. On that basis, various categories of grounds on which judicial review can be granted can be seen to be examples of a finding that the ultimate decision made affecting legal rights is not lawful.
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> 3.5 Such an analysis does not, of course, answer every question. It obviously leads to the next question as to just what it is that renders a determination affecting legal rights to be regarded as unlawful or, in the words of Henchy J., not 'in accordance with law'. In the particular context of this case, the question arises as to what type of error actually renders a decision of a statutory court unlawful as opposed to being merely regarded as being in error. The so called 'error within jurisdiction' jurisprudence must be seen in that light. Some errors may be such as render the

> ultimate decision unlawful and thus capable of being quashed by way of judicial review. Some errors do not render the decision unlawful and are only capable of being corrected, if at all, by an available appeal. It should also, in that context, be recalled that there would be little point in making any distinction between a judicial review and an appeal if there were no difference in substance between the sort of issues which could be canvassed in the respective cases.
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> 3.6 It is important, therefore, to emphasise that judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights whether by persons, bodies, or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. There may be some legitimate debate as to the type of error which can lead to a decision being regarded as unlawful rather than simply incorrect. However, the fundamental distinction between unlawfulness, which can give rise to a decision being quashed on judicial review, and incorrectness, which can not, remains."

19. The classic example of an error which will render a decision unlawful—and hence amenable to judicial review—is a failure to comply with fair procedures. If the breach of fair procedures is sufficiently serious it will have the consequence that the affected person will not have had a proper hearing at first instance. A right of appeal will not normally be regarded as an adequate alternative remedy if the statutory scheme envisages that an affected person is entitled to two proper hearings. Put colloquially, if the statutory scheme envisages two bites of the cherry, then a lack of fair procedures at first-instance will not be remedied by an appeal.

20. In exceptional cases, however, judicial review may also be appropriate where the error touches upon the *substance* of the decision. Even the broadest statutory discretion is subject to implied limitations. The resulting decision must be reasonable and proportionate within the meaning of well-established case law such as *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701. It should be emphasised that this is a very high threshold for an applicant to meet.

21. The application of these principles to sentencing in criminal proceedings might be summarised as follows. There will be a range of sentencing decisions which a trial judge can lawfully make. If a decision falls within this range, then the appropriate avenue by which to challenge that decision is by way of an appeal. If, however, the decision falls *outside* this range, then the decision is amenable to judicial review. An obvious example would be where the District Court purported to impose a sentence in excess of that

permitted on summary conviction. Thus, for instance, if the District Court had purported to impose a custodial sentence *in excess of* twelve months imprisonment for the offence of harassment, this would have been unlawful. This is because the maximum sentence on summary conviction is fixed under section 10 of the Non-Fatal Offences against the Person Act 1997 at twelve months.

22. Crucially, however, even a decision which falls within the express statutory limits may nevertheless be so far outside the *reasonable* discretionary limits that it amounts to an error of law. This point can be illustrated by reference to the following two judgments of the Court of Appeal which were cited in argument before me.

23. The first case, *O'Brien v. Coughlan* [2015] IECA 245, concerned the imposition of a disqualification order, i.e. an order disqualifying a person from holding a driving licence for a specified period. Such orders are made *consequential* to a conviction for a road traffic offence, such as, for example, drunk driving. Whereas a disqualification order is not primarily intended as a punishment, the power to impose such orders must nevertheless be exercised judicially. On the facts, the District Court had purported to impose a disqualification order of forty years duration. The Court of Appeal held that the order fell outside the zone of what might be considered reasonable.

> "33. On this point the Court takes the view that the 40-year disqualification is unjustifiable and ought to be struck down. It is outside the zone of what might be considered reasonable by any standard. It also offends the underlying legal basis of the disqualification as determined and set out by the Supreme Court in [*Conroy v. Attorney General* [1965] I.R. 411] case.
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> 34. It would have been within the jurisdiction of the District Court to impose a disqualification for some substantial period based on rational considerations of issues raised by Mr. O'Brien's record. This Court cannot do that so, the disqualification order must fall. That does not mean that the whole conviction is erased, however, because it is an ancillary disqualification that is severable from the sentence which was imposed within jurisdiction. There follows also a period of mandatory disqualification under the Road Traffic Acts. The Court will allow the appeal on this point. If Mr. O'Brien appeals his sentence of imprisonment, it will be open to the judge to consider the ancillary disqualification issue afresh and to impose a more appropriate disqualification, if so minded."

24. The second case, *Collins v. Director of Public Prosecutions* [2018] IECA 381, involved a challenge to the conditions imposed upon a suspended sentence. The principal issue on the appeal was whether the time period for which a sentence of imprisonment may be

suspended could exceed the maximum term of imprisonment which could have been imposed by the District Court. On the facts, the accused had been convicted of a number of counts of handling stolen property. The District Court had imposed a cumulative sentence of ten months imprisonment, but on appeal the Circuit Court had made an order suspending the final four months of that sentence for a period of five years. The original sentence could be reactivated during this five-year period if the accused failed to keep the peace or to be of good behaviour. This order was then challenged in judicial review proceedings. The gravamen of the challenge being that the period for which the sentence had been suspended (five years) was disproportionate having regard to the fact that the maximum aggregate sentence which the District Court may impose is two years imprisonment. In particular, it was argued that it was disproportionate that the period of time during which the risk of reactivation of the suspended sentence would be hanging over the accused's head was a multiple of the length of the sentence itself.

25. The Court of Appeal, *per* Kennedy J., emphasised that there is no statutory provision which stipulates a maximum period of time for which a sentence may be suspended. The judgment went on to consider the question of whether the manner in which the Circuit Court had exercised its statutory discretion might be disproportionate.

> "31. I have considered the principle of proportionality and whether the trial judge erred in concluding that the period of suspension was not so disproportionate as to render it unfair, void, contrary to law or in excess of jurisdiction. I am satisfied that the penalty imposed here was proportionate both in the constitutional law sense and in the distributive sense. S.99 of the Criminal Justice Act, 2006, makes no reference to a court having regard to the maximum sentence to be imposed in any instance in order to determine the appropriate period for which a sentence may be suspended. Such a determination is entirely within the discretion of a sentencing judge on a consideration of the evidence. There is no reason in principle why the operational period cannot be of a greater length than the custodial term. Such a decision cannot be an arbitrary one but must be based on the evidence. It is ultimately a matter for the proper exercise of the discretion of the trial judge."

26. The distinction between the two senses in which the term "proportionality" may be used had been explained earlier in the judgment as follows.

> "25. It is important not to conflate the two different senses in which 'proportionality' falls to be considered in sentencing. Firstly, there is proportionality in the constitutional law sense of requiring that any measure that may impact negatively on the personal rights of an individual should be proportionate to, but be no more

> than is required by, the legitimate aim being pursued. This is the type of proportionality spoken of in [*Heaney v. Ireland* [1994] 3 I.R. 593]. Secondly, then, there is proportionality as a distributive principle, which is the sense in which it is most commonly used in sentencing jurisprudence. Used in this sense it is concerned with the question of how much punishment is deserved in a particular case having regard to the gravity of the offending conduct on the one hand, and the circumstances of the individual offender on the other hand. The appellant's reliance on proportionality is primarily concerned with alleged disproportionality in the constitutional law sense, although he also makes a subsidiary case that the sentence imposed upon him, suspended on the terms on which it was, was too onerous, and to that extent is also relying on alleged disproportionality in the distributive sense."

27. In each of these two judgments, the Court of Appeal was prepared to consider whether a decision—which was nominally within statutory jurisdiction—might nevertheless exceed the range of lawful decisions permitted under the relevant legislation. This was done by examining whether the decision was "unreasonable" or "disproportionate". A decision which is not lawful is amenable to judicial review.

findings of the court on adequate alternative remedy

28. I turn next to apply the principles discussed above to the facts of the present case. The District Court, in principle, has jurisdiction to make an order pursuant to section 10(3) of the Non-Fatal Offences against the Person Act 1997 restricting a person, such as the Applicant, who has been convicted of the offence of harassment from communicating or approaching the injured party. An application for judicial review would only be appropriate where the challenge to such an order is predicated on an argument that the District Court has exceeded its jurisdiction, either by disregarding an express statutory restriction or by going outside the range of "reasonable" or "proportionate" decisions. If a convicted offender accepts that the order falls within the range of lawful decisions, but wishes to challenge the *correctness* of same, then the appropriate remedy is by way of appeal to the Circuit Court.

29. The challenge in the present case is directed to the *lawfulness* of the decision to impose the order pursuant to section 10(3). The Applicant contends that the District Court simply did not have jurisdiction to impose the purported restriction on residence. The temporal and geographical parameters of the order are said to involve a disproportionate interference with the Applicant's constitutional rights. At its core, the contention is that

the District Court had exceeded its jurisdiction, and that its order is unlawful. These are all contentions which fall to be determined by way of judicial review.

30. Similarly, the related arguments which the Applicant makes in respect of the conditions imposed on the suspended sentence are also ones which fall to be determined by way of judicial review.

31. It should be emphasised that a convicted offender who seeks to pursue an application for judicial review undertakes a much greater burden than one who elects to proceed by way of appeal. In order to succeed in an application for judicial review, the applicant must persuade the High Court that the decision impugned was *unlawful*, i.e. that it falls outside the range of what is reasonable or proportionate as these terms are defined in *O'Keeffe v. An Bord Pleanála* and *Meadows v. Minister for Justice and Equality*. It would not be enough that the High Court judge might—had he or she been hearing the matter *de novo*—have reached a different view than that of the District Court as to the nature and extent of the order to be made under section 10(3). The High Court judge hearing the judicial review is not entitled to substitute his or her discretion for that of the trial judge. Rather, the High Court judge must be satisfied that the impugned decision is so extreme as to be unlawful. This is the crucial distinction between judicial review and an appeal. A convicted offender should, therefore, think long and hard before invoking the judicial review jurisdiction in preference to a right of appeal. Arguments which might well have founded a successful appeal will rarely be enough to satisfy the high threshold for judicial review.

32. There is one additional factor which points in favour of allowing these judicial review proceedings to be pursued. The proceedings present novel issues in respect of the interpretation of section 10(3) of the Non-Fatal Offences against the Person Act 1997, and its interaction with section 99 of the Criminal Justice Act 2006, which issues do not appear to have previously been addressed in a written judgment of the High Court. The ultimate judgment in these proceedings—whether the judgment of this court or a superior court on appeal—will provide guidance as to the future exercise of the power under the sections.

33. In conclusion, therefore, I am satisfied that this is one of those exceptional cases where the complaints made by the Applicant are of a type which should be determined by the High Court by way of judicial review. Accordingly, the DPP's preliminary objection, i.e. that relief by way of judicial review should be refused by reference to the existence of an adequate alternative remedy, is rejected.

section 10 of non-fatal offences against the person act

34. The statutory jurisdiction to impose restrictions on communicating with and approaching an injured party is provided for under subsections 10(3) to (5) of the Non-Fatal Offences against the Person Act 1997 as follows.

> "(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.
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> (4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.
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> (5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do."

35. There are a number of aspects of this jurisdiction which should be noted. First, it is a criminal offence to fail to comply with an order. It follows as a consequence that an order must be drafted in clear and precise terms. The person subject to the order is entitled to know what exactly it is that he or she is being prohibited from doing.

36. Secondly, an order can be made not only where a person has been convicted of the offence of harassment, but also where a person has been acquitted, provided that the court is satisfied on the evidence that it is in the "interests of justice" to make an order.

37. Thirdly, it is uncertain whether an order is intended as a "penalty". The reference in subsection 10(3) to an order being in addition to or as an alternative to *any other penalty* suggests that it is another form of penalty. As against this, the fact that an order can be made even in the absence of a conviction might suggest that it is not a penalty. It would be anomalous to impose a criminal sanction in the absence of a conviction. At all events, whatever the precise character of the measure, it follows by analogy with the case law in respect of disqualification orders under the road traffic legislation, that a court making an order under section 10(3) must act judicially.

38. The form of order made in the present case is as follows.

> "ORDER UNDER SECTION 10(3) IN THE FOLLOWING TERMS NOT TO COMMUNICATE BY ANY MEANS WITH [THE INJURED PARTY] AND NOT TO APPROACH WITHIN 2 KILOMETERS (*SIC*) OF HER PLACE OF RESIDENCE OR 500 METERS (*SIC*) OF HER PLACE OF EMPLOYMENT IF

DIFFERENT AND NOT TO RESIDE WITHIN 8 KILOMETERS (*SIC*) OF THE INJURED PARTY FOR LIFE ACCORDING TO NON FATAL OFFENCES AGAINST THE PERSON ACT, 1997."

39. For the reasons set out below, the terms of the order exceed the statutory jurisdiction under section 10(3), and the order is accordingly unlawful.

40. First, to be lawful, an order under section 10(3) must be directed to a positive or deliberate act on the part of the convicted offender. More specifically, the order must prohibit the offender from *approaching* the injured party's place of residence/employment or from *communicating* with the injured party. It cannot be directed to the passive act of *residing* in a particular area. This is consistent with the definition of "harassment" provided for under section 10. Harassment consists of the doing of deliberate acts, i.e. persistently following, watching, pestering, besetting or communicating with another person without lawful authority or reasonable excuse. (See paragraph 6 above).

41. Secondly, the purported imposition of lifetime restrictions on the movements of the Applicant is disproportionate. The making of an order represents an interference with Applicant's right to liberty and/or right to free movement within the State. It follows from the judgments in *Meadows v. Minister for Justice and Equality* that where a measure interferes with a person's constitutional rights, then the court will consider the proportionality of the measure. To be lawful, the effect on constitutional rights must be proportionate to the objective of the measure. A decision-maker will be shown a significant margin of appreciation in this regard. The judgment in *Collins v. Director of Public Prosecutions* [2018] IECA 381 (discussed at paragraphs 24 to 26 above) provides a recent example of the proportionality test being applied to criminal sentencing.

42. It is an express requirement of section 10(3) that the period of the order be specified. Whereas there is no rule of thumb which requires that there be a fixed mathematical relationship between the length of the specified period and the length of the period of imprisonment, if any, imposed, the specified period must be proportionate to the severity of the offence of harassment.

43. On the facts of the present case, the offence was dealt with as a minor offence before the District Court. The maximum term of imprisonment which could be imposed was twelve months. In the event, a sentence of nine months imprisonment, with the final seven months suspended, was imposed. All of this gives a sense of the severity of the offence. The imposition of lifetime restrictions on the movements of the convicted offender is out of all proportion to this.

44. In this regard, a loose analogy can be drawn with the judgment in *O'Brien v. Coughlan* [2015] IECA 245. It will be recalled that a consequential disqualification order restricting a person convicted of a road traffic offence from holding a driver's license for forty years was held to be unlawful in *O'Brien* . See paragraph 23 above.

45. Thirdly, the geographical scope of the order, which involves all areas within a radius of eight kilometres, is also disproportionate. The principal objective of the making of an order under section 10(3) is to afford some protection to the injured party from further acts of harassment. The injured party has the reassurance of knowing that if the offender were to repeat the type of behaviour of which he or she has been convicted under section 10(1), then there would be an immediate sanction applicable pursuant to section 10(4).

46. There must, however, be some proportionality between the benefit to the injured party and the disbenefit to the convicted offender. On the facts of the present case, the balance weighs too heavily against the Applicant. The exclusion zone purportedly imposed, which involves an area within a radius of eight kilometres, is excessive. Whereas it may be proportionate to ensure that an offender does not approach the immediate vicinity of either the place of residence or employment of an injured party, an order which has the practical effect of exiling the Applicant from his home town is disproportionate. The purpose of making an order should be to protect an injured party from further acts of harassment. It is not intended to ensure that the injured party will never again have sight of the offender. The practical reality of life in a small town is that the paths of individuals will inevitably cross from time to time.

47. Fourthly, the terms of the order are too vague. Given that non-compliance with the order constitutes a criminal offence, the order must identify the addresses which he is prohibited from approaching. It is not enough to refer baldly to the "place of residence" or the "place of employment" of the injured party.

48. Finally, for the avoidance of any doubt, it should be emphasised that this judgment does **not** suggest that the imposition of restrictions upon a person who has been convicted of an offence of harassment is unconstitutional. The imposition of some level of interference with a convicted offender's right to liberty and/or right to free movement within the State is certainly justified by the legitimate aim of protecting an injured party from further harassment. The sole issue in this case is whether the order actually imposed is disproportionate in terms of its temporal and geographical scope. For the reasons set out above, I have concluded that it is disproportionate on both counts. The restrictions

imposed are disproportionate to the nature of the offence (a minor offence), and the disbenefit to the convicted offender is disproportionate to any benefit to the injured party.

suspended sentence / section 99 of criminal justice act 2006

49. The statutory jurisdiction to suspend a term of imprisonment (other than a mandatory term of imprisonment) is provided for under section 99 of the Criminal Justice Act 2006. A court may make an order suspending the execution of the sentence, in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

50. A convicted offender must, in effect, elect to avail of a suspended sentence by choosing to enter into a recognisance and to submit to the conditions imposed. On the facts of the present case, the Applicant declined to enter into a recognisance.

51. If a convicted offender breaches the conditions imposed upon a suspended sentence or is convicted of a further offence, then the original sentence reactivates.

52. The nature and extent of the conditions which can be imposed upon the suspension of a sentence are prescribed as follows under subsections 99(2) to (4).

> "(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—
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> (a) the period of suspension of the sentence concerned, or
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> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
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> and that condition shall be specified in the order concerned.
>
> (3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers—
>
> (a) appropriate having regard to the nature of the offence, and
>
> (b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,
>
> and any condition imposed in accordance with this subsection shall be specified in that order.
>
> (4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any one or more of

the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:

(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;

(b) that the person undergo such—

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment, as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service."

53. As appears, there are, in effect, three categories of conditions applicable to a suspended sentence. First, it is mandatory to impose a condition which requires that the offender keep the peace and be of good behaviour. Secondly, the trial judge has a discretion to impose conditions which (i) are appropriate having regard to the nature of the offence, and (ii) will reduce the likelihood of the offender committing any other offence. Thirdly, various conditions requiring the offender to undergo treatment and to co-operate with the probation service can be imposed in circumstances where there has been a partial suspension of a sentence.

54. On the facts of the present case, the District Court purported to subject the partial suspension of the sentence of imprisonment to conditions which replicate those imposed under section 10(3) of the Non-Fatal Offences against the Person Act 1997. More specifically, the requirement not to approach within two kilometres of the injured party's place of residence or 500 metres of her place of employment, and not to reside within eight kilometres of either are repeated. The only significant difference appears to be that this version of the conditions is limited in time to the period of the suspension of the sentence. Put otherwise, it seems that these requirements are only to apply for the seven-month period. The lifetime restriction has not been replicated.

55. As originally formulated, the Applicant's challenge to the conditions attached to the suspended sentence had been to the effect that the period for which the conditions applied could not exceed the length of the term of imprisonment. This argument has, however, since been overtaken by events in that the Court of Appeal delivered its

judgment in *Collins v. Director of Public Prosecutions* on 4 December 2018, that is, very shortly before the institution of the within judicial review proceedings. Counsel on behalf of the Applicant very properly conceded that this line of argument could not now be pursued in light of the judgment of the Court of Appeal.

56. Notwithstanding the fact that the terms upon which the sentence of imprisonment has been suspended are not unlawful by reference to any bright line rule concerning the mathematical relationship between the period of imprisonment and the period for which the sentence remains suspended, the conditions are nevertheless unlawful for reasons similar to those discussed in the context of section 10(3). The conditions appear to have been imposed in purported reliance on section 99(3). For reasons similar to those set out under the previous heading above, the eight-kilometre restriction is disproportionate. It goes far beyond that which could reasonably have been imposed in order to attempt to reduce the likelihood of the Applicant committing a further offence of harassment.

57. There is a further difficulty in relation to the order of the District Court insofar as it purports to duplicate under section 99 those matters which are dealt with under section 10(3). It seems to me that where there is a specific statutory jurisdiction to impose an ancillary order, this should be done in accordance with the specific statutory provision and not in purported reliance upon the more general provision of section 99. In this regard, it is to be noted that it is a separate offence under section 10(4) of the Non-Fatal Offences against the Person Act 1997 not to comply with restrictions imposed under section 10(3). It seems to me that this is the appropriate remedy, and it should not be duplicated or added to by way of the threat of the reactivation of a suspended sentence. Put shortly, the conditions under section 10(3) of the Non-Fatal Offences against the Person Act 1997 should not have been replicated under section 99 of the Criminal Justice Act 2006.

conclusion

58. For the reasons set out above, I am satisfied that the restrictions purportedly imposed pursuant to section 10(3) of the Non-Fatal Offences against the Person Act 1997 were disproportionate and should be set aside. I am also satisfied that insofar as the conditions imposed on the partial suspension of the nine-month term of imprisonment replicated these restrictions, same are also disproportionate and should be set aside.

59. An issue arises as to whether these parts of the District Court order can be severed, leaving the balance of the order intact. The Court of Appeal in *O'Brien* was prepared to make an order severing the disqualification order in that case. See paragraph 23 above.

60. For the reasons which follow, I have concluded that severance of the order is not possible in this case. It is clear from the terms of the ruling and the order that the District Court judge's decision to suspend in part the term of imprisonment was informed by the fact that extensive restrictions were going to be imposed upon the Applicant. (See paragraph 11 above). It cannot be assumed that the judge would have suspended the sentence in the absence of these restrictions.

61. Put otherwise, had the District Court judge appreciated at the time that he did not have jurisdiction to impose these extensive restrictions on the Applicant, then the judge might well have come to a different decision on the question of whether or not the sentence of imprisonment should be suspended. The decision to suspend and the decision to impose the conditions are so enmeshed that the two parts of the order cannot be separated out.

proposed order

62. I propose to make an order setting aside the sentence imposed by District Court in its entirety. I will hear counsel as to whether the sentence imposed can be severed from the *conviction*, and whether the matter should be remitted to the District Court.