



**THE COURT OF APPEAL**

**Birmingham P.  
Edwards J.  
McCarthy J.**

**Record No: 0095/2019**

**THE PEOPLE (AT THE SUIT OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

**RESPONDENT**

**V**

**D. W.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 2nd day of June, 2020 by Mr Justice Edwards**

**Introduction**

1. This is an appeal against the severity of a sentence of four years imprisonment with the final year suspended for three years, subject to the appellant entering into a bond in the sum of €150 to keep the peace and be of good behaviour for the suspended period, and the further condition that the appellant "*stay away from [the injured party 'N.C.'] for a period of 30 years, that you will not contact her yourself or cause anybody to contact her by any means whatsoever, and that you will stay away from any property that NC resides (sic) or will reside.*"
2. The offence for which this sentence was imposed was one of assault causing harm, contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997, in circumstances where the victim had been the appellant's life partner for a number of years, i.e., it was a case of domestic violence.
3. The focus of the appeal is solely on the condition requiring the appellant to stay away from the injured party, and not to contact or initiate contact with her, for a period of 30 years, in circumstances where they have four children together.
4. The case raises the interesting issue as to whether, and to what extent, the law may place limits on the kind of conditions that may be placed on suspended sentences. In *The People (Director of Public Prosecutions) v Alexiou* [2003] 3 I.R. 513 Murray J, giving judgment on behalf of the Court of Criminal Appeal, cited with approval the observation of Mr Thomas O'Malley in his seminal work on *Sentencing Law and Practice* (1st Ed, 2000) that "*there do not exist defined limits, as such, as to the kind of conditions which can be imposed.*" That situation, which is true in so far as it goes, still obtains. It is not suggested that there may not be limits, merely that "*defined limits do not [presently] exist*". The Court of Criminal Appeal in *Alexiou*, in considering an open-ended condition requiring a convicted person to leave the State and, implicitly, to remain outside the State indefinitely, while upholding the condition in the circumstances of the particular case,

indicated that this was not best practice as it created “*a risk that such a condition could have a disproportionately punitive effect*”. In offering this observation the Court was ostensibly accepting that in certain circumstances proportionality considerations might operate to place limits on conditions attaching to suspended sentences.

5. The case presently before us raises for the first time the legal nature of conditions attaching to a suspended sentence and what type of proportionality requirements, if any, may apply to them. Are conditions attaching to a suspended sentence an integral part of the primary punishment; or are they merely a facilitatory mechanism adjunct thereto and, to the extent that some, but not all, may have punitive effect in themselves, comprise secondary punishment?
6. The Supreme Court in *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2010] IESC 34 has suggested in an *obiter dictum* that the only proportionality consideration engaged in the sentencing context is proportionality “*in its ordinary meaning*” (per Murray J.), i.e., proportionality in the distributive sense of whether the punishment measure comprising the sentence is appropriate to the circumstances of the case; but that the proportionality of a sentencing measure in terms of how it may impinge on constitutionally guaranteed personal rights., i.e., “proportionality” when used as a term of art in the context of the constitutional doctrine of proportionality, as propounded in *Heaney v Ireland* [1994] 3 I.R. 593, does not arise for consideration.
7. This view, albeit expressed *obiter dictum*, and in circumstances where Murray J. giving judgment for the court conceded that “*it may not have been strictly necessary to decide the point*”, must be regarded as carrying great weight and authority, and there can be little doubt as to its application certainly in so far as measures which impose primary punishment are concerned.
8. It is less clear, however, that it fully excludes consideration of how sentencing measures which are not intended to operate in themselves as primary punishment, but which may still have some punitive effect and therefore arguably constitute secondary punishment, may impinge on constitutionally guaranteed personal rights that one would not otherwise expect to be impacted by the primary punishment.
9. However, before considering any of these issues it is necessary to indicate in more detail the context in which they arise in terms of the specific circumstances of the case which requires to be determined.

#### **Background to the appeal**

10. The appellant had faced trial on indictment in respect of three counts, namely count no 1, charging assault causing harm, contrary to s.3 of the Non-Fatal Offence against the Person Act, 1997 (“the Act of 1997”); count no 2, charging a threat to kill or cause serious injury contrary to s. 5 of the Act of 1997; and count no 3, charging false imprisonment contrary to s. 15 of the Act of 1997. The appellant was found guilty on the 9th of November 2018 by the unanimous verdict of a jury in respect of count no 1, and was acquitted on counts no 2 and 3.

11. At the sentencing hearing the court below heard evidence from a member of An Garda Siochána that the injured party, N.C., had been in an on/off relationship with the appellant for ten or eleven years. He is the father of her four children. The relationship had ended after her last child was born in April/May 2017. Despite this, there was still a lot of contact between her and the appellant, and he would come back and forth to see the children. The injured party had told the court of trial that the appellant would sometimes stay over but that he was not living with her.
12. The incident giving rise to the charges had occurred on the 31st of March 2018. On that occasion the injured party had been to a female friend's house for drinks. She told the court of trial that an arrangement had been made with the appellant that he would mind the children whilst she was out. She stated that this happened quite often, i.e. that the appellant would step in to babysit while she went out socialising, in order to give her a break.
13. The evidence was that on this occasion, however, the appellant was unhappy about the injured party going out. She stated that she arrived home at about 1 o'clock in the afternoon on the 1st of April 2018 which was Easter Sunday. When she arrived home, the children were in the house, but the appellant had gone shopping. He returned a few minutes later. The injured party recalled the house being in a mess with empty beer cans strewn about. She stated that she gave out to the appellant for having people over when the children were there, but she said that the conversation ended well. In fact, she said, the appellant suggested that she go to bed to get some rest, indicating that he had already slept and would clean up the place.
14. The evidence was that the injured party went to her bedroom upstairs and got into bed. She switched on the TV and started to drift off to sleep. She was subsequently woken when the appellant came into the bedroom and grabbed her by the hair. She stated that he pulled her to the ground while asking her to open her phone. She replied that she would not. She stated that he kept throwing her around the room. At one point she impacted against the wall. The injured party had also said that during the incident the appellant threw a cup towards her but that this smashed against the wall. She claimed that the appellant had threatened her with an electric razor and threatened to shave her hair. Further, he kicked her in the back, specifically her spine.
15. The injured party's evidence was that she ran into the bathroom at one point but that he had kicked in the door and dragged her back out again. She stated that she was terrified during the incident and that it went on for what felt like ages, but subsequently she estimated it as having lasted for half an hour, or possibly forty minutes. When asked how the incident ended, she said that he had his knees on her, choking her, but then he jumped up and ran downstairs when there was a knocking at the front door. This afforded the injured party the opportunity to get out of the house and to summon assistance. Gardaí were alerted following the incident, and upon their arrival at the scene found the injured party to be in a distressed state, crying and with blood around her lips.

16. The injured party was conveyed to hospital and was attended to by paramedics en route who gave her morphine to alleviate her pain.
17. The court of trial heard medical evidence from a Consultant in Emergency Medicine, Professor John Ryan, who stated that the injured party had presented with swelling over her left jaw, where there was pain on palpation and associated trismus (a medical term for tonic spasm of the muscles in the neck and lower jaw, causing the mouth to remain tightly closed). There was also pain in her lower cervical spine; pain on palpation of her lower ribs; pain in her lower thoracic and upper lumbar spine and coccyx; and pain over her right elbow, right arm and left knee. There was no marked swelling. She was admitted to the clinical decision unit for analgesia. She was given medication for pain relief. She was reviewed the following day when she was noted to have full range of movement in her cervical thoracic and lumbar spine. She was prescribed analgesia and was later discharged.
18. Photographs of the injured party's injuries were exhibited.
19. The appellant had put forward a claim of self-defence at the trial. He had acknowledged pushing the injured party and grabbing her, but he stated that he had never struck her.

#### **The impact on the victim**

20. In her victim impact statement, the injured party stated, *inter alia*:

##### ***"Describe the Injuries and Medical Treatment***

I suffered extensive bruising all over my body. I had a pain in my elbow for a few days after. I had a bad pain in my ribs for weeks afterwards. I had pain and bruising generally all over my body for 2/3 weeks after the incident. I had bumps and bruising all over my head for about two weeks after. I had difficulties with concentrating after the incident. My doctor thought I was suffering from a concussion.

Just after the incident I went to the hospital and I was seen by the doctor. I had x-rays and MRIs at the hospital and I was given morphine as well. When I was going home I was prescribed Tramadol - a very strong painkiller. I was out of it for the two weeks I was taking it. It was horrible.

I have visited my GP regularly since the incident. I've been picking up colds regularly. My GP says it's the stress of all of this, especially coming up to the court date, that's making me susceptible to this. I talked to her a lot about the incident and she has referred me to the psychiatric department in Holles Street to help cope with the incident.

...

##### ***Psychological/Psychiatric Effects and Treatment***

... I've been suffering flashbacks and nightmares from the incident, especially when I'm asleep cause that's when he assaulted me. My GP thinks I might have some PTSD from the incident so that's why she's referred me.

After the incident I had difficulties concentrating and had moments of memory loss. I had difficulties remembering appointments.

After the incident I was very worried about the trial, especially as it came closer. I had a counsellor from Solas who helped me. ...

After the incident I was upset the whole [time]. Even though I wasn't with [the appellant] at the time of the incident it's upsetting. He was always aggressive but I never thought he go that far with me

### ***Life changes***

... it's been a relief since he's been in prison. Just to know that he's not going to come banging on the door or I'd find him sleeping out the back when he no place else to go even though we weren't together it was like because we'd four children together that I was his property so it's a relief that he's not around. I feel free to live my life. I don't think I could even have an open relationship when he was around without hiding it because he be aggressive and I be afraid for my new partner. Now I'm happy in a relationship with another person. I don't think I could've done that if [the appellant] was around.

### ***Additional Information***

After the incident I couldn't take care of my children for a couple of weeks and they had to stay with my sister. This is because I was very sore after the incident and with the pain in my ribs I couldn't lift the little two. Also I was on heavy medication and I was very drowsy. Not having the children around but an emotional stress on me and the children. ...

...

Just after the incident social workers from TUSLA got involved with my family. ... I thought they were going to take my kids. ... Once I realized that wasn't going to happen I got on well with them. ...

...

I'm not looking forward to [the appellant] getting out of prison. I'd say he hates me for what I've done. I don't feel like he's sorry or that he's going to change. He's a very possessive person. I realise we still have four children together but he's not the role model I'd like for them. It's going to be difficult dealing with the children with him when he gets out. I know the social worker was talking about supervised visits but I don't know how that is going to work. I'm very nervous about it all."

### **The Appellant's Personal Circumstances**

21. The sentencing court heard evidence that the appellant, who was born in November 1986, has forty previous convictions, including a number for crimes of violence. A list of his previous convictions was handed into the Circuit Court but unfortunately it was not read into the record and so does not appear on the transcript, and the list has not been produced to this Court. Despite this, details can be gleaned from a Probation Report on the appellant which was made available to us.
22. According to the Probation Report, as of the 31st of May 2017, the appellant had thirty-eight previous convictions arising from eleven court appearances. Three of these had been recorded when he was a juvenile. The great majority had been dealt with in the District Court, but one matter had been dealt with in the Circuit Court. The range of offences involved included violent disorder; possession of drugs for the purpose of sale or supply; violent disorder in a Garda station; damaging property belonging to another; theft; possession of drugs for personal use; contravening a court order made under the Housing Act 1997; failing to appear; and numerous public order offences (for which there are twenty-four recorded convictions). He had been sanctioned in various ways for these offences including by means of a peace bond; fines; compensation orders; suspended sentences and imprisonment.
23. The court below did receive specific evidence concerning what might be regarded as relevant previous convictions in the context of the offence before that court, namely previous convictions for crimes of violence. His most recent previous convictions in that context were recorded at Dublin Circuit Criminal Court on the 14th of June 2017, where he was sentenced to three years imprisonment fully suspended for a period of four years in respect of two offences of assault causing harm. It was elicited in evidence during cross-examination of the investigating Garda in the present case that these offences were not committed in the context of domestic violence, but rather in the course of a disagreement between two parties that had occurred on the street. The Probation Report puts some flesh on the bones of this account in that it states:

"According to statements contained in the Book of Evidence, the two victims and their female partners were outside a bar when [the appellant] and his co-accused made verbal remarks towards them, which resulted in one of the victims kicking out at [the appellant] and his co-accused. It is reported that [the appellant] and his co-accused retaliated and began assaulting this victim. The second victim reported that he came to the assistance of his friend, and relayed that [the appellant] 'went for him', resulting in the two men falling to the ground following which [the appellant] punched and kicked this victim. One female witness reported that the incident was over very fast, following which [the appellant] and his co-accused walked away from the scene."
24. It is of note that the present offence was committed during the period of suspension of the sentence imposed for these two offences and as a result these matters were re-entered pursuant to section 99 of the Criminal Justice Act, 2006, before the Circuit Court judge who had imposed the said suspended sentence. The section 99 hearing was heard

on the same day as the appellant was sentenced for the present offence, namely the 13th of December 2018, but before he was sentenced and in a different courtroom in the CCJ. The outcome of the section 99 hearing was that the relevant judge part revoked the appellant's suspended sentence so that he was required to actually serve eighteen months of that sentence, to commence immediately. She further directed that he be subject to probation supervision post his release.

25. The court below further heard that in addition to these convictions for assault causing harm the appellant had a conviction for violent disorder that was also recorded at Dublin Circuit Criminal Court. Although the transcript does not provide any further details, some are supplied by the Probation Report, namely that this conviction was recorded in 2008 and that the appellant had received a part suspended sentence, although the precise details of it are unspecified.
26. Under cross-examination, the investigating Garda told the court that much of the appellant's offending in the past had been driven by his abuse of alcohol. The Probation Report confirms this.
27. The Probation Report, which was prepared in connection with the appellant's sentencing in June 2017, for the two previous assaults causing harm, and not in connection with the present case, assessed the appellant as being at a moderate risk of reoffending over the next twelve months, should he not address the risk factors associated with his offending behaviour. These were identified as his past involvement in criminality, his early exit from and his difficulties encountered in the education system, his substance misuse issues and his antisocial peers. However, on the positive side there were a number of protective factors that could serve to reduce his risk of further offending behaviour, namely his then current full-time employment, his prosocial support from his partner, his stated current sobriety and drug-free status, his active and positive role in the parenting of his four children, and his emotional and physical well-being.
28. Further details provided in the Probation Report concerning the appellant's personal circumstances suggest that he had a turbulent upbringing in circumstances where he was reared by his mother, grandmother, and his mother's long-term partner whom, throughout the appellant's childhood, was violent and physically abusive towards him and his mother. Moreover, both the appellant's mother and an uncle had alcohol addictions. While in his teenage years he moved in with his uncle with whom he had a positive relationship. However, this uncle died suddenly and it was the appellant who discovered him deceased in his home. It seems that the appellant had a significant grief reaction and thereafter began a downward spiral of substance abuse, homelessness and antisocial behaviour. His mother died in 2015 due to alcohol related health issues.
29. The appellant himself had a long-term relationship with the injured party during which they had four children together, two daughters and two sons. They are currently aged between eleven years and two years of age. The relationship broke down for a period in 2008 when the appellant was incarcerated for the violent disorder offence. He self-reported to the Probation Service that he was actively involved in the upbringing of his

children and that he realised the importance of him being a positive role model for them. He was also providing financial support for his family. The report outlines that although the appellant had left school at fifteen with no formal qualifications, he had had a number of periods of employment in various jobs. At the time of the preparation of the report in June 2017, he was working for a sports equipment company.

30. The reported had concluded that he was suitable for probation supervision in the event of the court considering a community section, and it suggested a number of conditions that might be attached to any suspension of his sentence in that event. As we now know, he did receive a suspended sentence, the conditions of which he breached, leading to the part revocation of that sentence.
31. Finally, in connection with the appellant's personal circumstances, the court below was furnished with a report from a consultant clinical psychologist dated the 19th of January 2017, which was also prepared in connection with the then impending sentencing which in fact occurred in June 2017, and which mirrors and confirms much of what is contained in the Probation Report.

#### **The Sentencing Judge's Remarks**

32. In the course of sentencing the appellant in the present case the sentencing judge stated, *inter alia*:

"So, the Court in determining the headline sentence in this matter has been advised that the penalty for assault causing harm, the maximum penalty is five years' imprisonment and the headline sentence in this case should be four years' imprisonment, as it was a very violent assault, occurred over quite a significant period of time in a person's own home when she was woken from her sleep during daytime and subjected to this prolonged and protracted assault. The Court is taking into account the injuries sustained by the injured party and the effect that this has had on her and continues to have on her and her children.

Ms C was initially grabbed by the hair and this assault went on for a period of half an hour to 40 minutes. The Court has been advised that Mr W has 40 previous convictions and they have been outlined to the Court. The Court is particularly concerned about Ms C, he being the father of four of her children and four of their children are living with her in the house. She has anxiety about the time when he is released from prison and anxiety about his future relationship with the children and the effect it will have on them and her family. This anxiety has been outlined in the victim impact report.

The Court, in setting the headline sentence, due to the violent nature of the protracted and prolonged assault, the fact it was on a mother of four children in her own home by the father of those children and the harm done, the fear, the injuries, physical and psychological, sustained by N.C., as I say, fixes the sentence at a headline sentence at four years' imprisonment. But, taking into account he has now accepted the verdict of the jury and his expression of remorse, the Court will



suspend one year of that sentence and backdate it to the time he went into custody in April of 2018, the 12th of April, and suspend that sentence for a period of 30 years on condition that he enter into a bond to keep the peace and be of good behaviour to the people of Ireland in the sum of €150 for a period of three years, but stay away from N.C. for a period of 30 years, not cause anybody or anybody on his behalf to approach her without her consent or have any communication with her by any way at all, and stay away from any property in which she is residing or any place of employment in which she may in the future be engaged in. So, if she continues to live at the house where the assault was in [a specified place], it is a condition of that suspended sentence that he stay away from that house and stay away from her and that can be lifted with her consent. And I realise that they have four children between them, but they are matters that can be addressed in another forum. You can enter the bond now."

33. There then followed a discussion between the bench and counsel concerning the conditions that should attach to the proposed suspension, and it is appropriate to set out the relevant exchanges:

DEFENCE COUNSEL: I'm sorry, Judge, I'm not sure I fully understand. Did the Court say a 30-year period?

JUDGE: I said 30 years, yes.

DEFENCE COUNSEL: Three-zero. And what condition does that apply to?

JUDGE: He stay away from N.C..

DEFENCE COUNSEL: Very good.

JUDGE: All right? He'll enter into a bond to keep the peace for three years, all right?

DEFENCE COUNSEL: Yes.

JUDGE: Right, but stay away from N.C., not cause anybody on his behalf to have any contact with her whether by social media, letter, text, email, calling to her house, place of work or anything like that, and that's the condition of the suspended sentence.

DEFENCE COUNSEL: I believe that doesn't apply to arrangements in relation to the children?

JUDGE: There's no arrangements at the moment in relation to the children.

DEFENCE COUNSEL: No.

JUDGE: That is not the function of this Court and it can be decided if it's not agreed between the parties in another forum.

DEFENCE COUNSEL: May it please the Court.”

### **The Grounds of Appeal**

34. The Notice of Appeal contains just three short grounds:
- (a) The sentencing judge erred in law in making an order that requires the appellant to avoid contact, direct or indirect, with N.C., for a period of thirty years;
  - (b) The sentencing judge failed to give adequate weight to the effect that such a sentence would have on the appellant’s personal circumstances and his ability to access, and maintain a relationship with, his children;
  - (c) The sentencing judge imposed an order that is excessive in all the circumstances.

### **Suspended sentences generally**

35. The suspended sentence is an extremely versatile and valuable tool for any sentencer to have in his or her toolbox. There are a wide variety of circumstances in which its use may be appropriate. It may be used in an appropriate case as a complete alternative to a custodial sentence (i.e., an otherwise merited custodial sentence is wholly suspended), or in conjunction with a custodial sentence (i.e., an otherwise merited custodial sentence is suspended in part).
36. That a custodial sentence should be otherwise merited before a sentence can be suspended in whole or in part is an important point. In the *People (Director of Public Prosecutions) v Loving* [2006] 3 IR 355 the Court of Criminal Appeal cited with approval the case of *R v Mah-Wing* (1983) 5 Cr App R (S), in which the Court of Appeal for England and Wales held (at p.348):
- “When the court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What the court must not do is pass a longer custodial sentence than it would otherwise do, because it is suspended.”
37. The *Mah-Wing* approach reflected what had become known as the *O’Keefe* principle first enunciated by the Court of Appeal in England and Wales in the case of *R v O’Keefe* [1969] Q.B. 122, and involving a three-stage test:
- 1) the court must eliminate all community sanctions before deciding that this is a case for imprisonment;
  - 2) the court must then sentence the individual to a term of imprisonment;
  - 3) the court must then ask whether there are any reasons why the sentence of imprisonment need not be served immediately.
38. Since the decision in *Loving*, the *Mah Wing* decision has been consistently cited and applied in this jurisdiction, notably by Feeney J. in the High Court in *Moore v Brady*

[2006] IEHC 434, and by this Court in *People (Director of Public Prosecutions) v Floyd* [2014] IECA 39 and in *People (Director of Public Prosecutions) v Slattery* [2017] IECA 90.

39. In the first edition of his now seminal work on *Sentencing Law and Practice*, which predated the enactment of s. 99 of the Criminal Justice Act 2006 (the Act of 2006), Thomas O'Malley commented that:

"Although the suspended sentence has no statutory basis in Irish law, it has been thrice blessed by the Supreme Court and enthusiastically employed by both trial courts and the Court of Criminal Appeal."

40. The reference to being thrice blessed referred to express approval of the practice by the Supreme Court in *Re McIlhagga* (Unreported Supreme Court, July 29th 1971, O'Dálaigh J. *nem diss*), and in *O'Brien v Governor of Limerick Prison* [1997] 2 ILRM 349; and implicit approval of it in *People (DPP) v Alymer* [1995] 2 ILRM 624. The most recent (i.e., the 3rd) edition of the same work now adds the case of *People (DPP) v Foley* [2014] 1 I.R. 360, at para 48, to this list.

41. The manner in which a wholly or partially suspended sentence operates is that (carceral) punishment is imposed but is not put into operation straight away. Prof W.N. Osborough, in his article published in 1982 in *The Irish Jurist*, entitled "*A Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland*", described it in these terms:

"Instead, the punishment is made to hang over the offender like some sword of Damocles for the duration of a period which the sentencer has prescribed in advance. If, within this probationary period, the offender offends again or otherwise violates the trust placed in him, he runs the risk that the sentence previously suspended will thereupon be activated. In short, he runs the risk that, in such an eventuality, the sword of Damocles will descend."

42. We have placed the word carceral in parenthesis because it may be observed in passing that in principle, other types of punishment can also be suspended. Indeed, as Osborough points out in the article just mentioned, s. 50 of the Criminal Justice Bill, 1967 (the Bill of 1967) envisaged the introduction of the suspended fine but for various reasons that innovation was never enacted into law and it was not proceeded with in this jurisdiction. Be that as it may, the use of suspended sentences in the context of custodial punishments is a longstanding and commonplace practice in this jurisdiction.
43. For a time, the lawfulness of the practice of part suspending sentences was the subject of some doubt. However, this was with respect to cases being re-entered for review part of the way through the sentence, with a view to the balance being possibly suspended, or future modification of sentences in a certain eventuality. There were various concerns ranging from jurisdictional issues, e.g., whether jurisdiction could be retained by the sentencing court to effect a review, or whether it was *functus officio*; whether certain forms of part suspended sentences, i.e., those making suspension part of the way

through the sentence conditional on a good report being received from the prison with respect to adherence to prison discipline, in effect sought to repose in prison officials the decision on the length of a sentence, thereby breaching the separation of powers; and whether making provision for the review of a sentence mid-term impinged on the power of commutation of sentences which was reserved to the executive under the Constitution, again breaching the separation of powers envisaged under the Constitution. See the cases of *The People (Attorney General) v. Cronin* [1972] I.R. 159; *Re McIlhagga* (cited above); *The State (Woods) v. Attorney General* [1969] I.R. 385; *The State (Morris) v. Governor of Mountjoy Prison* (unreported, Supreme Court, 16 December 1970); *The People (Director of Public Prosecutions) v. Cahill* [1980] I.R. 8; and more recently *The People (Director of Public Prosecutions) v. Finn* [2001] 2 I.R. 25.

44. However, there has never been any problem with the part suspension of a sentence upon conditions determined upon with certainty at the date of sentencing and where the accused who is to benefit from the part suspension immediately enters into a bond and undertakes to abide by the specified conditions. A sentence part suspended on this basis does not involve any subsequent process of review, nor does it envisage future modification in a certain eventuality. There is certainty as to the sentence from the outset. The sentence is part suspended from the outset. If, however, there is a breach of conditions by the beneficiary during the suspended period a court may lift the suspension in whole or in part. To do so is not to review the sentence originally imposed in any way. It is consequential and is an enforcement measure.
45. For completeness on this topic, it does also bear mentioning that there is, exceptionally, express statutory provision under s. 27(3J) of the Misuse of Drugs Act, 1977, for imposing a reviewable sentence in the limited circumstances of a presumptive minimum sentence of 10 years, or a greater sentence, on person charged with a s.15A or 15B drugs offence; where that person has a drugs addiction and that addiction was a substantial factor leading to the commission of the offence – see *The People (Director of Public Prosecutions) v Dunne* [2003] 4 I.R. 87 in that regard.
46. As Osborough recounts it, somewhat unusually the practice of suspending sentences evolved within the common law of Ireland but not that of England. Its Irish common law origins are more than a century old at this stage. More recently, the common law power to suspend sentences has been replaced by a statutory authority to do so, contained in section 99 of the Criminal Justice Act, 2006 (“the Act of 2006”), as amended by the Criminal Justice (Suspended Sentences of Imprisonment) Act, 2017 (“the Act of 2017”) – see *Director of Public Prosecutions (Garda Purtill) v Murray* [2015] I.E.H.C.782 where it was held that the common law power to suspend a sentence of imprisonment did not survive the enactment of s. 99 of the Act of 2006. However, the statutory replacement operates in principle in essentially the same way as its common law precursor. In that regard it should be noted that the new statutory regime under s. 99 of the Act of 2006 (as amended) makes express provision for the part suspension of sentences.

47. Of course, there are some subtle differences, and indeed several major differences, between the new statutory regime and the old common law regime. The subtle differences relate to how a sentence to be suspended in whole or in part is now to be structured, and the major differences are principally that precise procedures for revoking the suspension of a sentence in appropriate circumstances are now prescribed, and included in these are mechanisms for a court, for the Director of Public Prosecutions, and for a probation officer to initiate the process. It may be mentioned in passing that the procedures for the revocation of the suspension of a sentence have already given rise to difficulty in the short time since the statutory scheme was established, in circumstances where subsections (9) and (10) of s. 99 of the Act of 2006 were declared unconstitutional in *Moore v. Director of Public Prosecutions* [2016] IEHC 244, necessitating the enactment of amending legislation in the form of the Act of 2017.
48. It is interesting to record that Judge David Riordan, in his important research conducted in 2009 and entitled "The role of the Community Service Order and the Suspended Sentence in Ireland" (PhD Thesis – UCC, NUI), considered the rationale for a suspended sentence and concluded that its "*primary identity and expression [is] as a device which seeks to control the future behaviour of a convicted person*", as opposed to avoidance of custody. He further elaborates on how inconsistencies in sentencing practice made his search for a rationale for suspending a sentence more difficult, stating:
- "The search for the rationale for the suspended sentence in Ireland presents distinct difficulties because the rationale must be gleaned from a series of conflicting cases which rarely if ever address the purpose of the sanction other than the issue of proportionality. In addition, the inaccessibility of decisions of sentencers in the lower criminal courts, where most suspended sentences are imposed, contributes to the difficulty in extracting a clear and singular rationale for the sanction. There is a distinct possibility that the purpose for the suspended sentence if stated at all in the superior courts may differ from the purpose for which the sentencing judges in the lower courts deploy the sanction".
49. Judge Riordan has suggested that the suspended sentence serves one or more of five purposes:
- 1) it is a means of avoiding an immediate custodial sentence;
  - 2) it serves as a denunciation of the accused's behaviour;
  - 3) it is a controlling and rehabilitative device;
  - 4) it has a deterrent effect on the individual offender;
  - 5) it can serve as part of a crime prevention strategy focused on particular types of crime.

### **The current statutory framework**

50. It is appropriate at this point in our judgment to set out (to the extent relevant to the issues discussed already or to be discussed) the terms of s. 99 of the Act of 2006 as now amended by the Act of 2017:

“99.—(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(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—

- (a) the period of suspension of the sentence concerned, or
  - (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,
- 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.

- (5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.
- (6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order.
- (7) [Not relevant].
- (8) [Not relevant].

“(8A)(a) Where a person to whom an order under subsection (1) applies—

- (i) commits an offence after the making of that order and during the period of suspension of the sentence concerned (in this section referred to as the ‘triggering offence’), and
- (ii) subject to subsection (8B), is convicted of the triggering offence,

the court before which proceedings for the triggering offence are brought shall, after imposing sentence for that offence, remand the person in custody or on bail to a sitting of the court that made the said order to be held—

- (I) no later than 15 days after such remand, or
- (II) if there is no sitting of that court within that period, to the next sitting of that court thereafter,

*and, if there is no sitting of that court on the day to which that person has been remanded, he or she shall stand so remanded to the sitting of that court next held after that day.*

*(b) The remand of a person in custody or on bail under paragraph (a) to a sitting of the court that made the order under subsection (1) concerned applying to the person may be to a sitting of that court other than a sitting thereof referred to in paragraph (c).*

*(c) Subject to paragraph (b), references in paragraph (a) to a sitting of a court shall be construed as references to a sitting of the court at a place and time appointed or fixed for sittings of that court by or under statute.*

*(8B) Subsection (8A) applies to a conviction of a person for an offence if proceedings for the offence are instituted against the person during the period of suspension of the sentence concerned pursuant to the order under subsection (1) applying to the person and 12 months thereafter.*

*(8C) Subject to subsection (8D), a court to which a person has been remanded under subsection (8A) shall revoke the order under subsection (1) concerned unless it considers that the revocation of that order would be unjust in all the*

*circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period spent in custody by the person in respect of the triggering offence) pending the revocation of the said order.*

*(8D) Where a person appeals against conviction or sentence for the triggering offence, a court referred to in subsection (8C) may, upon application in that behalf by the person, adjourn the proceedings under that subsection for such period as the court considers appropriate to enable that person to bring the appeal and for it to be determined.*

*(8E) [Not relevant].*

*(8F) [Not relevant].*

*(8G) [Not relevant].*

*(8H) [Not relevant].*

- (9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, being an offence committed after the making of the order under subsection (1), the court before which proceedings for the offence are brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order.
- (10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period spent in custody by the person in respect of an offence referred to in subsection (9)) pending the revocation of the said order.
- (11) [Not relevant].
- (12) [Not relevant].
- (13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened the condition referred to in subsection (2) or a condition imposed under subsection (3),



he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

*(13A) The Director of Public Prosecutions may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).*

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(15) [Not relevant].

(16) [Not relevant].

(17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

(18) [Not relevant].

*(18A) [Not relevant].*

(19) This section shall not affect the operation of—

(a) section 2 of the Criminal Justice Act 1960 or Rule 38 of the Rules for the Government of Prisons 1947 (S.R. & O. No. 320 of 1947), or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977 .

*(19A) [Not relevant].*

*(19B) [Not relevant].*

(20) [Not relevant].

(21) [Not relevant].

(22) [Not relevant].

(23) [Not relevant].

### **Discussion**

51. Since the enactment of the Act of 2006, a sentencing court may have recourse to the statutory option of suspending a sentence, either in whole or in part, in any case where the sentencing judge considers it appropriate. In practice, what that means in terms of the constitutional imperatives underpinning Irish sentencing law is that a sentence suspended in whole or in part may be imposed if to do so represents a proportionate response to the particular offence, considered both in terms of its gravity and having regard to the personal circumstances of the offender. In that regard, a suspended sentence is in every respect a sentence, and the conditions upon which the sentence is to be suspended form part of that sentence. The latter part of the observation just made is a critical one in the context of the particular issue in this case and it is a matter to which we will be returning to later in this judgment.
52. The type of circumstances that might merit the imposition of a suspended sentence would include cases in which the sentencing judge considers that a proportionate response to the particular offence requires that it be marked by the imposition of a custodial sentence, so as to communicate the necessary degree of censure and societal deprecation of the crime, but that it is not essential that the offender should have to suffer all (or, in an appropriate case, any) of the hard treatment associated with the sentence imposed. In such a case the fact that a custodial sentence has been imposed, even if submission to actual incarceration for all or any of the relevant period is not required, is considered sufficient, coupled with the prudential incentive of the required bond and the condition or conditions associated therewith, to appeal to the offender in question as a moral agent and influence him/her towards future desistance. It may be particularly useful used in that way, in cases involving first-time offenders, in cases where the need for custodial disposition at all is considered marginal, and also in cases where there is an evidence-based earnest to reform or rehabilitate. In relation to the former the suspended sentence has been characterised as:
- “an almost ideal punishment for generally law-abiding persons who have committed a serious out of character crime. The prison sentence can express strong censure while the suspension spares unnecessary expense to the state and unnecessary damage to the low-risk offender and his or her loved ones.”
- (Reform and Punishment: The Future of Sentencing (2002) Rex S., and Tonry M., (eds) Chpt 1, 12, Cambridge: Willan Publishing)
53. Section 99(1) of the Act of 2006 provides that where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order. Accordingly, the statute envisages a recognisance (which may be nominal or substantial at the discretion of the court) and conditions.

## Conditions

54. We have referred already to the cases of *O'Keefe* and *Mah-Wing* in an earlier section of this judgment. The Law Reform Commission in its 2017 "Issues Paper" on "Suspended Sentences" (LRC IP 12 - 2017) has commented (at para 3-09):

"The *O'Keefe* and *Mah-Wing* principles, as adopted by the Irish courts, represent the fundamental principles of suspended sentences developed by the courts. These two principles are primarily concerned with how a suspended sentence is imposed. From these guiding principles, three more tentative principles with regard to other aspects of the suspended sentence can be distilled, namely:

- 1) *The conditions of suspension should be selected carefully and clearly defined so that the individual that is subject to the suspended sentence has a realistic chance of complying with them.*
- 2) *The length of the operational period should be considered part of the punishment, and*
- 3) *there is a presumption that the offender is liable to serve the entire custodial sentence where he or she is found to be in breach of a condition of suspension."*

55. At common law, a sentencing judge was at large as to what conditions he or she might impose, but invariably there was at a minimum a condition to keep the peace and be of good behaviour.

56. The modern statutory scheme replicates this to the extent that s. 99(2) of the Act of 2006 provides:

- "(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—
- (a) the period of suspension of the sentence concerned, or
  - (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,
- and that condition shall be specified in the order concerned."

57. As O'Malley, Osborough and others have observed, there are some similarities between the imposition of a condition to keep the peace and be of good behaviour when suspending a sentence, and the practice now much less availed of than it was, of binding a person over on a recognisance to keep the peace and be of good behaviour. The essential difference however is that the power to bind over is not contingent on the imposition of another punishment.

58. Over the years many other conditions have been imposed when suspending sentences in whole or in part, and by the time of the enactment of s. 99 of the Act of 2006 it had long

been accepted that judges, at least at common law, enjoyed a wide discretion in terms of the conditions that they might impose.

59. A flavour of the types of conditions that were imposed can be gleaned from the following passages from Osborough's 1982 article, referred to earlier:

"Essentially, the majority are crime prevention measures tailored to the circumstances of the individual offender and of his offence. The husband found guilty of attacking his wife has been required, as a condition of suspension, to undertake not to attempt to see, or molest or visit her save at her invitation; a pregnant wife, found guilty of killing her husband when provoked by his brutality, has been obliged, as have many other convicted offenders, to undergo psychiatric treatment; a man killing his brother, to live with his sisters; men assaulting friends or neighbors, to move out of the district, perhaps, as in one case where interruption of an adulterous relationship prompted retaliation, even an entire county, certainly not to reappear in it. Offenders with a drink problem have had to agree to abstain, others whom it was hoped could be induced to 'go straight', to agree not to consort with known criminals. A woman found guilty of cruelty to animals had to promise not to keep any for the length of the prescribed probationary period. Squatters avoided attachment for contempt by promising not to return to the house from which they had had to be ejected by force. Reporting to the Gardaí on either a weekly or a monthly basis has also formed a separate exceptional undertaking. The aftermaths to prosecutions in the early 1970s for attacks on the Gardaí and for possessing explosives saw resort to another distinct group of conditions. One offender, expressing remorse over the shooting for which he had been convicted, was required to undertake to forswear any attempt to advance his political ideals by force or other unlawful means, and any advocacy of others to do so. Another, on conviction for possessing bombs and explosives, had to enter into an undertaking not to commit any offences against The Firearms Act 1925, The Explosive Substances Act 1883, and the Offences against the State Act 1939.

Three further non-standard conditions to figure in Irish practice are not primarily measures of crime prevention at all. These are the obligations to make restitution, to leave the jurisdiction, and to contribute towards the cost of the prosecution."

60. The passages just quoted were liberally annotated with endnotes identifying authorities or sources for the propositions being asserted, and we have omitted these for convenience. However, they can be viewed by anyone interested in doing so in Osborough's full article in the 1982 Irish Jurist. Most were in fact references to newspaper reports of individual case disposals.
61. The new statutory structure mandated by s. 99 of the Act of 2006 largely preserves the wide discretion of the courts with respect to the imposition of conditions, by providing, in subsections (3) and (4) that:

*"(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."

62. Accordingly, a sentencing judge retains a wide discretion concerning what, if any, further conditions (beyond the requirement to keep the peace and be of good behaviour) he or she might impose upon the offender. The only statutory constraints on the sentencer in that regard are that a condition should be such that the court considers it to be (a) appropriate having regard to the nature of the offence, and (b) that it will reduce the likelihood of the person in respect of whom the order is made committing any other offence. The words "committing any other offence" would seem to be wide enough to embrace not just any other offence of the same type but also, arguably, any other offence at all. The constraints imposed by s. 99(3) (a) & (b) apply whether the sentence is being suspended in whole or in part.

63. Moreover, s. 99(3) (a) & (b) appear to impose conjunctive requirements. So, for example, if a person convicted of possession of child pornography were to receive a part suspended sentence (perhaps in circumstances where he has undergone, or is committed to undergoing, a program of treatment for his addiction to child pornography) it might be appropriate for the sentencing court to require him not to access the internet on any device whatsoever during the period for which his sentence would be partially suspended. Such a condition would be both appropriate to the offence and designed to reduce the likelihood of re-offending in the same way, thereby satisfying the conjunctive requirements of s. 99(3). However, if the same condition were to be attached to a part

suspended sentence in the case of a person convicted of arson, or perhaps forgery, (to take some random examples and assuming the offence was committed in circumstances that had nothing to do with the internet), then the condition would not be appropriate to the offence, and so even if it could be argued that such a condition might in some way reduce the likelihood of the accused "*committing another offence*", the condition would be unsuitable as failing to satisfy the conjunctive requirements of s. 99(3) (a) & (b).

64. Clearly, the requirement in s. 99(3)(b) can be satisfied by a condition or condition(s) that seeks to modify future behaviour either by deterrent or coercive effect, alternatively by reform or rehabilitation through positivistic intervention. Moreover, there is nothing to prevent a sentence from being suspended in whole or in part on conditions directed towards both of those objectives. To return to our example of the possessor of child pornography, it would be open to a court to suspend his sentence in whole or in part on the several conditions that (a) he should keep the peace and be of good behaviour, (b) that he should stay off the internet during the suspended period of his sentence, and (c) that he should fully engage with and complete [a specified] program of treatment. Condition (b) would seek to modify his future behaviour by deterrent or coercive means, i.e, the primary intention of imposing the condition is to secure the accused's compliance with it through deterrence or coercion; so even if the sentence is not effective to influence the offender as a moral actor to turn away from apprehended future offending, it is hoped that the threat of having to serve the custodial sentence imposed but suspended, or part of it, will provide a sufficient a prudential incentive to the accused to secure his compliance. Condition (c) would also seek to modify the accused's future behaviour through the positivistic intervention of requiring him to address an underlying problem or problems pre-disposing him to potential recidivist offending.
65. Some concern has been expressed at the very considerable latitude that Irish courts have in choosing the conditions of suspension. In an recent article entitled "*That measure of wise clemency*": Defending the Suspended Sentence" (2018) Irish Criminal Law Journal, 28(2) 39-53, Thomas O'Malley identifies one possible objection to the suspended sentence as being that it may operate in a lawless fashion if courts are empowered to make suspension subject to any conditions of their choosing. With that in mind it is interesting to note that the *Law Reform Commission* in the "Issues Paper" referred to, at paragraph 54 above, has sought submissions on the question of whether there should be a list of conditions of suspension set out in legislation as well as a limit on the operational period of a suspended sentence. In other jurisdictions such as England and Wales a sentencing court is required to choose from a set list of conditions/requirements - see for example s. 190 of the UK's Criminal Justice Act 2003.
66. Suspended sentences are frequently used to help break cycles of crime or patterns of recidivism associated with problems like addictions; psychological, psychiatric and psycho-social issues; and offender susceptibilities and vulnerabilities towards becoming involved in crime. When used in this context a custodial sentence to be served may in fact be objectively merited by the circumstances of the crime, but the option of suspending the sentence (sometimes completely, but more usually in part) is availed of in the long-

term interests of both the offender and society. The need to break the cycle of the offender's recidivism may be adjudged in the circumstances of an individual case to take priority over any immediate need for a retributive response. Frequently the offender's prior record will exhibit that a graduated retributivist response (which may well include some sentences that were previously suspended in whole or in part) has already been attempted and has failed. A sentencer may consider that, on the evidence before him or her, if the cycle is to be broken, either a completely new approach may be required, or a redoubling of previous efforts aimed at rehabilitation with perhaps better and additional supports. Strategically, the required approach will be positivistic and aimed at future behaviour modification through a combination of carrot and stick, prudential incentive and Damoclean sword, and the provision where possible of necessary or at least desirable rehabilitative programs, aids and supports.

67. This is a matter for the exercise of judicial discretion following a rigorous analysis of the circumstances of the case, but if it is decided to have recourse to the option of suspending a sentence either in whole or in part, it is incumbent on a sentencer to provide in reasonable detail his or her reasons for doing so, both to assist with transparency and also to assist a reviewing court in understanding what motivated the judge in availing of the sentencing option in the event of a review being later sought either at the instance of the prosecutor or the accused. A reviewing court will normally attach significant weight to the reasons given by a sentencing judge at first instance.
68. A feature of the suspended sentence used for positivistic behavioural modification purposes is increased use of conditions. Rarely in such a case will the offender be left entirely to his or her own devices upon the suspension becoming effective, and merely required to enter into a modest bond to keep the peace and be of good behaviour for a specified period. Such a condition is invariably imposed, but with accompanying further conditions addressed to the offender's particular problem or adversities. Typically, the offender will be required to submit to the supervision of the Probation Service during the period of suspension, to engage with them and to comply with all their recommendations and requirements. Sometimes there will be a requirement to attend a course or programme, and/or to submit to a treatment and/or form of monitoring. Conditions of this type are primarily directed towards supporting the offender in his or her rehabilitative efforts and increasing their prospects of successfully rehabilitating.
69. Sometimes conditions are attached with a view to limiting or reducing the likelihood of re-offending pending the offender's completion of a program of reform or rehabilitation. Such conditions do not so much serve to incapacitate the offender from further commission of crime during the relevant period as provide an increased incentive towards desistance. An alcohol abuser might be required to abstain from alcohol consumption during the suspended period; or a drugs abuser, typically following detoxification, required to abstain from drug taking during the suspended period. As mentioned already, a possessor of child pornography might be required to stay off the internet. A fraudster who committed his crimes to feed an online gambling habit might equally be required to stay off the internet, and to stay away from turf accountants, casinos and slot machines; and a stalker or

person guilty of harassment might be required to keep away from the person with whom they are obsessed, to give but some examples.

70. Occasionally conditions have been used, somewhat controversially, not for behaviour modification purposes through reform or rehabilitation, nor as temporary crime avoidance measures to assist the offender's chances of successfully completing a programme of reform or rehabilitation, but as a means of incapacitating the offender from continuing to commit crime within this jurisdiction, or a particular part thereof. Thus, offenders (typically, but not always, foreign nationals) have from time to time received suspended sentences, or partially suspended sentences, subject to the condition that they leave the jurisdiction and not return for a specified time. Such a mechanism has also been used to restrict movement within the State, as in the *People (Director of Public Prosecutions) v Lee* [2017] IECA 152 where the Court of Appeal upheld the suspension of two years of a five year sentence, where it was made a condition of the suspension that the offender, a recidivist burglar who operated principally in the towns of Laytown and Barrystown, would not enter those towns for a period of five years without the prior written consent of the Chief Superintendent for the relevant Garda Division.
71. Although it is now only of historical interest, in the article previously referred to, Prof Osborough notes that s. 50 of the ill-fated Bill of 1967 also had a provision within it prohibiting sentencers from attaching a condition to a suspended sentence "*restricting the person's choice of a country of residence*". (This provision was never enacted because the Bill of 1967, which although highly innovative in terms of proposed reforms to the criminal justice system, was also highly controversial - particularly in terms of the harsh approach adopted in some of its terms towards political protest and the expression of dissent. It was fiercely opposed by the opposition in the Dáil and ultimately fell with the announcement of a general election in 1969 and was not reintroduced. For those who may be interested, see O'Hanlon R.J., "*The Criminal Justice Bill 1967*" in *The Irish Jurist*, 1968, 3 (1), 101-106, and the account of the Bill in Dr Mary Rogan's "*Prison Policy in Ireland: Politics, penal-welfarism and political imprisonment*" (2011) (Oxford: Routledge), pp 119-121.
72. Be that as it may, Thomas O'Malley observes in the most recent (i.e., the 3rd) edition of his seminal work on *Sentencing Law and Practice* (at para 38-15) that:

"Any practice that may have existed in the past of suspending a sentence on condition that an offender who was an Irish citizen went to live in England would no longer be legally or politically tolerable, even though the Criminal Justice Act 2006 (s. 99) places no formal limits on the range of particular conditions that may be attached to a suspended sentence."
73. The issue received substantive consideration by the former Court of Criminal Appeal in the case of *The People (Director of Public Prosecutions) v Alexiou* [2003] 3 I.R. 513. In that case a South African National who was convicted of unlawful possession of a controlled drug, worth IR£10,000 (now €13,000) or more, for the purpose of sale or supply, contrary to s. 15A of the Misuse of Drugs Act, 1977, was sentenced to four years



imprisonment suspended in its entirety on the conditions that he keep the peace and be of good behaviour and that he leave the State immediately. The DPP sought a review of the sentence on the grounds that it was unduly lenient, arguing (a) that the sentence could not be activated if the respondent was outside of the jurisdiction, (b) that it would not deter non-nationals from importing drugs into the State and therefore lacked general deterrent effect, and (c) that it offended the separation of powers in circumstances where the power to make deportation orders was reserved to the Minister for Justice, Equality and Law Reform.

74. The Court of Criminal Appeal was satisfied that the condition requiring the respondent to leave the State was not an executive act and did not offend the separation of powers. However, it was also satisfied that the sentence was not unduly lenient. The suspension was not meaningless as had been argued in that the respondent was in no different position from any other person required to keep the peace and be of good behaviour who decided to go and reside abroad as soon as he or she was free to do so. Further, with respect to the complaint that the sentence lacked deterrent effect the court asserted that the sentencing judge had been bound to decide the case having regard to its own particular circumstances and deterrence could never be "*a basis for punishing an accused for crimes which may have been or may be committed by others*".
75. The judgment is valuable in the context of the issue presenting in the present case in terms of what it has to say concerning conditions attaching to suspended sentences and the task of a judge when imposing a conditionally suspended sentence. While the context was specific (i.e., the condition complained of, which required the respondent to leave the State) much of what the Court of Criminal Appeal had to say had more general application to the attachment of conditions to a suspended sentence. Giving judgment for the court, Murray J. remarked (at p.525-526):

"On a more general level the court would observe that the imposition of suspended sentences in appropriate cases, together with conditions attached to the suspension of the sentence, has for a very long time been part of the sentencing law in Ireland. In his book, *Sentencing Law and Practice* (2000), Mr. Thomas O'Malley sums up some of the practices of the courts in this respect at p. 290: - 'Suspension of sentence involves imposing a determinate prison sentence but suspending it on the condition that the offender does not re-offend within a defined period. Further conditions may be attached requiring, for example, that the offender undergo a course of treatment or stay away from a particular locality.' Later in the same chapter he observes at p. 337: - 'Any practice that may have existed in the past of suspending sentence on condition that an offender who was an Irish citizen went elsewhere, usually to England, would no longer be legally or politically tolerable.' As a general statement concerning a practice that was not all together unusual many decades ago, that is undoubtedly correct. He then went on to observe at p. 337: - 'Foreign offenders are, however, occasionally banned from entering the State for a specified period, usually as a condition of bind over or a suspended sentence. To describe this as deportation is not strictly accurate, as deportation is an executive

power. ... A more common practice, however, is for non-nationals to be bound over on the condition that they leave the State immediately, often for a specified minimum period'. This is undoubtedly what sentencing courts do from time to time. Different considerations obviously arise in relation to citizens and European Union nationals.

When imposing a suspended sentence, courts invariably attach a condition that the accused be of good behaviour for a specified period of time. In addition there may be conditions of a more general nature. Those conditions usually reflect some course of action which the accused has told the court he proposes to follow, in mitigation of his circumstances, such as his intention to undergo a particular course of treatment or participate in a particular form of rehabilitation, or that he has concrete plans to move and take up work elsewhere away from the locality or persons which had an influencing effect on him becoming involved in the crime. Frequently, the courts adjourn final sentence in order to ascertain whether the accused follows through with his proposed course of action and sometimes a suspended sentence is imposed on condition that the accused follows such a course of action. As Mr. O'Malley observes in *Sentencing Law and Practice* (2000), there do not exist defined limits, as such, as to the kind of conditions which can be imposed.

The court is only concerned with the circumstances of this case and not with an abstract review of the kind of conditions which can be imposed when a sentence is suspended. However, for the purposes of this case it may be said that conditions which are attached to suspended sentences usually reflect either something which the accused is bound to do in any case, such as to be of good behaviour and observe the law, or something which he has told the court he intends or wishes to do. This approach undoubtedly reflects a prudent concern on the part of the courts to avoid the risk of imposing a condition which would be tantamount to imposing a penalty not envisaged by the law. This could arise in the case for example of a non-national who was habitually resident in the State and in which he had worked for many years and raised his family. Where the only penalty prescribed by law was a fine or imprisonment, a suspended sentence conditional on such a person leaving the State against his express wishes, could be considered so extraneous to the penalties imposed by law and beyond the discretionary powers of sentencing vested in a trial judge. If, in such a case, the nature of the offence appeared to the judge to be one which called in question the appropriateness of the accused being permitted to reside in the country, then he would have available to him the statutory power to make a recommendation to the Minister for Justice, Equality and Law Reform that he be deported. It would then be for the Minister, in his executive discretion, to decide on that matter.

Different considerations arise where an accused, who, prior to his conviction, had little or no connection with this country and he is required, as a condition of a suspended sentence, to return to the country of which he is a citizen or in which he has been habitually resident. Although it may be a subsidiary part of the trial

judge's considerations, such an order does have the advantage of further eliminating the risk that the offender might commit further offences in this country or be a further burden on the tax payer. Of course, all these matters depend on the circumstances of the case including any declared intention of an accused to return to his own country as soon as he is free to do so. It should be noted that the court is here considering the kind of condition and form of order which a court may make, and it is not being suggested that a convicted person be given a suspended sentence simply because he is a non-national with no connections with this country. That, as explained earlier, depends on the gravity of the offence and the circumstances of the case."

76. Although the Court of Criminal Appeal was satisfied that the sentence in that case was not unduly lenient, and was not therefore disposed to interfere with it, Murray J. felt it appropriate to add in his concluding remarks (at p.527):

"The court, however, does take the view that imposing an open-ended condition that the accused never return to this country is not, in principle, good practice. If a condition requiring a convicted person to leave the country is imposed the better practice would be to do so for a defined period of time proportionate to the offence. Otherwise, there is a risk that such a condition could have a disproportionate punitive effect. Many years later such a person might have good reason to return to the country for a short period of time. There are many hypotheses, whether it be to attend a three day conference or visit a dying relative. That a visit for such purposes could lead to the final imposition of a severe custodial sentence could have disproportionate effect."

77. Post *Alexiou*, it is permissible for Irish courts to continue to impose conditions of this type but subject to a detailed consideration of proportionality, as occurred in *The People (Director of Public Prosecutions) v Broszczack* [2016] IECA 121, where this court upheld a seven-year sentence for a drugs offence with the final three years thereof suspended on condition that the offender would leave the State on his release and remain outside the country for a period of seven years.

**The impugned condition in the present case**

78. We indicated earlier that it was of importance to appreciate that a suspended sentence is in every respect a sentence and the conditions upon which the sentence is to be suspended form part of that sentence. It is a fundamental and constitutionally mandated requirement of the sentencing process in this jurisdiction that sentences should be proportionate in the distributive sense, i.e., both to the gravity of the offence, and to the personal circumstances of the offender. This means that every component of the sentence should be proportionate in the sense spoken of, and the sentence overall should also be proportionate in that sense.

79. For example, many statutes creating criminal offences provide for a penalty involving a fine up to a specified figure (or perhaps unlimited) and/or a custodial sentence up to a maximum figure (or perhaps up to life imprisonment). Accordingly, in a case where a

court seeks fit to impose both a fine and a custodial sentence, both components of the sentence must be proportionate in the distributive sense. Moreover, the overall sentence must be proportionate in that sense, i.e., the cumulative effect must be distributively proportionate.

80. In the case of a sentence to be suspended, either in its entirety or in part, proportionality considerations also arise in the distributive sense. However, an issue which arises in this case is whether, with respect to conditions that could impinge on the exercise of a constitutionally protected right, proportionality considerations also arise in the sense spoken of by Costello J. in the High Court in *Heaney v Ireland* [1994] 3 I.R. 593 and later approved by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

81. In *Heaney v. Ireland*, Costello J formulated the test as follows:

“the objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
- impair the right as little as possible, and*
- be such that their effects on rights are proportional to the objective.”*

82. In *Kelly: The Irish Constitution*, 5th Ed, by Hogan et al, the authors note at 7.1.52 that the *Heaney* test has been held not to apply to certain rights, such as equality and the right to trial in due course of law, before commenting at 7.1.54:

“The *Heaney* test has also been co-opted into areas of law where no standard of review of this sort is needed, but rather where an ordinary meaning of the word proportionality would be appropriate. For example, it was not uncommon to see it cited in cases relating to the severity of sentencing. There are several other instances where there is uncertainty about the difference between the *Heaney* test and proportionality in the general sense, such as the discovery of confidential documents and the use of hearsay evidence in respect of bail. On three occasions, judges have found it necessary to clarify that the test may only be used when constitutional rights are infringed, not as some general means to review any state action. The Supreme Court recently issued a helpful clarification that use of the *Heaney* test in sentencing cases is ‘misplaced,’ and when the word ‘proportionality’ is used in sentencing, it should have its ordinary meaning:

*‘Broadly speaking the specific doctrine of proportionality referred to by Costello J, in that case is a public law doctrine with specified criteria, according to which decisions or acts of the State, and in particular legislation,*

*which encroach on the exercise of constitutional rights which citizens are otherwise entitled to enjoy, are scrutinized with regard to their compatibility with the Constitution or the law. When used in that context the doctrine of proportionality might be said to be a term of art.'*

(per the judgment of Murray C.J. in *Lynch and Whelan v Minister for Justice* [2010] IESC 34)"

83. It seems to us, that notwithstanding this caveat by the Supreme Court, and we note that it is introduced with the words "broadly speaking", it does not appear to go so far as to suggest that the constitutional doctrine of proportionality propounded in *Heaney* can never have application in the sentencing context. Proportionality is intended to be used in its ordinary sense and not as a term of art when the consideration is how much punishment is appropriate having regard to the gravity of the offence on the one hand and the circumstances of the offender on the other hand. This is proportionality in the distributive sense and it will always be the dominant proportionality consideration in sentencing cases and in the great majority of sentencing cases it will be the only such consideration.
84. However, in the case of suspended sentences, the conditions attaching to the court's willingness to suspend the sentence may sometimes impinge on the subject person's constitutional rights in a non-distributive way. Where that arises, the impingement is not just to do with how much punishment is deserved or appropriate in the case. Rather, the concern that has given rise to the condition may be based on some other perceived need such as protection of the public at large or of some class of persons or indeed of an individual; or a perceived need to incapacitate the offender in terms of his ability to commit further crime in certain circumstances. In such circumstances, although the condition may have some punitive effect, the legitimate aim to which the measure is addressed is not primarily penal. Arguably it is therefore inappropriate to consider its proportionality as though it were primarily penal. The words "punitive" and "penal" are used here to import aims consonant with retribution, deterrence, and the promotion of reform and rehabilitation, which represent the principal objectives of a punishment lawfully imposed in the course of a sentencing in this jurisdiction. The issue in such circumstances is not solely whether that measure, to the extent that it has punitive effect, is deserved or appropriate as a lawful punishment (although it may be condemnable on the grounds of having a disproportionately punitive effect alone); rather it may be whether that measure is lawful as a punishment at all, and in so far as it is a measure addressed to another legitimate aim or aims, such as individual or public protection, or incapacitation in the public interest, and which may over-ride constitutionally protected rights in doing so, whether it is a proportionate measure in terms of the constitutional doctrine of proportionality. Such a condition might potentially impinge on the individual's constitutionally guaranteed right to freedom of expression, or freedom of association, or to the enjoyment of family life, or privacy, or bodily integrity, or right to work, amongst other possibilities. To take a perhaps extreme hypothetical example, if a court were to purport to suspend the sentence of a sex offender on condition that he submit to chemical

castration, it would manifestly have the potential to impinge on the subject person's right to bodily integrity and would raise *Heaney* type proportionality concerns. (It would also raise an issue about using such a condition to, in effect, impose a punishment presently unknown to Irish law.) It seems to us that in such a case it would be appropriate for the sentencer at first instance, or any appellate court asked to review the sentence, to subject the proposed condition to a proportionality test similar to that propounded in *Heaney* to determine its lawfulness before proceeding to impose it or, in the appeal scenario, to uphold it.

85. In the present case, counsel for the appellant has argued that the condition attached to the suspension of the final year of appellant's sentence of four year's imprisonment for a period of three years post release, namely that he should stay away from the injured party for 30 years, is arbitrary, disproportionate, unenforceable and excessive in all the circumstances. In his client's grounds of appeal, he further specifically alleges a failure by the sentencing judge "*to give adequate weight to the effect that such a sentence would have on the appellant's personal circumstances and his ability to access and maintain a relationship with his children*". He argues both that it represents an excessive punishment and is therefore disproportionate in the quotidian distributive sense, but also that in addition to being disproportionately punitive in that sense it is so far reaching in its import and implications that *de facto* it represents a punishment unknown to the law. He argues that, regardless of what may have motivated the sentencing judge in imposing it, either in terms of a legitimate aim that she may have been seeking to pursue, and/or any pressing concern that she may have discerned as necessitating its imposition, it impinges unduly and unnecessarily on various of his constitutionally protected rights including his right of freedom of association with his children and his right to enjoyment of family life in that he will be severely restricted in his ability to participate in or attend many events involving his children that parents would normally seek to be able to do. It seems to us that these complaints clearly engage issues both as to the proportionality of the sentence in the distributive sense and in the *Heaney* sense.
86. Counsel for the appellant has identified a number of practical difficulties for his client in complying with the impugned condition. As previously stated the appellant and the injured party have four children together. A condition of suspension of the final year of the appellant's sentence is that he have no contact with the injured party for thirty years. This condition is interpreted, correctly it seems to us, as including both direct and indirect contact. It has been submitted that the concern must arise that, in the aftermath of the appellant's release from custody, the making of arrangements between the appellant and the injured party as parents of those four children will be very difficult, if not impossible, to achieve without breaching the impugned condition. Prior to the sentencing the appellant had been making such arrangements through the injured party's sister, but even such indirect contact would now breach the condition which has been imposed.
87. It is suggested that the terms of the present condition are so restrictive that, absent an unsolicited expression of willingness on the part of the injured party to engage with him, it is impossible for the appellant to conduct any discussions or negotiations with the

injured party, even through a solicitor (as that would involve indirect contact), concerning the possibility of having any involvement in his children's lives. It is suggested that the appellant will likely have to become involved in family law proceedings in order to seek access to or custody of his children with the injured party, particularly in light of the sentencing judge's remarks that "*it can be decided if it's not agreed between the parties in another forum.*" However, the point is made that the impugned condition is so strict in its terms that it would potentially frustrate the service of documents on the injured party in her capacity as a respondent in any such proceedings, and it would certainly make settlement talks in those proceedings very fraught and difficult, if not impossible.

88. Even more fundamentally, the point is made that the length of the prohibition imposed by the condition is an extraordinary one. By the time it has expired the appellant would be in his 60s and his children will be in their 40s and 30s. In that regard we note that in the *People (Director for the Prosecution) v Hogan* (unreported, Court of Criminal Appeal, 4th of March 2002) the Court of Criminal Appeal said that it was generally undesirable to make the operational period of a suspended sentence longer than the custodial term unless there were special circumstances for doing so. The court emphasised, however, that it did not wish to lay down any firm rule in that regard and it appears to have been concerned with ensuring that there was a reasonable limit on the period during which the offender was at risk of custody or, in other words, with ensuring that the operational period was proportionate.
89. We should observe that the sentencing judge's remarks contain contradictory indications as to her intention in terms of what is to be the operational period of the suspension in the present case. On the one hand, the condition requiring the appellant to stay away from the injured party extends out to thirty years, whereas on the other hand, the requirement placed upon him to keep the peace and be of good behaviour is confined to three years.
90. Counsel for the appellant states that his client accepts his culpability in the assault of the injured party, and he has raised no issue with the sentence of imprisonment imposed upon him. However, he contends that the "stay away" condition is unrealistic, unjustified in its terms, and disproportionate. It is said to be arbitrary and, by extension, unlawful and that it is unprecedented in the context of such offences in this jurisdiction.
91. In response, counsel for the respondent has sought to argue that the condition was appropriate given the specific nature of the offence and the injured party involved and that it was aimed at reducing the likelihood of the appellant committing a further similar offence against the injured party. She submitted that, contrary to what is asserted by the appellant, the sentencing judge did indicate the basis for imposing the condition in question. During the course of the sentence hearing on the 13th of December 2018, the sentencing judge indicated that she would have to make "*some sort of order*" to cover the concerns raised by the injured party in her victim impact statement regarding the release of the appellant from prison. In imposing sentence on the 20th of December 2018, the

sentencing judge referred once again to the victim impact statement and the anxiety on the part of the injured party over the appellant's release from prison.

92. We think that counsel for the respondent's belief that the condition in question was imposed by the sentencing judge in circumstances where she felt that she would have to make "*some sort of order*" to address the anxieties expressed by the victim is most likely correct. However, we do not agree with counsel that it was an appropriate order to make. The condition is too far-reaching in its temporal extent and in its implications and it amounts to secondary punishment in our view. It is in our view disproportionate and arbitrary and ultimately excessive in the distributive sense having regard to its operative duration and the strictness and lack of flexibility in its terms. Because it has a disproportionately punitive effect it is condemnable on that ground alone.
93. However we also consider that it is disproportionate in the *Heaney* sense insofar as, notwithstanding any legitimate aim that the sentencing judge may have been pursuing, it impacts excessively on the appellant's rights, variously arising either under the Constitution, or the European Convention on Human Rights/ the Charter of Fundamental Rights, including a right of freedom of association with his children, his right as a parent to further develop his relationship with his children, and a right to enjoyment of a family life which involves his children. The condition was arguably so far-reaching in its terms as to amount to an unlawful punishment, not presently available under Irish law.
94. Accordingly, we consider that the sentencing judge, although unquestionably acting with a worthy motive and the best of intentions, was in error in making the suspended portion of her sentence subject to the impugned condition.
95. In circumstances where we have found an error the appeal is allowed, and we will quash the sentence imposed by the court below and proceed to a re-sentencing.
96. We will reimpose a sentence of four years imprisonment and will again suspend the final year for a period of three years from the date of his release. We will make the suspension conditional upon the appellant entering a bond in the sum of €150 to keep the peace and be of good behaviour for the suspended period of three years. We will also impose the further conditions that the appellant should stay away from the injured party "N.C." during the suspended period and that during that period he should not contact her himself or cause anybody to do so by any means whatsoever (save for a solicitor instructed on his behalf who may do so in writing in relation to any issue or issues pertaining to the welfare of their children) unless invited by the injured party to do so; and further that the appellant should stay away from any property in which the injured party resides or may reside during the suspended period. It is a further condition of the suspension that the appellant must submit to supervision by the Probation Service during the suspended period and comply with, and abide by, all of their recommendations and requirements including, but not confined to, undergoing any courses or programs advised by them to address his propensity towards domestic violence and his anger management issues. We consider these conditions to be necessary but proportionate in the circumstances of this case.