Dublin Institute of Technology
ARROW@DIT

Articles | Law

2011-01-01

The Innocence Rights of Sentenced Offenders

Mary Rogan
Dublin Institute of Technology, mary.rogan@dit.ie

Follow this and additional works at: http://arrow.dit.ie/aaschlawart

Part of the Law Commons

Recommended Citation
Rogan, M: The Innocence Rights of Sentenced Offenders. Irish Journal of Legal Studies, Vol. 2(1), 2011.

This Article is brought to you for free and open access by the Law at ARROW@DIT. It has been accepted for inclusion in Articles by an authorized administrator of ARROW@DIT. For more information, please contact yvonne.desmond@dit.ie, arrow.admin@dit.ie.

This work is licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 License

The Innocence Rights of Sentenced Offenders

Dr. Mary Rogan*

Civil orders which take effect after a person has been released from a sentence of imprisonment have become more common features of Irish law. Despite representing a major departure from the principle that when a person has served a sentence the state has no further 'call' on that person, such orders have received limited attention. This article examines some of these new orders, in particular section 26 and section 26A of the *Criminal Justice Act 2007*. It argues that these orders should be of concern, suggesting that they are likely to act as barriers to reintegration of ex-prisoners, represent a 'failure model' of criminal justice and have the potential to undermine the presumption of innocence of those released from prison.

I – Introduction

The recent introduction of orders which take effect after a convicted person has been released from a sentence of imprisonment has given judges new options when sentencing a person to a term of imprisonment for certain offences. Such orders have been a feature of our law for some time, most notably under the *Sex Offenders Act 2001* (*2001 Act*). However, since the introduction of the *Criminal Justice Act 2007* (*2007 Act*) and the *Criminal Justice (Amendment) Act 2009* (*2009 Act*) these post-release orders have a much wider application. Orders made under such legislation place restrictions on the activities and/or movements of a person released from prison or require such individuals to do certain things specified in the order. These restrictions, requirements or conditions can last for long periods.

This article reviews the provisions which introduce these novel orders. Though this legislation has potentially very far-reaching effects, there has been limited examination of their nature or possible consequences, partly because the impact which such changes may bring will not be visible for some years. This article argues that the development and expansion of such orders is unfortunate and should not continue. It suggests that post-release orders are likely to hinder the re-integration of those who have been released from prison. It also posits that the introduction of such orders represents a philosophical shift in how we in Ireland think about ex-prisoners and our criminal justice system. These orders, furthermore, undermine the traditional principle that once a person has served a sentence, the presumption of innocence re-attaches to them.

* **Lecturer in Socio-Legal Studies, Dublin Institute of Technology: mary.rogan@dit.ie.**

II - Post-Release Orders in Irish law

The *2001 Act* contains the most well-known orders which take effect after a person is released from imprisonment. Under section 28 of that Act a court "shall consider" whether to implement post-release supervision over a person convicted of a sexual offence. Such supervision is carried out by a probation officer. A court may also, under section 30, impose conditions "prohibiting the sex offender from doing such one or more things the court considers necessary for the purposes of protecting the public" including counselling or treatment. In addition, a person convicted of certain offences under the Act is required to notify the Gardaí of certain information such as her or his address. Part 9 of the *Criminal Justice Act 2006 (2006 Act*) also introduced similar reporting requirements for those convicted of a drug trafficking offence and who received a prison sentence of over one year. In all cases, breach of these orders constitutes a criminal offence.

A. Section 26 of the *2007Act*

Of much wider application and involving more extensive restrictions and requirements are those contained in section 26 of the *2007 Act*. Its provisions apply to those convicted of offences listed in Schedule 2 of the Act. These include murder, causing serious harm, threats to kill or to cause serious harm, false imprisonment, various firearms offences, aggravated burglary, organised crime offences and drug trafficking offences, including the offences of possession and under section 15A of the *Misuse of Drugs Act 1977* (*1977 Act*).

Those convicted of such offences and who receive a sentence of imprisonment may be subject to two types of order, a "monitoring order" and a "protection of persons order". A monitoring order requires the individual to notify an Inspector of the Garda Síochána of his or her address as soon as practicable after release. Any change of address and any proposed absence of more than seven days must be notified in writing to the Inspector. Any such order can be made for a period of up to seven years.

A protection of persons order prohibits a person from engaging in behaviour which "in the opinion of the court, would be likely to cause the victim of the offence or any other person named in the order fear, distress or alarm or would be likely to amount to

intimidation of any such person."[1] Again, such an order can be imposed for a maximum of seven years. In both cases, breach "without reasonable cause" is a criminal offence. Such an offence is tried summarily with a possible fine of up to €2,000 or a prison sentence of up to six months, or both. The individual affected can apply to the court which imposed the order for it to be revoked or varied.

B. Section 26A of the *2007 Act*

Section 14 of the *2009 Act* introduced another type of order, which takes effect after a person's release from prison, by inserting section 26A into the *2007 Act*. Section 26A applies to offences under Part 7 of the *2007 Act* or organised crime offences as well as offences contained in Schedule 2 of the *2007 Act* committed as part of or in furtherance of the activities of a criminal organisation.

Section 26A introduces a single order which gives a great deal of flexibility to judges in fashioning a set of conditions or restrictions on activities or requirements to engage in certain behaviours. The order is called a "post-release (restrictions on certain activities) order". It enables a judge to make an order which takes effect after a person's release which may do any of the following:

1. restrict a person's movements, actions or activities;
2. impose conditions subject to which a person may engage in any activity;
3. place restrictions on the person's association with others or conditions subject to which the offender may associate with others.

Any such order may be imposed for a period of up to seven years. The penalties for breaching a post-release (restrictions on certain activities) order are a fine of up to €5,000 or a prison sentence of up to twelve months or both on summary conviction.

Section 26A provides more detailed guidance for a judge wishing to use it than the comparable provisions in section 26 as to the type of matters which must be taken into account in exercising his or her discretion in making any such order. Before a judge can make an order under section 26A, she or he must consider that it is in the public interest to

[1] Section 26 of the *1997Act*.

do so having regard to the evidence in the trial, the evidence in relation to sentence, the person's previous convictions, if any, as well as the person's personal circumstances. In addition, the court must be satisfied that the restrictions are no more than reasonably necessary in the public interest and that any restriction imposed falls into a category of restrictions and conditions laid down in a scheme set out in a statutory instrument of July 2010.[2] This scheme consists of a set of examples of types of restrictions a judge might consider imposing. These include conditions:

1. obliging a person to refrain from attending at such premises, place or locality at all or at specified times;
2. requiring a person to attend at a premises, place or locality;
3. requiring a person who intends to leave the State for seven days or more to notify a member of the Garda Síochána in person before and after the period spent abroad;
4. requiring a person to notify a member of the Garda Síochána of any names used by the person other than the name the person was convicted under;
5. requiring a person to notify a member of the Garda Síochána of her/his address and any change of address;
6. requiring a person to refrain from specified activities;
7. placing restrictions and conditions on the person's association with others (though no restrictions can be imposed on association with the person's immediate family).

As with section 26, a person who is the subject of such an order may apply to the court which made the order to be released from it. The order can be varied or revoked if the court is satisfied that there are circumstances occurring since the order was made which warrant its variation or revocation. Any such application is made on notice to the Inspector of the Garda Síochána in the area in which the person ordinarily resided at the time the order was made or where the person currently resides. Section 26 specifically makes provision for legal aid for a person making such an application. However, there is no reference to legal aid under section 26A, though the reason for the difference is difficult to understand.

[2] Post-Release (Restrictions on Certain Activities) Orders Scheme 2010 (S.I. No. 330 of 2010).

III - Post-Release Orders Compared: Vagueness and the Burden and Standard of Proof

There are few indications that the post-release provisions under the *2001 Act* have given rise to much disquiet and it might be argued that extending them to other offences will provide an effective way to tackle re-offending rates. While there are obvious comparisons with the *2001 Act*, there are also some important differences between orders which can be made under that Act and orders made under sections 26 and 26A. Under the *2001 Act*, the court is obliged to have regard to the need to protect the public and the need to rehabilitate the offender when making the decision to impose post-release supervision or conditions. In addition, under the *2001 Act*, the conditions which are imposed upon the released person are much more precise. Section 31 of the *2001 Act* requires the judge to lay down the conditions imposed and to explain them to the convicted person. The type of restrictions and conditions which may be imposed under section 26 and 26A are much wider and more vague. The protection of persons order under section 26, for example, contains wording which bears more than a passing resemblance to anti-social behaviour legislation under section 113 of the *2006 Act*. The wording used in section 113 and in comparable legislation in England and Wales has been criticised on a number of grounds including its vagueness, lack of clarity and potential to be overbroad in its application.[3] The same concerns apply to the protection of persons order and the restriction on certain activities order in particular. The courts in England and Wales have emphasised the need to adopt a narrow approach when imposing any such order, making them only when necessary and in clearly identifiable terms.[4] Similarly, the need for clarity in the criminal law was also stated in strong terms by Hardiman J. in *D.P.P. v. Cagney and McGrath*.[5]

There is another serious concern with orders under section 26 and 26A which is comparable to that encountered in anti-social behaviour legislation. Both section 26 and 26A are silent about the burden and standard of proof required by the courts for the making of the orders involved. Though civil orders, the fact that their breach constitutes a criminal

[3] C. Hamilton, "Anti-Social Behaviour Orders and the Presumption of Innocence" (2005) 23 I.L.T. 215, M. Rogan, "Extending the Reach of the State into the Post-Release Period: Section 26 of the Criminal Justice Act 2007 and "Post-Release" Orders (2008) 15(1) D.U.L.J. 214 [hereinafter Rogan (2008)], A. Ashworth "Anti-Social Behaviour: The Subversion of Human Rights?" (2004) 12 L.Q.R. 263, M. Rogan, "Crime Control without the Criminal Law? Perspectives on Emerging Strategies for Dealing with Crime" (2007) 25 I.L.T. 23.
[4] *R v. Boness and Bebbington and others* [2005] T.L.R. 1, (2006) 1 Cr. App. R. (S.) 120 [hereinafter *Boness*], *Hill v. Chief Constable of Essex* [2006] E.W.H.C. (Admin.) 2633.
[5] [2007] I.E.S.C. 46.

offence means that clarity about such issues is critical. The Judicial Studies Board for England and Wales has stated in relation to similar legislation there that the decision to impose a post-release order is separate to the sentencing hearing and, specifically, that arguments made in mitigation on behalf of a defendant are irrelevant.[6] Section 26A's guidelines to the judiciary, that they should consider the evidence given in sentencing and at trial, would seem to be in direct contradiction to this approach. In a decision on the constitutionality of the notification requirements under the *2001 Act*, *Enright v. Ireland* the Supreme Court held that a defendant could make submissions regarding the imposition of such requirements.[7] The Courts have been left with the task of fashioning a constitutionally sound interpretation of where the burden of proof falls in such applications, the type of evidence which may be considered and the standard to which it must be proven. The potential for criminal sanctions for breach makes such a task especially important.

IV - Post-Release Orders and the Re-integration of Released Prisoners

Section 26 and 26A are designed to control the behaviour of those released from prison in order to prevent re-offending and further victimisation, including of the original victim of the offence. However, it is difficult to see how these kinds of orders can act as a mechanism to facilitate the reintegration of a released prisoner, which is the key factor in that person's desistance from crime. At base, post-release orders represent a major departure from the principle that once a person has served her or his sentence, the state has no further call or claim on that person. Moreover, the stigma associated with serving a sentence of imprisonment is well documented. Through these orders, the reach of the state over a person who has been released from prison and has served the sentence imposed on them becomes much longer than before. The stigmatising effects of such orders cannot be underestimated either. As the court in *C.C. v. Ireland* held,[8] inclusion on the sex offender register imposes a heavy stigma upon a person and can impact upon the ability of that person to obtain employment and that person's future life more generally. Continuing involvement with the authorities of criminal justice would also pose difficulties for a person attempting to put past criminal actions behind him or her.

---

[6] Lord Justice Thomas, *Anti-Social Behaviour Orders: A Guide for the Judiciary* (London: Judicial Studies Board, 2007) at 33.
[7] [2003] 2 I.R. 321 [hereinafter *Enright*].
[8] [2006] 4 I.R. 1.

At a practical level, the protection of persons order and the restriction on certain activities order pose particular difficulties. Any such order may prohibit a person from entering a particular area, which may also include areas in which that person's own roots or families are, or where potential employment or services may be. It is a singularly difficult task for a court to predict what the person's likelihood of offending, risks posed or needs might be in the years which will pass during the sentence of imprisonment. It is even more challenging to make orders about particular areas or neighbourhoods and where the individual may or may not reside or visit. An English case of *R. v. H.* is of relevance here.[9] In that case a man was given a post-release anti-social behaviour order. He was prohibited from contacting the victim of his crime either directly or indirectly and also from entering an area around which the victim lived. The man's parents lived in the same area however and the order meant that he would not be able to visit or live in his family home. The Court of Appeal reduced the duration of the order and narrowed the exclusion zone. Orders made in Ireland must also be carefully scrutinised in order to ensure that they do not marginalise those released from prison – an already severely marginalised group.[10]

Those released from prison already face a myriad of social, economic, personal and cultural barriers to reintegration. Now, specific statutory impediments have been placed in the way of those returning to the community after serving a sentence of imprisonment. Thus, the collateral consequences of imprisonment have increased significantly. In very direct ways, these orders have the potential to interfere with and disrupt the links and possible links an individual has or may have with the community, family, activities, employment opportunities and services such as drug addiction counselling and treatment. While it is welcome that the restriction on certain activities order legislation states specifically that no order may be made which prevents a person associating with a member of her or his immediate family, there are many other possible ways in which such an order can limit a released person's ability to develop and maintain these crucial connections.

Given the serious restrictions inherent in any such order on a person's liberty, freedom of movement, freedom of association, family and private life, one would expect that the gains to be made, i.e. reduced reoffending, would be well-proven and patent. There is a

---

[9] [2006] E.W.C.A. Crim. 255.

[10] I. O'Donnell, C. Teiljeur, N. Hughes, E. Baumer & A. Kelly, "When Prisoners go home: Punishment, Social Deprivation and the Geography of Reintegration" (2007) 17(4) I.C.L.J. 3, P. O'Mahony, *Mountjoy Prisoners: A Sociological and Criminological Profile* (Dublin: The Stationery Office, 1997), National Economic and Social Forum, *Re-Integration of Prisoners* (Dublin: N.E.S.F., 2002) [hereinafter N.E.S.F.].

vast and growing literature on desistance or what it is that makes people stop or reduce offending.[11] From that literature a number of factors have been identified as crucial to successful reintegration and to promoting desistance. It is impossible to do justice to this literature here, but the main elements identified by these scholars include: personal motivation; secure and adequate housing; the support of professional services; addiction treatment where necessary; the support of the community; pre-release planning; education; mental health supports and employment. Civil orders such as the kind introduced by sections 26 and 26A do not feature.

The National Economic and Social Forum published a report in 2002 on the reintegration of prisoners, but made no mention of orders such as those contained in the *2007 Act* as being possibly effective mechanisms of reintegration.[12] The Council of Europe in 2006 published recommendations on the social reintegration of released prisoners but, similarly, no reference to these kinds of orders was made.[13] The Irish Penal Reform Trust published a report in 2010 on the reintegration of prisoners.[14] The authors interviewed those involved in providing services and supports to those released from prison regarding the most effective ways to assist in that transition. Again, no mention was made of civil orders such as those introduced by the *2007 Act*.

For those who have already been in conflict with the criminal law, civil orders with relatively mild penalties are unlikely to be effective mechanisms to address reoffending. As such, these orders represent a superficial response to the problem of recidivism and again fall into the trap of perpetuating the view that solutions to offending are to be found in creating more laws. Solutions are much more likely to be found outside the criminal law and these orders are unlikely to be any more effective than investment in the elements necessary for desistance mentioned above.

---

[11] For a selection of studies on reintegration and the collateral consequences of imprisonment see J. Petersilia, *When Prisoners Come Home: Parole and Prisoner Re-entry* (New York: Oxford University Press, 2003), S. Maruna & R. Immarigeon eds., *After Crime and Punishment: Pathways to Ex-Offender Reintegration* (Cullompton: Willan Publishing, 2004), S. Kethineni & D. Falcone, "Employment and Ex-Offenders in the United States: Effects of Legal and Extra Legal Factors" (2007) 54(1) Probat. J.l 36.
[12] N.E.S.F., *supra* note 10.
[13] Council of Europe, *Social Re-Integration of Prisoners*, Parliamentary Assembly Report Doc 10838 (7th February 2006).
[14] Irish Penal Reform Trust, *It's like stepping on a landmine: Reintegration of Prisoners in Ireland* (Dublin: Irish Penal Reform Trust, 2010).

Furthermore, the necessity for these orders has not been proven. The behaviour targeted by the orders is likely to fall within standard criminal offences anyway. The penalties for breaches of the orders are low, but it is of concern that they may in some instances be more significant than would have been the case under comparable criminal law. In any event, they are unlikely to be a greater deterrent than existing criminal laws. Moreover, the administrative burden of the recording of information necessitated by these orders has yet to be calculated.

V - What these Orders say about how we think about Punishment and Prisoners

As explored elsewhere,[15] as well as involving several practical difficulties, post-release orders also say something at a theoretical level about how we think of punishment and indeed of people. These orders represent an assumption that those convicted of offences are incapable of change and that our prison system is unable to make any difference to behaviour. Given recidivism rates,[16] such assumptions may be held with good reason, but if a long sentence of imprisonment has proven ineffective, it must be asked if the imposition of a post-release order will prove to have any better results.

In this regard it is pertinent to refer to the work of David Garland who, speaking on contemporary penal policy in the United States of America and the United Kingdom, writes that there is "no such thing as an ex-offender – only offenders who have been caught before and will strike again."[17] This is a profound shift in how we think about those released from prison and embodies a deeply punitive attitude. However, it cannot be said with certainty that any such intention was behind the introduction of these post-release orders. What became section 26 of the *2007 Act* received five minutes of Dáil time and it is more likely that the real inspiration for section 26 was the *Serious Crime Act 2007* from England and Wales which introduced post-release orders.[18] It is unfortunate that a change of this magnitude was imported with such a lack of scrutiny and apparent need for the Irish context. The extension of these orders in the *2009 Act* without an analysis of the desirability

[15] Rogan (2008), *supra* note 3.
[16] I. O'Donnell, E.P. Baumer & N. Hughes, "Recidivism in the Republic of Ireland" (2008) 8(2) Criminology and Criminal Justice 123.
[17] D. Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001) at 142.
[18] 634 Dáil Deb. (April 24, 2007).

of those contained in section 26 is regrettable . Indeed what became section 26A also received very little Dáil attention.[19]

VI - Post-Release Orders and the Presumption of Innocence: Procedural Safeguards

In addition to all of these concerns about reintegration, effectiveness and so on, there is another way in which these orders are a very unfortunate development. Post-release orders represent an erosion of the presumption of innocence for those who have served their sentences. It casts a shadow over the presumption which re-attaches to a person who has served her or his sentence. It ensures that the reach of the criminal justice system lengthens over these individuals. In addition, depending on the breadth and nature of the orders imposed, they may be very easy to breach, for example by entering a particular area, not turning up to a location the person has been required to, etc. The chaotic lives that some former prisoners lead make these kinds of breaches particularly likely. In light of this, it is likely that more ineffective and costly short sentences will be imposed on these individuals. There is a deeper issue here also. Can it be said with certainty that proof of conviction alone is enough to give rise to a presumption that the individual will engage in such behaviour many years from the date of conviction? The evidence needed to justify such a major change in our traditional values in criminal law and punishment has not been put forward by our policy-makers.

As such, the imposition and drawing of these orders must be very carefully watched and executed. It is crucial that the terms of any order are drawn tightly and do not contain over-broad restrictions on a person's movements or activities. As noted in jurisprudence of the courts in England and Wales there must not be a 'blunderbuss' approach taken by judges,[20] with orders restricting all sorts of behaviour being made. It is also important that judges do not rely solely on the submissions of the prosecution when drafting the orders and indeed in deciding on the necessity for them. There is a related concern here with regard to the type of evidence which can be introduced in the hearing in which it will be decided whether to impose an order or what kind of order to impose. Section 26A, unlike section 26, gives some legislative guidance regarding the nature of the evidence which can be relied upon in making a restriction on certain activities order. This includes evidence given at the trial and in sentencing. However, the legislation is silent regarding the

[19] See for example 686 Dáil Deb. cols. 177-237 (July 3, 2009).
[20] *Boness, supra* note 4.

standard to which that information must be proven or indeed on whom lies the burden of proving - or possibly disproving - it, given that the order is, in form at least, a civil one.

There are also concerns here regarding prosecutions for breaches of the order. It is for the individual accused of breaching the order to show reasonable cause in the case of an alleged breach in order to avoid conviction and sentence.[21] In addition, it is for the individual to seek revocation or variation of the order.[22] It is similarly essential that the accused person is made fully aware of the terms of the order at the time it is made but also, much later, on release.

Finally, there is a much broader possible difficulty with section 26 and section 26A. The sex offenders register has been challenged in *Enright* on the basis that it constitutes punishment without the procedural safeguards associated with the imposition of a criminal sanction and is thus unconstitutional.[23] This argument was rejected in *Enright*.[24] However, similar arguments could be made about these orders and *Enright* distinguished.[25] In *Enright* the Supreme Court placed much emphasis on the fact that the orders in question were aimed at rehabilitating the offender as much as protecting the public and Finlay-Geoghegan J. placed weight on their therapeutic nature and empirical evidence on the particular characteristics of those convicted of sexual offences.[26] No such motivation is evident here. The intention is to prevent future offending, itself a constitutionally dubious aim. In any event, a judge imposing such an order will have to tread carefully in ensuring that procedural safeguards are afforded to a convicted person at risk of receiving an order under these sections.

VII – Conclusion

It is not possible to say at present whether any orders have been made under section 26 or 26A and there appears to be limited awareness of their existence. Searches of the Irish Sentencing Information System have not revealed any such orders being imposed and it

[21] See section 26 (10) of the *2007 Act* and section 14(8) of the *2009 Act*.
[22] See section 26 (8) of the *2007 Act* and section 14(6) of the *2009 Act*.
[23] *Enright*, *supra* note 7.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

does not seem to be the case that the Courts Service collects this data or publishes it.[27] The author would be glad to hear about any experiences of practitioners of such orders. It may be that, like anti-social behaviour orders, given the difficulties and concerns outlined above, prosecutors will be reluctant to seek them. However, once on the statute book there is every chance that orders will be imposed in the future and their presence alone signals some important shifts in how we think about those released from prison.

Section 26 and 26A do much to restrict innocence rights, are unlikely to be effective and have yet to be justified by those who have introduced these significant changes. Their use must be monitored closely as their effects become more apparent. Most particularly, it is very important that we conduct research into who is subject to them and the effects on the transition back to the community. Preliminary research indicates that those who receive sentences for offences under section 15A of the *1977 Act* are frequently first time offenders,[28] young and with a drug addiction or financial pressures, who are often holding drugs on behalf of somebody else in order to pay a drug debt. A section 15A conviction can trigger a post-release order, meaning that some already vulnerable individuals who have served comparatively severe sentences will be faced with even more difficulties upon release.

In light of all these concerns, it is submitted that the type of orders introduced by section 26 and 26A should not be extended to other offences or into other forms and their existence or at least their current form should be the subject of serious reconsideration.

---

[27] Irish Sentencing Information System <http://www.irishsentencing.ie> (date accessed: 20th December 2010).

[28] M. Rogan, "The profile of those sentenced for offences under section 15A of the Misuse of Drugs Act 1977", [forthcoming].