**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 319 J.R.]**

**BETWEEN**

**ERIC WANSBORO**

**APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**AND**

**THE GOVERNOR OF MOUNTJOY PRISON**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Faherty delivered on the 16th day of June, 2017**

1. This matter comes before the court by way of an application for judicial review.

**Background**
2. On 14th November, 2013, the applicant appeared at Dublin Circuit Criminal Court in respect of Bill No. 298/2012. He received a three year and two six month concurrent sentences from Her Honour Judge Ring (as she then was). These custodial sentences were for an offence of the unlawful taking of a vehicle, contrary to s. 112 of the Road Traffic Act 1961 (as amended), a drink driving offence and driving without a driving licence respectively. These sentences were however suspended in their entirety for a period of three years on conditions.

3. On 22nd April, 2015, the applicant pleaded guilty to an offence of dangerous driving causing death and serious injury on Bill No. 99/2015. This offence was committed on 29th May, 2014. At the time of this incident, the applicant was driving the vehicle concerned away from pursuing gardaí. The applicant was remanded in custody until 18th May, 2015, for the purpose of a sentence hearing in respect of the offence on Bill No. 99/2015 and for the potential activation of the suspended sentences which were imposed on 14th November, 2013, on foot of Bill No. 298/2012.

4. On 18th May, 2015, Judge Ring heard evidence relating to the facts on Bill No. 99/2015 and also relating to the applicant's background and circumstances. Having heard further submissions from counsel for the applicant, she proceeded to order the activation of the three year sentence in respect of count 1 on Bill No. 298/2012 in its entirety as well as the two concurrent six month sentences in respect of counts 6 and 7 on the same Bill number, all of which were to run concurrently and to commence from 27th January, 2015.

5. Judge Ring then imposed a sentence of five and a half years imprisonment on Bill No. 99/2015, the said sentence to commence on the lawful expiration of the sentence on Bill No. 298/2012.

6. The learned trial judge pointed out that pursuant to the provisions of the legislation the five and a half year prison sentence imposed for the dangerous driving offence was required by law to be consecutive to the three year sentence required to be served pursuant to s. 99 (10) of the Criminal Justice Act 2006 (as amended) ("the 2006 Act").

7. It is clear from the transcript that in imposing the five and a half year sentence, Judge Ring took into account that the applicant had been driving the vehicle the subject of the charge on Bill No. 99/2015 at a time when he was disqualified from driving (and subject to the suspended sentence).

8. Committal warrants were issued to give effect to the aforesaid Orders and the applicant is currently in the custody of the second named respondent on foot of same.

9. On 20th May, 2015, the applicant filed a notice of appeal against the Order made in respect of Bill No. 208/2012 and also against the severity of the sentence imposed on Bill No. 99/2015.

**The event which gave rise to the within application**
10. On 19th April, 2016, it was determined by the High Court (Moriarty J.) in the case of *Moore & Ors. v. the Director of Public Prosecutions* [2016] IEHC 434 that the provisions of s. 99 (9) and (10) of the 2006 Act were invalid having regard to the provisions of the Constitution.

11. On 9th May, 2016, the High Court (Noonan J.) gave the applicant leave to seek, *inter alia*, an Order quashing the Order of the Circuit Court on 18th May, 2015, pursuant to s. 99 (10) of the 2006 Act in respect of Bill No. 298/2012; an Order of certiorari quashing the committal warrant issued pursuant to the aforesaid Order; and a declaration that the applicant is currently being held in unlawful detention by the second named respondent on foot of the aforesaid committal warrant.

12. In his written submissions in the within proceedings, counsel for the applicant acknowledges that relief pursuant to the provisions of Art. 40 of the Constitution was not sought on the grounds that if the relevant committal warrant in respect of the sentence of three years imprisonment (and the two six month concurrent sentences) issued pursuant to the Order of Judge Ring on 18th May, 2015, in respect of Bill No. 298/2012 were found to be invalid and quashed, the Order providing for a five and a half year custodial sentence in respect of Bill No. 99/2015 would remain valid and effective in law. The applicant thus acknowledges that the effect of the within proceedings, if successful, would be that the five and a half year sentence imposed in respect of Bill No. 99/2015 would be deemed to have taken effect at the time of its imposition rather than on the expiration of the sentences imposed in respect of Bill No. 298/2012.

13. The principal grounds upon which the applicant seeks relief can be summarised as follows:

1. As a consequence of the declaration of invalidity arising from the decision in *Moore*, the Circuit Court did not have the statutory power it purported to exercise under ss. 99 (9) and (10) on 18th May, 2015;

2. The Circuit Court did not have available to it any common law power to activate the applicant's suspended sentence which might have afforded it the authority to do so in the absence of a valid statutory power;

3. For these reasons, the Order made by Judge Ring activating the applicant's suspended sentence was made *ultra vires* and in excess of jurisdiction, and was unlawful. Consequently the committal warrant which was issued to give effect to the Order was likewise unlawful.

4. It was recognised in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45 that it was only in exceptionally circumstances that a case in which finality had been reached could be disturbed by a subsequent declaration of unconstitutionality. In *Director of Public Prosecutions v. Cunningham* [2012] IECCA 64, it was held that this general principle does not apply where finality has not been reached in criminal proceedings. There has not been finality in the instant case as the applicant has lodged an appeal to the Court of Appeal which remains live. For this reason, the decision in *A v. Governor of Arbour Hill Prison* does not pose an obstacle for the applicant seeking to rely in these proceedings on the declaration of constitutionality made in *Moore*.

5. Further and/or in the alternative, for the reasons set out, the impact of the particular declaration of unconstitutionality *Moore* was such as to entirely deprive the Dublin Circuit Court of jurisdiction to consider the issue of activation of the suspended sentence.

14. In order to put the respective submissions of the parties in this application into context it is necessary to refer to a body of jurisprudence which followed the decision in *Moore*.

**Post-*Moore* jurisprudence**

15. It is common case that the finding of unconstitutionality in *Moore* led to the institution of a number of Art. 40 and judicial review applications wherein a number of prisoners sought to obtain the benefit of the decision. Written judgments were delivered in both the High Court and Court of Appeal in a number of cases. In all of the cases, the applicants were unsuccessful. The cases include: *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278; *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244; *Foley v. Governor of Portlaoise Prison* [2016] IEHC 334; *Foley v. Governor of Portlaoise Prison* [2016] IECA 411; *Ryan v. Director of Public Prosecutions* [2016] IEHC 380 and *Larkin v. Governor of Mountjoy Prison* [2016] IEHC 680.

16. *Clarke* involved a post *Moore* challenge, where Mr. Clarke had an appeal pending concerning the activation of suspended sentences by His Honour Judge McCartan on 4th November, 2014.

17. In the High Court, having reviewed the authorities (including *A. v. Governor of Arbour Hill Prison*) on the effect of a finding of unconstitutionality, McDermott J. accepted that the applicant could seek to rely on the declaration of invalidity made by Moriarty J. in *Moore*. The learned Judge put it as follows, at para. 41:

> *"The applicant lays particular emphasis on the fact that the criminal proceedings in his case have not been finalised or concluded in the Court of Appeal since his appeal against sentence under s. 99 (12) is still pending. I am satisfied that this is so that the applicant is not precluded from raising a point concerning the invalidity of the statute under which he was returned to the Circuit Court under s. 99 (9) and (10). He is entitled to advance all such arguments and evidence to establish a claim that he is entitled to benefit from the declaration. I am satisfied that this conclusion is also in accordance with the decision of the Court of Criminal Appeal in The People (Director of Public Prosecutions) v. Cunningham [2012] IECCA 65. However, I am not satisfied, as is made clear in the above authorities, that the finality argument must always prevail against all others in determining the retroactivity of such a declaration, or indeed must prevail in this application: the behaviour of the applicant and other circumstances of the case must also be considered."*

18. In the course of his judgment in *Clarke*, McDermott J., at para. 42, quoted Hardiman J. who, in *Director of Public Prosecutions v. Cunningham*, set out two related questions to determine the scope of the retroactivity of a finding that a statute is unconstitutional:

> *"Firstly, if the ruling […] were to be applied to the circumstances of the accused's case, would this involve the retrospective or, alternatively, the prospective application of the finding of unconstitutionality? Secondly, has the accused conducted himself in such a manner, such as suggested that he is debarred by his conduct from claiming the benefit of the ruling?"*

19. McDermott J. then went on (at paras. 43-52) to review a body of case law of the Superior Courts, including jurisprudence following upon the decision of the Supreme Court in *Damanche v. Director of Public Prosecutions* [2012] 2 I.R. 266, on the question of the extent to which tactical decisions of the defence during the course of a criminal trial or "acquiescence" by a plea of guilty or otherwise might preclude the retrospective application of a finding of unconstitutionality.

20. Having ruled that the applicant could seek to rely on the invalidity of s. 99 (9) and (10), McDermott J. then considered whether the applicant's conduct could debar the grant of relief. For the purposes of the within proceedings and in particular in light of the respective submissions of the parties in the within application, it is apposite to set out ruling of McDermott J. on this issue in some detail:

> *"53. The applicant was convicted of a number of offences including robberies and possession of firearms. In one of those robberies a sawn-off shotgun was discharged terrorising others. He was duly arraigned and pleaded guilty to these very serious offences and lengthy sentences of imprisonment were imposed. A number of the terms of imprisonment imposed were suspended on the conditions already set out. Before that could be considered, the trial court was obliged to determine the appropriate sentence to be imposed. The applicant does not and has never argued that those sentences were unduly severe. The court mitigated the sentences by the suspension of most of the custodial period, subject to conditions. The matter was concluded. The applicant had been convicted and sentenced following a trial in due course of law and in accordance the fundamental attributes of a fair trial. No appeal was taken at that stage and the criminal trial was concluded once the time limit for appeal had expired. The applicant solemnly undertook to abide by the conditions of the suspended sentence. He was happy to do so. The Court, the Director of Public Prosecutions, An Garda Síochána and the probation and prison services were satisfied to engage with him on this basis to secure his rehabilitation. He commenced to serve the sentence then imposed.*

*54. The mandatory condition that he keep the peace and be of good behaviour for a period of seven years was breached. He committed further offences. He failed to abide by the directions of the probation service. He failed to attend the drug treatment centre as directed. None of this is in dispute.*

*55. When he appeared in the District Court in respect of the new offences in 2014, he pleaded guilty. His case was then sent back to the Circuit Court. The applicant has never evinced an intention to appeal his conviction in the District Court on these matters. Unlike the applicants in the Moore case he is not a person convicted after a trial in the District Court who wished to appeal that conviction but was unable to do so before the case was referred back to the court which had imposed the suspended sentence. He did not experience the prejudicial or suggested discriminatory effects of the impugned sub-sections found to apply to the Moore applicants. He was guilty and accepted his guilt. He had no basis upon which to issue judicial review proceedings challenging the process, as the applicants in Moore had done.*

*56. In the course of the revocation hearing, he was represented by solicitor and counsel. No objection was taken to the procedure adopted. The court dealt with the matter in accordance with the law then applicable. No attempt was made by the applicant to challenge the constitutionality of ss.99 (9) and (10). I am satisfied that such a challenge could not have succeeded because he could not demonstrate any prejudice or discrimination that he had suffered upon which to base it. He made no objection to the order made under s.99 (9) sending him back to the Circuit Court. He made no objection to the procedure when he appeared before that court. He not only submitted to the jurisdiction of the court and acquiesced in its exercise, but has no basis upon which to claim that he has suffered any fundamental injustice in the hearing of the revocation application. Indeed no such claim is made, nor was one made during the hearings in the Circuit Court or these proceedings.*

*57. He benefited from the suspended term on his release from prison and was happy to remain at liberty pursuant to its terms until convicted of the District Court offences. He now raises a challenge to the re-activation of his sentences almost seventeen months after the conclusion of the Circuit Court hearing which he has since chosen to appeal. The applicant had the full range of remedies by way of judicial review or an application under Article 40 available to him to challenge the lawfulness of his detention at that time but chose not to do so because, of course, he could not demonstrate any fundamental default of fairness or injustice based on the facts of his case: the absence of merit in the facts of his case in that regard is not changed by the Moore decision.*

*58. I am satisfied that the procedures under s.99(9) and (10) were relied upon by the State in good faith in that they were regarded as having the force of law at the time. These procedures were not and could not have been successfully impugned by the applicant because he could not have demonstrated any prejudice or fundamental injustice or inequality of treatment in the manner in which they were applied to his case. I am satisfied that where no demonstrable injustice of a fundamental nature has occurred in the applicant's case he should not be regarded as a person in respect of whom release must be ordered. I do not consider that there are any circumstances, exceptional or otherwise, in this case which require that the declaration made in the Moore case should have a retrospective effect, much less the blanket effect suggested.*

*59. The supervision and enforcement of the sentence duly imposed by the Circuit Court following the applicant's lawful conviction is essential to the fair and proper administration of criminal justice. It is clear that the learned trial judge addressed not only the narrow issue of the applicant's further convictions but the clear breaches of the other conditions which he had committed. Thus the basis for the revocation of the sentence was clearly considered in respect of both his commission of further offences under sub-section (9) and the breaches of conditions in respect of which the court may also revoke a suspended sentence under sub-section (17).*

*60. The purpose and intention of s.99 was to ensure that the facility of a suspended sentence might be available as a sentencing tool post conviction. It was essential for its operation as a useful and effective tool that the court be vested with a power whereby it could ensure that the convict would be faced with serious consequences if he/she failed to comply with the terms of suspension. Of course the incentive to comply with such conditions must stem from a personal determination to do so but it would be completely unrealistic to rely entirely on expressed good intentions. It is necessary for the advancement of rehabilitation and the protection of the rights of victims and the general public that the power to revoke a suspended sentence exists: otherwise, the administration of justice and public confidence in its serious purpose and effectiveness will be eroded. This is especially the case when a person who is a drug addict with a long history of addiction and criminality who has committed further violent offences involving the use, and in one case the discharge of, a firearm, and who has been assessed by the court as being a serious and dangerous offender, benefits from the imposition of a substantially suspended sentence.*

*61. When the applicant's sentence was imposed he fully understood the conditions by which he had to abide in order to continue to avail of the substantial leniency shown by the court in suspending most of the sentences. I am not satisfied that the form of retrospective effect contemplated in this application is in accordance with principles of certainty and fairness of procedures as contemplated in the administration of criminal justice under Article 38 of the Constitution. I do not consider that the circumstances of this case give rise to a default of fundamental requirements of the type contemplated for a successful collateral attack on a criminal trial exceptionally permitted under an Article 40 inquiry.*

*62. The retrospective application of the declaration of invalidity is not warranted in this case. The applicant pleaded guilty to the original offences charged on indictment. He was lawfully sentenced. He agreed the conditions of the suspended sentence. He breached those conditions. He admits the breaches. He was returned to court. He failed to object to the procedure adopted in doing so. He pleaded guilty to the offences in the District Court as a result of which he was returned to the trial court. He evinced no intention then or now of appealing those convictions to the Circuit Court. He could not have succeeded in a challenge to ss.99 (9) and (10) on the same basis as the Moore applicants. His application is without merit and is based entirely on the happenstance that the law under which he was returned to the trial court was declared invalid seventeen months after his suspended sentence was revoked. In the meantime he has appealed to the Court of Criminal Appeal: his appeal against the revocation is still pending but he has failed to lodge grounds or take steps directed by that court in order to advance his appeal."*

21. McDermott J. concluded:

*63. I am satisfied that each case of this kind must be examined on its own merits and that the authorities do not establish that a declaration of invalidity of the two sub-sections has a blanket retrospective effect. The applicant is not to be excluded from seeking the benefit of the declaration because his appeal under s. 99(2) is still pending and the*

*proceedings under s .99 have not been concluded. However, I am satisfied that he is not entitled to its benefit for the following reasons. Firstly, he engaged fully in the original sentencing process whereby following his plea for leniency he undertook to abide by the several conditions set down in the order for the purpose of securing his early release from custody. In response, the State intended to devote significant resources to secure his rehabilitation during the course of the suspension. As a result he obtained his release from custody. These decisions were made following advice and involved the making of an irreversible commitment by the applicant and the State. Secondly, absent a breach of those conditions the trial was at an end. Thirdly, he failed to challenge the s. 99 procedure at any stage. These procedures were relied upon and applied by the State in good faith and were the relevant law in force at the time. Furthermore, he cannot identify any substantive injustice or breach of his right to fair procedures or any unfair prejudice or discrimination suffered by him in the course of the hearings leading to the revocation. He seeks the technical benefit of the declaration which has no relevance to the merits of his case. To permit the applicant's release on that basis would tend to place a premium on a formal and rigid application of the declaration of invalidity which is not justified or mandated by the decisions of the Supreme Court and Court of Criminal Appeal set out above: nor is it justified on the facts of this case."*

22. The judgment of McDermott J. was appealed to the Court of Appeal. A unanimous Court of Appeal, concluded (paras. 30 to 31) that the activation of the suspended sentences could be considered as having taken place under the broad and general jurisdiction provided by s. 99 (17) of the 2006 Act. This conclusion was arrived at after Birmingham J. considered the transcripts from the Circuit Court. The learned Judge found that the consideration of the matter by the Circuit Court expanded beyond the confines of s. 99(10). He went on to state that while the Circuit Court Judge had not indicated that he was dealing with the matter under s.99 (17), "*the reading of the two transcripts would suggest that that is what was happening*". The relevance of this, as found by the Court of Appeal, is that it was not a pre-condition to the exercise of a s.99(17) jurisdiction that the person had to be brought before the court pursuant to s. 99(9). It was on this basis that the Court of Appeal held that the applicant was not in an unlawful custody, unlike the position in *Moore*.

23. Additionally, Birmingham J. went on to address the reasoning of McDermott J. which he described as "*compelling*". He stated:

*"32. If I am wrong about that I would in any event follow the reasoning of McDermott J. in the High Court. I accept, as he did, that a notice of appeal was lodged, which means that Mr. Clarke's position is to be distinguished from that of A. v. Governor of Arbour Hill Prison. However, like McDermott J., I do not believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before judgment in Moore that it follows automatically that Mr. Clarke is entitled to be released. The position is that Mr. Clarke committed offences of the utmost gravity. He persuaded the Circuit Court to deal with him in a very lenient fashion indeed and then very shortly after his release, having served the custodial element of his sentence, he breached the conditions of his suspended sentences in a number of respects. There was a full and fair hearing in the Circuit Court over two days which addressed the issue of whether the sentence should be activated. The judge in the Circuit Court decided to activate the sentence. Mr. Clarke has a right of appeal from that decision and has invoked that right by lodging a notice of appeal. On the hearing of that appeal Mr. Clarke can argue that the activation of the sentences in full was an excessive and disproportionate response*

*33. In those circumstances I cannot see how it can be said that there was a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises from a departure from fundamental rules of natural justice to use the language of State (McDonagh) v. Frawley and State (Aherne) v. Cotter.*

*34. Rehabilitation is an important aspect of penal policy. The possibility of a suspended sentence is a vital tool in promoting the objective of rehabilitation. The objective of rehabilitation will be frustrated if not indeed set at nought if those who chose to breach conditions attached to suspended sentences do not suffer the consequences. I find the reasoning of the High Court compelling and I would dismiss the appeal."*

24. In *Foley v. Governor of Portlaoise Prison,* McDermott J., in the High Court, refused a post *Moore* application for an Art. 40 inquiry on the basis that there was "finality" in terms of the substantive criminal proceedings. However, he also refused the application on another freestanding basis:-

*"38. As already stated, I am not satisfied that the applicant is entitled to the retrospective benefit of the declaration on the basis of principle adopted by the Supreme Court in A. v. Governor of Arbour Hill Prison, for the reasons already given. Even if this were not so, the court would be obliged to consider all other relevant aspects of the case and the words of Henchy J. in The State (Byrne) v. Frawley [1978] I.R. 326 , whether the applicant has by reason of his circumstances, including his conduct, "lost not the right guaranteed by the Constitution but his competence to make claim to it in the circumstances of the case". Each case depends on its own facts.*

*39. In this case, the applicant was the subject of a carefully constructed suspended sentence to which conditions were attached under section 99(1). He undertook to abide by those conditions. A sentence of imprisonment appropriate to his crimes was determined but suspended on his solemn undertaking to abide by the imposed conditions. He benefited from the sentence and was duly released from custody. He broke the conditions by committing further offences. He could only have anticipated in those circumstances that an application would be made to seek the revocation of the suspended part of the sentence and return him to custody. This duly occurred. He was afforded full representation and an opportunity to make such submissions and adduce such evidence as was deemed appropriate to the Court of Criminal Appeal at the revocation hearing. He objected to the jurisdiction of the court on the basis that the matter should have been returned to the Circuit Court for the determination of the revocation issue. That point was lost. That point was certified under s. 29 to the Supreme Court and the ruling of the Court of Criminal Appeal was upheld. There is no suggestion and no evidence to indicate that there was any want of fair procedures or breach of natural justice in the determination of the revocation issue before the Court of Criminal Appeal. No such point is advanced in these proceedings.*

*40. The applicant pleaded guilty to the 'trigger' offences which resulted in his return to the Court of Criminal Appeal under section 99(9). He did not and could not have initiated a challenge on the same basis as the applicants in Moore to the operation of the subsection in his case. He could not, therefore, have initiated or maintained a judicial review or an Article 40 application following the revocation of his sentence on the grounds which were ultimately successful in Moore. It is not, therefore, so much the case that the applicant acquiesced in not initiating any constitutional challenge to s. 99(9) and (10) on the Moore grounds, rather he had no basis for so doing."*

25. At para. 44 of his judgment, the learned judge had this to say:-

*"I am also satisfied that the process whereby the applicant submitted to the terms of a suspended sentence is important to the administration of justice. The rehabilitation of a convicted person is a prime consideration in sentencing policy. It inures to the benefit of the applicant and an ordered society. It is essential for the advancement of the applicant's rehabilitation and protection of the rights of victims and the general public that the power to revoke a suspended sentence exists: otherwise the effectiveness of the administration of justice and public confidence in it will be eroded. The imposition of a suspended sentence involves each of the parties including the applicant, the Director of Public Prosecutions, An Garda Síochána and the Probation and Welfare Services and the Prison Service in an irreversible process once the initial period of limitation in respect of the right of appeal against such sentence expires. It seems to me that it is only in the most exceptional circumstances that an applicant may secure his release post conviction under Article 40 and that it should only be in the most exceptional circumstances that a declaration of invalidity within the rules as set out in A v. Governor of Arbour Hill , should apply retrospectively. I am not satisfied that the applicant has demonstrated any circumstances which establish such a default of fundamental requirements of fair procedures, in the determination of the revocation of his sentence, that would justify his release in this application."*

26. McDermott J.'s decision was upheld by the Court of Appeal in *Foley v. Governor of Portlaoise Prison* [2016] IECA 411.

27. In *Ryan v. Director of Public Prosecutions*, an application for judicial review on foot of the decision in *Moore* was rejected by O'Regan J. After setting out that "*the case law provides that each case must be examined on its own merits and the authorities do not establish that a declaration of invalidity has a blanket retrospective effect"*, the learned judge was satisfied that:

*"the applicant's criminal case had reached finality prior to the institution of the within judicial review application and that this judicial review application could not be considered part of the process in order to establish that finality had not yet been reached, notwithstanding that judicial review was sought within the time limits afforded." (at para. 16)*

Regan J. went on to state:

*"17. Furthermore, even if finality had not been reached, the applicant in the instant matter is debarred by his conduct from securing the reliefs claimed by him on the basis that:-*

*a. The applicant pleaded guilty to the trigger offence.*

*b. He had breached two conditions of the suspended sentence, namely to be of good behaviour and to remain entirely alcohol free.*

*c. He did not maintain an appeal of the revocation of a portion of the suspended sentence under s.99(12).*

*d. The trigger offence was committed eight months following his release from prison.*

*e. The trigger offence was that of criminal damage, being one of the offences in the initial offence.*

*f. At the hearing of the revocation to suspend the sentence, the applicant did not raise a constitutional issue and in fact engaged with the provisions of s.99(10) in or about securing a partial revocation of the suspended sentence.*

*18. In the circumstances I refuse the applicant in each of the claims for certiorari based on s. 99(9) and s. 99(10) of the 2006 Act."*

28. In *Larkin v. Governor of Mountjoy Prison*, Eagar J. also rejected a post *Moore* Art. 40 application. While he found that the proceedings could not be considered as finalised for the purposes of the "*finality principle*" because the applicant had an extant appeal to the Court of Appeal in relation to the activation of a suspended sentence (similar to the applicant in the within proceedings), Eager J. was nevertheless satisfied to reject the application for an inquiry on the basis that the applicant had not appealed the conviction which led to the suspended sentence, that he had pleaded guilty to the "trigger" offences and that he had made no attempt to challenge the constitutionality of s.99(9) and (10) of the 2006 Act. Eager J. quoted with approval the following passage from the judgment of McDermott J. in *Clarke*:-

*"He engaged fully in the original sentencing process… he cannot identify any substantive injustice or breach of his right to fair procedures or any unfair prejudice or discrimination suffered by him in the course of the hearings leading to the revocation. He seeks the technical benefit of the declaration (in Moore) which has no relevance to the merits of his case."* (at para. 31)

The foregoing represents the legal landscape for the purpose of the present application.

**The applicant's submissions, in summary**

29. In his written submissions, while acknowledging given the basis upon which the within proceedings are opposed, that considerable reliance will be placed by the respondents on *Clarke*, counsel for the applicant contends that in *Clarke*, McDermott J. was led into error in the manner in which he considered the "*finality principle*" and that it is not clear what is by the learned Judge meant by "*the finality argument*".

30. It is also contended that the line of authority relied upon by McDermott J. in *Clarke* to refuse relief based on "*conduct*" does not substantiate the approach adopted in that case. It is further submitted, notwithstanding that the Court of Appeal found McDermott J.'s reasoning "*compelling*", that that reasoning is not supported by authority and is contrary to principle.

31. Counsel also contends that the "*conduct*" referred to in *Clarke* was radically different to the type of "*conduct*" that the applicant in the instant case could be accused of, albeit it is acknowledged that the applicant committed a very serious offence during the currency of a suspended sentence. It is also submitted that in *Clarke*, McDermott J. had regard to a whole range of issues which do not have any relevance to the particular position of the applicant in the within proceedings. This is in circumstances where the only "conduct" which could be relied upon to deprive the applicant of relief is the very fact he has committed an offence during the currency of the suspended sentence. It is submitted that for the Court to hold that that "*conduct*" of itself is such as to deprive the applicant of relief is contrary to principle. It is also submitted, in the alternative, that if the Court were to hold that the conduct of the applicant did equate with the conduct in *Clarke*, then *Clarke* was wrongly decided.

32. The applicant's position is that *prima facie* he is entitled to relief. Counsel contends the authorities relied upon in *Clarke* do not, in their substance or in principle, undermine the applicant's contention in this regard. The applicant is not seeking a "retrospective" application of the decision in *Moore*. Rather, the thrust of the applicant's application is that he is currently being detained on foot of provisions that have been found to be unconstitutional in circumstances where his criminal proceedings have not concluded.

33. Counsel also takes issue with para. 58 of the judgment in *Clarke* where McDermott J. states: "*I do not consider that there are any circumstances, exceptional or otherwise, in this case which require that the declaration made in the Moore case should have a retrospective effect, much less the blanket effect suggested*." This, counsel submits, is a misapprehension as to the appropriate principle: the search for "*exceptional circumstances*" only arises where the "*finality principle*" is a bar to relief. It is submitted that nowhere in the authorities such as *A v. Governor of Arbour Hill* and *Cunningham* is there a suggestion that the public policy considerations, which justify an exception to the finality principle "*once finality has been reached*", themselves constitute a freestanding basis upon which to refuse an applicant relief who would otherwise have been entitled to relief.

34. In the context of conduct and "acquiescence" as a bar to the granting of relief to the applicant in the within proceedings, counsel acknowledges that there is a line of authority relating to "acquiescence" which holds that a litigant, by his conduct, can be deprived of the entitlement to raise an issue during the currency of proceedings. It is submitted however that "acquiescence", as that concept has been addressed in relevant case law, is not alleged against the applicant in this case. Accordingly, the applicant does not fall under the rubric of "acquiescence" as enunciated in the State *(Byrne) v. Frawley* [1978] I.R. 326.

**The respondents' pleadings and submissions, in summary**

35. The respondents oppose the application for judicial relief on the following grounds :

- The applicant pleaded guilty to the offences the subject matter of the sentences imposed on Bill No. 298/2012;

- The applicant pleaded guilty on 22nd April, 2015 in respect of the dangerous driving offence. This conviction amounted to a "trigger" offence leading to the applicant being remanded in custody to Judge Ring on 18th May, 2015, for the consideration of the lifting of the suspension in respect of the sentences previously imposed on Bill No. 298/2012;

- Appeals have been lodged against the activation of the suspended sentence and the severity of the five and a half year sentence for the "trigger" offence;

- The applicant did not challenge the provisions of s. 99 (9) and (10) of the 2006 Act during the currency of the proceedings in respect of the prosecution for the "trigger" offence or the activation of the suspended sentence. As a result of not bringing a challenge the applicant is disentitled to relief. The provisions of s. 99 were presumed to be valid at the time they were sought to be invoked by the Director of Public Prosecutions;

- The judgment in *Moore* does not operate "retrospectively" in respect of the legality of the applicant's conviction for the "trigger" offence, the sentence imposed for that offence or the activation of the three year suspended sentence;

- The applicant cannot argue and has not alleged any want of fairness at the trial for the "trigger" offence or that his conviction for the 2012 offences (following a guilty plea) was otherwise unlawful or in breach of his constitutional rights;

- The applicant "secured a benefit" by pleading guilty to the offences the subject matter of the suspended sentence and thereby received a suspended sentence and there has been "acquiescence" in the manner of the disposal of the relevant criminal proceedings. The applicant's guilty pleas, following legal advice, disentitles him to any claim of denial of rights;

- Although accepting that the criminal proceedings are not "finalised", the behaviour of the applicant and the manner he met the proceedings and all the circumstances of the case, including his pleas of guilty, his failure to object to the operation of s. 99 though legally represented, the fairness of the disposal of the proceedings by Judge Ring, his breach of the suspended sentence by committing a further offence of utmost gravity, militate against the Court exercising its discretion to grant relief.

36. In written submissions, the respondents contend that all of the propositions which the applicant now puts forward as a basis for relief to be granted in his case were rejected by the respective decisions of the High Court, Court of Appeal and Supreme Court in *Clarke*. Furthermore, similar arguments to those now being put forward were also rejected in the *Foley, Ryan* and *Larkin* cases. Accordingly, on the basis of these authorities, the present claim for judicial review should be dismissed.

37. The respondents rely specifically on the applicant's guilty pleas both in respect of the offences for which the suspended sentence was imposed and the "trigger" offence. Furthermore, there was no challenge by the applicant to the constitutionality of s. 99(9) and (10) at any relevant time. This was in circumstances where he was legally represented at all times. Furthermore, there was no failure to afford natural justice to the applicant at any stage in the Circuit Court proceedings and no exceptional circumstances arise which could be described as constituting a fundamental injustice done to the applicant during the currency of the proceedings before the Circuit Court.

38. The fact of the matter is that the applicant breached the terms of a suspended sentence by committing further serious offences. He has extant an appeal to the Court of Appeal on the merits of the activation of the suspended sentence. It is also the case that he has appealed the consecutive sentence imposed in 2015 for the offence of dangerous driving causing death or serious injury.

39. While the applicant asserts that he is not seeking any retrospective application of the findings in *Moore*, in reality that is what he is seeking. Without *Moore*, the applicant would not have an argument to seek leave to apply for judicial review. It is further submitted that his conduct and "acquiescence" in the substantive Circuit Court criminal proceedings disentitle him to relief.

40. In all of the circumstances, notwithstanding that by virtue of his extant appeals before the Court of Appeal (Criminal Division) the applicant's criminal proceedings cannot be considered finalised, the application for judicial review should be rejected, on the authority of *Clarke*, given the parallels between that case and the applicant's circumstances. It is submitted that it was the particular features of the *Clarke* case, as considered by McDermott J. against the relevant legal principles applicable to convicted prisoners, including where there has been a finding of unconstitutionality (see paras. 33 – 52 of the judgment of McDermott J. which refer, *inter alia*, to

*State (McDonagh) v. Frawley [*1978] I.R. 131, *State (Ahern) v. Cotter* [1982] I.R. 188*, State (Royle) v. Kelly* [1974] I.R. 259, *A. v. Governor of Arbour Hill prison* [2006] 4I.R. 88 and *Director of Public Prosecutions v. Cunningham* [2012] IECCA 64) that influenced the learned Judge to decline relief in *Clarke*. Accordingly, all of the arguments which the applicant in the within proceedings advances to obtain relief have been considered by McDermott J. in *Clarke* and relief was nevertheless declined in that case for the reasons set out at paras. 53 – 62 of the judgment.

41. It is also submitted that insofar as the applicant advances the proposition that by reason of the declaration of an unconstitutionality in *Moore*, no sentence could have been lawfully imposed by Judge Ring (or by the Court of Appeal (Criminal Division) in any future appeal hearing in respect of the reactivated sentence), the applicant does not explain the basis for this aspect of his claim. In any event, it is submitted that the applicant is raising the same argument as was raised in *Clarke* and it must be taken to have been rejected as having no proper basis as the applicant in *Clarke* was refused release.

**Considerations**

42. In the first instance, counsel for the applicant made a number of submissions with regard McDermott J.'s treatment, in *Clarke*, of the "*finality argument*". I do not perceive those submissions as germane to the issue which this Court has to decide. It is not in dispute but that the applicant has appealed both the severity of the sentence imposed for the "trigger" offence and the activation of his suspended sentence. Accordingly, there has been no finality in the proceedings such as to preclude the applicant from raising the issue of the invalidity of s. 99(9) and (10) the 2006 Act under which he was returned to the Circuit Court on 18th May, 2015.

43. The applicant's principal contention is that s. 99(9) and (10) of the 2006 Act, by virtue of the decision in *Moore*, never had a lawful basis in the State. He argues that the Order of the Circuit Court of 18th May, 2015, which activated his suspended sentence thus requiring him to serve a lengthy prison term never had any validity, having regard to the provisions of the Constitution.

44. In essence, in these proceedings, the applicant takes issue with the jurisdiction of the Circuit Court to deal with him pursuant to the provisions of s. 99(9) and (10) of the 2006 Act. The applicant contends that his arguments do not hinge on having to disprove his "acquiescence" to issues such as the admissibility of evidence at the criminal trial or tactical decisions taken in the interest of the defence during the course of his trial. Even if there had been some form of "acquiescence" (which the applicant denies), it is submitted that "acquiescence" could not have vested jurisdiction in the Circuit Court on 18th May, 2015, when it did not have such jurisdiction *ab initio*, by virtue of s. 99(9) and (10) never having had any validity in the State. This is the fundamental principle on which the applicant hinges his present challenge. Accordingly, he argues that by reason of the declaration of unconstitutionality in *Moore*, no sentence could have been lawfully imposed by Judge Ring at the activation hearing on foot of Bill No. 298/2012. Similarly, it is contended that the Court of Appeal (Criminal Division) cannot impose any sentence or make any order for the same reason.

45. Counsel for the applicant also submits that a similar argument as is now being made in these proceedings was advanced before the High Court and the Court of Appeal in *Clarke* but that neither judgment dealt with this argument and, accordingly, it is counsel's contention that the question remains to be determined.

46. I am not persuaded by the applicant's counsel's contention that the primary argument which he advances before this Court has not yet been adjudicated upon in jurisprudence. I note that in his decision for the Court of Appeal in *Foley v. The Governor of Portlaoise Prison*, Mahon J. summarised the arguments of the applicant in that case in the following terms:

> *"18. The appellant maintains that A does not preclude the appellant from bringing his challenge and benefiting from the decision in Moore. The appellant maintains that his case comes within the exception to the rule as provided for in A. He also maintains that since the declaration of repugnancy operates to render the sub sections void abi nitio, the court activating the suspended sentence lacked jurisdiction on two separate and distinct grounds, firstly the remand order pursuant to subsections 9 on foot of which the appellant was brought before the activation court was invalid and devoid of legal effect and, secondly, the statutory power utilised by the activation court to activate the sentence and order the appellant's imprisonment was not available to the court as it was a power that no longer existed."*

47. In the course of his judgment, the learned Judge cited, *inter alia*, the *dicta* of Regan J. and Eager J. in *Ryan and Larkin* respectively. At para. 22 of his judgment, he quoted O'Regan J. in Ryan to the effect that "*the authorities do not establish that a declaration of invalidity has a blanket retrospective effect*". At para. 24,Mahon J. goes on to state:

> *"In Larkin v. The Governor of Mountjoy Prison [2016] IEHC 680, similarly a post Moore Art. 50 application, Eager J. re-iterated that, based on the authorities, a declaration of the invalidity of a statutory provision does not have blanket retrospective effect."*

48. That, to my mind, appears to be an implicit, if not an explicit, rejection of the argument which had been put forward in *Foley*, as summarised in Mahon J.'s judgment and as quoted above.

49. In *Clarke v. The Governor of Mountjoy Prison* [2016] IESCDET 122, an argument of a similar nature to that being advanced by the applicant in the within proceedings formed the basis of an application to the Supreme Court to have that Court accept a further appeal. In the grounds of appeal sought to be relied on if leave to appeal was granted, it was argued, *inter alia*, that a lawful order under s. 99 (10) depended upon the proper and lawful invocation of s. 99 (9); that the Court of Appeal had erred in law in mischaracterizing the "finality argument" as one relied on by the applicant in *Clarke* (whereas the thrust of the argument advanced before the Court of Appeal was that the order which held him in custody was one which had been held to be invalid having regard to the provisions of the Constitution and that, accordingly, he had not lost the competence to seek his release); that the Court of Appeal failed to address the fundamental submission that the default of fundamental requirements of the law upon which the applicant in *Clarke* relied related to the fact that he was serving a seven year sentence for which there was no legal justification; and that McDermott J. in the High Court had failed to address the absence of jurisdiction in the Court of Appeal (Criminal Division) to entertain an appeal in circumstances where its jurisdiction to entertain an appeal (whether on a stand alone basis under s. 99 (12) of the 2006 or under s. 3 (2) of the Criminal Procedure Act 1993) would only be the same as that of the Circuit Criminal Court, which jurisdiction had been held in *Moore* to be invalid having regard to the provisions of the Constitution.

50. In refusing to admit the appeal, the Supreme Court was clearly of the view that nothing of general public importance or touching upon the interest of justice arose in the *Clarke* case. The determination of the Supreme Court was as follows:

> *"22. The analysis of the Court of Appeal as to the relevance of subs. (17) is based on its analysis of what had transpired in the Circuit Court. Whether or not that analysis is correct is not a matter of general public importance, but is specific to the facts of the case. This Court no longer has the role of correcting errors, but is constrained in its functions by the Constitutional criteria identified above.*

*23. The Court also considers that it is clear that the Court of Appeal, while forming its own view of the case, fully endorsed and adopted the reasoning of McDermott J. in the High Court. There are thus two separate, independent bases for the decision.*

*24. The applicant has chosen not to address any argument or ground of appeal arising from the endorsement of the reasoning of McDermott J. Under its new jurisdiction, leave to appeal to this Court does not allow an appellant to argue grounds not raised in the notice of application for leave. Applicants must therefore seek leave on all grounds that they wish to have considered.*

*25. It is clear that the applicant retains his appeal to the Court of Appeal, where he can argue against the re-activation of his sentence on grounds that it is excessive and/or disproportionate.*

*26. The Court is satisfied that this application does not meet the criteria set out in the Constitution. Consequently, the Court refuses to grant leave to appeal."*

51. Solely by way of observation, it appears to me therefore that the Supreme Court did not consider the applicant's argument, namely that the absence of legal justification for the activation of the suspended rendered the activation void *ab initio*, came within the constitutional criteria for intervention by the Supreme Court.

52. Accordingly, I am satisfied that the applicable jurisprudence against which this Court must consider the present challenge is as set out at paras. 15 to 28 of this judgment.

53. For the purpose of the present challenge, I turn now to the applicant's specific circumstances by which the suspended sentence came to be activated. On 14th November, 2013, the Circuit Court dealt with the applicant on Bill No. 298/2012, which concerned the offences of unlawful use of a stolen motor vehicle, driving while drunk and driving without a licence. These offences involved the applicant driving at speed while being pursued by the Gardai, but on that occasion did not involve injury to anyone. He pleaded guilty to the said offences. On 14th November, 2013, the applicant was disqualified from driving for four years and received, *inter alia*, a three year sentence, suspended for three years. The applicant was specifically advised by the trial judge that she would impose the three year sentence if she saw him during the suspended period. No appeal was taken in respect of the penalties imposed on the applicant. On 29th May, 2014, the applicant committed the "trigger" offences. These again involved driving offences but which on this occasion resulted in the death of one person and serious injury to another. The offences were committed some six months into the period of the applicant's three year suspended sentence. Accordingly, it is clear that the applicant had failed to abide by the direction of the sentencing judge. At his trial for the "trigger" offences, the applicant entered a plea of guilty to the offences of dangerous driving causing death and serious injury. In that circumstance, he never evinced an intention to appeal the conviction for the "trigger" offences, unlike the situation which pertained in *Moore*. Nor is it suggested, on affidavit or otherwise, that the applicant sought to challenge the constitutionality of s.99(9) and (10), and it appears that no objection was raised to the Order of 22nd April, 2015, remanding him in custody for the purpose of a sentence hearing for, *inter alia*, the potential activation of the suspended sentence.

54. It is clear from the trial transcript that the applicant was represented by solicitor and counsel during the activation hearing. Equally, there is no suggestion but that he was legally represented at his trial on foot of Bill No. 298/2012. Furthermore, the case is not made by the applicant or his legal representative in the course of these proceedings that there was any substantive injustice or breach of the applicant's rights to fair procedures at his trial on foot of Bill No. 298/2012. Nor is it now alleged that there was any unfair prejudice or discrimination suffered by him in the course of the hearing leading to the activation of his suspended sentence such that would warrant *certiorari* of the Order of the Circuit Court activating the suspended sentence. In any event, this Court has had the benefit of the transcript of the proceedings before the Circuit Court.

55. I am satisfied that on 18th May, 2015 the Circuit Court dealt in good faith with the applicant in accordance with the law as then understood to be applicable. He submitted to its jurisdiction and acquiesced in its exercise, as is clear from the submission made on his behalf on 18th May, 2015, when his counsel acknowledged that if the Circuit Court was so minded, it could impose all, or such element of it as it felt appropriate, of the three year sentence suspended in November, 2013.

56. It is common case that the applicant has appealed the activation of his suspended sentence and the severity of the sentence for the "trigger" offences. At the hearing before the Court of Appeal, it will be open to him to argue that the activation of the suspended sentence was an excessive and/or disproportionate response.

57. The net issue for this Court is whether the applicant is precluded from obtaining the benefit of the declaration of unconstitutionality in *Moore*, as contended for by the respondent. Having considered the merits of the applicant's case, I am satisfied that the decided authorities particular to the consequences of the declaration of unconstitutionality made in *Moore*, as referred to in this judgment, support the respondents' argument that the applicant's application for judicial review should be rejected. Furthermore, whilst the applicant stresses that he is not looking for the *Moore* declaration to have any retrospective effect, on any reasonable interpretation of the substance of his case, as pleaded, the reality of the matter is what he is seeking is that the declaration of unconstitutionality should have a blanket effect. That being the case, the relevant jurisprudence both pre- and post-*Moore* is clearly against the applicant's claim, having regard to the particular circumstances of his case. I am satisfied that the circumstances where prisoners can obtain relief in cases of this kind are limited. There must be, in the words of Birmingham J. in *Clarke*,:

*"a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises on a departure from fundamental rules of natural justice".*

58. I find that there are no such features in the applicant's case. I am satisfied that in deciding the matter, this Court is bound by the Court of Appeal decision in *Clarke*. Accordingly, the relief sought in the notice of motion herein is denied.