THE HIGH COURT

[2016 No. 464 J.R.]

BETWEEN

JASON HEAPHY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

IN THE MATTER OF AN INQUIRY PURSUANT TO

ARTICLE 40.4.2 OF BUNREACHT NA hÉIREANN

[2017 No. 143 SS]

BETWEEN

JASON HEAPHY

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 31st day of July, 2017

1. In the proceedings herein, the applicant challenges the lawfulness of an order of the Circuit Court made on 24th November, 2015 whereby a three year suspended part of a ten year sentence imposed on 25th February, 2008, was re-activated, pursuant to the provision of s. 99 of the Criminal Justice Act, 2006, ("the 2006 Act") upon the conviction of the applicant for offences committed in May, 2015.

Background

2. On 25th February, 2008, in proceedings entitled as between the respondent in the within judicial review proceedings and the applicant and bearing the record no. CK 000224/2007, the applicant, having pleaded guilty, was sentenced to ten years imprisonment for the possession of cocaine (pursuant to s. 15A of the Misuse of Drugs Act, 1977 (as inserted by s. 4 of the Criminal Justice Act, 1999) and s. 27 of the Misuse of Drugs Act, 1977 (as amended by s. 5 of the Criminal Justice Act, 1999). The sentence was backdated to 25th October, 2007. The final three years were suspended on the applicant's undertaking to keep the peace and be of good behaviour towards all the people of Ireland for a period of three years. The finer points of the bond is an issue in the within proceedings and are addressed later in this judgment.

3. On 15th February, 2013, the applicant was released from custody on foot of the 2008 proceedings, which had been extended by a one month consecutive sentence by reason of a 2011 mobile telephone offence. Post his release, the applicant committed various offences under the Road Traffic Acts in respect of which he was ultimately sentenced, after appeal to the Circuit Court, to six months imprisonment which was suspended in its entirety. There was no reliance on s. 99 (9) of the 2006 Act to reactivate the suspended sentence which was imposed on 25th February, 2008.

4. On 4th May, 2015, the applicant was found in possession of controlled drugs. On 11th November, 2015, after a six day trial, the applicant was found guilty of two counts in the indictment regarding the unlawful possession of controlled drugs for the purpose of selling or otherwise supplying them to another or others in contravention of the Misuse of Drugs Regulations 1988 and 1993 made under s. 5 of the Misuse of Drugs Act, 1984, and contrary to ss. 15 and 27 of the Misuse of Drugs Act, 1977. The applicant was also found guilty of two offences contrary to s. 3 of the Misuse of Drugs Act, 1977, on the same date.

5. On 24th November, 2015, the Circuit Court (Judge Riordan) exercised the power pursuant to s. 99 (10) Criminal Justice Act 2006, as amended ("the 2006 Act") to revoke the earlier three year suspended portion of the sentence handed down on 25th February, 2008. There was no objection made to the application to revoke. Judge Riordan then sentenced the applicant to three years imprisonment in respect of each of the two s. 15 offences ("the triggering offences") which sentences were ordered to run concurrently with one another, but consecutively to the revoked suspended sentence. **(Tab 4, para.9)**

6. On 8th December, 2015, the applicant lodged a notice of appeal against conviction and sentence for the triggering offences. No appeal was prosecuted under s. 99 (12) of the 2006 Act against the decision to revoke the suspended portion of the 2008 sentence.

The judicial review

7. On 19th April, 2016, judgment was delivered by Moriarty J. in *Moore v. Ireland* [2016] IEHC 244 in which s. 99 subs. (9) and (10) of the 2006 Act were deemed unconstitutional.

8. On 11th July, 2016, leave was granted to the applicant to seek review of the orders made by Judge Riordan on 24th November, 2015. The grounds on which the applicant relied for leave to seek *certiorari* of the order made on 24th November, 2015, were that the sentences imposed were made in breach of his constitutional rights and/or in excess of the jurisdiction of the Circuit Court as a consequence of which he was unlawfully detained. It is acknowledged that the judicial review proceedings were initiated on the back of the decision of Moriarty J. in *Moore*.

9. Since the decision of Moriarty J. in Moore, the extent to which other persons in custody on foot of sentences reactivated under s. 99 (9) and (10) can rely on *Moore* has been the subject of consideration in a number of cases, including *Clarke v. The Governor of Mountjoy Prison* [2016] IEHC 278 (27th May 2016), *Gheorge Pasare* (application for habeas corpus) [2016] IEHC 312 (9th June 2016),

Edward O'Sullivan (application for habeas corpus) [2016] IEHC 311 (9th June 2016), *Foley v. The Governor of Portlaoise Prison* [2016] IECA 411, *Ryan v. the Director of Public Prosecutions* [2016] IEHC 380, *Larkin v. The Governor of Mountjoy Prison* [2016] IEHC 680. On, 28th July, 2016, the decision of McDermott J. in *Clarke v. Governor of Mountjoy Prison* was upheld by the Court of Appeal.

10. The net effect of these judgments is that other persons in custody on foot of reactivated orders should not automatically benefit from the findings of unconstitutionality made in the *Moore* case and that each case fell to be decided on its own facts. The cases identify a range of relevant facts which include whether an appeal was taken, whether objection was made before the reactivation of the sentence, whether there was a guilty plea or not on the triggering offence and whether finality had been reached in respect of the triggering offence.

11. Counsel for the applicant acknowledges that having regard to the principles developed in the aforesaid recent case law, the applicant does not seek to identify factors in his case which would allow him to succeed in these proceedings by reason of the unconstitutionality of s. 99 (9) and (10). Accordingly, insofar as the applicant relied on Moore, that aspect of his challenge falls away.

12. However, it is the applicant's case that quite apart from the considerations flowing from the unconstitutionality of s. 99(9) and (10), which it is acknowledged prompted the within judicial review proceedings, the applicant's detention is unlawful on a number of grounds.

13. The first of the arguments upon which the applicant now relies in support of his contention that his detention is unlawful was advanced in February, 2017, essentially on the eve of the hearing of the challenge which the applicant brought on foot of Moore.

14. It is common case that in July, 2016, for the purposes of bringing the within judicial review proceedings the applicant's solicitor, Ms Hallahan, took up what is described in the statement of grounds as "copies of the said orders of 25 February, 2008 and 24 November, 2015", exhibited as "DH1" and "DH2" in her affidavit sworn 7th July, 2016.

15. The judicial review proceedings were scheduled for hearing on 3rd February, 2017. On 2nd February, 2017, Ms. Hallahan swore an affidavit for the purpose of grounding an application for an inquiry pursuant to Article 40.2 of the Constitution into the lawfulness of the applicant's detention at Cork prison.

16. In her 2nd February, 2017 affidavit, Ms. Hallahan addressed the orders which were exhibited in her earlier affidavit, as follows:

> "While the 2008 Order records a ten year sentence and records the suspending of the final three years of same, it is clear from the face of the order that the condition of suspension specified by the sentencing judge is that the Applicant be of good behaviour for three years 'from this date' which I read as being the date of the Order (namely, the 25th February, 2008). Accordingly, I believe and I am advised that when the offences for which the Applicant was convicted in November, 2015, were committed the condition of good behaviour specified in the Order was not breached as the term of that condition had ended. I note that the Committal Warrant on foot of which the Applicant is detained recites the condition of suspension of sentence imposed in 2008 incorrectly as being '*that he will keep the peace and be of good behaviour towards all the people of Ireland for a period of 3 years post release'*. This is not what the Order … on its face provides. The condition to be of good behaviour as recorded on the Order was spent by February, 2011 and offending behaviour in May, 2015 (the date of the triggering offences) could not result in a breach of the good behaviour condition.
>
> …
>
> It seems from the terms of the Committal Order made that the Court in making the Order in November, 2015 to reactivate the earlier suspended sentence did so on the mistaken basis that the triggering offence had occurred during the period of the condition to be of good behaviour whereas the term of the said condition as recorded on the order was over in February 2011
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> …
>
> Accordingly, to the extent that the Applicant is in custody on foot of a reactivated sentence contained in an Order made in February, 2008, I believe his custody to be unlawful as that sentence ought not to have been reactivated in November, 2015. I say this because it was a condition of the 2008 Order and suspension as recorded on the face of the Order that he be of good behaviour for three years from February, 2008 and not for the duration of the sentence with the result that he was not in breach of condition in May, 2015 when the triggering offences occurred and should not have been sentenced as if he were in breach of condition. I further say that his custody is unlawful because the 2008 Order fails to comply with the requirement of s. 99(2) of the Criminal Justice Act, 2006 and could not properly therefore form the basis of an order under s. 99 (9) & (10) of that Act to reactivate the suspended sentence. I am advised that the conditions precedent to the making of an order under s. 99 (9) & (10) were not met on the face of the Order."

17. It is acknowledged by Ms Hallahan that it was only in February, 2017 that the she noticed the difference between the Order she describes as the Order of 25th February, 2008 exhibited in her 7th July, 2016 affidavit at "DH1" (hereinafter referred to as "the purported Circuit Court Order") and the Order of Judge Riordan dated 24th November, 2015.

18. On 3rd February, 2017, on foot of the contents of Ms Hallahan's affidavit of 2nd February, 2017, a new hearing date for the within proceedings was fixed by White J., and he directed the applicant to issue and serve a notice of motion in relation to a parallel inquiry pursuant to Article 40 of the Constitution, which was duly done.

19. On 16th March, 2017, Detective Sergeant Laurence O'Brien, the prosecuting garda in both in the 2008 and 2015 proceedings, swore affidavits by way of reply to the affidavits sworn by Ms. Hallahan on 7th July, 2016 and 2nd February, 2017 in the judicial review and Art. 40 proceedings respectively.

20. With regard to what transpired before the Circuit Court on 25th February, 2008, Detective Sergeant O'Brien avers as follows:

> "3. [The applicant] pleaded guilty and was sentenced to ten years imprisonment which was backdated to October 25th 2007. The sentence was imposed on February 25th 2008. I was present in court when the sentence was handed down. I gave evidence at the sentence hearing.
>
> …

4. The sentence was backdated and the final three years were suspended. The applicant entered a bond to keep the peace and be of good behaviour on foot of which the final three years were suspended. The three years were to run not from the date on which sentence was imposed but from the date of the applicant's release from prison. This was abundantly clear to the applicant who entered the bond before the court. This was also the clear understanding of the prosecution, the gardaí and the prison service.

5. On the day the sentence was handed down a warrant was prepared for imprisonment of the applicant. It was signed by Martin O'Donovan who was then the acting County Registrar. As appears from the warrant, [the] bond was entered into in court orally and the bond required the applicant to 'keep the peace and be of good behaviour for a period of 3 years post release'.

…

6. In her affidavit of February 2017 Ms. Hallahan refers to a document exhibited to her affidavit [sworn in July 2017 at 'DH1']… This document is not a copy of the order made in February 2008. This is clear from the fact that the document also refers to the orders made in 2015 by his Honour Judge Riordan. The reference in the document to 'from this date' is not an accurate reflection of the order made by his Honour Judge Moran on February 25th 2008.

7. I have discussed this issue with Mr. O'Donovan who is now the County Registrar in Cork. He informed me that the document at 'DH1' to the affidavit of Ms. Hallahan is not the original court order but in fact a recently generated document. This is because the 2008 order was handwritten instead of computer generated. He went on to explain that the current computerised system used to generate Sentencing Order is not compatible with the system in place in 2008 and as a consequence document 'DH1' was created solely for the purpose of permitting the new system to generate the 2015 sentencing order. The applicant has not exhibited the original handwritten order.

8. Mr. O'Donovan has since drawn up a certificate of conviction relating to the order in question. It refers to the ten year sentence being imposed with the final three years suspended on the applicant entering a bond to keep the peace and be of good behaviour 'for a period of 3 years post release'.

…

11.At the sentence hearing [on 25th November, 2015] it was abundantly clear to the applicant, the prosecution, the applicant's legal team and the judge that the offence committed in May 2015 was in breach of the bond the applicant entered into in February 2008.

12. Proceedings were initially brought by way of judicial review …The proceedings as originally framed did not relate to any defect now being suggested to exist on face [of] the document although it was exhibited to an affidavit sworn in July 2016. The proceedings as originally framed appeared to relate to an attempt by the applicant to enjoy the benefit of the decision of This Honourable Court (Moriarty J.) in *Moore v. Ireland* [2016] IEHC 244."

21. On 22nd March, 2017, Ms. Hallahan swore an affidavit in reply to Detective Sergeant O'Brien's affidavit wherein she avers that the purported Circuit Court Order was emailed to junior counsel for the applicant by Cork Circuit Court Office on 6th July, 2016. By way of response to para. 7 of Detective Sergeant O'Brien's affidavit, she goes on to aver, at para.5:

"a. I have also spoken with the said Mr. Martin O'Donovan, Registrar who has informed your deponent that in fact there is no handwritten sentence order in respect of the Applicant from 2008 on the Court file.

b. I say further that your deponent is advised that a copy of any such order from 2008 ought, if it exists, to have been furnished to both the Governor of Cork Prison and to the Respondent by the Courts Service and I have therefore sought a copy of same [from] the Respondent also by e-mail dated 22 March 2017…

c. I say further that your deponent attended at the Cork Circuit Court Office in February, 2017 seeking a copy of the 2008 order. The order was duly printed off by the said Mr. Martin O'Donovan who advised that there was going to be a problem with same because of a failure to specify a date for commencement of the suspended portion of the sentence imposed in 2008. The order given to your deponent on this occasion is the same as that exhibited "DH1" of your deponent's affidavit of February, 2017."

22. Ms. Hallahan outlines further inquiries made by her on 21st March, 2017 of Cork Circuit Court Office. These revealed that the purported Circuit Court Order was in fact created in 2012 which, she states, was not consistent with the position being advanced by the respondents, namely that the only documents on the file relating to the 2008 proceedings were the handwritten warrant and the Certificate of Conviction, as exhibited in Detective Sergeant O'Brien's affidavit. She goes on to state that she would have expected a copy of the handwritten order which was drawn up in February 2008 to be on file together with the 2012, 2016 and 2017 computer generated documents, albeit she acknowledges that the latter may be found on computer.

23. The matter came before this court for hearing on 23rd March, 2017. On that date it was urged by counsel for the respondent that there was a potential conflict between what it was alleged was said by Mr. O'Donovan to the applicant's legal representatives and what was deposed to by Detective Sergeant O'Brien. Matters were adjourned to 28th March, 2017, for the purpose of Mr. O'Donovan swearing affidavits in response to the judicial review and habeas corpus proceedings. He swore such affidavits on 27th March, 2017, in almost identical terms.

24. He avers as follows:

"3. On 25th February 2008 the applicant was arraigned and pleaded guilty to all eight counts on bill CK 224/2007 proffered against him. Having heard the evidence of Sgt Lar O'Brien, his Honour Judge Patrick Moran handed down a sentence of ten years with the final three years suspended on condition he keep the peace and be of good behaviour for a period of three years following his release from the custodial portion of the sentence.

4. As our system was not computerised at the time, a handwritten Warrant was prepared by me on a template and signed by me in my capacity as Acting Country Registrar and given to the prison staff to convey the applicant to prison. That is the only document which was produced on the 25th February 2008. The order made by the court was transcribed onto the Trials Book Record Sheet.

…

5. On the 28th day of March 2008, I created a certificate of conviction as required by s. 96 the Criminal Justice Act 2006… [This] was signed by me on March 28th 2008 and transmitted to various parties as required by that section.

6. When the applicant was convicted by jury on Indictment CKDP220/2015 in 2015, evidence was given in relation to the 2008 conviction and the matter was adjourned to enable the 2008 file to be brought back before the Court. When the file was recovered from storage the bare details of the applicant, the offences and the sentence were entered onto the computer system. His Honour Judge David Riordan had before him the terms of the order made by Judge Moran in 2008. He then re-activated the three year balance of the sentence on bill CK224/2007 and a warrant was produced. The applicant was also sentenced to a further three year sentence consecutive upon the revoked sentence on bill CKDP 220/2015 and a warrant produced for that too.

7. In response to para. 5 (a) the affidavit of Diane Hallahan sworn on March 22nd 2017, I recall that I informed Ms. Hallahan that the only document produced on the 25th February 2008 was the original handwritten document. The document I was then refering to is the document at exhibit "LOB1" to the affidavit of Laurence O'Brien. This document was transmitted to the prison therefore was no longer on the court file but continues to exist."

25. At para. 10, Mr. O'Donovan lists a number of documents which he says contain evidence of the Order made on 25th February, 2008. These documents are more particularly referred to later in the judgment. Mr. O'Donovan goes on to aver:

"11. Unlike the District Court (which is subject to s. 14 of the Courts Act 1971 (as amended)) there is no statutory provision for the drawing up of orders of the Circuit Court in a particular form. Furthermore, unlike the District Court (which is subject to Order 12 Rule 2 of the District Court Rules) there is no requirement in the rules for the Circuit Court to record the contents of an order in a particular fashion.

12. Therefore, the requirement under s. 99(7)(b) of the Criminal Justice Act 2006 (as amended) was fulfilled by furnishing the prison with (a) a copy of the document at "LOB1" to the affidavit of Mr. O'Brien which sets out clearly the terms of the order [and] recites that this is done '*By order of the court'* and was signed by me as well as (b) furnishing the prison with a copy of the certificate made under s. 96 of the Criminal Justice Act 2006."

26. On 28th March, 2017, Ms. Hallahan swore supplemental affidavits in reply to Mr. O'Donovan's affidavits wherein she avers, *inter alia*, that "[i]t now appears clear from Mr. O'Donovan's affidavit that no order was drawn in 2008 or subsequently."

27. With regard to the Art. 40 proceedings, on 28th March, 2017, the Assistant Governor of Cork Prison certified the grounds for the applicant's detention by reference to two Warrants of the Circuit Court dated 24th November, 2015 respectively, the first of which records the revocation of the suspended portion of the applicant's ten year sentence and that he serve the heretofore suspended three years, to date from 11th November 2015. The second Warrant records the two concurrent three year sentences handed down on 24th November 2015 for the triggering offences and that they were to date from the legal termination of the reactivated suspended sentence.

The relevant statutory provisions

28. It is apposite at this juncture to set out the relevant provisions of the 2006 Act, as arise for consideration in this case.

29. Section 99 (1) of the 2006 Act provides:-

"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."

Section 99(2) states:

"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."

Section 99(7) provides:

"Where a court makes an order under this section, it shall cause a copy of the order to be given to—

(a) the Garda Síochána, or

(b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána."

Sections 99(9) and (10) state:

"(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, the court before which proceedings for the offence were brought shall, after 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 during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9)) pending the revocation of the said order.

The applicant's submissions

30. It is submitted that by virtue of the contents of "the purported Circuit Court Order", there is an error on the face of the Circuit Court Order drawn on 24th November, 2015. Counsel contends that Judge Riordan proceeded on the mistaken basis, as apparent from the Committal Warrant drawn up on 24th November, 2015, that the condition to keep the peace and be of good behaviour applied following the applicant's release from custody. Accordingly, since Judge Riordan purported to reactivate a conditional suspended sentence in circumstances where the conditions of the suspension expired in February, 2011, there could be no question of the applicant being in breach of his bond in May, 2015 (the date of the triggering offence). It is submitted that the only condition recorded on the purported Circuit Court Order is that the applicant was to keep the peace and be of good behaviour for a period of three years from 25th February, 2008. Accordingly, as a condition precedent (as required by s.99 (1) and as prescribed by s.99(2)) to trigger the reactivation of the suspended sentence under s.99(10) was not present, the Committal Order made on 24th November, 2015 is bad on its face.

31. Counsel for the applicant also challenges the lawfulness of the applicant's detention on foot of the reactivation of his suspended sentence on the basis that even if the court were to find that "the purported Circuit Court Order" was not the Order of Judge Moran of 25th February, 2008, there is in fact no written Order of 25th February such as could have given Judge Riordan jurisdiction on 24th November, 2015, to reactivate the applicant's suspended sentence. Counsel contends that s. 99 of the 2006 Act requires a written court order and submits that s.99(2)(b) implies that a written order is required.

32. It is submitted that none of the documents relied on by the respondent as constituting the order of 25th February, 2008 is sufficient for the purposes of s. 99 as these documents are not court orders. In particular, the handwritten warrant referred to in the affidavits of Detective Sergeant O'Brien and Mr. O'Donovan is not sufficient for the purposes of the 2006 Act. Nor can the respondent rely on a certificate of conviction under s. 96 of the 2006 Act since that part of the Act deals only with the mechanism to place a person on the Drugs Offender Register. Counsel contends that such a certificate is a proof only for the purpose of Part 9 of the 2006 Act and does not meet the requirement for a written order as required by s. 99 (7) of the Act. Furthermore, the contents of s.99(13) of the 2006 Act re-enforces the necessity for a written order. Counsel submits therefore that it follows that if no order was drawn up by the Circuit Court in 2008, then a condition precedent to the later reactivating of the applicant's suspended sentence on 24th November, 2015, was absent.

33. With regard to the requirement for a written order, counsel relies on J.O'G. v. Governor of Cork Prison [2007] 2 I.R. 203, where at para. 40, Peart J. states:-

> *"40. It is essential in a situation where a person is at risk of losing his liberty in the event of not complying with an order of the court directing him to do some act, that he is fully aware of that possibility. It seems obvious that the new wording was regarded by the Rules Committees in question, and the legislature subsequently, as bringing home to such a person the seriousness of any failure to observe the terms of the order. I cannot countenance a situation where, even though a person may in fact be aware of the consequences of his failure to comply with an order, the strict compliance with service of the order and the terms of the penal endorsement could be overlooked so as to facilitate the incarceration of the defaulter. On this ground also I would find that the detention of the applicant is unlawful."*

34. It is further contended that there is a third discrete basis which renders the applicant's detention on foot of the revocation of his suspended sentence unlawful. Counsel submits that nowhere in the material said by the respondents to constitute the Circuit Court order of 25th February, 2008 is there evidence of adherence to the provisions of s. 99 (2)(b) of the 2006 Act. At best, the Orders upon which the respondents rely record only that the applicant entered a bond to keep the peace and be of good behaviour during the period of post-release. In none of the documents is there a reference to the applicant having entered a bond to keep the peace and be of good behaviour during "the period of imprisonment and the period of suspension of the sentence concerned", as required by s. 99(2)(b) of the 2006 Act.

35. It is thus contended that a valid revocation of a suspended sentence can only arise if there has been compliance in the first instance with s. 99(1) and (2) of the 2006 Act. It is submitted that the jurisdiction which was previously vested in a court under s. 99(9) and (10) was contingent on the existence of a valid order under s. 99(1), which in turn requires that the requirements of s. 99(2) to be met. It is argued that none of the documents urged on the court by the respondents shows compliance with s.99(2)(b). Accordingly, as a condition precedent to the making of an order under s. 99(1) and (2), namely the failure to require the applicant to keep the peace and be of good behaviour in prison as well as post release, is absent from all of the documents relied upon by the respondent, this meant that on 24th November, 2015, Judge Riordan was deprived of jurisdiction to reactivate the suspended sentence. In this regard, counsel cites *The State (Browne) v. Feran* [1967] IR 147, *The State (Roche) v. Delap* [1980] I.R. 170, *Fitzwilton v. Mahon & Ors* [2008]1 I.R. 712 and *DPP v. Carter* [2014] IEHC 179.

36. It is acknowledged by the applicant, on foot of the reasoning of Baker J. in *Kovacs v. Governor of the Women's Prison* [2015] IEHC 418, that even if the court finds the applicant's detention on foot of the revocation to be unlawful, that does not impugn the warrant in respect of the triggering offences.

37. However insofar as the respondent cites *Kovacs* as sufficient to render the applicant's Art. 40 proceedings moot, counsel submits that, in *Kovacs*, it was only when Baker J. found the first sentence null and void that was she in a position to consider the validity of the consecutive sentence. Counsel submits that until such time as the court cures the applicant's unlawfully reactivated suspended sentence by declaring it null and void the applicant is in unlawful detention subject to a finding by the court that the concurrent sentences imposed by the Circuit Court for triggering offences are valid.

38. The point is also made by the applicant that, contrary to the respondent's assertion, neither the judicial review proceedings nor the Article 40 proceedings are a collateral attack on what occurred in 2008. The issue before the Court relates solely to what occurred before the Circuit Court on 24th November, 2015, as their effect on the applicant is from November 2015.

The respondents' submissions

39. First, the respondents reject the applicant's contention that no Circuit Court order exists in respect of the February, 2008

proceedings. Such an order exists, albeit that it does not have to be in a particular form, for the reasons deposed to by Mr. O'Donovan.

40. The respondents are not contending that the "purported Circuit Court Order" as exhibited in Ms. Hallahan's affidavit of 7th July, 2016, constitutes the order in respect of the 25th February, 2008 proceedings. That document is a computer document which was generated in 2015.

41. As to what constitutes a court order, counsel submits that an authority of assistance is *Miller v. Governor of Midlands Prison* [2014] IEHC 176. In that case, Baker J. had regard to a number of instances where the courts were prepared to resolve any ambiguity in Circuit Court sentences by reference to the Circuit Court records of the spoken decision on sentence.

42. It is submitted that there are a number of other documents which record the Order made on 25th February, 2008. In the first instance there is the document signed by Mr. O'Donovan on 25th February, 2008 which bears the seal of the Circuit Court. Over and above this document, Mr. O'Donovan's affidavit also exhibits the Certificate of Conviction made under s. 96 of the 2006 Act and signed by him on 28th March, 2008 (one month post the Circuit Court Order), which was sent to the applicant, the Garda Commissioner and the Governor of Cork Prison, as required by statute. Again, this document refers to the terms upon which the final three years of the applicant's ten year sentence was suspended.

43. Furthermore, there is the "Certificate of Conviction" drawn up by Mr. O'Donovan on 3rd March 2017. It likewise refers to the ten year sentence imposed on the applicant in 2008 with the final three years being suspended on the applicant's bond to keep the peace and be of good behaviour for three years post release. There is also the Trial Book Record Sheet, onto which Mr. O'Donovan transcribed Judge Moran's order of 25th February, 2008.

44. Accordingly, it is submitted that there are myriad documents which record the terms of the Circuit Court order 25th February, 2008. All bar one ("the purported Circuit Court Order") refer to the applicant being required to keep the peace for three years "post release". Thus, insofar as the applicant relies on "the purported Circuit Court Order" as evidence that his bond to keep the peace and be of good behaviour had expired by the time of the commission of the triggering offences such that Judge Riordan had no jurisdiction to revoke the suspended sentence, it is the respondent's case that the purported Circuit Court Order is not the order of the Circuit Court, but merely a document generated by a computer in 2015, and which is in any event an inaccurate record of what transpired on 25th February, 2008.

45. The respondents further submit that it is also clear from the Order of Judge Riordan of 24th November, 2015, as exhibited in Ms. Hallahan's affidavit of 7th July, 2016, that in 2008 the applicant received a ten year sentence to date from 25th October, 2007, the final three years of which were suspended upon his pledging to keep the peace and be of good behaviour for a period of three years post release.

46. It is further contended that there is no merit in the argument that s. 99 (7) was not complied with. A copy of the Order signed by Mr. O'Donovan on 25th February, 2008, namely that bearing the seal of the Circuit Court and with the words "By order of the court" was provided to the Governor, as is evident on the face of the document.

47. Insofar as the applicant contends that the Circuit Court Order of 25th February, 2008, had to be before Judge Riordan on 24th November, 2015, counsel submits that there is nothing in s. 99 (10) or (17) which mandates this. In any event, Mr. O'Donovan's affidavit makes it clear that the 2008 file (which included the trial ledger sheet which was created on 25th February, 2008) was before Judge Riordan. It is submitted that this document was capable of being construed as the Circuit Court Order of 25th February, 2008.

48. With regard to the third ground upon which the applicant's detention is challenged, counsel for the respondents submits that there is a fundamental frailty to the applicant's contention that the 25th February, 2008, Order does not comply with the provisions of s.99(2)(b). While s.99(2) can perhaps be read in the manner advocated by counsel for the applicant, there is an alternative reading of the provision which, it is submitted, the Court should adopt. This is addressed below.

49. It is further submitted that a more fundamental difficulty arises for the applicant. Whilst the applicant relies on the *dictum* of O'Malley J. in *Director of Public Prosecutions v. Carter* in aid of her argument that on 24th November, 2015 the Circuit Court was deprived of jurisdiction to revoke the suspended sentence because of an alleged defect on the face of the February 2008 Order, it is submitted that the *Carter* case is distinguishable. Counsel contends that unlike the position in Carter, the applicant's case is not one where there was an absence of a condition precedent such as may affect jurisdiction.

50. It is submitted that the applicant never sought to appeal the February, 2008 Circuit Court Order (which was an order of a court of competent jurisdiction) or otherwise seek to challenge it by way of judicial review. Accordingly, on 24th November, 2015, Judge Riordan was within jurisdiction in effectively, acting on foot of the 2008 Order and the exercise of his function was not dependent on ascertaining the validity or otherwise of the February, 2008 Order.

51. The respondents urge the court to reject the applicant's argument by reference to the decision of Peart J. in *Director of Public Prosecutions v. Vajeuskis* [2014] IEHC 265 which, it is contended, bears a closer analogy to the present circumstances than the case law relied on by the applicant.

52. It is further submitted that the applicant's reliance on *The State (Browne) v. Feran* does not assist him since on 24th November, 2015, the Circuit Court was only acting on foot of an earlier order.

53. Furthermore, counsel submits that even if the applicant is correct in her interpretation of s. 99(2)(b), at best the sentence which the applicant is serving on foot of the revocation Order of 24th November, 2015, falls away. The applicant's arguments do not impugn the two concurrent sentences imposed by the Circuit Court on 24th November, 2015, in respect of the triggering offences and which are consecutive to the revocation Order. In this regard, counsel cites the *ratio* of Baker J. in *Kovacs v.Governor of Womens Prison* [2015] IEHC 418.

The applicant's reply to the respondents' submissions

54. Counsel contends that *Vajeuskis* has no applicability to the present case. In *Vajeuskis*, the issue was the length of a previously suspended sentence, whereas in the applicant's case the issue is the jurisdiction of the Circuit Court on 24th November, 2015 to reactivate the applicant's suspended sentence. It is further submitted that *Miller* is of little assistance to the court in deciding whether there was a written order of the Circuit Court in February 2008 as Miller was not dealing with statutory requirements, unlike the present case.

Considerations
55. Essentially, the challenge on foot of *Moore* having fallen away, the applicant challenges the unlawfulness of his detention on the following grounds:

> 1. That on 24th November, 2015, Judge Riordan was without jurisdiction in revoking the suspended sentence as the requirement on the applicant to keep the peace and be of good behaviour was spent as of February 2011, some four years prior to the triggering offences which occurred in May, 2015;
>
> 2. That there was no written order reflecting what occurred on 25th February, 2008, as required by statute; and
>
> 3. Even if the court were to find that there was such a written Order, none of the documents relied on by the respondents on their face comply with the provisions of s. 99 (1) and (2) of the 2006 Act, with the result that on 24th November, 2015, the Circuit Court lacked the requisite jurisdiction to revoke the applicant's suspended sentence.

56. Fundamentally, the present case concerns the lawfulness of the applicant's detention. If the court finds the revocation of the suspended sentence to have been made without jurisdiction, the applicant cannot be lawfully held on foot of the Order revoking the suspended sentence.

Was the applicant's bond to keep the peace and be of good behaviour spent by the time he committed the triggering offences?
57. The first question which arises is whether the period of the applicant's suspension was spent by 24th November, 2015. To answer this, the court must determine what order was made by the Circuit Court on 25th February, 2008, and whether the "purported Circuit Court Order" constitutes the Order of the Circuit Court of that date. If this document constitutes the Order made by Judge Moran on 25th February, 2008, then the period of suspension was spent on 24th November, 2015, such that the Order made on 25th November, 2015, lacked jurisdiction on its face.

58. However, I am satisfied that "the purported Circuit Court Order" is not the Order made by Judge Moran on 25th February, 2008. The affidavits sworn by Detective Sergeant O'Brien and Mr. O'Donovan state that this is a document that was generated after the 2015 proceedings had concluded. It was provided to the applicant following a request by his legal representatives in July, 2015 for copies of the Circuit Court Orders of 2008 and 2015. As is patent from the document itself, it cannot constitute a contemporaneous record of what occurred on 25th February, 2008 (albeit it contains a recital of what occurred in the 2008 proceedings) since it contains details of what transpired before the Circuit Court on 24th November, 2015. Moreover, it is unsigned and has no court seal. Furthermore, it contains factual errors in that it refers to the late Judge Con Murphy as the sentencing judge on 25th February, 2008, when in fact it was Judge Patrick Moran who sentenced the applicant.

59. By reason of the foregoing, the Court finds that the "purported Circuit Court Order" does not reflect the Order which was made on 25th February, 2008. Accordingly, insofar as the applicant relies on this document in support of his claim that on 24th November, 2015, the Circuit Court lacked jurisdiction by reason of the fact that his term of suspension was spent by the time of the commission of the triggering offences his claim to be in unlawful detention on this particular ground falls away.

Does a written record of the 25th the February 2008 Circuit Court proceedings exist?
60. The Court now turns to the other argument canvassed by the applicant, namely that in fact there was no written order of 25th February, 2008, as required by the provisions of s.99 of the 2006 Act. The respondents agree that before an order revoking a suspended sentence could be made, the Judge who revokes the suspension must have regard to the order suspending the sentence. However, they refute the contention there was no record of the 2008 proceedings. The respondents point to myriad documents which they say evidence the Order made by the Circuit Court on 25th February, 2008.

61. At para. 10 of his affidavit, Mr. O'Donovan avers as follows:

> "There are a number of documents before This Honourable Court which contain evidence of the contents of the order which was made by his Honour Judge Moran on February 25th 2008 as follows:
>
> (a) The trials book record sheet …;
>
> (b) The handwritten document signed by me on February 25th 2008 which was sent to the prison with the applicant …
>
> (c) The certificate of conviction made under s. 96 of the Criminal Justice Act 2006 signed by me in March 2008 …;
>
> (d) The certificate of conviction signed by me in March 2017 which was created in the context of these proceedings …;
>
> (e) The unsigned print out furnished to junior counsel for the applicant which incorrectly recites the order from 2008 as part of the recital of the order from 2015 …;
>
> (f) The affidavit of Laurence O'Brien itself."

62. The Court is satisfied that the handwritten document created and signed by Mr. O'Donovan on 25th February, 2008, referred to at "(b)" above (the original of which was before the Court) is sufficient for this Court to find that it constitutes a record of the Order of Judge Moran of 25th February, 2008. This was also the document exhibited at "LOB1" in Detective Sergeant O'Brien's affidavit.

63. I am satisfied that this handwritten document, as created by Mr. O'Donovan on a template, is a written version of the Order made on 25th February, 2008. It bears the seal of the Circuit Court and has the words "By order of the court". While "Warrant" is written on the document, it is not on the title of the document. Accordingly, the document is not just a warrant (albeit it is referred to as such in Detective Sergeant O'Brien's affidavit), contrary to what is maintained by the applicant's counsel. This document contains everything that is required to constitute an Order of the Circuit Court of 25th February, 2008. It has the following: the requisite indictment number; the applicant's personal details; the date of conviction and sentence; and the name of the judge and court; and details of the crime. The substance of the Order made on 25th February, 2008, is then set out. It provides:

> "10 Years Imprisonment to date from 25/10/07 suspend final 3 years of this sentence on accused entering into a bond to keep the peace + be of good behaviour for a period of 3 years post release. Bond entered into orally"

64. I will return to the substance of the Order in due course and the applicant's contention as to its defective nature for the purposes of s.99(2) of the 2006 Act. However, it bears stating at this juncture that there is no suggestion from the contents of this document that the applicant's bond to keep the peace and be of good behaviour was to commence from 25th February, 2008. Again, this disposes of the contention that the conditions of the applicant's bond were spent by the time of the triggering offences. All in all, I am satisfied that insofar as the provisions of s.99(7) of the 2006 Act underscore the requirement for a written order when a sentencing court makes an order under s. 99(1) of the 2006 Act, that requirement was met by the creation by Mr. O'Donovan of the handwritten document as referred to above.

65. It is also clear that as well as reciting the details of the suspended sentence, this handwritten document also contains a "Warrant" to the Governor of Cork Prison to receive the applicant into his custody. As deposed to by Mr. O'Donovan, this document was given to the prison staff to convey the applicant to prison to serve the sentence imposed on 25th February, 2008. As this Court has found that the document in question records the Order of the Circuit Court of 25th February, 2008, as well as constituting the warrant to the Governor of Cork Prison to receive the applicant into his custody, there can be no question but that the Governor of Cork Prison received "a copy of the order" as required by the provisions of s.99(7) of the 2006 Act. Therefore insofar as the applicant contends that this did not occur, that contention is rejected.

66. As Mr. O'Donovan's avers, the aforesaid handwritten document was not before Judge Riordan on 25th November, 2015, when he revoked the suspended sentence. Counsel for the applicant submits that there is no evidence that the Order made on 25th February, 2008 was before the Circuit Court on 24th November, 2015. She submits that same is required pursuant to the provisions of the 2006 Act. For the purposes of the applicant's argument, this Court accepts that in order for the Circuit Court on 24th November, 2015 to satisfy itself that the terms of the applicant's suspended sentence had been breached there had to be evidence before the Circuit Court as to what Order was made in February, 2008.

67. In his affidavit, Mr. O'Donovan avers to having transcribed the Order made by Judge Moran on 25th February, 2008 onto the "Trials Book Record Sheet". It is not altogether clear from Mr. O'Donovan's affidavit that this particular document was before Judge Riordan. The document is however evidence of the spoken order of 25th February, 2008. At para. 6 of his affidavit, Mr. O'Donovan avers that when the applicant was convicted in November 2015, "evidence was given in relation to the 2008 conviction and the matter was adjourned to enable the 2008 file [to] be brought back before the Court." Mr. O'Donovan further avers that Judge Riordan had before him "the terms of the order made by Judge Moran in 2008".

68. "Tab B" of Ms. Hallahan's affidavit of 7th July, 2016, (albeit she refers to the documents solely as "warrants") exhibits the orders made by Judge Riordan on 24th November, 2015, in respect of the revoking of the applicant's suspended sentence and the imposition of sentence for the triggering offences. The first of these documents recites, in similar terms to what is contained in the handwritten document created by Mr. O'Donovan on 25th February, 2008, that on 25th February, 2008, the applicant was sentenced to ten years imprisonment with the final three years suspended on his entering a bond to keep the peace and be of good behaviour for three years post release. The document then goes on to recite the order revoking the suspension and that the applicant shall serve the entirety of the suspended period, such imprisonment to date from 11th November, 2015.

69. There is also the s. 96 Certificate which was prepared by Mr. O'Donovan on 28th March, 2008, as exhibited in his affidavit, a copy of which was on the Circuit Court file. I am not persuaded by the applicant's argument that this document does not constitute a record of Judge Moran's spoken Order on sentence. To my mind, the recitals therein contained are sufficient also for this Court to be satisfied that the terms of Judge Moran's Order of 25th February, 2008, were before Judge Riordan on 24th November, 2015. Furthermore, I also have regard to the contents of Det. Sgt. O'Brien's affidavit, in particular para. 9 thereof where he avers (with regard to the 2015 proceedings): "[The applicant] was sentenced on November 25th 2015. At the sentence hearing it was abundantly clear to the applicant, the prosecution, the applicant's legal team and the judge that the offence committed in May 2015 was in breach of the bond the applicant entered into in February 2008".

70. Overall, in the context of what was before Judge Riordan on 24th November, 2015, there is nothing which causes the Court to apprehend that there exists any unusual or special circumstances that might require me to exercise my discretion in this case and not regard the handwritten document prepared by Mr. O'Donovan on 25th February, 2008, or the Trial ledger sheet, or the s.96 Certificate or indeed the Order of Judge Riordan of 24th November, 2015 as evidencing the Order made on 25th February, 2008, especially as I can do so "*without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent*", to quote Baker J. in *Miller v. The Governor of the Midlands Prison* (at para. 27).

71. Thus insofar as the applicant seeks to impugn the lawfulness of his detention on the basis that there was no evidence of the 25th February, 2008, Order before the Circuit Court on 24th November, 2015, that argument is rejected. Furthermore, in so far as the case was made that there was no compliance with s.99(7) of the 2006 Act, that argument is rejected as the Court is satisfied that the handwritten document of 25th February, 2008, as created by Mr. O'Donovan, and which contains, *inter alia*, the "Warrant" to the Governor fully meets the requirements of s.99(7).

***Alleged failure to comply with s.99(2)(b) of the* 2006 Act**

72. It is contended by the applicant that in order for Judge Riordan to revoke the applicant's suspended sentence on 24th November, 2015, he was required to satisfy himself that s. 99(2)(b) of the 2006 Act had been complied with by the sentencing court in 2008, this being a condition precedent to Judge Riordan's jurisdiction to revoke the suspended sentence. It is also contended that the 24th November, 2015, Order, which reactivates the applicant's suspended sentence, is bad on its face as it recites and relies upon an Order made on 25th February, 2008 that did not comply with the mandatory provisions of s.99(2)(b).

73. Counsel for the applicant submits that given that the applicant's sentence was being suspended in part, the requisite Order, which the Statute mandated Judge Moran to make, was one pursuant to the provisions of s.99(2)(b) of the 2006 Act. It is argued that that was not done.

74. Thus, the applicant asserts that Judge Moran's Order of 25th February, 2008, as relied on and recited in Judge Riordan's Order of 24th November, 2015, renders the latter Order bad on its face and accordingly, the Governor has no lawful basis to detain the applicant on foot of the latter Order.

75. In support of her contention that the absence of compliance with conditions precedent goes to jurisdiction, counsel relies on the *State (Browne) v. Feran* and *The State (Roche) v. Delap.* Reliance is also placed on *Fitzwilton v. Mahon & Ors*, as authority for the proposition that where a requirement is mandatory, the question of whether the requirement has been complied with is a question of the construction of the document.

76. Counsel for the applicant effectively submits that all of the documents before this Court, said by the respondents to constitute

the Circuit Court Order of 25th February, 2008, are bad on their face in the absence of any recital therein that the applicant was bound to keep the peace and be of good behaviour while in prison as well as post release. Accordingly, in the face of the frailty as to jurisdiction evident on the face of the documents said by the respondent to record the spoken Order of Judge Moran on 25th February, 2008, the Court is urged by the applicant to adopt the approach in *The State Browne v. Feran* and *The State (Roche) v. Delap*, and that of O'Malley J. in DPP v. Carter.

77. It is contended that while the jurisdictional issue in *Carter* was different, the ratio applies to the present case, as the exercise of the jurisdiction under s. 99(9) and (10) is dependent on the requirements of s. 99(1) and (2) having been complied with in the first place.

78. Accordingly, it is submitted that even if the Court finds that one or other of the documents relied on by the respondents constitutes for the purposes of s. 99 the Circuit Court Order of 25th February, 2008, it remains the position that none of the said documents recites a statutory condition precedent to the suspension of part of his sentence, namely that he keep the peace and be of good behaviour in prison, as well as post release. Counsel for the applicant further submits that notwithstanding that the trigger offence occurred within the three years post release (and in respect of which, as reflected in all the documents said by the respondents to constitute the Circuit Court Order of 25th February, 2008, it was a condition of the suspension of part of the applicant's sentence that he would be of good behaviour and keep the peace for a period of three years post release), that did not cure the jurisdictional deficit which, it is said, pertains to the 24th November, 2015 Order.

79. Counsel for the respondents advocates that the Court should not adopt the applicant's counsel's reading of s.99(2)(b) of the 2006 Act. With regard to s.99 (2), counsel submits that if it is a fully suspended sentence that is being imposed, then the requirement to be of good behaviour and keep the peace is for the duration of the period of suspension. However, if the sentence is suspended in part only, then the requirement to keep the peace and be of good behaviour may be directed by the sentencing court either pursuant to the provisions of s. 99(2)(a) or s.99(2)(b) of the 2006 Act. Accordingly the respondents urges the foregoing as the plain and ordinary meaning of s.99(2). It is also urged that the applicant's counsel's reading of s. 99(2)(b) is erroneous on the facts of the applicant's case. The applicant was sentenced in respect of the 2008 offences on 25th February, 2008, with the sentence back dated to October 2007, presumably on the basis that the applicant was in custody as of the date of sentencing. It is submitted that the entering into a bond cannot be backdated. The respondents argue that if the applicant's counsel's interpretation of s.99(2)(b) is correct, a court when suspending a sentence in part only would encounter considerable difficulty in making it a condition that a person keep the peace and be of good behaviour both in prison and post release. By way of example, it is submitted that if the applicant had committed an offence in the week prior to being sentenced, and if the sentence were to be backdated, that would be a breach of the bond, on counsel for the applicant's interpretation of s.99(2). However, the respondents assert that it cannot be the case that the applicant would be retrospectively penalised in terms of s.99, which, counsel submits, the applicant's interpretation of s. 99(2)(b) would allow for. Therefore, it must be the case that there is latitude in a sentencing court, pursuant to s.99(2), where a sentence is being suspended in part, to require the entering of a bond for the period of the suspension only. The respondents contend that it cannot be the case that where a sentence is suspended in part that a person is required to keep the peace and be of good behaviour for the entirety of the sentence and post release, as that would be unworkable. If the applicant's argument is to be accepted, it means that a court could never backdate a sentence.

80. With regard to this particular argument, I am not satisfied that s.99(2) allows for such latitude to the sentencing judge, as advocated by counsel for the respondents, without the court having to do violence to the plain meaning of s.99(2)(b). All that being said however, the question to be determined in these proceedings is whether the failure of Judge Moran to make it a condition of the applicant's part suspended sentence that he keep the peace and be of good behaviour while in prison has the consequences contended for by counsel for the applicant.

81. The further basis upon which the respondents oppose the applicant's challenge is that the applicant is seeking to challenge the revocation Order of 24th November, 2015, by effectively reaching back to the Order of 25th February, 2008 and asserting that the latter Order has infected the Order made on 25th November, 2015. This, the respondents submit, is a fundamental difficulty for the applicant, as it is a collateral attack on the 2008 Order in circumstances where that Order was never challenged by way of appeal or judicial review. Furthermore, the respondents assert that in so far as the applicant relies on *DPP v. Carter*, that case is entirely distinguishable from the applicant's circumstances, as in the applicant's case no question of a condition precedent to Judge Riordan's jurisdiction arose, unlike the position in *Carter*.

82. *DPP v. Carter* concerned the question of whether for the purposes of considering the revocation of a suspended sentence a valid remand order had been made to the District Court where the suspended sentence had been imposed. The particular issue in *Carter* was what was meant by the words "*the next sitting*" as provided for in s.99(9) of the 2006 Act. O'Malley J. found that the District Court had no jurisdiction to deal with the defendant because a valid remand order had not been made. The learned Judge addressed the ramifications of the solely statutory provisions which govern suspended sentences in the following terms:

> *"39. The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs.(10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentences are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs.(10) of the Act depends on a valid order having been made under subs. (9). I propose therefore to follow Devine and hold that in this case the District Court had no jurisdiction to deal with the applicant. I do so on the basis that Devine is a decision of the Court of Criminal Appeal directly concerned with the proper interpretation of the statutory provisions in issue in this case."*

83. The background to the decision of the Court of Criminal Appeal in *People (DPP) v. Devine* [2011] IECCA 67 (referred to in *Carter*) is helpfully set out by O'Malley J. in *Carter*, as follows:

> *"27. Reliance was placed upon the decision in People (DPP) v Devine [2011] IECCA 67. In that case, the Court of Criminal Appeal had imposed a suspended sentence. During the currency of the suspension, the accused appeared before the District Court and pleaded guilty to a number of summary charges. The District Judge, who was not informed of the amendment brought about by s. 60 of the 2007 Act, imposed a three month sentence and then remanded him to the Court of Criminal Appeal for the purposes of s.99. The Court held that, having regard to the provisions of the section as amended, the District Court should first have remanded the accused to the next sitting of the Court of Criminal Appeal so that the suspended sentence could be reinstated in whole or in part. The latter court would then have remanded him back to the next sitting of the District Court for the imposition of sentence.*
>
> *28. In deciding what the consequences of the irregularity were, the Court of Criminal Appeal ruled as follows: -*

> *'Both the Court of Criminal Appeal and the District Court are creatures of statute and have such jurisdiction as is conferred upon them by statute. The District Court had no jurisdiction to impose sentence on the respondent without first complying with section 99(9) as amended. The effect of section 99(9) as amended on the jurisdiction of this court is that its jurisdiction to revoke in whole or in part the suspended portion of the respondent's sentence arises only if the respondent is remanded to this court in accordance with section 99(9). As the respondent has not been remanded to this court in accordance with section 99(9) this court has no jurisdiction to carry out its function envisaged under section 99(1O) and (1OA). For the jurisdiction of this court to arise it would be necessary that the orders made by the District Judge on the 22nd April 2008 be set aside and an order in compliance with section 99(9) of the Criminal justice Act 2006 be made remanding the respondent to this court.'"*

84. As against the jurisprudence relied on by the applicant, counsel for the respondents relies on the *dictum* of Peart J. in *Director of Public Prosecutions v. Vajeuskis.* Mr. Vajeuskis was convicted in the District Court of offences under the Road Traffic Acts. As part of a range of penalties imposed by the trial judge, he was sentenced to four months imprisonment suspended for a period of two years pursuant to s. 99(1) of the 2006 Act. Subsequently he was convicted of further offences which occurred during the period of suspension and he was remanded back to the original sentencing court for consideration whether the suspended sentence should be activated. In the course of that hearing, his counsel raised an issue as to whether the District Court had jurisdiction to suspend a sentence of four months for a period longer than the suspended sentence itself. The matter came before the High Court by way of Consultative Case Stated. Peart J. found that there was no statutory temporal limit on the length of the suspended sentence which could be imposed subject to the principles of proportionality. It fell to the learned Judge to consider the question of whether at the revocation it was open to the District Judge who imposed the suspended sentence to enter upon a consideration of its lawfulness.

Peart J. addressed this issue in the following terms:

> *"15. Mr O'Higgins submits that in the present case also, the lawfulness of the suspended sentence goes to the question of jurisdiction of the District Court to consider a revocation of the suspension under section 99 (10), since it cannot be said that a District Judge would have jurisdiction to make an order the effect of which would be to incarcerate a person on foot of the sentence the suspension of which was unlawful. He submits that at a minimum there is a question mark over the validity of the sentence which was imposed. I do not accept that submission as correct. In the present case, the issue which has been raised in this regard does not go to jurisdiction. The District Judge passed sentence and suspended it and did so within jurisdiction. That sentence was not appealed or otherwise challenged. It was a lawful sentence for reasons which will appear below. The matter was therefore properly before Judge Hughes on the 5th June 2013."*

85. In reliance on *Vajeuskis*, counsel for the respondent submits that there can be no criticism of Judge Riordan for not embarking on the question of the lawfulness or otherwise of the 25th February, 2008, Order since the latter Order was a separate and discrete Order to the Order made on 24th November, 2015, and where the 2008 Order had not been challenged by the applicant by way of appeal or judicial review.

86. While I am not persuaded by the respondent's argument that *Vajeuskis* is as close an analogy to the applicant's circumstances as urged on the Court by counsel for the respondents, I accept the general proposition put forward by the respondents that it was not the function of the Circuit Court on 24th November, 2015, when the revocation of the applicant's suspended sentence was being considered, to enquire into the lawfulness or otherwise of the Order which was made on 25th February, 2008.

87. What confronted Judge Riordan on 24th November, 2015 was the undisputed factual matrix that the applicant had been convicted of offences committed in the three years suspension period, in breach of the bond entered into by him on 25th February, 2008 to keep the peace and be of good behaviour towards all the people of Ireland for three years post his release from prison on 15th February, 2013. In the absence of any challenge by the applicant to the 25th February, 2008 Order, either in February, 2008 or, more particularly, on 25th November, 2015, I am of the view that it was not incumbent on Judge Riordan to put himself on inquiry as to the validity or otherwise of the Order of 25th February, 2008.

88. The applicant's conviction on 11th November, 2015, was the trigger for the revocation application. In effect, that conviction was the condition precedent for Judge Riordan to revoke the suspended sentence, once application for same had been made and the learned Judge was satisfied that it was not unjust to do so having regard to the factors to be taken account of, as set out in the now impugned s.99(10). This is particularly so in the absence of any challenge by the applicant on 24th November, 2015 to the revocation application. Again, it is to be noted that the applicant did not appeal the revocation of the suspended sentence, although he did appeal the sentences imposed on him for the triggering offences.

89. It is the case that there is no evidence on the face of any of the documents put before the Circuit Court on 24th November, 2015 of compliance by the original sentencing court with the requirement that the applicant keep the peace and be of good behaviour during the period of his incarceration, which is one aspect of the condition to be attached when a sentence is being suspended in part, as provided for in s. 99(2)(b) of the 2006 Act.

90. Counsel for the applicant cited *The State (Browne) v. Feran* in aid of her arguments that Judge Riordan's Order of 25th November, 2015, was bad on its face by virtue of the failure of Judge Moran to subject the applicant to keep the peace and be of good behaviour while in prison. The circumstances of *The State (Browne) v. Ferran* were that the prosecutor was charged with having committed an indictable offence. He was tried summarily in the District Court, convicted of the offence and sentenced by the District Justice to be imprisoned for six months. The District Court was empowered, subject to compliance with certain conditions precedent, to try the prosecutor summarily under s. 2 of the Criminal Justice Act 1951 and was also so empowered, subject to certain other conditions precedent, under s. 3 of that Act. It was not clear which section had been invoked, as the conviction and order made by the District Justice did not recite that either the conditions applicable to s. 2 of the Act had been satisfied or that those applicable to s. 3 of the Act had been satisfied. The prosecutor was granted conditional orders and, subsequently, absolute orders of *habeas corpu*s and *certiorari*. The matter was appealed to the Supreme Court. The Supreme Court was satisfied to quash the District Court order as it not recite on its face the requirements of s. 3 of the Criminal Justice Act 1951. At p. 172, Walsh J. stated:-

> *"On the assumption that the District Justice did intend to apply the jurisdiction conferred by sect. 2, his order as recorded in the minute book, which should show the jurisdiction, is defective in material particulars. It does not state, as it ought to, that the prosecutor on being informed of his right to be tried with a jury did not object to being tried summarily. The statement which does appear 'accused consents to jurisdiction, pleads guilty' is, apart from the ambiguity of it, not a sufficient statement of the necessary foundation to jurisdiction already referred to. It is to be noted that the documents which purport to be certified copies of the conviction or order in fact contain the proper*

recitals as to jurisdiction. That, however, is not sufficient when the order in the minute book itself does not contain this material. Because of this defect on the face of the order in the minute book, I am of opinion that the order must be quashed. Accordingly the appeal should be dismissed."

91. In *The State (Roche) v. Delap*, Henchy J. also addressed the question of jurisdiction where an order was bad on its face. In that case, the issue was that the District Court conviction did not record the jurisdiction of the District Judge to sentence the prosecutor to detention in St. Patrick's institution. Addressing this failure, Henchy J. opined:-

> *"The ground on which the conditional order was granted was that the conviction was bad on its face because it did not show that the District Justice had jurisdiction to sentence the prosecutor to detention in St. Patrick's Institution. It was for the same reason that an absolute order of certiorari, from which this appeal has been taken, was later made.*
>
> *I am in agreement with the conclusion that the conviction was bad because it failed to disclose that the sentence was imposed in pursuance of the jurisdiction conferred by s. 13 of the Criminal Justice Act, 1960. Before the enactment of that section there was no jurisdiction to sentence an offender to detention in St. Patrick's Institution. When that jurisdiction is now being exercised, the conviction should recite that the youthful offender is of one of the specified age groups-thus indicating the basis of the sentence and the fact that the court has addressed its mind to the conditions necessary for the exercise of this statutory jurisdiction. The failure of the written order in this case to indicate the basis on which detention was chosen as the appropriate sentence meant that it was bad on its face for failure to show jurisdiction."*

92. The respondents argue that there is no substance in the applicant's reliance on *The State (Browne) v. Feran* or *The State (Roche) v. Delap.* It is the respondents' contention that as on 24th November, 2015, Judge Riordan was exercising a jurisdiction vested in the Circuit Court by (the now impugned) s.99(10) of the 2006 Act his jurisdiction was not required to be crystallised by the applicant's consent to jurisdiction, unlike the situation which was found to pertain in *Browne v. Feran*. The respondents further contend that there was evidence before Judge Riordan of the applicant's non- compliance with the bond he had entered into on 25th February, 2008. This has not been disputed by the applicant.

93. Before addressing the above arguments, it is worthwhile reprising the factual circumstances which pertained to both the proceedings in 2008 and 2015 and which are not in dispute.

94. On 25th February, 2008, the applicant pleaded guilty to certain drugs offences for which he received a ten year sentence with the final three years suspended. It is worthy of note that the applicant never appealed the ten year sentence which was partly suspended on 25th February, 2008 by Judge Moran and when the applicant entered his bond to keep the peace and be of good behaviour for the three year period post release. Nor did he seek to otherwise challenge its validity. There is no dispute but that the applicant was duly released on 15th February, 2013, in accordance with the terms of the 2008 Order. Following his release, he was subject to the condition of his suspension to keep the peace and be of good behaviour for a period of three years, on foot of the Order as made on 25th February, 2008, and in respect of which he had entered a bond on the said date. There is no dispute but that offences were committed by him in May, 2015 during the relevant three year period. He contested those offences and was found guilty on 11th November, 2015. On 24th November, 2015, Judge Riordan dealt with the revocation of the three years suspended from the sentence which had been imposed on 25th February, 2008. The revocation was dealt with in the presence of the applicant's solicitor and counsel and no objection was made to the application to revoke. I have already referred to the evidence of Mr. O'Donovan who avers that the issue before Judge Riordan on 24th November, 2015, was the breach of the bond that the applicant entered into orally on 25th February, 2008.

95. I am not satisfied that the non-specification by Judge Moran that the applicant keep the peace and be of good behaviour while in prison can be equated with the deficits that were found to exist in *The State Browne v. Feran* or in *The State (Roche) v. Delap*.

96. The failure of Judge Moran, on 25th February, 2008, to require the applicant to enter a bond to keep the peace and be of good behaviour while in prison cannot, to my mind, be said to be relevant to or undermine the bond into which the applicant undoubtedly entered on 25th February, 2008, which was that he would keep the peace and be of good behaviour towards all the people of Ireland in the three years post his release from prison. He entered the bond in open court and did so with the benefit of a full hearing where he was legally represented. Furthermore, on the face of the legislation, the nature of the bond entered into by the applicant is provided for under s.99(1) and s.99(2) of the 2006 Act. While the 25th February, 2008 Order did not impose on the applicant that he keep the peace and be of good behaviour in prison as well as for a three year period post release as set out in s99(2)(b) of the 2006 Act, that omission, even accepting that it was legally required, cannot, in my view, lead to a conclusion that Judge Riordan's Order of 25th November, 2015 "*is defective in material particulars*" such as to render the said Order bad on its face. Accordingly, the applicant's circumstances are distinguishable from the deficits in jurisdiction which arose in *The State (Browne) v. Feran* and *The State (Roche) v. Delap.* The "*material particulars*" to the making of Judge Riordan's Order of 25th November, 2015 are to be clearly found in the Order of 25th February, 2008, and fell to be considered consequent on the applicant's conviction for the trigger offences, and within the confines of the now impugned s.99(10) of the 2006 Act.

97. Accordingly, in the circumstances of this case I do not find that the failure of Judge Moran to impose a condition on the applicant that he keep the peace and be of good behaviour during the period of his incarceration to be such as to amount to a deficit of the fundamental requirements of justice that the applicant's detention on foot of the Order made by Judge Riordan on 25th November, 2015 may be said to be wanting in due process of law.

98. In aid of her submissions, counsel for the applicant submitted that s. 99(2), being a penal provision, must be construed strictly. I fully accept this proposition. In *DPP v. Moorehouse* [2006] 1 I.R. 421, Murray C.J. states:-

> *"67 It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence [Maxwell on The Interpretation of Statutes , (12th ed.) at pp. 239 and 240].*
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> *68 If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."*

99. However, I do not find that there is any ambiguity in s.99 (1) or (2) of the 2006 Act, or in the Order made by Judge Moran on 25th February, 2008, or in the Order of Judge Riordan on 24th November, 2015, such as would lead this Court to a conclusion that the applicant was in danger of being subjected to a penal liability by implication.

100. Thus, on the question of whether the Order made by Judge Riordan on 24th November, 2015, was bad on its face, for the reason set out above, I am not persuaded by the arguments canvassed by counsel for the applicant.

101. As I am satisfied that Judge Riordan was vested with jurisdiction to make the Order he made on 24th November, 2015, it follows that the applicant is not in unlawful detention and accordingly, the relief sought pursuant to Art. 40. 4.2 of the Constitution is refused.

102. It follows that the relief sought by the applicant under the judicial review proceedings is also denied. The refusal of relief in the judicial review proceedings renders the respondents' arguments on the issue of delay and insufficiency of pleading in the judicial review proceedings entirely moot.