Neutral Citation: [2016] IEHC 244

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 54 J.R.]

BETWEEN

EDWARD MOORE

PLAINTIFF

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

[2013 No. 70 J.R.]

BETWEEN

STEPHEN BUTLER

PLAINTIFF

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

[2013 No. 120 J.R.]

BETWEEN

MIHAI STANCU

PLAINTIFF

DIRECTOR OF PUBLIC PROSECUTIONS, JUDGE TERENCE O'SULLIVAN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

[2013 No. 602J.R.]

BETWEEN

DEAN CORMACK

PLAINTIFF

JUDGES OF DUBLIN CIRCUIT CRIMINAL COURT, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE ATTORNEY GENERAL AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

DEFENDANT

[2013 No. 925 J.R.]

BETWEEN

MICHEAL HANLEY

PLAINTIFF

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

[2014 No. 86 J.R.]

BETWEEN

LEROY DUMBRELL

PLAINTIFF

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

JUDGEMENT of Mr. Justice Moriarty delivered on 19th day of April, 2016.

INTRODUCTION.

1. Section 99 of the Criminal Justice Act, 2006, has had a relatively chequered history since its enactment, and judges in all Irish jurisdictions have on occasion expressed concerns about the manner in which it has sought to address what in theory ought not to be an insuperable aspiration, namely to address and provide a balanced and operable framework that will address what has long been a recurring situation arising in Irish criminal courts. Pared to its essentials, what is involved is that an accused person is convicted in what in practice has always been the District Court or the Circuit Court, following which, in preference to an immediate sentence of imprisonment, a suspended custodial sentence is imposed, for example twelve months, to be suspended for a like period, probably subject to other terms such as probation supervision, and being bound to keep the peace and be of good behaviour throughout that period. Should matters proceed without mishap for the relevant period, all is well, but not infrequently a further charge will be brought. Should this proceed to conviction before what in many instances will be an entirely different judge to the person who imposed the suspended sentence, or indeed a different jurisdiction, what procedure is to apply? Section 99 has already undergone two processes of amendment, and its present form will set forth in the next paragraph. But what is beyond doubt is that the intended path has proved thorny, beset with problems, and results in recurring applications on behalf of such accused persons, whether by way of Article 40 of the Constitution judicial review or other declaratory relief. In the present instance, the legal advisors to the six individuals named as applicants, all falling within the broad picture of typical case histories, being relatively young urban males, have combined their efforts by having the six cases listed together. Further, in addition to the usual remedies sought by way of judicial review in such instances, they have each made a concerted and diligently researched assault on the constitutionality of s. 99, given the manner in which adherence to the operative portions of s. 99 has impacted on each of their individual clients. The six case histories to date have many common features, but equally have relevant differences. Before summarising these, it is necessary to set forth the comparatively lengthy wording of s. 99, as amended by s. 60 of the Criminal Justice Act 2007, and s. 51 of the Criminal Justice (Miscellaneous Provisions) Act, 2009.

2. Section 99 now reads as follows.

> "Power to suspend sentence.
>
> 99.— (1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.
>
> (2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—
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> (a) the period of suspension of the sentence concerned, or
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> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned, and that condition shall be specified in the order concerned.
>
> (3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers—
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> (a) appropriate having regard to the nature of the offence, and
>
> (b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,
>
> and any condition imposed in accordance with this subsection shall be specified in that order.
>
> (4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any one or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:
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> (a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;
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> (b) that the person undergo such—
>
> (i) treatment for drug, alcohol or other substance addiction,
>
> (ii) course of education, training or therapy,
>
> (iii) psychological counselling or other treatment,
>
> as may be approved by the court;
>
> (c) that the person be subject to the supervision of the probation and welfare service.

(5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.

(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order.

(7) 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.

(8) Where a court has made an order under subsection (1) and imposes conditions under subsection (4) upon an application under subsection (6), it shall cause a copy of the order and conditions to be given to—

(a) the probation and welfare service, and

(b) (i) the Garda Síochána, or

(ii) 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.

(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.

(a) The court referred to in sub. s. 10 shall remand the person concerned in custody or on bail to the next sitting of the court referred to sub. s. 9 for the purpose of that court imposing sentence on that person for the offence referred to in that subsection.

(11) (a) A sentence (other than a sentence consisting of imprisonment for life) imposed—

(i) in respect of an offence committed by a person to whom an order under subsection (1) applies, and

(ii) during the period of suspension of sentence to which that order applies,

shall not commence until the expiration of any period of imprisonment that the person is required to serve of the sentence referred to in paragraph (b) either by virtue of the order under subsection (1) or a revocation under subsection (10).

(b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951 .

(12) Where an order under subsection (1) is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in subsection (2) he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3) or (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(15) Where the court fixes a date for the hearing of an application referred to in subsection (13) or (14), it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under subsection (15), the court may issue a warrant for the arrest of the person.

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

(18) A notice under subsection (15) shall be addressed to the person concerned by name, and may be given to the

person in one of the following ways:

(a) by delivering it to the person;

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.

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

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

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

(20) Where a court imposes a sentence for a term of imprisonment that is to run consecutively to a sentence of a term of imprisonment, the operation of a part of which is suspended, the first-mentioned sentence shall commence at the expiration of the part of the second-mentioned sentence the operation of which is not suspended."

3. Next it is necessary to set forth a brief summary of what has transpired to date in the six individual cases under review.

4. Following the listed sequence, the first matter is Edward Moore v. DPP, Ireland and the Attorney General. In this instance, the applicant was convicted of a minor District Court offence, and the presiding judge was proceeding to sentence when it became apparent that a prior suspended sentence imposed by the Circuit Criminal Court was still operative. Accordingly the matter was remanded to the Dublin Circuit Criminal Court for determination of whether or not the suspended sentence should be activated. In what was to become a constant argument in similar cases, it was submitted on behalf of Mr. Moore that he wished to appeal the conviction in the District Court and have an outcome pronounced prior to any hearing in the Dublin Circuit Criminal Court. It was pointed out that this now appeared to be precluded in view of the amended wording of s. 99, and that if the Circuit Court were to activate the suspended sentence, he would serve considerable time in prison prior to his appeal hearing. If the appeal against the District Court conviction ultimately proved successful, it was argued that the basis for activation that he was unfairly being prevented from challenging would be incorrect, and his period in custody unjustified. It was also argued that under R. 28 (a) of the Rules of the District Court the applicant was accordingly precluded from appealing his latter conviction until the issue of activation of his suspended sentence had been finalised, and this it was argued was unfair and unconstitutional. Leave was granted by Peart J. on 28th January 2013 in respect of (a) seeking a declaration that s. 99 as amended was unfair and offends the right to appeal the District Court conviction; (b) prohibition of further prosecution of the applicant before the Circuit Criminal Court in relation to activation; (c) an injunction restraining further prosecution in the Circuit Criminal Court; (d) a declaration that any imprisonment thus imposed was unfair and unconstitutional; (e) a declaration of entitlement to exhaust an appeal of the District Court conviction before determination of the activation application; (f) a declaration of unconstitutionality if precluded from a full appeal of the District Court conviction in relation to s. 99 and the relevant District Court rule. On a subsequent application to O'Neill J., a further ground was permitted, to the effect that s. 99 (9) was inoperative in regard to summary proceedings, save after sentence was imposed.

5. The second listed was Mihai Stanku, who had brought his proceedings against the Director of Public Prosecutions, His Honour Judge Terence O'Sullivan, Ireland and the Attorney General. The background facts were that he was convicted and sentenced in the Dublin District Court on 23rd January 2012 of an offence under s. 13 of the Criminal Justice (Public Order) Act, 1994. He received a sentence of five months imprisonment, suspended for one year. This was appealed by the applicant, but due to his change of address, he did not receive notification of the date of his appeal, and the District Court order was affirmed by the Circuit Court on 21st May, 2012. He was then further charged under the Criminal Justice (Theft and Fraud Offences) Act on 20th August, 2012. After a contested hearing, he was found guilty on 19th November, 2012. Evidence of his live suspended sentence was given, and, pursuant to s. 99 (9) of the Criminal Justice Act, 2006, as amended, the applicant was remanded to Dublin Circuit Criminal Court on 20th November, 2012. Recognisances were then also fixed, and the applicant entered those recognisances, and lodged an appeal of his conviction. However, he faced the obstacle of inability to appeal conviction only, this being inseparable from an associated penalty lawfully imposed. Illness of the Circuit Court judge who had first dealt with the District Court appeal delayed matters somewhat, and on 1st February, 2013, following one aborted listing the applicant again appeared before the Circuit Criminal Court on foot of his appeal from the District Court conviction of 19th November 2012. In the course of the hearing before His Honour Judge O'Sullivan, the solicitor for the Director of Public Prosecutions sought to have the appeal struck out, contending that the District Court still had seisin of the matter. Counsel for the applicant sought time to consider the position, so the matter was adjourned to 7th February, 2013, on which date the hearing of the s. 99 activation hearing was also listed. Having heard argument, Judge O'Sullivan indicated that he felt bound to strike out the appeal until a s. 99 procedure had been finalised. A further remand was granted at the request of counsel for the applicant to 27th February 2013. Prior to that listing, it appears that leave was granted in these proceedings on 18th February 2013. It appears that it was indicated to Judge O'Sullivan that judicial review had been contemplated, and he remarked to the effect that such a view was understandable.

6. The leave granted by Peart J. on 18th February 2013 was in respect of

(1.) a declaration that s. 99 as amended is unfair as it does not allow an applicant to appeal a "triggering" conviction, prior to determination of an activation hearing;

(2.) prohibition upon further prosecution of the activation application;

(3.) an injunction by way of judicial review restraining the defendants from any further steps on foot of the activation;

(4.) certiorari by way of judicial review quashing the Circuit Court order striking out the applicant's appeal convicting him of the latter offence;

(5.) a declaration that any imprisonment imposed by way of activation of a suspended sentence is unfair and unconstitutional in circumstances where the applicant has expressed an intent to appeal the conviction that triggers the activation of the suspended sentence;

(6.) a declaration that by not permitting an appeal from the District Court conviction prior to determination of activation under s. 99,

such a provision is unconstitutional.

Leave was also granted on two further grounds that largely reiterate the grounds already recited.

7. The third applicant listed was Stephen Butler, who had sued the Director of Public Prosecutions, Ireland and the Attorney General. This applicant was convicted after a contested hearing of an attempted robbery charge in the District Court on 9th February, 2012, and sentenced to two years imprisonment, with the last fifteen months suspended for two years from 9th February, 2012. He was subsequently charged with a further offence contrary to s. 9 (1) of the Firearms and Offensive Weapons Act 1990, as amended. The matter related to alleged possession of a knife. On a plea of not guilty, the matter was set down for hearing on 5th December, 2012. On that date he was convicted, and the record of previous convictions included details of the matter heard on 9th February 2012, and the suspended sentence which remained operative. Judge Smyth remanded the applicant on bail to the Dublin Circuit Criminal Court on 6th December 2012. The matter was then heard by Judge Nolan, and after some argument, the issue of activation of the suspended sentence was deferred to 21st February, 2013. It later transpired that bail pending appeal had not been set in respect of the trigger offence, through a misunderstanding, and that it was necessary for the activation to be dealt with first in the Circuit Court before the trigger offence could be appealed. In view of the indivisibility of conviction and sentence in the District Court, it was not possible to appeal conviction simpliciter, and under existing law it was necessary that an offender had to be sentenced before a judge could fix recognisances to facilitate an appeal from the conviction and sentence.

8. On 4th February, 2013, Peart J. granted leave on the grounds following:

(a) A declaration that the procedure provided for in s. 99 as amended was unfair and offended the applicant's right to appeal an order of the District Court, as it did not allow for the applicant to enter recognisences in respect of a conviction for a "triggering offence" prior to determination of the issue of whether a suspended sentence imposed under s. 99 should be activated;

(b) Prohibition of further prosecution of the applicant before Dublin Circuit Criminal Court on foot of Bill No. 602/11 in relation to the issue of activation of the prior suspended sentence;

(c) An injunction by way of judicial review restraining the Director of Public Prosecutions from any further steps towards activation of the prior suspended sentence;

(d) A declaration that any sentence of imprisonment imposed by way of activation of the prior suspended sentence was in the circumstances unfair and unconstitutional;

(e) A declaration that the applicant was entitled to exhaust his appeal from the District Court conviction prior to determination of the activation issue'

(f) A declaration that by not permitting an appeal of the District Court conviction prior to determination of the activation inquiry under s. 99 (10), the provisions of s. 99 of the Criminal Justice Act, 2006, as amended were unconstitutional;

(g) A declaration that the failure to provide for the staying or suspending of a decision to convict an accused of a trigger offence pending appeal, prior to the determination of the issue of activation of a prior suspended sentence, pursuant to s. 99 as aforesaid, amounts to an unconstitutional lacuna such that the legislative provisions in question are unconstitutional;

(h) A declaration that insofar as they do not allow the applicant to appeal a conviction recorded against him when the provisions of s. 99 as amended are invoked, the relevant provisions of this legislation and the District Court Rules, including O.28A of those rules, are unconstitutional.

9. The fourth applicant was Dean Cormack, and in his judicial review proceedings the defendants named were the judges of the Dublin Circuit Criminal Court, the Director of Public Prosecutions, the Attorney General and the Irish Human Rights and Equality Commission. The facts in this instance were that the applicant was arrested and charged on 2nd April, 2013, with two offences, namely driving without insurance, and giving a false name to the investigating garda member, contrary to the relevant provisions of the Road Traffic Act, 1961, as amended. Following an initial hearing in Blanchardstown District Court on 26th April, 2013, the case duly proceeded to hearing on 26th June, 2013. The charge relating to the false name was dismissed, but the applicant was convicted of driving with no insurance. The investigating garda informed the court that a three month sentence had been imposed on the applicant by the Circuit Court (sitting for District Court Appeals), on 12th July, 2012, but that this sentence had been suspended for one year. In these circumstances, the applicant was remanded on bail pursuant to s. 99 of the 2006 Act to the Criminal Courts of Justice on 1st July, 2013, for consideration of possible reactivation of the prior suspended sentence. Following argument at this hearing, Judge O'Sullivan indicated that he believed that he should proceed with the determination of whether or not to invoke the suspended sentence. Some legal debate ensued, in the course of which Judge O'Sullivan expressed a view that s. 99 was "a disaster", and that it would require this Honourable Court or the Supreme Court to find a way through it. After a date was fixed for hearing, counsel for the applicant informed the court as a matter of courtesy that judicial review proceedings in the interim might be contemplated, whereupon Judge O'Sullivan remarked to the effect that such a course was understandable in the events that had transpired. In due course, leave was granted by McGovern J. on 29th July, 2013, on grounds of

(a) prohibition from embarking on a hearing to determine whether to revoke the suspension of the three months sentence;

(b) a declaration that the Criminal Justice Act, 2006, as amended did not permit the applicant to appeal his District Court conviction to the Circuit Court prior to consideration by the Circuit Court whether to revoke the suspended sentence of three months;

(c) a declaration that s. 99 of the 2006 Act as Amended was invalid, having regard to the provisions of the Constitution and in particular Article 40.3 and Article 38.1. A further ground related to the joinder of the Irish Human Rights and Equality Commission, but on grounds that will appear later in this judgment, I have taken a view that it is not necessary for the Court to embark upon that aspect.

10. The fifth listed applicant was Michael Hanley, who proceeded against the Director of Public Prosecutions, Ireland and the Attorney General. He had been convicted, after a contested hearing, of a minor District Court offence; the court was proceeding to sentence when it became apparent that a suspended sentence was still operative from the Circuit Criminal Court. He was accordingly remanded under s. 99 (9) to the Dublin Circuit Criminal Court for determination of the issue of activation. He was anxious to appeal the District Court outcome, and have that issue determined before the Circuit Court embarked on the issue of activation. The applicant complained that he was prevented from this by reason of the provisions of s. 99 as amended. If the suspended sentence was activated by the Circuit Court, he complained that he would serve significant imprisonment prior to the hearing of his District Court

appeal. If ultimately successful, the basis for the initial activation, which in his contention he was unfairly prevented from challenging, would be found incorrect, and the custody served unjustified. This was the gravamen of his initial contention, on foot of which he was granted leave to proceed, and he further complained that the District Court Rules, particularly 28A, did not permit an accused remanded under s. 99 to appeal the conviction which had given rise to the remand, until after the issue of activation of the suspended sentence had been heard and determined. This, it was alleged, gave rise to an unfair and unconstitutional process. Thirdly, he contended that the procedure mandated under s. 99, and the District Court Rules implementing the Act, was unfair and unconstitutional, and unduly interfered with the right of appeal from the District Court to the Circuit Court. Fourthly, he contended that the operation of s. 99 in his case was unfair, unjust and unconstitutional, insofar as it prevented him from appealing his District Court conviction prior to determination of the activation issue. He further argued that this legal lacuna amounted to a violation of his right to trial in due course of law, pursuant to Article 38.1 of Bunreacht Na Eireann. These, in summary form, are the grounds upon which he was granted leave to proceed in his judicial review proceedings.

11. The sixth and last applicant was Leroy Dumbrell. He was convicted and sentenced in the Dublin Circuit Criminal Court on 25th October, 2012, of violent disorder, contrary to s. 15 of the Public Order Act, 1994, and sentenced to two years imprisonment, suspended for two years from the said 25th October, 2012. He was subsequently charged with a further public order offence, allegedly committed in the Dun Laoghaire area on 28th October, 2013. He pleaded not guilty, and the matter was set down for hearing in Dun Laoghaire District Court on 10th February, 2014. He was convicted by District Judge Reilly, and the evidence then heard in relation to previous convictions included details of the prior suspended sentence. He was accordingly remanded to the Dublin Circuit Criminal Court on 11th February, 2014. The essence of the contentions made on his behalf was that, since conviction and sentence were indivisible in the District Court, he was precluded from appealing his latter conviction, and must accordingly be sentenced prior to the District Court fixing recognisences to facilitate an appeal from both conviction and sentence. In the events that had happened, if the Circuit Court activated the suspended sentence, he might appeal from that activation to the Court of Criminal Appeal, but in contrast to an appeal from the District Court, there would be no automatic right to bail pending the Court of Criminal Appeal determination. Accordingly, while he wished to appeal the conviction by District Judge Reilly, he was precluded by the case-law and the Rules of both the District Court and the Circuit Court from appealing the conviction that precipitated the s. 99 procedure until that hearing had been finalised. If the Circuit Court activated the suspended sentence, the applicant would remain in custody pending the District Court appeal being finalised. If he was then successful in that appeal, he would have served relatively substantial incarceration, even if he was ultimately acquitted on the matter that led to the inquiry and activation under s. 99. This was in his contention an unfair and unwarranted interference with his right to appeal the District Court conviction.

12. Leave in the judicial review proceedings was duly granted by Peart J. on 10th February 2014 on the following grounds:

(a) A declaration that the s. 99 procedure was unfair and offended the applicant's right to appeal the District Court order, insofar as it did not allow him to enter recognisances for the "triggering offence" conviction, prior to determination of whether the s. 99 suspended sentence should be activated;

(b) Prohibition on further prosecution of the reactivation of the initial suspended sentence;

(c) A declaration that any sentence of imprisonment by way of activation of the suspended sentence was unfair and unconstitutional in circumstances where the applicant had expressed his intent to appeal the conviction that had triggered activation of the suspended sentence;

(d) A declaration that denial of an automatic right to bail in these circumstances, pending determination of the appeal against the District Court conviction, was unconstitutional;

(e) A declaration that the applicant was entitled to exhaust his appeal from the District Court conviction prior to the determination of the activation of the initial suspended sentence under s. 99 as aforesaid;

(f) A declaration that, by not permitting an appeal from the District Court conviction, prior to determination of activation of the inquiry under s. 99, that section was unconstitutional;

(g) A declaration that, insofar as it precluded the applicant from appealing his conviction on the latter offence when the s. 99 procedure was invoked, the relevant section and provision of the District Court Rules was unconstitutional.

13. The foregoing is a summary of the factual background giving rise to each of the applicants' contentions, and the grounds upon which leave was granted in each of their cases. It does not purport to be comprehensive, but the court is mindful of the dicta of Murray C.J., in his judgment of 25th January, 2011, in APB v The Director of Public Prosecutions, to the effect that the grounds upon which leave may have been granted to judicial review applicants should be fairly set forth, to avoid trial or appellate courts having to address matters in relation to which no leave was granted.

PRIOR CASE LAW, SUBMISSIONS AND DETERMINATIONS.

14. I acknowledge the diligence and thoroughness with which counsel on all sides advanced their contentions, both in detailed written submissions on behalf of each applicant, and in the two days of closely-reasoned argument. It may be that there was some element of overload, in that some of the decisions relied upon (including one of my own) seemed to me to have been somewhat peripheral and of no great assistance in resolving the issues that here arise. However, it is self-evident that s. 99 has frequently engaged all jurisdictions. In the Supreme Court, the most significant and substantial recent decision was that delivered on 5th March, 2015, in the joined cases of Director of Public Prosecutions v. Jeffrey Carter, and Director of Public Prosecutions v. Sean Kenny, consultative cases stated referred by the Circuit Court. Whilst the matters resolved in the decision primarily related to interpretation of the phrase "next sitting", as set forth in s. 99, the court was emphatic in the two judgments delivered, those of the late Hardiman J., and O'Donnell J., as to the difficulties that have arisen from the section. At para. 4, Hardiman J. stated as follows:

> *"This case concerns the interpretation of the deceptively simple words of s.99 of the Criminal Justice Act, 2006 as already twice amended, by s.60 of the Criminal Justice Act, 2007 and by s.51 of the Criminal Justice (Miscellaneous Provisions) Act 2009. I emphatically agree with Mr. Justice O'Donnell when he says that this Section 'has given rise to innumerable practical difficulties and problems of interpretation, only some of which are illustrated by the present cases'. I also agree with him when he says that:*
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> *'Only one thing is clear and beyond dispute: s.99 is in need of urgent and comprehensive review .'*
>
> *5. The reason for these difficulties and for the urgency of the need for a review of the Section is that s.99 was drafted and enacted by persons quite unacquainted of the actual practices of the Courts, and in particular of the District and*

Circuit Courts. I am quite certain that the myriad difficulties which have arisen with the Section could have been avoided if any proper effort had been made to consult the judges who actually implement the procedures for the activation of a suspended sentence.

6. I agree in general with the identification by Mr. Justice O'Donnell of the difficulties which have arisen in the application of this Section and with his observation that 'these questions cannot be resolved by a simple, surface interpretation of apparently simple words, taken in the abstract'. On the contrary 'the provision is one of considerable complexity and difficulty, requiring some learned debate, fine distinctions and considerable argument'.

7. Section 99 is intended to deal with a situation of common, perhaps almost daily, occurrence in some at least of the Courts exercising criminal jurisdiction. A clearer and more transparent provision, which pays due attention to the rights of both parties to a criminal proceeding, is urgently required".

15. As to other courts frequently exercising jurisdiction in relation to matters arising from s. 99, reference has already been made to the succinct description of the section made by his Honour Judge Terence O'Sullivan on more than one occasion in one of the present cases. In the High Court, in his judgment of 21st December, 2010, in *Sharlott v. Judge Collins and Judges of the Dublin Circuit Court and the Director of Public Prosecutions*, Hanna J., whilst not finding in favour of the applicant, stated in the course of his judgment in relation to Mr. Sharlott:

"Were he ultimately to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated."

Lastly, in the course of a detailed Paper prepared by District Judge Gráinne Malone of the District Court on the general topic of Suspended Sentences, she noted at the outset "given the scarcity of the reported decisions, the area of suspended sentences and s. 99 has caused some confusion and practical difficulties in the District Court". At the conclusion of her Paper, whilst welcoming the concept of s. 99 as an effort to enshrine in statute the power to suspend sentences, she also stated as follows:

"However, practical difficulties have caused frustration amongst all court-users and are in danger of lessening the impact of the more positive aspects of this legislation".

16. In the two days of oral hearing, the parties were well served by counsel arguing the respective contentions, Mr. McDonagh S.C. and Mr. O'Higgins S.C. on behalf of the different applicants, and Mr. Power S.C. and Mr. O'Malley B.L. on behalf of the respective respondents, with an additional brief submission also being furnished in relation to one of the applicants by Miss Leader B.L.

17. While fully and thoroughly argued on all sides, as befits a case of obvious general importance in which a concerted constitutional argument has been mounted against Section 99, it seems to me that there can be some danger of an excess of analysis masking the reality of the situations that most foreseeably and regularly arise under the section in the Circuit and District Courts. I note one particularly painstaking written submission on behalf of the applicants which seeks to depict all the potential situations that may arise under the Section, but while not neglecting these, I would prefer in the first instance to concentrate on the factual scenarios that have actually arisen, as in the experiences of the applicants. Pared down to essentials, the three most obvious situations of potential jeopardy or prejudice that may arguably arise under the Section seem to me the following:

(a) Mr. X is convicted in the District Court of a relatively serious offence, but in view of his youth, modest prior record and a positive Probation Report, he is sentenced to one year's imprisonment, but that sentence is suspended on appropriate terms for a similar period of one year. Within that period, further criminal proceedings are brought against him in a different Dublin District Court. After a contested hearing, he is again convicted of the new offence, but prior to a full sentence hearing the prosecuting garda brings to the court's attention the prior suspensory sentence that is still operative. As required by the Section, he is expeditiously brought before the District Judge who imposed the initial suspended sentence, no sentence hearing having taken place before the second judge. He wishes to appeal the latter conviction to the Circuit Court forthwith pursuant to his clear and undoubted entitlement to an appellate rehearing, but he is made aware that this course is in the events that have happened not open to him under Section 99.

(b) The same initial suspended sentence is imposed on the applicant and during the currency of the suspended sentence he is again convicted of a criminal offence, but in this instance a more serious matter and one brought in the Circuit Court. He is dissatisfied with the second outcome and wishes to exercise all appellate entitlements open to him, particularly as under the section he has been brought back before the initial judge who exercised leniency in his favour. However a further grave hurdle is conveyed to him by his legal advisors: unlike his automatic entitlement to a full appeal of the District Court conviction to the Circuit Court, he is now entitled only to the more truncated right to an appeal before the Court of Criminal Appeal, which will not be a full rehearing, and in which he will have to persuade that court that the outcome was wrong in law on grounds that can be sustained. Worse still, distinct from the simple entitlement to have recognizanses fixed pending appeal from the District Court to the Circuit Court, he is now in the eyes of the law a convicted person and subject to the rigorous requirements under the authority of the case of DPP v. Corbally of persuading that court of realistic prospects of success in the appeal on some one or more of the grounds prepared on his behalf.

18. Of the various further scenarios drawn to attention by Mr. McDonagh S.C. another, although one less demonstrably at the heart of the s. 99 controversy, was a situation in which a young offender, who was facing reactivation on foot of his still operative suspended sentence by reason of having been convicted of a further offence, had to consider, independently of his wish to appeal that latter conviction, the possibility that he might still fare better by abandoning such thoughts of appeal and throwing himself upon the mercy of the initial judge who had treated him with clemency, and who might still be disposed to reactivate only at worst a limited portion of the suspended sentence.

19. These and other potential situations apart, the substantive battleground has been clearly defined by all sides. In essence, the Respondents claim inter alia that the applications to impugn the relevant portions of the Section are premature, speculative, contend for appellate entitlements beyond what the Oireachtais has properly provided for, that the threshold for having a legislative measure declared unconstitutional has not been reached, and that, insofar as any limited problems have been established, they can readily and properly be addressed within the existing statutory framework.

20. In the context of that latter contention, it is worth looking briefly at what is proposed in that regard by Mr. O'Malley B.L. on behalf of the Attorney General.

21. Having raised the question of whether, in circumstances such as the experiences of the various applicants, it remains possible to devise and apply procedures under s. 99 in a manner which is realistically compatible with the constitutional rights of accused persons, he submits that an appropriate strategy may be devised to deal with such cases. He then proceeds as follows:

> *"As already described, the amended terms of s. 99 require the judge must decide on the reactivation of an earlier suspended sentence to reach that decision prior to sentence having been imposed for the later offence and, therefore, prior to an appeal being taken against the later conviction. The judge will no doubt be aware of the possibility that the later conviction may be reversed on appeal. It would of course, be expected that the convicted person (or more likely his/her legal representative) will bring this possibility to the attention of the judge in question. In accordance with the express terms of s. 99, that judge may decide in the circumstances not to revoke the suspended sentence at all. The judge should then remand the accused back to the District Court which should conclude the case by imposing sentence on the accused. If the accused then appeals against the District Court order and the Circuit Court affirms the conviction, that court should then invoke s. 99 (9) by remanding the accused back to the court that imposed the suspended sentence, assuming the conviction is affirmed during the currency of the suspended sentence. But if the judge decides to reactivate the suspended sentence in full or in part, he or she is surely entitled to defer the commencement of any term of immediate imprisonment thus imposed until such time as the appeal against the later conviction has been heard or determined. If that appeal is successful, there will have been no conviction and therefore the reactivated term of imprisonment will have no affect. If the appeal is unsuccessful then the reactivated term of imprisonment will take effect probably with effect, from the date on which the District Court appeal is dismissed by the Circuit Court, and it could be so ordered at the time at which the suspended sentence is fully or partly reactivated. In addition it should be noted that the accused has a right of appeal against a revocation of a suspended sentence. It is of course accepted that in the case of Mr. Stancu, the court that imposed the suspended sentence was an appellate court so there is no clear path for the applicant to exercise his right of appeal against revocation."*

22. This, with all the respect that is rightly due to an exceptional barrister, who is viewed as pre-eminent within these shores and beyond as a professor and author on all aspects of criminal law, is something of a far cry from setting forth, following two amendments, clear and unambiguous provisions that legislate for instances experienced on a daily basis in criminal courts. Nor is it I think disrespectful to Mr. O'Malley, who of course was professionally obliged to advance the best case that could be made out on behalf of his client, to mention that in the course of a quite recent address made by him to Irish Judges, a role he generously and willingly discharges in a most expert fashion, he seemed inclined to a less sanguine view of potential difficulties under the section. Having on that occasion set forth the content of the section and some of the relevant case-law, he concluded:

> *"There remains an awkward problem arising from the last point. If revocation of an existing suspended sentence must be decided before sentence is imposed to a later conviction in the District Court, a person might well be sent to prison following revocation and yet succeed in having their later conviction in the District Court quashed on appeal to the Circuit Court. The problem is that such a person cannot appeal to the Circuit Court until such time as he or she has been sentenced (State (Aherne) v. Cotter [1982] I.R. 118 and Muntean v. Judge Hamill [2010] IEHC 391). It might happen therefore that such a person would end up serving time in prison even though the conviction that triggered the revocation was later quashed. This is, admittedly, something of a conundrum, and is the subject of a number of cases due to be heard by the High Court in early December."*

23. Insofar as any mutually responsive chord was struck in the two days of oral hearing, it seems to me that it was probably in the course of the oral submissions of Mr. O'Malley when he said that, if any shortcoming was apparent in the framing of the Statute and s. 99, it was paradoxically in that it tried to do too much, in effect seeking to regulate in advance every remotely foreseeable contingency that might be apprehended as arising. I recall acting informally as the List Judge in the Dublin Circuit Criminal Court in a period approaching and during the mid-1990s, a period when there were admittedly far fewer Courts and cases, and a lesser disposition towards extensive codifying statutes which appear to seek to regulate all conceivable contingencies. What transpired as to disposition of the court's business was far from some pastoral idyll, but from recollection it seemed possible to equate to some degree the differing objectives of sentencing in a manner that by and large sought to address the sentencing of lapsed young offenders in some degree of accordance with the individual merits, and was not circumscribed by inflexible and mandatory rules of procedure

24. The Constitution cannot be pronounced upon for reasons of expedience or popularity, but it is not a factor of utter irrelevance that judges from all jurisdictions have expressed at best pronounced wariness towards the provisions of s. 99, especially subs. 9 and 10, that a weekly and apparently increasing incidence of Judicial Review and Article 40 applications relevant to the section is apparent, and that protagonists, lay and professional, in the arena of criminal law simply do not know at present where they stand.

25. It may be that I have insufficiently adverted in detail to all of the many cases that were cited by both sides, both at the hearing and in course of the detailed written submissions furnished, but I have refreshed my memory in respect of those with which I am familiar, and read those of which I was not. One that I have found of significant influence is the decision of Hogan J. (when in the High Court) in the case of *Damian McCabe v. Ireland and the Attorney General* [2014] IEHC 435. This decision, relating to circumstances affecting the plaintiff that were broadly comparable with those of the present applicants, was partly reversed by Finlay-Geoghegan J. in her judgment in the Court of Appeal within the past year, but I accept the argument advanced by Mr. McDonagh S.C. that this was in the context of finding a subsisting right of appeal in the individual facts of that case, and that the primary reasoning of Hogan J. in the High Court as to the predicament faced by the applicant, and by analogy by the present applicants, remains valid and highly persuasive.

26. Among the observations made by Hogan J. in that case are those that relate to the importance of there being a rational basis for any disparity of treatment affecting individuals in legislative provisions. Amongst these, he states at para. 15:

> *"The equal treatment of similarly situated persons within the criminal justice system is at the heart of the concept of equality before the law which, as the language of that provision makes clear, is one of the fundamental objectives of Article 40.1"*

27. Hogan J. shortly thereafter proceeds:

> *"This is especially so, given that the fundamentally different treatment with regard to sentencing which would then obtain would so greatly impact on the core constitutional right to liberty under Article 40.4.1".*

28. Hogan J. then at para. 21 proceeds to state:

> *"Given that in the present case the significantly differing treatment of otherwise similarly situated accuseds, so far as rights of appeal are concerned, is incapable of objective justification, and let it be recalled, no such justification has really been advanced, the conclusion that such a state of affairs plainly offends the guarantee of equality before the law and Article 40.1 is, accordingly, inescapable".*

29. Hogan J. in his conclusion proceeds to state that any such law as the provisions comprised in the Section presently under review must, by virtue of Article 34.3.4, comply with the principles articulated by Henchy J. in the case of *King v. Attorney General* [1981] I.R. 233, since the law must not ignore the fundamental norms of the legal order postulated by the Constitution. In that celebrated case, it was held by the Supreme Court that the inconsistency found in the relevant statutory provision resulted from incompatibility with the requirement in Article 38 of the Constitution that no person shall be tried on a criminal charge save in due course of law, with the guarantee in Article 40, s. 4 sub-s. 1, that no citizen shall be deprived of his liberty save in accordance with law, the principle of equality before the law declared in Article 40, s. 1, and with the guarantee in Article 40, s. 1, to defend and vindicate the personal rights of citizens.

30. In all the circumstances of the case, and having given the matter as much careful consideration as I can, I am persuaded that notwithstanding the presumption of constitutionality that exists in relation to enactments, and the regard and respect that Courts must show to enactments of the Oireachtais, the subsections under review of s. 99 fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made. One small and uncontroversial matter remains, and that relates to the joinder by the legal advisers to Mr. Dean Cormack in his proceedings of the Irish Human Rights and Equality Commission. As submissions on behalf of other parties make clear, it is readily apparent from the decision of the Supreme Court in *Carmody v. The Minister for Justice, Equality and Law Reform & Ors* [2010] 1 I.R. 365, that the question of the constitutionality of a particular statutory provision should be resolved prior to any consideration of whether to make a declaration of incompatibility under s. 2 of the European Convention on Human Rights Act, 2003. Accordingly the Irish Human Rights and Equality Commission will simply be dismissed from the proceedings with no order. I will hear counsel on any other matters they may wish to refer to at this stage.