Neutral Citation: [2014] IEHC 435

THE HIGH COURT

[2014 No. 5652P]

BETWEEN

DAMIAN McCABE

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered the 30th day of September, 2014

1. Where an accused receives a suspended sentence from the Circuit Court on appeal from the District Court and that sentence is later re-activated following a conviction for a subsequent offence, is he or she constitutionally entitled to appeal against the decision to re activate that sentence? This is essentially the issue which is presented in these proceedings in which the plaintiff has challenged the constitutionality of key portions of s. 99 of the Criminal Justice Act 2006 (as amended) ("the 2006 Act").

2. The plaintiff in these proceedings was originally convicted by the District Court on 24th June, 2013, of the offence of driving a motorcycle without insurance. He received a five months prison sentence in the District Court. Mr. McCabe appealed that sentence to the Circuit Court. On 29th October, 2013, the sentence was increased to six months, but, critically, it was suspended in its entirety for two years. Having regard to the scheme posited by s.99 of the 2006 Act it is accepted that the Circuit Court is now the first court for this purpose, *i.e.*, it was the Circuit Court (albeit sitting in its appellate capacity when hearing an appeal from the District Court) which imposed the suspended sentence.

3. The plaintiff was, however, subsequently convicted in the District Court on 26th May, 2014, of an offence under s. 6(1) of the Criminal Justice (Public Order) Act 1994. That Court then remanded the applicant back to the Circuit Court in accordance with s. 99(9) of the 2006 Act. On the following day the Circuit Court then revoked the suspended sentence with immediate effect, so that the applicant commenced to serve his prison sentence of six months in relation to the original no insurance offence. It is pursuant to this sentence that the applicant is now in custody. Sentencing on the second charge has now been adjourned by the District Court pending the outcome of this and associated legal challenges.

4. The plaintiff originally sought to challenge the legality of his detention on a range of non-constitutional grounds in Article 40.4.2 proceedings. I rejected that challenge in a judgment delivered on 3rd June, 2014: see *McCabe v. Governor of Mountjoy Prison* [2014] IEHC 309. While there was some debate as to whether the plaintiffs constitutional challenge should be heard in those proceedings or whether it might not be better to have separate plenary proceedings with pleadings, it was ultimately agreed that the plaintiff should be at liberty on bail in the Article 40.4.2 proceedings pending the outcome of this constitutional challenge in these separate plenary proceedings.

5. As I observed in the first judgment, the question of the re-activation of suspended sentences in the manner envisaged by s. 99 of the 2006 Act has not been without its difficulties. The Oireachtas has indeed intended to address some of these problems of interpretation and application by two further amendments of the 2006 Act, namely, s. 60(1)(a) of the Criminal Justice Act 2007 ("the 2007 Act") and s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009 ("the 2009 Act").

6. The scheme envisaged by s. 99 of the 2006 Act is clear enough. Section 99(9)(as amended by s. 60(a) of the 2007 Act) envisages that where an accused has been "convicted of an offence" for which he has received a suspended sentence and he subsequently commits a further offence during the currency of that suspended sentence, the court (which I shall term for ease of reference "the second court") before which proceedings for the second offence are brought "shall before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order".

7. It should be noted that, as originally enacted, s. 99(10) provided that the second court should impose sentence *prior* to sending the matter back to the original court for consideration in relation to the suspended sentence. Following the change effected by the 2007 Act, the second court is now required to remit the matter to the first court (*i.e.*, the court which originally imposed the suspended sentence) prior to imposing sentence. Section 99(10) provides that the court to which the accused has been remanded shall revoke the suspension of the sentence "unless it considers that the revocation of that order would be unjust in all the circumstances of the case."

8. Section 99(12) further provides that:

> "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 or, or sentence imposed on, a person for an offence by the court that revoked the order."

9. The dilemma which was presented for the plaintiff was that as the suspended sentence in his case was imposed by the Circuit Court, the decision to re-activate that sentence was taken by that Court. The difficulty, however, is that in summary prosecutions, the decision of the Circuit Court on appeal is final and unappealable. There is, of course, a statutory right of appeal from the Circuit Court to the Court of Criminal Appeal, but this is in respect of prosecutions on indictment only: see s. 63 of the Courts of Justice Act 1924 and s. 31 of the Criminal Procedure Act 2010.

10. Against the background, it is agreed that the first question, therefore, which must be considered is whether the Constitution requires the existence of a right of appeal against the re-activation of a suspended sentence by the Circuit Court when it is agreed that such an appeal would lie had but the suspended sentence been imposed in the first instance by the District Court.

Does the Constitution require the existence of a right of appeal in these circumstances?
11. The plaintiff advances two fundamental arguments in support of his contention that the Constitution requires the existence of a right of appeal. First, he says that he has such a right by virtue of Article 34.3.4 of the Constitution which provides:

> "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."

12. Second, he argues that a failure to provide a right of appeal against the re-activation of the suspended sentence when that suspended sentence was itself imposed by the Circuit Court on appeal when a right of appeal against the re-activation of the sentence is provided when the suspended sentence was originally imposed by the District Court would be fundamentally arbitrary and contrary to the equality guarantee in Article 40.1.

13. I propose now to deal with these arguments in reverse order.

A right of appeal and equality before the law
14. It is clear that, so far as the plaintiff is concerned, the fact that the suspended sentence was imposed by the Circuit Court rather than the District Court is a purely accidental factor which should be immaterial in any consideration of whether the decision to re-activate that sentence should itself be capable of being appealed. If, then, the plaintiff enjoys no right of appeal against the re-activation of the sentence, it might be asked why he should be placed at a disadvantage by reason of the fact that he was obliged in the first place to appeal to the Circuit Court in order to ensure that the sentence was actually suspended? If, of course, that suspended sentence had been imposed by the District Court in the first instance, then, upon re-activation of that sentence by the District Court, that decision (*i.e.*, the decision to re activate) could in turn have been appealed to the Circuit Court.

15. It must also be recalled that the policy expressed by the Oireachtas in s. 99(12) is that the re-activation of every suspended sentence should be capable of being appealed to a higher court. In these circumstances, it is not possible to discern any possible justification for the radically different treatment of persons whose suspended sentences for minor offences have been re-activated by the Circuit Court as distinct from the District Court. 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: see, e.g., *Cox v. Ireland* [1992] 2 I.R. 305, *SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 I.R. 369, *BG v. Ireland (No.2)* [2011] IEHC 445, [2011] 3 I.R. 748 and *Byrne v. Director of Oberstown School* [2013] IEHC 562, [2014] 1 I.L.R.M. 346. 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.

16. In this context it must also be stressed that s. 99(10) does not provide for the *automatic* re-activation of a particular sentence, since it recognises that there may be circumstances where the re-activation of a suspended sentence might be unjust. This is precisely why the right of appeal provided for by s. 99(12) in respect of the re-activation of a sentence is of such vital importance.

17. In these circumstances, the denial of the right of appeal to one category of litigant simply because of the essentially accidental fact that the suspended sentence which has now been re-activated was imposed *on appeal by the Circuit Court* rather than at first instance by the District Court has the inherent capacity to work a considerable injustice and unfairness. I say "essentially accidental" advisedly, because the question of whether an accused has the right of appeal against the re-activation of a sentence should not depend on whether the original sentence was imposed at first instance or whether it was imposed following an appeal to the Circuit Court.

18. This conclusion is, moreover, re-inforced by a consideration of the Supreme Court's judgment in *The People v. Foley* [2014] IESC 2. In that case the accused had originally received a sentence of 8 years' imprisonment, the entirety of which was suspended by the trial judge. Following an undue leniency appeal by the Director of Public Prosecutions to the Court of Criminal Appeal, that Court varied the sentence by suspending only five of the eight years. When the accused committed further offences in breach of the conditions attaching to the suspended sentence, the issue arose as to what the appropriate court which should determine the re-activation issue actually was: was it the Circuit Court or was it the Court of Criminal Appeal?

19. The Supreme Court held that the re-activation issue should be determined by the Court of Criminal Appeal, since it was that Court which had effectively set aside the decision of the Circuit Court and replaced it with what Denham C.J. described as a "new sentence." It followed that a right of appeal existed from the re-activation decision of that Court to the Supreme Court, albeit under the limited conditions contained in s. 29 of the Courts of Justice Act 1924. Critically, however, the Supreme Court rejected the argument that this constituted an unfair discrimination as between different categories of appeals, whether appeals against severity or appeals against undue leniency. As Denham C.J. observed:

> "In fact...convicted persons in both such appeals, namely, those under s. 2 of the Criminal Procedure Act 1993 [undue leniency] and s. 3 of the Criminal Procedure Act 1993 [severity] are subject to a similar power of the [Court of Criminal Appeal] to quash the sentence of the trial judge and to impose a new sentence. Thus, I would dismiss this ground of appeal [unfair discrimination] also."

20. The clear implication from this passage, of course, is that had matters been otherwise, Article 40.1 would have been breached.

Conclusions on the Article 40.1 issue
21. Given that in the present case the significantly differing treatment of otherwise similarly situated accused so far 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 in Article 40.1 is, accordingly, inescapable. We can consider presently the implications of that particular conclusion.

Whether Article 34.3.4 requires the existence of a right of appeal?
22. As the Circuit Court is a court of local and limited jurisdiction, it is plain that Article 34.3.4 is, in principle, at least applicable to a decision to re-activate a sentence. Counsel for the defendants, Mr. Barron S.C., argued that the decision to re-activate a suspended sentence was in this instance no more than the exercise of a statutory power which was ancillary to the pre-existing appellate jurisdiction. In effect, therefore, the argument was that this decision was simply part and parcel of the appellate jurisdiction which had already been exercised when Mr. McCabe persuaded the Circuit Court to suspend the sentence on appeal from the District Court.

23. While this argument was attractively put, I do not think that this, with respect, can be regarded as a realistic analysis of what actually occurred in the Circuit Court. Certainly, the decision to re-activate the sentence is treated by s. 99(10) as an autonomous, free standing exercise of a new jurisdiction, requiring the application *for the first time of separate statutory tests,* necessitated in turn by the presence of new facts which are themselves the basis on which this jurisdiction was to be exercised. Any other conclusion is, in any event, contra indicated by the very wording of s. 99(12) itself which creates a right of appeal from the decision to re-activate the suspended sentence. The language, structure and form of this sub section necessarily pre-supposes that the decision to re-activate is a decision taken at first instance, even if the court which exercised that re-activating jurisdiction was itself originally exercising an appellate jurisdiction when the decision to impose the suspended sentence first came before it. This is further underscored by the comments of Denham C.J. in *Foley* which strongly support the view that the re-activation of the suspended sentence pursuant to s. 99(10) represents a new exercise of a statutory jurisdiction.

24. Next, it was argued that there is in fact an appeal from the decision of the Circuit Court in that s. 16 of the Courts of Justice Act 1947 allows for a case to be stated by the Circuit Court to the Supreme Court. That section provides in material part as follows:

> "A Circuit Judge, may, if an application in that behalf is made by any party to any matter...pending before him, refer, on such terms on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of such case stated."

25. It will be seen that s. 16 of the 1947 Act provides for a case stated procedure and not for a right of appeal. The ultimate decision continues to rest with the judge who made the reference to the Supreme Court, namely, the Circuit Court judge. Section 16 cannot thus be regarded as an "appeal" within the meaning of Article 34.3.4, which necessarily implies that there will be an independent determination of the case by a higher court, even if the scope of any such appeal is itself subject to conditions imposed by law.

26. Turning now to the construction of Article 34.3.4 itself, is clear from the judgment of Finlay J. in *The State (Hunt) v. O'Donovan* [1975] I.R. 39 that the right of appeal envisaged by Article 34.3.4 is one which requires statutory vesture. It is equally clear from that judgment that Article 34.3.4 does not contemplate a universal right of appeal in all cases. As Finlay J. observed ([1975] I.R. 39, 48):

> "I have no difficulty in interpreting [Article 34.3.4] as prohibiting the constitution of a court of local and limited jurisdiction from which there was no appeal at all; but there is a very large gap between that interpretation and one which excludes the right of the law to determine from which precise decision an appeal will lie."

27. In *Hunt* the applicant had pleaded guilty to the commission of an indictable offence in the District Court and in accordance with the provisions of s. 13 of the Criminal Procedure Act 1967 he was sent forward to the Circuit Court for sentence. As the law then stood, there was no right of appeal against the imposition of a sentence by the Circuit Court following such a plea of guilty in the District Court, although, as Finlay J. pointed out, had the accused withdrawn the plea before the Circuit Court and was subsequently found guilty, he would have had a right of appeal against sentence in such circumstances. (The right of appeal against sentence was in fact subsequently restored by s. 1 of the Criminal Procedure (Amendment) Act 1973).

28. In the light of his finding that Article 34.4.3 did not confer a universal right of appeal, Finlay J. concluded that the legislation was not unconstitutional by reason of an incompatibility with Article 34.3.4. Finlay J. also went to dismiss the argument that the 1967 Act thereby violated Article 40.1 ([1975] I.R. 35 at 50-51):

> "A person can never be dealt with under that section unless he so wishes. There is no moral or legal duty on a person, when charged with an indictable offence before the District Court, to signify his desire to plead guilty to that charge. Unless he does so, the provisions of s. 13 of the Act of 1967 never come into operation. Even after he has been sent forward by the District Court on a plea of guilty (if he makes one), the accused having been sentenced by the Circuit Court must be asked if he wishes to withdraw that plea; if he does withdraw his plea he is indicted and to that indictment he may plead guilty or not guilty and, if sentenced, he has a statutory right of appeal against that sentence. However, to take a hypothetical case, each of two persons might be charged with the same type of crime but one of them might be sent forward for sentence on his plea of guilty which does not withdraw while the other might be convicted, or plead guilty on indictment; in such circumstances it is undoubtedly true that one had the right of appeal against severity of sentence while the other has not that right. I must ask myself whether this result, on the principles laid down in the cases to which I have referred, constitutes an invidious discrimination or a failure to protect adequately the rights of the individual.
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> The person who has been sent forward for sentence on his plea has the opportunity to withdraw that plea up to the very last moment; in addition such person is sentenced, after due submission in evidence, by a constitutional court with an independent judge subject to legal maximum standards as to the penalty he may impose. In these circumstances I do not consider that these provisions are repugnant to either s. 1 of Article 40 or s. 3 of that Article of the Constitution.
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> It is important to note that the choice to which I have referred is not an illusory one. Practitioners are well accustomed to using an unequivocal admission of an offence as a plea in leniency, and it often succeeds. Furthermore, there is a brevity in speed in the procedure under s. 13(2)(b) of the Act of 1967 which may constitute an advantage to an accused person. Therefore, I refuse these applications."

29. This passage invites a number of comments. First, one might respectfully doubt whether this analysis of the proper scope of Article 40.1 would be followed today. In the early case-law dealing with Article 40.1 the term "invidious discrimination" seems to have been borrowed from the US case-law dealing with the equal protection clause of the 14th Amendment. The US jurisprudence had been developed in a context where the US Supreme Court frequently encountered legislation which was "invidiously" discriminatory in this sense in that there was legislative discrimination on the basis of race or colour. One would be hard pressed to identify any legislation enacted by the Oireachtas which was "invidious" in this particular sense. The scope of Article 40.1 is, however, far broader than this and it is perhaps for this reason that the Supreme Court has subsequently observed that the use of this term ("invidious discrimination") "in discussing Article 40.1 is more likely to mislead than to help": see *Murphy v. Attorney General* [1982] I.R. 241, 286, *per* Kenny J.

30. Second, as O'Donnell J. noted in his judgment in *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.L.R.M. 457, 481, it is clear that the modern case-law on Article 40.1 endeavours to avoid any formalistic analysis such as might have been a feature of the equality jurisprudence of the 1970s and 1980s. The emphasis is instead rather on ensuring that the substance of the guarantee is upheld and, in particular, that any "significant differentiation between citizens....may still fall foul of the provision if they cannot be justified": see

[2014] 1 I.L.R.M. 457, 481-482, *per* O'Donnell J.

31. While it is true that, returning to the precise question at issue in *Hunt*, there are differences between the case of the accused who elects to plead guilty in the District Court and who is sent forward for sentence on the one hand and the accused who either pleads guilty following a return for trial in the Circuit Court or who is found guilty following a trial on indictment on the other, it is nonetheless hard to see how those differences could justify such a strikingly different treatment in terms of appellate remedies regarding sentence. Viewed through the prism of the modern Article 40.1 case-law, I very much doubt whether the actual result in *Hunt* would nowadays be regarded as correct. Indeed, it may be significant that in *Todd v. Murphy* [1999] 2 I.R. 1, Geoghegan J. already said as much.

32. In any event, so far as the present case is concerned, I do not think that the fact that an accused found himself obliged to appeal to the Circuit Court in order to secure a suspended sentence in the first place should be the critical fact which could justify the failure to provide for a right of appeal from the decision to re-activate that sentence.

33. With regard to the interpretation of Article 34.3.4, I agree with Finlay J. that this provision does not confer or guarantee a universal right of appeal. This point was also illustrated by the decision of Geoghegan J. in *Todd v. Murphy* [1999] 2 I.R. 1. In that case the applicant had challenged the validity of legislation which provided that the decision of the Circuit Court not to transfer a trial from one venue to another was unappealable. Geoghegan J. expressed approval for the general principles enunciated by Finlay J. in *Hunt*, without "necessarily endorsing the particular application of that principle" in that case. He went on to say that it was clearly open to the Oireachtas to bar an appeal from a preliminary decision of this kind, adding ([1999] 2 I.R. 1, 4):

> "It would seem to me to be peculiarly in the interests of a fair and efficient administration of justice that there should not be a right of appeal from a decision of a trial judge as to the venue of a trial made before the trial commences. Such an appeal is likely to delay the proceedings and is open to much abuse."

34. The right of appeal is subject to "law", but it is now clear- in a way which was not perhaps quite the case in 1972 at the time when *Hunt* was decided - that where this phrase appears in the Constitution, it does not simply refer to positive law only in the sense of a statute enacted by the Oireachtas. It is rather the case that any such "law" as is envisaged by Article 34.3.4 must comply with the principles subsequently articulated by Henchy J. in *King v. Attorney General* [1981] I.R. 233, 257, so that the law "must [not] ignore the fundamental norms of the legal order postulated by the Constitution." This principle was recently re affirmed by O'Donnell J. in *Murphy* in the context of Article 38.3.1 and the establishment "by law" of the Special Criminal Court. The application of the *King* principle meant that the question in that case thereafter became whether the provisions of the Offences against the State Act 1939 providing for the establishment of that Court were "compatible with the dictates of fairness postulated by the Constitution."

35. If the matter is looked at this way it may be said that the existence of a right of appeal against a purely procedural ruling of a trial judge in matters relating to venue is not intrinsic to the fundamental norms postulated by the Constitution and nor is it central to the criminal justice system. As Geoghegan J. pointed out, the existence of a right of appeal against decisions in respect of venue would be likely to prove disruptive to the smooth and orderly administration of justice.

36. The right of appeal of an accused against sentence is an entirely different matter. As a matter of history, a right of appeal on the part of the accused against sentence has been a fundamental feature of the criminal justice system since the Constitution was first enacted. Indeed, leaving aside for a moment the issues raised in these proceedings, it might be said that the only example since 1937 of where an accused was not afforded a right of appeal against sentence was in the interval between the enactment of the Criminal Procedure Act 1967 and the Criminal Procedure (Amendment) Act 1973, *i.e.*, the issue which formed the background to the issue raised in *Hunt*. Even then it might be said that this particular omission was an unintended by-product of the manner in which the 1967 Act had been drafted, rather than a deliberate policy on the part of the Oireachtas. To that extent, therefore, this legislative omission seems to have been regarded as something of an anomaly and the omission was, in any event, swiftly rectified by the Oireachtas once the problem came to light.

37. In view of the centrality of sentencing to the criminal justice system and given that the protection of liberty, the trial of offences in due course of law and the existence of a right of appeal are themselves all fundamental norms expressly safeguarded by the Constitution, it is difficult to see how a law which did not provide for a right of appeal against sentence imposed by a court of local and limited jurisdiction could be said to be a law which respected those fundamental norms, so that it was a "law" in the sense identified by Henchy J. in *King* and by O'Donnell J. in *Murphy* (2014). It is, perhaps, unnecessary to decide whether Article 34.3.4 requires the existence of a right of appeal against sentence on the part of an accused in every single case. It is, however, to say that the denial of a right of appeal against a sentence imposed by a court of local and limited jurisdiction is something which, at the very least, requires to be objectively justified.

38. For all of these reasons, I do not think that either aspects of the reasoning nor the actual decision in *Hunt* would be followed today. In arriving at this view, I do not overlook the fact that the Supreme Court dismissed an appeal from the decision of Finlay J.: see [1975] I.R. 39, 53. As no reasons were given by that Court in respect of the single judgment delivered on the constitutional question, its precedential value is difficult to discern. But even if - which is by no means clear - that decision is regarded as having endorsed the reasoning of Finlay J. in this Court, the decision in *Hunt* could still no longer hold as an authority because the judgment is based on a doctrinal analysis of Article 34.3.4 and Article 40.1 which has since been overtaken by a series of much later Supreme Court decisions.

Conclusions on the Article 34.3.4 issue

39. Can it be said that such objective justification is present here? For the reasons already stated with regard to the equality argument in Article 40.1, one must doubt whether such justification is or could be present. After all, to return to a point already made in that latter context, the underlying policy expressed ins. 99(12) is that the re-activation of a suspended sentence following a further conviction is not automatic. Furthermore, as is apparent from the language of s. 99(12), the Oireachtas appears to have contemplated that there should be a universal right of appeal against sentence.

40. In summary, therefore, for the reasons I have already stated, it follows that the legislative failure to provide an accused a right of appeal against the re-activation of a suspended sentence imposed by the Circuit Court amounts to a breach of Article 40.1 and Article 34.3.4.

What relief is available to the plaintiff!

41. In these proceedings the plaintiff has claimed a declaration that s. 99 is unconstitutional. It is true that in one sense the plaintiff is affected by the operation of s. 99(12) in that it is pursuant to those provisions that the suspended sentence was thereafter activated. But this is not the real source of his complaint, since the objection to s. 99 is not really to that *which it contains*, but

rather in respect of what it *does not contain*. The two separate findings of unconstitutionality (in respect of both Article 34.3.4 and Article 40.1) relate to a *legislative failure* to provide a right of appeal for an accused person whose sentence has been re-activated.

42. In these circumstances, given that the identified unconstitutionality relates to a legislative lacuna, an order declaring the section to be unconstitutional would generally be inappropriate. Just as I observed in *BG v. Ireland (No.2)* [2011] IEHC 445, [2011] 3 I.R. 748, 767 (where a similar unconstitutional lacuna had come to light), a finding of unconstitutionality would serve no real purpose in the present case "other than a Samson-like collapsing of the legislative pillars which gave rise to the unconstitutionality in the first instance." At the same time, the court must fashion an effective remedy to address the legislative lacuna if it is to be faithful to the constitutional command contained in Article 40.3.1 to "defend and vindicate the personal rights of the citizen", so far as it is practicable to do so. It is in these particular circumstances that the court "will feel obliged to fashion its own remedy": see *McDonnell v. Ireland* [1998] 1 I.R. 134, 148, *per* Barrington J.

43. Similar views were expressed by Murray C.J. in *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635, 668- where an unconstitutional legislative lacuna of this kind has been identified- to the effect that in this type of case the court enjoys a constitutional jurisdiction "to grant such remedy as it considers necessary to vindicate the right concerned." In that case the applicant contended that the fact that he had no right to apply for criminal legal aid in a District Court trial which would provide him with representation by counsel as well as a solicitor and therefore no right to be granted such legal aid where the essential interests of justice so require. The Supreme Court held while that the Criminal Justice (Legal Aid) Act 1962 was not unconstitutional, the failure to make provision in suitable cases for the present of counsel at a criminal trial was, objectively, a breach of the accused's entitlement under Article 38.1 to trial in due course of law. Viewed thus, *Carmody* is really a classic example of an unconstitutional lacuna where the invalidation of the underlying legislation is neither an appropriate or a necessary remedy.

44. What, then, should the remedy in the present case actually be? In *Byrne v. Director of Oberstown School* [2013] IEHC 562, [2014] 1 I.L.R.M. 346 I noted that that, in theory, at any rate, "once an unconstitutional omission is judicially identified then the solution generally best lies with the legislative branch" and that since the constitutional command related to equality before the law ([2014] 1 I.L.R.M. 346, 358):

> "in the wake of such a judicial determination the choice rests with the Oireachtas to decide whether to level up or level down so that the precepts of Article 40.1 are thereby satisfied."

45. I continued by noting that in practice matters may not be quite that simple ([2014] 1 I.L.R.M. 346 at 358-359):

> "What, then, is the situation in the present case? In theory, perhaps, the Oireachtas and the Minister could bring about equality by abolishing the remission regime for all offenders. In practice, however, this would be all but impossible, certainly insofar as such an equalising measure purported to operate *retroactively* by removing the existing legal entitlements and expectations of serving prisoners to remission. Such a retroactive measure would be open to a host of objections and given that the entire criminal justice system has been heretofore premised on the understanding that (the special cases of murder and persons imprisoned for contempt of court aside) all other prisoners are eligible for and have an entitlement to remission....one may doubt whether the retroactive removal of remission in this fashion would survive constitutional scrutiny.
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> Just as in *Carmody* and *SM*, therefore, there is no realistic option open other than to find that the failure to provide for the same remission regime at Oberstown as applies to offenders detained at St. Patrick's Institution violates the precept of equality in Article 40.1. This means in turn that the failure to afford the applicant the same remission entitlements as other young offenders violates his constitutional rights.
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> . . ..In these circumstances it must be adjudged that by reason of the continued application to him of this unconstitutional legislative omission, the applicant's continued detention at Oberstown is not in accordance with law. In accordance, therefore, with the requirements of Article 40.4.2 of the Constitution, it follows that I must direct his release from that custody."

46. The present case is different again. Even though I have found that the *denial* to the plaintiff of a right of appeal is a violation of both Article 34.3.4 and Article 40.1, the parameters of such a right of appeal are entirely a matter of legislative policy which is committed to the Oireachtas alone. Specifically, the unconstitutionality cannot, perhaps, be as readily cured in the same manner as happened in cases such as *SM (No.2)* and *BG (No.2)*. These were both sentencing cases where specific classes of defendants were unconstitutionally exposed to the prospect of a higher maximum sentence than other similarly situated defendants. In both cases it was held that the legislative omission could be cured by declarations which ensured that there was only one uniform maximum sentence.

47. In the present case, the equivalent remedy might be to create a right of appeal for the accused persons in the same position as the plaintiff. In that hypothetical scenario, all accused persons would enjoy equivalent rights of appeal following the re-activation of suspended sentences which had been imposed in respect of summary offences, thus satisfying the requirements of both Article 34.3.4 and Article 40.1. That, however, is a remedy which lies far beyond the judicial capacity to effectuate or to create. It would be a matter for the Oireachtas to determine by law how such a right of appeal might be exercised, not least the identity and composition of the court which might be assigned jurisdiction to hear such an appeal.

48. In *Byrne* the unconstitutional discrimination consisted of the failure to apply the same type of sentence remission to similarly situated categories of young offenders depending on the identity of the institution in which they were detained. In those circumstances, I found that the only practical way of curing this unconstitutionality and providing an effective remedy for this violation was to treat the remission rules applicable to offenders detained at St Patrick's Institution as being also applicable to those detained at Oberstown School.

49. More importantly, a similar solution was devised by the Supreme Court in *Carmody* where, as we have seen, the lacuna stemmed from the failure of the Criminal Justice (Legal Aid) Act 1962 to allow for the provision of counsel in certain types of cases. On this basis the applicant in that case had claimed that s. 2(1) of the Act was repugnant to the Constitution. Dealing with the question of remedy Murray C.J. stated ([2010] 1 I.R. 635, 668-670):

> "The Court has already determined that the denial of an opportunity to apply for and be granted, where appropriate, such legal aid is a denial of a constitutional right. He is entitled to have that constitutional right vindicated. Article 40.3 of the Constitution imposes on the organs of government of the State the duty to defend and vindicate the personal rights of the citizen.....

> The Court is satisfied that it would be unjust and contrary to the appellant's right to a trial "in due course of law" as required by Article 38.1 of the Constitution if the prosecution of the charges brought against him were allowed to proceed while he is denied the right to apply for legal aid to include solicitor and counsel and have that application determined on its merits. To allow a trial to proceed without any possibility of determining whether it was essential to a fair hearing that the defendant be represented by solicitor and counsel would be, in the words of O'Higgins C.J., in *[The State (Healy) v. Donoghue* [1976] I.R. 325, 351] "to tolerate injustice".
>
> ……..Accordingly the Court will grant a declaration that the appellant has a constitutional right to apply, prior to being tried, for legal aid in the criminal proceedings brought against him in the District Court and to have that application heard and determined on its merits. It will also make an order prohibiting the prosecution from proceeding in respect of the criminal charges referred to in these proceedings unless and until the appellant is afforded that right."

50. I propose to apply by analogy the solution devised by the Supreme Court in *Carmody* to the present case. Compliance with the obligations placed on this Court by Article 40.3 to vindicate the constitutional rights of the plaintiff requires that he is nonetheless entitled to a real remedy in order to ensure that these rights are not further infringed.

51. Accordingly, for so long as sentenced persons such as the plaintiff are denied a right of appeal against the re-activation of the sentence for a summary offence by the Circuit Court, the only effective yet practicable remedy which can be devised to ensure that this unconstitutionality is adequately mitigated is to declare that it would be unconstitutional to give effect to the re-activated sentence in the absence of a legally conferred right of appeal.

Conclusions
52. It remains only to summarise my principal conclusions:

53. First, the starkly different treatment of the rights of appeal of convicted persons whose suspended sentence in respect of summary offences was originally imposed by the Circuit Court rather than the District Court is not objectively justifiable and amounts to a breach of the equality guarantee in Article 40.1. This is especially so given that s. 99(12) of the 2006 Act (as amended) pre-supposes that all such offenders will enjoy a right of appeal against the re-activation of such a sentence and as s. 99(10) makes it clear that such re-activation was not intended to operate automatically in every single case.

54. Second, the failure to provide a right of appeal against the re-activation of a suspended sentence by a court of local and limited jurisdiction involves a failure to provide a right of appeal in the manner determined "by law" for the purposes of Article 34.3.4, at least, where, as here, no objective justification for such failure has been supplied. By failing to providing for such a right of appeal, the Oireachtas has failed to comply with fundamental constitutional norms in the sense identified by Henchy J. in *King* and, more recently, by O'Donnell J. in *Murphy*.

55. Third, given the unconstitutionality which has been just identified relates not to what is contained ins. 99 of the 2006 Act, but rather to that *which it does not contain*, it would be both inappropriate and unnecessary to make a formal declaration of unconstitutionality invalidating s. 99 itself.

56. Fourth, the plaintiff is nonetheless entitled to a real remedy to ensure that his constitutional rights are not further infringed. In these circumstances, adapting by analogy the solution devised by the Supreme Court in *Carmody* in respect of the unconstitutional legislative omission identified in that case, I propose to grant an order declaring that it would be unconstitutional to give effect to the re-activated sentence in the absence of a statutorily conferred right of appeal against the decision of the Circuit Court to re-activate the sentence.