

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 185 J.R.]**

**BETWEEN**

**PATRICK DOOLEY**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, THE COMMISSIONER OF AN GARDÁ SÍOCHÁNA AND THE MINISTER FOR JUSTICE  
AND EQUALITY**

**RESPONDENTS**

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 212 J.R.]**

**BETWEEN**

**GAVIN OWENS**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, THE COMMISSIONER OF AN GARDÁ SÍOCHÁNA AND THE MINISTER FOR JUSTICE  
AND EQUALITY**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Eagar delivered on the 5th day of May, 2017.**

1. The applicants seek to quash committal warrants for their arrest and detention. The warrant for the arrest and detention of Mr. Dooley was issued on the 17th February, 2016 by Judge Desmond Zaidan sitting at Naas District Court. The warrant for the arrest and detention of Mr. Owens was issued on the 14th March, 2016 by Tom Ward the District Court Clerk for the Dublin Metropolitan District.

2. The entirety of the Fines (Payment and Recovery) Act 2014 was commenced on the 11th January, 2016 by the Fines (Payment and Recovery) Act 2014 (Commencement Order 2016) (SI 6 of 2016).

3. The applicants' claim is that the aforesaid warrants cannot be executed without compliance with the terms of section 7 of the Fines (Payment and Recovery) Act 2014.

4. In each case leave was granted by Mr. Justice Humphreys to apply for judicial review to stop the respondents taking any further steps to execute the aforesaid committal warrants. The applicants sought a stay on the execution of the aforesaid committal warrants pending the determination of these proceedings.

5. In relation to Mr. Dooley, the court granted leave on the 16th March, 2016 and in the case of Mr. Owens the court granted leave on the 11th April, 2016.

6. The essential issue in this case is whether or not the provisions of the Fines (Payment and Recovery) Act 2014 (herein "the 2014 Act") are applicable to the applicants' circumstances – this is to say circumstances where the applicants were convicted and sentenced *before* the commencement of the 2014 Act, but the committal warrants issued *after* the commencement of the 2014 Act.

**Patrick Dooley**

7. The applicant was convicted in respect of four separate offences contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on the 22nd July, 2015. He was ordered to pay fines in the sum of €500.00 separately in respect of each of the matters, within a period of ninety days, and he was to be imprisoned in default of payment within the stated period.

8. On the 11th March, 2016 the applicant was in communication with Garda Gibson of Lucan Garda Station in relation to the fact that the committal warrants had been issued for his arrest and detention. He was informed of the intention of An Garda Síochána to execute the two warrants.

9. The affidavit of Gareth Noble solicitor of KOD Lyons Solicitors avers that Patrick Dooley contacted his office in order to seek legal advice where he had been informed that a committal warrant was in existence for his arrest and detention. He stated on affidavit that on receipt of the committal warrant, it was immediately apparent to him that the warrant did not conform to the provisions of the 2014 Act.

**Gavin Owens**

10. Mr. Owens was convicted of an offence contrary to s. 56 of the Road Traffic Act 1961 on the 3rd July, 2015. He was ordered to pay a fine in the sum of €500.00 within a period of four months, and he was to be imprisoned in default of paying the fine within the stated period.

11. Mr. Owens stated that in March, 2016 he became aware that a committal warrant was in existence for his arrest. He said that on

the 24th March, 2016 his solicitor was furnished with a copy of the relevant committal warrant and it became apparent that the warrant did not conform to the provisions of the 2014 Act.

### **The 2014 Act**

12. The 2014 Act provides for a mechanism whereby a person who fails to pay a fine should be brought before the District Court to facilitate representations being made by him, or on his behalf, to prevent his imprisonment, and which allows for staged payment, or for an alternative to imprisonment, such as community service.

13. Section 7(4) of the 2014 Act provides for a prerequisite hearing (on notice to the fined person):

"The appropriate court official concerned shall, by notice in writing served on the fined person, require the person to appear before the court on the date and at the time specified in the notice, and to provide to the court a statement in writing of his or her financial circumstances."

14. S. 7(5) of the Act demands that specified criteria must be satisfied before a committal may be ordered in default. In respect of summary offences, these measures provide, *inter alia*, for the recovery of the sums by coercive means other than imprisonment (such as attachment to salary) and for the mandatory consideration of a community service option, prior to any committal taking place:

"(a) The court shall, after considering a statement provided to it pursuant to subsection (4) in deciding what order to make under subsection (1)—

(i) first, give consideration to making an attachment order in respect of the fined person, and

(ii) second, if it is satisfied that it would not be appropriate for it to make an attachment order in respect of the fined person, give consideration to making, subject to subsection (2), a recovery order or community service order in respect of the fined person.

(b) Where the court is satisfied that it would not be appropriate for it to make an attachment order, recovery order or community service order in respect of the fined person, it may commit the person to prison in accordance with section 2 or 2A of the Act of 1986."

15. Counsel for the applicants submitted that the 2014 Act contains an express retrospective provision, so far as pre-existing fines are concerned. Specifically, section 1 of the Courts (No. 2) Act 1991, which allows for the issuing of committal warrants in respect of unpaid fines is amended by s. 22 of the 2014 Act by means of the insertion of s. 1A. The 1991 Act now provides as follows:-

"(1)(1) Subject to subsection (2) of this Act, in all cases of summary jurisdiction whenever an order has been made, upon the conviction of any person for an offence, for the payment of a penal sum or the performance of a condition and the penal sum has not been paid or the condition has not been performed, a warrant of committal to imprisonment for the non-payment of the penal sum or the non-performance of the condition may be issued by a justice of the District Court—

(a) not later than six months from the expiration of the time fixed by the said order for the payment of the penal sum or the performance of the condition where—

(i) the said order was made after the passing of this Act, or

(ii) the said order was made before the passing of this Act and the time for the payment of the penal sum or the performance of the condition expired after the passing of this Act, and

(b) not later than six months after the passing of this Act, where the time for the payment of the penal sum or the performance of the condition expired not earlier than the 1st of July 1989, and not later than the day before the passing of this Act.

(2) This section shall apply notwithstanding either—

(a) the references in section 23 of the Petty Sessions (Ireland) Act 1851 to the times for the issue of any warrant, or

(b) the issue before the passing of this Act of any warrant under the said section 23 for the non-payment of a penal sum or the non-performance of a condition.

*(1)(a) The operation of section 1 of this Act and of section 23 of the Petty Sessions Ireland Act 1851, insofar as they relate to any penal sum referred to therein shall, from the commencement of section 7 of the Fines (Payment and Recovery) Act 2014, be subject to the operation of the provisions of the Fines (Payment and Recovery) Act 2014 insofar as these provisions relate to such penal sums and such section 1 and section 23 shall with all necessary modifications be construed accordingly [this Court's emphasis]. "*

16. Counsel for the applicants submitted that the 2014 Act as such makes explicit provision for retrospective effect in relation to persons subject to fines imposed *prior* to the commencement of the 2014 Act, and are the subjects of an application for the issue of a committal warrant for non-payment of such fines *after* the commencement of the 2014 Act.

17. This Court notes that the time for payment of the fine in both the applicants' cases had expired before the passing of the 2014 Act, however, no application for the issuing of a warrant was made until after the Act was commenced. In those circumstances, it was open to the applicants to pay the fines at any time prior to the application for the issuing of the warrants. Accordingly, the applicants ought have been subject to the provisions of the 2014 Act.

### **Presumption against retrospectivity**

18. Counsel for the respondent argue that legislation can only be given retrospective effect where it deals with truly procedural or evidential matters. Given that the 2014 Act deals with important aspects of sentencing, affecting the substantive rights of the applicants, counsel state that the 2014 Act cannot be interpreted as solely a matter of procedure or evidence. The common law

presumption against the retrospective operation of a statute has not been rebutted by the applicants. They cite *Toss Ltd. v. District Court Justice Ireland* (Unreported, Blayney J, High Court, 24th November, 1987) where legislation dealing with the issuing process of summonses was held to be retrospective in its application, as the legislation dealt with a purely procedural matter.

19. Counsel for the respondent highlight the novel infrastructure as to the imposition of fines in criminal courts contained in the 2014 Act. The 2014 Act concerns, *inter alia*; important aspects of sentencing, how fines are imposed, the availability of new sentencing options (attachment/recovery orders, community service orders, imprisonment in default of payment). Naturally, the imposition of sanctions involves procedure, however, counsel argues that this does not alter the core premise that the 2014 Act involves substantive changes to sentencing in Ireland, more than mere procedural or evidential matters.

20. They point to the use of present tense language in the 2014 Act, and refer in particular to section 5 and 20, and conclude that this use of present tense language contradicts the position of the applicants, that there is an explicit retrospective provision in the 2014 Act. They argue that the 'entire language, structure and format' of the 2014 Act compels the Court to interpret the Act prospectively.

By way of example, counsel cite section 5 of the Act deals with the capacity of a person to pay a fine:

"(1) The purpose of this section is to ensure, in so far as is practicable, that, where a court *imposes* a fine on a person, the effect of the fine on that person or his or her dependants is not significantly abated or made more severe by reason of his or her financial circumstances.

(2) Where a person of full age is convicted of an offence, the court shall, *in determining* the amount of the fine (if any) to impose in respect of the offence, take into account the person's financial circumstances. [This Court's emphasis]

[...]"

21. They state that if there was to be the possibility of the retrospective application of any of the provisions of the 2014 Act, this ought to have been made crystal clear in the legislation.

22. In reply, counsel for the applicants' points to section 1A, and states that there has been no engagement by the State with the actual retrospective provision in consideration. He repeats that section 1A supposes an express retrospective application so far as pre-existing fines are concerned. He submits that the provisions of section 22 are conclusively determinative of the issue under discussion insofar as they make explicit provision for retrospective effect as regards fines imposed prior to commencement of the 2014 Act.

23. He makes submissions as to the broader question of the presumption of retrospectivity - however, he premises his argument by stating that these submissions are surplusage if the foregoing is correct, namely that section 22 compels the Court to read the 2014 Act as applying *retrospectively* to the applicants' case.

#### **Retrospective legislation concerning matters of procedure or evidence**

24. Counsel for the applicants submits that *DPP v. McDermott* [2005] 3 IR 378 is clear authority for the proposition that statutory enactments only affecting procedural or evidential matters are presumed retrospective in effect. He cites Francis Bennion, *Bennion on Statutory Interpretation*, 4th Edition (LexisNexis, 2002): "purely procedural and evidential changes in the law should apply as from the moment when the law is enacted to the proceedings which are currently pending before the courts".

25. If the Court were to interpret the legislation as applying *prospectively*, then there would be two different processes at play in respect of the same matters, based on an arbitrary distinction, concerning whether or not a defendant was sentenced to pay a fine before or after the commencement of the 2014 Act. Counsel for the applicants' states that a prospective reading of the legislation would lead to a constitutionally frail situation.

26. This Court notes *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317:

"the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."

27. This Court finds that the State has not explained how a *prospective* application of the 2014 Act, effectively creating two different processes for those subject to fines *before* and *after* the commencement of the 2014 Act, would not lead to unfairness and injustice. Such an application would deprive the present applicants, and society, of the benefits brought about by the 2014 Act. The committal warrants in question issued when the 2014 Act was in force. Further, in terms of administration, counsel for the respondent has not demonstrated how these two different systems would work in practice. In accordance with the dicta of Phillips L.J. in *Bairstow v. Queens Moat Boathouses Plc* [1998] 1 All E.R. 34.:

"The prospect of two different rules as to the admissibility of hearsay applying simultaneously in English law, dependent on the date of commencement of proceedings, is not attractive. No more attractive is the prospect of the simultaneous applicability of alternative codes of procedure."

28. Whilst the 2014 Act to a degree involves changes to substantive as well as procedural matters, it is inevitable that legislation involving criminal procedure will involve changes to substantive matters, such as is the case here. Changes in the procedure of how fines are imposed affects the substantive issue of sentencing, in placing an onus on District Judges to consider a variety of different sentencing options in lieu of issuing a committal warrant for imprisonment in default of payment.

29. Counsel for the respondent have failed to show how a *prospective* reading of the legislation would be practically workable. They have not adequately dealt with the administrative difficulties that would arise if the Court were to read the legislation prospectively. They have not responded to counsel for the applicants' submissions that such a reading would in effect create a two-tiered process. It has not been argued how any such reading would be constitutionally sound. In light of counsel for the respondents choosing not to refer to section 1A, where explicit provision was made for the retrospective application of this legislation, this Court finds itself in accord with counsel for the applicants, in describing the State's arguments as somewhat of a forensic confection.

30. The Court will therefore quash the warrants issued by the District Court Judge and the District Court Clerk. The Court directs that the D.P.P. initiate section 7 proceedings under the 2014 Act in respect of the unpaid fines of each of the applicants to date.

