THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 230

Record No. 265/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

PATRICK MCNAMEE

APPELLANT

- AND–

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT delivered on the 25th day of July 2017 by Mr. Justice Mahon

1. This is an appeal against the refusal of the High Court, (Humphreys J.), to grant leave to the appellant to seek various reliefs by way of judicial review, and the entire of his judgment delivered on the 12th day of May 2016.

2. By way of background information, I propose to paraphrase the opening paragraphs of the judgment of the learned High Court judge as follows:-

> • On 17th December, 2015, while serving a prison sentence of four and a half years imprisonment with the final twelve months suspended for offences of robbery, attempted robbery, burglary and unauthorised taking of a motor vehicle in respect of which he was convicted on the 19th June 2014, the appellant was given temporary release from Mountjoy Prison pursuant to s. 2 of the Criminal Justice Act 1960. A condition of temporary release, pursuant to Rule 3(a) of the Prisoners (Temporary Release) Rules 2004, is "that the person shall keep the peace and be of good behaviour during the period of his or her release". Upon that release the appellant acknowledged the said conditions in writing and that they had been explained to him.
>
> • At approximately 11am on the 23rd December, 2015, some six days after his release, gardaí alleged that the appellant was witnessed trespassing on residential property. He was arrested on suspicion of an offence contrary to s. 11 of the Criminal Justice (Public Order) Act 1994, and was subsequently charged with that offence and an offence contrary to s. 6 of the Criminal Justice Act 1960 of being unlawfully at large arising from the breach of a condition of his temporary release. According to the précis of evidence exhibited, he is said to have replied after caution "I wasn't doing any burglaries, I wasn't doing any of that".
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> • Bail was initially refused by the District Court and subsequently by the High Court in respect of the s. 11 charge. It was subsequently re-applied for and granted.

3. Leave to seek judicial review was sought from the High Court in respect of the following reliefs:-

> (i) An order of prohibition by way of application for judicial review of the prosecution of the appellant in charge sheet 16353652.
>
> (ii) In the alternative, an injunction by way of judicial review preventing or restraining the further prosecution in respect of the charge sheet 16353652.
>
> (iii) A declaration that the charge of being unlawfully at large by way of breaching a condition of temporary release to be of good behaviour is so vague and uncertain as to be incapable of a trial in due course of law.
>
> (iv) A declaration that the charge of being unlawfully at large by way of breaching a condition of temporary release to be of good behaviour is not an offence known in law.
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> (v) A declaration that R. 3(a) of the Prisoner (Temporary Release) Rules 2004 is *ultra vires* the Criminal Justice Act 1960, as amended.
>
> (vi) A declaration that R. 3(a) of the Prisoner (Temporary Release) Rules 2004, is incompatible with Articles 5 and 7 of the European Convention on Human Rights.
>
> (vii) An order pursuant to O. 84 of the Rules of the Superior Courts staying the criminal proceedings and the subject matter of the application for relief herein, pending the determination of these judicial review proceedings.
>
> (viii) Such further or other reliefs as the court shall deem meet.
>
> (ix) Costs.

4. At the outset, I should state that I agree with the decision of the learned High Court judge to refuse leave, and I adopt much of his reasoning as set out in his comprehensive judgment. I propose limiting my judgment to those aspects of the High Court judgment with which I differ or wish to express any additional views or comments.

Is the application premature?
5. In relation to the issue of prematurity I would respectfully disagree with the thrust of some of the comment and views expressed by the learned High Court judge, and in particular:-

> *"In the context of a challenge such as the present one, this means that the applicant must generally first submit to the criminal process. If he is innocent, as he asserts, then presumably he will be acquitted, thereby removing the need to determine any wider public law issues. If, on the other hand, he is convicted and such conviction is affirmed on appeal, the public law challenge to the offence and the 2004 Rules will be able to proceed on the basis of clear facts as found in the course of those criminal proceedings."*

6. I agree that generally speaking, judicial restraint is called for in the granting of applications for prohibition and that recent *jurisprudence* has sought to emphasise the preference for judicial review challenges to be bought at the conclusion of a lower court's process rather than to disrupt it mid-stream. While that might be said to be the general rule, or the common approach of the courts, it is important to emphasise that this statement of general principle is subject to exceptions where the interests of justice so require. There have been many occasions when such exceptions have been recognised.

7. One such example is to be found in the Supreme Court's decision in *Osmanovic v. DPP* [2006] 3 I.R. 504. In his judgment in that case, Geoghegan J. states (at p. 510/511):-

> *"...In the first case, the judge took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision. In relation to the second case the respondents lay emphasis on the very early stage of that case and that it is not known yet what options are open to that appellant at the District Court stage. In other words, the Act of 1967 has not really yet come into play. The trial judge seems to have been of the same view. I do not accept that locus standi is such a narrow concept or that the views of the trial judge conformed with the principles of this court set out in Cahill v. Sutton [1980] I.R. 269. I appreciate that prematurity and locus standi are not quite the same thing. In each of these three cases, however, I am of the opinion that if the applicants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted."*

8. Geoghegan J. also said (at p. 511):-

> *"Counsel for the applicants in the first case has argued that there is plenty of authority for the proposition that a person facing criminal charges has sufficient standing to challenge the constitutionality of the substantive provisions at issue. In the written submissions and at the oral hearing Norris v. The Attorney General [1984] I.R. 36, Desmond v. Glackin (No. 2) [1993] 3 I.R. 67 and Curtis v. The Attorney General [1985] I.R. 458 have all been relied on and reliance has also been placed to some extent on the recent judgments of this court in C.C. v. Ireland and P.G. v. Ireland [2005] IESC 48, [2006] 4 I.R. 1. In expressing the views which I have done, I would prefer to rely on general principle supported by the case which seems to me to be most relevant, that of Curtis v. The Attorney General , a decision of Carroll J. in the High Court. The P.G. v. Ireland and C.C. v. Ireland cases are distinguishable in that there was a very special reason which is set out in the judgments as to why this court was prepared to consider the validity of a proposed defence ahead of a trial. Some support can be gained from Norris v. The Attorney General and Desmond v. Glackin (No. 2) but Norris v. The Attorney General , in particular, would seem to me to have different features. I believe that the case most in point is Curtis v. The Attorney General . In that case, there was a prosecution under s. 186 of the Customs Act 1876, as amended, and by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J. took the view, at p. 458, that the plaintiff had locus standi to challenge the constitutionality of the provisions in question, "as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights." In my opinion, Carroll J. applied the law correctly. Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."*

9. In his judgment in *Cahill v. Sutton* [1980] I.R. 269, Henchy J. stated (at p. 286):-

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."*

10. In the instant case, what is at issue is the description of the offence with which the appellant is charged. In particular the appellant maintains that the charge of being unlawfully at large by way of breaching a condition of temporary release to be of good behaviour is so vague and uncertain as to be incapable of a trial in due course of law. In essence, the appellant argues that it would be unjust to require that he meet a charge of committing a crime in respect of which he does not have sufficient information because of its vagueness, and having done so, if convicted, then proceed to challenge the constitutionality of the statutory provision giving rise to that charge on the basis of vagueness. The appellant was facing *a decision which would adversely affect his rights* (as per Carroll J. in *Curtis*). The *right* in question was the right to liberty which would be at risk of being lost in the event of a conviction. He was entitled to know what he was charged with and to understand the basis of that charge. A claimed inability to so understand is a factor which would have justified the court in at least considering the application for leave in advance of the appellant's trial for the offence in question.

11. I am satisfied that the instant case is in the nature of a case where in the interests of justice it was appropriate that the appellant be entitled to seek to challenge the constitutional validity of the statutory provision underpinning his prosecution prior to it being adjudicated in court rather than after its conclusion, and subject to the merits of the application. The issue of the vagueness of a statutory provision creating a criminal offence is by its nature one that may require judicial determination prior to any requirement on the part of an accused to defend himself or herself.

The failure of the appellant to swear the grounding affidavit
12. Order 84, R. 20(2) requires specific documentation to be provided to ground an application for judicial review. One such requirement is the swearing of an affidavit in *Form No 14 in Appendix T, which verifies the facts relied on*. Form No. 14 in Appendix T

requires that the affidavit be sworn by either the applicant or the respondent in the proceedings.

13. In the instant case, the grounding affidavit is sworn by the appellant's solicitor, Mary Bridget Keely, and not the appellant himself.

14. While a failure to have the required affidavit sworn by an applicant or a respondent is in breach of Order 84, it may not always prove fatal to an application for a judicial review. For example, see *J.C. v. DPP* [2016] IECA 183. In the instant case however, the core ground for judicial review is the contention that a particular statutory offence is so vague and uncertain as to be constitutionally unsound, a contention prompted by the claim of the appellant's uncertainty as to the meaning of the offence with which he is charged. In these circumstances strict compliance with the Order 84 requirement that a party to the proceedings swear the necessary grounding affidavit is necessary and cannot be satisfied by an affidavit sworn by a solicitor. The very nature of the case being made requires the affidavit to be sworn by the person claiming uncertainty due to vagueness of the charge in respect of which a prohibition of trial is sought. At a minimum, the appellant, as the person arguing vagueness, is required to verify on oath his contention that he was uncertain as to what it was that he had done, or had failed to do, that was said to constitute behaviour other than good behaviour. Such a requirement cannot be discharged by submission of an affidavit sworn by a solicitor or other third party.

The vagueness issue

15. The temporary release document signed by the appellant clearly stated that it was being granted for the reason of compassion and was subject to certain conditions with which compliance was required during the period of temporary release. They were stated to be, *inter alia*:-

> *"1. To be of good behaviour, and*
>
> *2. To keep the peace."*

16. The document contained the following warning as to the consequences of failing to comply with any of the conditions:

> *"Failure to return on or before the expiration of the period of temporary release or breach of any of the conditions attached to the period of temporary release is an offence under s. 6 of the Criminal Justice Act 1960 and punishable on conviction by imprisonment to a term not exceeding six months."*

17. The appellant, in signing the document, acknowledged his awareness of the terms and conditions of his temporary release, and that they had been explained to him. It is not suggested that he was unaware of them or that he did not understand what was expected of him. It is also noteworthy that the appellant has one hundred and sixty four previous convictions for various offences stretching as far back as 1994. He received a number of custodial and suspended prison sentences and did, in respect of a number of them, enter into bonds to keep the peace and be of good behaviour. It can reasonably be suggested therefore that, in general terms, the appellant was very familiar with the criminal legal system, and, more specifically, with the sentencing process.

18. The central issue in these proceedings is whether or not the charge laid against the appellant was so vague and uncertain as to be incapable of a trial in due course of law. A person charged with a crime is entitled to know with a reasonable degree of precision what he is charged with and more particularly what alleged conduct, activity or lack of activity is said to constitute the offence in question. In DPP v. Cagney [2008] 2 I.R. 111, Hardiman J. said, at p. 121/122:-

> *"…from a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful."*

19. The focus of these proceedings is on the meaning of the words *"failing to be of good behaviour"*. In this case because the appellant is alleged to have failed to be of good behaviour he is suspected of having breached the terms of his temporary release thereby rendering him unlawfully at large. It is contended on behalf of the appellant that the notion of *"failing to be of good behaviour"* is so vague and uncertain as to render the consequential offence of *"being unlawfully at large by way of having breached a condition of temporary release"*, (i.e., the requirement to *"be of good behaviour"*), unconstitutional thereby warranting the prohibition of the trial of the appellant for that offence. It is contended that the term could describe a variety of non-criminal behaviour, such as, for example bad table manners or spitting in public.

20. What is meant by *good behaviour* in the context of a requirement to "be of good behaviour" as a condition of temporary release? Can it be said that the term is sufficiently capable of definition that a person subject to its strictures knows what is required of him or her in the situation of being granted temporary release? Is it simply a requirement not to commit further crime of any sort, or are the words reasonably capable of also embracing activity (or lack of activity) which is not, and could never be criminal? Is a person on whom such a requirement is imposed left in a position of uncertainty as to what is expected of them?

21. The relief sought by the appellant (according to the Statement Grounding the Application for Judicial Review) included a Declaration that the *"charge of being unlawfully at large by way of breaching a condition of temporary release to be of good behaviour is so vague…"* does not accurately represent the charge actually laid against the appellant. The appellant was, in fact, charged that:-

> *"you broke a condition of your release by: failing to be of good behaviour,* ***by attempting to commit the offence of trespassing****" (emphasis added)*

22. At the core of these proceedings is the allegation that the applicant committed an offence pursuant to s. 6 of the Criminal Justice Act 1960. The particulars of the offence are set out in charge sheet number 16353652 and are as follows:-

"That you the said accused / defendant. That you being a person who was lawfully imprisoned at Mountjoy prison and who was temporarily released under the terms of section two of the Criminal Justice Act 1960 on the 17th December 2015 was found on the 23rd December 2015 at 47, Northbrook Avenue, Ranelagh, Dublin 6 in said District Court Area of Dublin Metropolitan District, to be unlawfully at large in that:- *you broke a condition of your release by failing to be of good behaviour by attempting to commit the offence of trespassing.*

> *Contrary to s. 6 of the Criminal Justice Act 1960." [emphasis added]*

23. Section 6 of the Criminal Justice Act 1960 provides as follows:-

6(1) A person who, by reason of having been temporarily released under section 2 or section 3 of this Act, is at large shall be deemed to be unlawfully at large if:-

(a) the period for which he was temporarily released has expired, or

(b) a condition to which his release was made subject has been broken.

(2) A person who is unlawfully at large shall be guilty of an offence under this section and on summary conviction thereof shall be liable to imprisonment for a term not exceeding six months.

(3) Where, by reason of the breach of a condition to which his release under section 2 or section 3 of this Act was made subject, a person is deemed to be unlawfully at large and is arrested under section 7 of this Act, the period for which he was temporarily released shall thereupon be deemed to have expired.

(4) The currency of the sentence of a person who is unlawfully at large for any period shall be suspended in respect of the whole of that period."

24. At the same time the appellant was charged with an offence contrary to s. 11 of the Public Order Act 1994 (charge sheet 16353693) to which he replied *"I wasn't doing any burglaries, I wasn't doing any of that"*.

25. Section 11 of the Criminal Justice (Public Order) Act 1994 provides as follows:-

"11(1) It shall be an offence for a person:-

(a) to enter any building or the curtilage of any building or any part of such building or curtilage as a trespasser, or

(b) to be within the vicinity of any such building or curtilage or part of such building or curtilage for the purpose of trespassing thereon,

in circumstances giving rise to the reasonable inference that such entry or presence was with intent to commit an offence or with intent to unlawfully interfere with any property situate therein.

(2) A person who is guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both."

26. In recent times there have been a number of court challenges seeking to impugn different criminal offences, some arising at Common Law and others created by statute, as being constitutionally infirm on the grounds of vagueness and uncertainly of definition. The appellant is critical of the learned High Court judge's reference to such challenges as comprising a *minor cottage industry*. He refers to a number of cases including decisions of the English and European courts. Whether or not there was a degree of hyperbole in the suggestion that a minor cottage industry has grown up in respect of these types of cases, the learned High Court judge exhibited no bias in referring to them as such, as he did so clearly in a particular context, and in no way suggested that such cases should be curtailed. That said, in my judgment no issue can be taken with the following view as expressed by him:-

"It is particularly important that a firm approach be taken to such applications at the leave stage, not only because this cottage industry is based on a false premise for the reason I have indicated, but also as I pointed out in Casey v. DPP ([2015] IEHC 824) (at para. 11), if leave for prohibition is granted on the grounds of unconstitutional vagueness of a statutory provision, this amounts to a de facto suspension of that provision, allowing any others charged with such an offence to obtain similar leave orders and stays on prosecution, thereby rendering the offence unenforceable for the time being contrary to the obligation imposed on judges to "uphold", subject to the Constitution, the laws of the State pursuant to Article 34.6.1 of the Constitution. The court must be slow to accept any approach which involves putting elements of the criminal law of the State into suspension. Such orders can of course be granted in appropriate circumstances, but judicial restraint must be calibrated to a high level in such a situation".

27. In *Douglas v. DPP* [2013] IEHC 343 the offences of causing scandal and injuring the morals of the community (s. 18 of the Criminal Law Amendment Act 1935) were held by Hogan J. to be *hopelessly vague in character, liable to lead to arbitrary and inconsistent applications and incapable of an objective determination on whether they had actually occurred*. He held that no clear standard of conduct prohibited by law was articulated in the wording of the section. Hogan J. stated:-

"The offences of causing scandal and injuring the morals of the community are hopelessly and irremediably vague; they lack any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application. In these circumstances the conclusion that the offences offend the guarantees of trial in due course of law in Article 38.1 of the Constitution, the guarantee of equality before the law in Article 40.1 and the protection of personal liberty in Article 40.4.1 is inescapable."

28. In *McInerney v. DPP* [2014] 1 I.R. 436, Hogan J. declared s. 18 of the Criminal Law Amendment Act 1935 (as amended by s. 18 of the Criminal Law (Rape) (Amendment) Act 1990) to be inconsistent with the Constitution on the basis that the offence of offending modesty was hopelessly vague and subjective in character and intrinsically invited arbitrary and inconsistent application, and thereby offended the guarantee of fair trial in due course of law (Article 38.1), the guarantee of equality before the law (Article 40.1) and the protection of personal liberty (Article 40.4.1). In the course of his lengthy judgment in that case, Hogan J. stated:-

"One might add that, in line with the reasoning of the European Court of Human Rights in Hashman and Harrup v. U.K. (App. No. 25594/94) (2000 30 EHRR 24), the conduct prohibited by s. 6 of the Act of 1994 is measured by reference to the likely effect of such conduct on others, a key consideration in ensuring that the offence prescribed an objective and ascertainable standard. This is not true (or, at least, not necessarily true) in the case of the conduct at issue under s.18 of the Act of 1935. Both the gentleman bathers at the Forty Foot and the celebrity fashionista who attends a glamorous social event in a revealing evening dress may all commit offences under the offending modesty provisions of s. 18 even, if no one who is present on either occasion is either actually offended in the slightest or would be likely to be

so offended."

29. In that case, Hogan J. also stated:

> *"It must be here acknowledged, however, that in a common law system such as ours, absolute precision is not possible. One may therefore have perfectly general laws which can be adapted to new sets of facts within certain defined parameters, provided that the laws themselves articulate clear and objective standards."*

30. In *Cox v. DPP* [2015] IEHC 642, McDermott J. refused to strike down as being unconstitutional s. 4 of the Vagrancy Act 1824 (as amended). The case concerned an allegation that the applicant in that case exposed himself on a train in front of a young girl. In the concluding paragraph of his judgment, McDermott J. said:-

> *"(Section 4) simply provides that a male should not wilfully and openly expose his penis in a public place with intent to insult a female. It is calculated to protect females and young girls from the insult which often derives from the threatening element, sexual harassment and intimidation involved in this act and clearly constitutes anti-social behaviour. The words "lewdly and obscenely" aptly and clearly qualify the circumstances which attract criminal liability. They must be construed in the context of the narrow definition of the behaviour which is addressed in the section."*

31. *In King v. A.G.* [1981] I.R. 233, the plaintiff successfully challenged the constitutionality of part of s. 4 of the Vagrancy Act 1824 which created the offence of loitering with intent to commit a felony, a constituent element of which was the frequenting by *"every suspected person or reputed thief"* of any of the places listed in the Act with the intention of committing a felony. The Supreme Court held that this section was unconstitutionally vague for reasons articulated thus by Henchy J. at p. 257:-

> *"…the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."*

32. These cases are but a few examples of offences subjected to judicial analysis on the basis, as contended, that they were vague or imprecise as to the criminal behaviour alleged against an accused person.

33. The subject of the legality of the terms *"breach of the peace"* and *"being of good behaviour"* was considered by the Court of Final Appeal of Hong Kong when it held that the terms should be interpreted restrictively. (*Wo v. Hksar* [2004] 1 HKLRD 372). In his judgment in that case, Lord Scott said at p. 392:-

> *"As to the conduct that would justify a bind over to keep the peace, we would adopt the approach of the English authorities cited in Steel v. United Kingdom ([1999] 208 EHRR 603) and hold that the conduct must involve violence to person or property, or the threat of such violence or be conduct giving rise to a reasonable apprehension that such violence will take place. In the absence of conduct of the character described we do not think a bind over order to keep the peace should be made. As to conduct that would justify a bind over to be of good behaviour, we think the conduct must inform the commission of the actus reus of a criminal offence, or the threat of such an act, or be conduct giving rise to reasonable apprehension of the commission of a criminal offence. In the absence of conduct of the character described above we do not think a bind over to keep the peace or be of good behaviour may be made and in other circumstances a bind over order to be of good behaviour may be made but not an order to keep the peace. The traditional use of both types of bind over together in all the cases should not, in our opinion, be continued."*

34. The necessity, on occasion, to have a degree of vagueness or lack of precision in law has been acknowledged by the European Court of Human Rights in relation to Art. 7 of the Convention of Human Rights. In *Aydin v. Germany* [2013] 57 EHRR35, para. 56, it is stated:-

> *"The relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice.'*

35. The decision of the European Court of Human Rights in *Hashman and Harrup v. United Kingdo*m [2000] 30 EHRR 241 was opened to this court in support of the application for judicial review. That case concerned a violation of Art. 10 of the ECHR relating to the restriction on freedom of expression. As Prof. O'Malley states in his Third Edition of Sentencing Law and Practice (at p. 61) the judgment in that case *"did not by any means render binding over orders incompatible with the Convention. It merely confirmed that any order requiring persons to engage in or refrain from certain conduct must specify with sufficient clarity what they may and may not do during the currency of the order"*.

36. The requirement to be *of good behaviour* is a condition commonly imposed in the criminal courts in Ireland since at least the foundation of the State, and almost certainly for many decades prior to that. It most frequently arises in the context of the suspension of a prison sentence, or part of such sentence, or upon the granting of conditional bail. However, it can also arise in the related context of the exercise by the executive of its statutory power to grant temporary release to a person serving a sentence of imprisonment under s. 6 of the Criminal Justice Act 1960. It is a term which has acquired the status of a legal term of art, when used within the context of criminal law proceedings, both pre and post conviction, or in the context of executive action taken in the course of the administration of a sentence of imprisonment imposed by a criminal court consequent upon the subject person's conviction of an offence. It is clearly understood to involve a requirement not to breach the criminal law during the currency of the condition

requiring the subject person *to be of good behaviour*. It is completely fanciful, and flies in the face of common sense, to suggest that when used in either of those contexts, it could refer to or include behaviour of a non criminal nature, and I am satisfied that the point advanced does not even reach the low threshold of "arguability". Where it is alleged that the good behaviour condition has been breached it is, of course, necessary that the basis for such allegation is clear to the person so charged, as indeed happened in this case.

37. In this case the allegation of what is contended constitutes the failure *to be of good behaviour* is clearly identified in the wording of the charge as being the attempt to commit the offence of trespassing, an inchoate offence with which the appellant was separately charged. The appellant could have no doubt as to what it was alleged constituted the activity which was said to have fallen foul of the requirement to be of good behaviour. The ingredients of the offence, could not be said to be (to use the words of Henchy J. in *King*):-

> *"arbitrary, vague, difficult to rebut, related to rumour or ill-repute or past conduct, or ambiguous."*

38. Of course, it remains to be seen whether the appellant is guilty or not guilty of the attempted trespass offence which is said to constitute his failure to be of good behaviour. If he is found not guilty, it follows that he will not have been in breach of the good behaviour condition of his temporary release, at least on that account. Should that situation arise, and absent some other proven breach of the conditions of his temporary release, he would be entitled to be acquitted of the offence of being unlawfully at large . (See *The State (Murphy) v. Kielt* [1984] I.R. 458 and *Dowling v. The Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535).

39. In *Kielt*, Griffin J. stated at p. 473 of his judgment:

> *"In my opinion, the fact that the [accused] had been charged with an offence is an insufficient reason for the revocation of his temporary release. Charges are frequently dropped or not proceeded with and, if a temporary release can be revoked merely or solely before the person released has been charged with an offence, what are the apparent injustice done to such a person who, in the period intervening between the charge and the dropping of the charge is, has lost the liberty to which he would otherwise have been entitled under the Act and the Rules? When, on the other the hand, the Governor holds an informal inquiry, justice will not only be done but will be seen to be done."*

Summary and conclusion

40. It is not the case that the appellant has been charged simply with being unlawfully at large by reason of his failure to comply with a condition of his temporary release, namely failing to be of good behaviour. Had he been so charged he could justifiably argue that he was unable to identify the offending conduct. Rather, he was charged that he broke a condition of his release by failing to be of good behaviour, by attempting to commit the offence of trespassing. Furthermore, neither at the time the appellant signed the temporary release document when its content was explained to him nor at any time prior to being charged with being unlawfully at large, did he question or challenge the condition on the basis of vagueness, or for any reason.

41. I cannot therefore accept as being credible that the appellant did not fully appreciate and understand the offence with which he was charged.

42. I am satisfied that the decision to refuse the leave in this case was justified on the basis that the appellant failed to make out an arguable case in law that he was entitled to the relief which he sought. I would therefore dismiss the claim.