THE HIGH COURT

[2017 No. 506 S.S.]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

MARK KENNEDY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 23rd day of June, 2017

1. This is a judgment on an application seeking an inquiry under Article 40.4 of the Constitution of Ireland into the legality of the detention of Mark Kennedy, currently detained at Portlaoise Prison since the 21st of September, 2015.

2. This Court made an order directing an inquiry on the 15th of May, 2017 and directed that the Governor of Portlaoise Prison certify in writing the grounds of the detention of the applicant. On the 16th of May, 2017 the Assistant Governor Reilly certified that he held the applicant pursuant to a Circuit Court warrant dated the 16th day of April, 2016 and two committal warrants dated the 12th of April, 2016.

3. The application was grounded on the affidavit of Timothy Kennelly, solicitor on record for the applicant. He states that he did not represent the applicant in the proceedings that resulted in his imprisonment, but he sets out his knowledge from instructions, and from his reading of the applicant's file and the committal warrant under which the applicant was detained.

4. He states that on the 21st of September, 2015 the applicant attended at Thurles District Court, charged under s. 2(1) of the Criminal Damage Act 1991, s. 2 of the Non-Fatal Offences against the Person Act 1997 and s. 8 and s. 5 of the Criminal Justice (Public Order) Act 1994.

5. He states that the applicant was found guilty of these charges and the District Court judge made an order under s. 99(9) of the Criminal Justice Act 2006, as amended, remanding the applicant to the Circuit Court sitting in Nenagh on the 6th of October, 2015 for the purpose of dealing with re-entry of the matter, as a suspended sentence had been imposed on the applicant on the 18th of October, 2011.

6. The applicant first appeared before Nenagh Circuit Court on 6th October, 2015 and subsequently on 9th and 22nd October 2015. His next appearance was in Clonmel Circuit Court on 18th December, 2015 and subsequently in the Circuit Court in Nenagh on 2nd February, 2016 and 5th April, 2016.

7. On the 5th April, 2016 the applicant's suspended sentence, handed down on 18th October, 2011 was reactivated at the Circuit Court seating at Nenagh, Co. Tipperary. The applicant was remanded back to Thurles District Court on 12th April, 2016 for the purpose of sentence in relation to the matter for which the applicant was convicted on 21st September, 2015. 8. The applicant in Thurles District Court on 12th April, 2016 was sentenced for five months under s. 2 of the Non Fatal Offences Against the Persons Act 1997 and for six months under s. 2 (1) Criminal Damage Act 1991. Both of these sentences were to be served on the legal expiration of the seven year sentence, the subject matter of Bill No. TYDP0025/2009 - this being the suspended sentence that had been activated at Nenagh Circuit Court on 5th April, 2016.

9. The District Judge fixed bail in respect of an appeal at €500 (on the applicant's own bond) together with one independent surety in the sum of €2,500 (together with a cash lodgment of €1,000). An application to extend time to appeal against the District Court convictions was lodged with Court Services on 15th July, 2016 and the application was heard at Thurles District Court on 19th July, 2016. The applicant was granted an extension of time to appeal, and the appeal is due to be heard on 31st October, 2017.

10. Mr. Kennelly in his affidavit said that it was his understanding that the section utilised by the court to activate the Circuit Court sentences was ss. 99 (9) and (10) of the Criminal Justice Act 2006. Those subsections were struck down as unconstitutional by Moriarty J. in *Moore v. Ireland* [2016] IEHC 244, in which judgment was delivered on *19th April, 2016* (this Court's emphasis). Mr. Kennelly says he is advised and believes that since s. 99 (9) and (10) were declared *void ab initio*, this means that the Circuit Court had no jurisdiction to activate the suspended sentence, or issue the resulting committal warrant. He says that accordingly, there was a fundamental defect in the procedures that were used by the Circuit Court.

11. He further says that the warrant is invalid because it fails to show jurisdiction on its face. In particular there is no reference to the applicant having been remanded pursuant to s. 99 (9), or having been convicted of the trigger offence, or even that the same occurred during the currency of the suspension bond. It is his understanding that recital to this effect is required in order for the instrument to show jurisdiction on its face.

12. He also says that on 15th July, 2016 the applicant's then solicitor James Orange sought and was granted leave of the court to come off record. As a result, the applicant was without legal representation and did not have the benefit of advice in respect of appealing the decision to activate the sentence. He says that however as a result of the applicant serving the extension to appeal the conviction, and being granted same, this brings this matter within the remit of Moriarty J.'s decision in *Moore v. Ireland* [2016] IEHC 244. He says that his firm was engaged by the applicant in the first week of April, 2017.

The submissions of counsel for the applicant

Do the District Court sentences 'fall into the shoes' of the Circuit Court sentence?

13. Counsel for the applicant says that the respondent certified the detention of the applicant on the basis of three warrants - the Circuit Court warrant relating to the activated seven year sentence, the District Court warrant relating to the six month sentence, and the District Court warrant relating to the five month sentence. Counsel for the applicant contended that if the Circuit Court warrant and sentence were invalid, the District Court sentences cannot validly detain the applicant, as they themselves are either invalidated, or have expired. He states that if the decision of Baker J. in *Kovac v. Governor of Mountjoy Women's Prison & Ors* (30th June, 2015) currently represents the law, then the District Court sentences "fall into the shoes" of the Circuit Court sentence. If the Circuit Court sentence is void *ab initio*, this means that the District Court sentence would have commenced on 6th April, 2016. That would mean that the aggregate sentence of six months would have expired on 5th October, 2016.

Challenge to the seven year activated sentence

14. Counsel for the applicant argues that the Circuit Court judge did not have jurisdiction to activate the seven year sentence pursuant to section 99 (10). The consequence of Moriarty J's findings in *Moore v. Ireland* [2016] IEHC 244 is that the sentence activated in the Circuit Court under s. 99 of the Criminal Justice Act 2006 was activated under procedures which were invalid at the time.

15. The declaration of unconstitutionality of Moriarty J. in *Moore v. Ireland* [2016] IEHC 244 has the effect in law of declaring the subsections to be void *ab initio*.

Is the applicant entitled to rely on Moore v. Ireland [2016] IEHC 244?

16. A central question in this case is whether the applicant is entitled to take advantage of the declaration of unconstitutionality, as established in Moore v. Ireland [2016] IEHC 244. Counsel for the applicant argues that the applicant is entitled to relief *ex debito justitiae*. The order in question is legally unsound and therefore, the applicant should be released.

How does Clarke v. Governor of Mountjoy Prison [2016] IECA 244 apply to the present case?

17. Counsel pointed out that a number of other s. 99 challenges have come before the courts since Moriarty J's decision in *Moore v. Ireland* [2016] IEHC 244, and he notes that these have all been unsuccessful. He referred to (i) the Court of Appeal judgment in *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244; (ii) the Court of Appeal judgment in *Foley v. Governor of Portlaoise Prison* [2016] IECA 411; (iii) the judgment of O'Regan J. in *Ryan v. Director of Public Prosecutions* [2016] IEHC 380; and (iv) the judgment of this Court in *Larkin v. Governor of Mountjoy Prison* [2016] IEHC 680.

18. It is agreed and accepted that the last three mentioned judgments effectively apply the ratio of *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244. Accordingly, counsel states that there was an obligation to consider whether Clarke was capable of binding the present applicant's case.

19. Counsel submitted that the principal reason why the applicant in *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244 was judged not to be entitled to benefit from Moriarty J's decision in *Moore v. Ireland* [2016] IEHC 244 was because the 'mischief' identified in *Moore* did not apply to his situation - Clarke had pleaded guilty to the trigger offences in the District Court, and had not appealed the trigger offences. Counsel for the applicant cited the decision of McDermott J. in the High Court:-

> "Moriarty J. concluded that the procedure mandated under s. 99 unduly interfered with the right of appeal from the District Court to the Circuit Court and insofar as the other applicants were prevented from initiating and concluding their appeals against conviction prior to the determination of the activation issue, it was a violation of the right to trial in due course of law pursuant to Article 38.1 of the Constitution and the right to equality before the law under Article 40.1. This conclusion was reached 'in the context of the facts reviewed and the arguments made' though the final order declaring the sub-section invalid states that this is so because they are repugnant to Articles 38.1 and 40.3 of the Constitution."

20. Counsel for the applicant submitted that Moriarty J. struck down s. 99(9) and (10) because he concluded that the procedure unduly interfered with the right to appeal a conviction.

21. Counsel for the applicant submitted the same situation pertained to the applicant's case. He says the applicant's appeal against the trigger offences is scheduled to be heard on 31st October, 2017. He stated the whole basis of the decision to activate the suspended sentence was based on the allegation that he had committed the trigger offences. If acquitted on appeal, he might have suffered a period of imprisonment, precipitated by a conviction which may be set aside. The *Clarke* case is entirely distinguishable from the applicant's case on this basis. He contends that the 'mischief' that interfered with the right to appeal in *Moore v. Ireland* [2016] IEHC 244 occurs in the present case.

Retrospective application of declaration of unconstitutionality

22. The issue of the retrospective application of declarations of unconstitutionality has received substantial consideration in recent years, culminating in the detailed judgment of the Supreme Court in *A v. Arbour Hill* [2006] 4 I.R. 88. A significant focus of the judgment related to the conduct of the applicant, and the jurisprudence that has since evolved has focused on same.

23. In *A v. Arbour Hill* [2006] 4 I.R. 88, Mr. A. had pleaded guilty to the offence of unlawful carnal knowledge, and did not appeal. Mr. A. had not raised any point regarding the lack of a defence or the presence of him having made a reasonable mistake. Mr. A. was not a party to the case of *C.C. v. Ireland* [2006] 4 I.R. 1, nor had he commenced any related litigation. He had no basis by which to argue that he would have benefitted from the existence of a defence relating to mistake, as held for in *A v. Arbour Hill* [2006] 4 I.R. 88. Counsel cited from Murray C.J.:-

> "…in a criminal prosecution where the State relied in good faith on a statute in force at the time and the accused did not seek to impugn the bringing or conduct of the prosecution, on any grounds that might in law have been open to him or her, including the constitutionality of the statute, before the case reached finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, was unconstitutional."

24. The Supreme Court therein stated that cases which had been finally decided and determined on foot of a statute which was later found to be unconstitutional ought not be set aside. Once *finality* (this Court's emphasis) had been reached and the parties had exhausted their actual or potential remedies, the judgment must be deemed valid and lawful. In the present case, counsel for the applicant argued that this finality had clearly not been reached, as the applicant's appeal has yet to be heard.

25. Counsel for the applicant on this point further relied on *The People (DPP) v. Ted Cunningham* [2013] 2 I.R. 631. In *Damache v. DPP & Ors* [2012] I.R. 266, the power of a Superintendent to issue a search warrant was struck down as unconstitutional by the Supreme Court. The appellant in *The People (DPP) v. Ted Cunningham* [2013] 2 I.R. 631 was searched on foot of a search warrant obtained under s. 29(1) of the Act, and was later charged with money laundering and found guilty by a jury in Cork Circuit Court. This decision was appealed, and the Court of Criminal Appeal held that the appellant was entitled to rely upon the later finding of unconstitutionality. In contrast with Mr. Cunningham's case, Mr. A's case had achieved finality at the time of the declaration of unconstitutionality. Counsel for the applicant submitted that the principle in *The People (DPP) v. Ted Cunningham* [2013] 2 I.R. 631 is that a criminal case cannot be said to have reached finality where there remains an appeal outstanding by the accused. In the present case, the applicant's appeal against the trigger offence remains extant.

Can acquiescence preclude relief in an Article 40, and can article 40 relief be withheld on discretionary grounds?

26. Counsel for the applicant submitted that no principle of law exists, that if a person is 'morally undeserving', or has broken a promise, that the rule of law should be set aside in their case.

27. Counsel for the applicant submitted that relief under Article 40 of the Constitution is not discretionary, as determined by the Supreme Court in *Caffrey v. the Governor of Portlaoise Prison* [2012] 1 I.R. 637. Denham C.J. held:

> "As to the notice to vary, the High Court Judge stated at pp. 8 to 9:-
>
> [9] What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in *habeas corpus* proceedings. There is only one issue in this kind of inquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment. I would affirm this approach by the High Court Judge. The issue for the court was whether the applicant was lawfully detained or not. The applicant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."

Relief Ex-Debito Justitiae

28. Counsel suggests that an applicant seeking *certiorari* to quash *an order made without jurisdiction* (this Court's emphasis) is entitled to such relief *ex debito justitiae*, or as a matter of right. Once an applicant has proved that an order has been made without jurisdiction, this removes the possibility for judicial discretion. Counsel referred to the Supreme Court's decision in *O'Keeffe v. Judge Connellan* [2009] 3 I.R. 643 in support of this argument. Both in his Article 40 challenge and his judicial review proceedings, the applicant has identified fatal jurisdictional flaws in the orders holding him. On this basis, the applicant is entitled to the relief he seeks *ex debito justitiae*.

29. Counsel for the applicant submitted that a number of recent judgments from the Supreme Court have held that Article 40 relief is appropriate where the applicant demonstrates that the order governing his detention was made by a court that lacked the jurisdiction to impose such an order. Counsel for the applicant referred to *Leroy Roche (a.k.a. Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53, where Charleton J. approved Hogan J's decision in *Cirpaci v Governor of Mountjoy Prison* [2014] IEHC 76, where the District Court failed to inform the accused of his right of election, and therefore lacked jurisdiction to impose the order in question.

Is the Circuit Court warrant 'bad' for failing to show jurisdiction on its face?

30. Counsel for the applicant submitted that the Circuit Court warrant was invalid because it failed to show jurisdiction on its face. The warrant appears lacks a number of important recitals, including the following:-

> (i) there is no mention that the applicant was before the court pursuant to s. 99(9) of the Criminal Justice Act 2006;
>
> (ii) there is no mention that the applicant committed an offence under the currency of the suspension bond;
>
> (iii) there is no mention as to which of the conditions the applicant is said to have breached;
>
> (iv) no particulars of the trigger offence are provided, not even an outline description of the offence is provided; and
>
> (v) there is no mention that the offence was committed after the suspended sentence itself was given.

31. Counsel submitted that for a warrant under s. 99(10) to be valid, the warrant must contain basic recitals to show the facts upon which s. 99(10) rests. Counsel for the applicant relied on *Egerenwa v. Governor of Cloverhill Prison* [2011] IESC 41 in making this submission.

Submissions on behalf of counsel for the respondent
Collateral Attack

32. Counsel for the respondent submitted that the present application amounts to a collateral attack on the activation of the suspended sentence. The District Court conviction has been finalised. The time for bringing an appeal against the District Court conviction expired on 19th April, 2016.

33. In *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, Murray J. described a collateral attack:-

> "The applicant's case was finally decided in 2004. He was found guilty, after a plea, and sentenced to prison. The case is over and the decision final. There is no appeal outstanding. In these proceedings he seeks to mount a collateral attack on that final verdict. At no stage prior to or in the course of his prosecution proceedings did he seek to impugn the lawfulness of his prosecution or conviction by reason of any constitutional frailty. A collateral attack arises where a party, outside the ambit of the original proceedings seeks to set aside the decision in a case which has already been finally decided, all legal avenues, including appeal, having been exhausted, for reasons that were not raised in the original proceedings but for reasons arising from a later court decision on the constitutionality of a statute."

34. Counsel for the respondent stated that the applicant in this case should not be allowed to piggyback upon *Moore v. Ireland* [2016] IEHC 244, when he did not raise a question as to the constitutionality of section 99 in the course of his District Court trial. Counsel for the respondent quotes *C.C. v. Ireland* [2006] IESC 33, and states that therein, the applicant had raised a challenge to the constitutionality of s. 1(1) of the Act of 1935 that was ultimately successful *before his trial* (this Court's emphasis). He submits that the applicant seeks to rely on *Moore v. Ireland after* (this Court's emphasis) his case has been finalised. The applicant asks the Court to apply the finding in *Moore v. Ireland* retrospectively.

35. In *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278, McDermott J. in the High Court found that the applicant was not entitled to the retrospective application of *Moore v. Ireland* [2016] IEHC 244 for the following reasons:-

> (i) there was no error on the face of the warrant;
>
> (ii) the application was a collateral attack on the reactivation process;
>
> (iii) the court was not satisfied that "the finality argument must always prevail against all others in determining the retroactivity of such a declaration, or indeed must prevail in this application: the behaviour of the applicant and the other circumstances of the case must also be considered";
>
> (iv) as the applicant did not raise the issue at the reactivation hearing that he was not now entitled to raise it;
>
> (v) that the applicant had pleaded guilty to both the original and triggering offences;
>
> (vi) that the applicant had not showed that he suffered any fundamental injustice or that there was any basis upon which one might apprehend that he had suffered any unfairness or unfair prejudice in the re-entering hearing concerning the revocation of the suspension of his sentence. Section 99 (9) and (10) was relied upon in good faith by the State in which they were regarded as having the force of law.
>
> (vii) the applicant could not bring himself within the mischief defined in *Moore v. Ireland* [2016] IEHC 244 on the facts.
>
> (viii) the applicant understood the conditions of the suspended sentence when it was imposed and breached those conditions
>
> (ix) the applicant had pleaded guilty to both the original and triggering offences.

50. McDermott J. further commented that the applicant personally could not avail of the declaration of unconstitutionality in *Moore v. Ireland* [2016] IEHC 244, as McDermott J. characterised his application as the seeking of the technical benefit of the declaration in *Moore v. Ireland*, which was of no relevance to his case. Mr. Clarke engaged in the original sentencing process and undertook to abide by the conditions. Absent a breach of the conditions the trial was at an end. He failed to challenge that s. 99 procedure at any stage. Further, Mr. Clarke could not identify any substantive injustice, breach of his right to fair procedure, any unfair prejudice or indiscrimination suffered by him in the course of the hearing.

51. Counsel for the respondent submitted all of the above reasons apply to Mr. Kennedy. He further cited the decision of the Court of Appeal in *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244 in which Birmingham J. stated:-

> "The starting point for consideration of this issue has to be that the applicant/appellant is a convicted person who pleaded guilty to offences of the utmost gravity, was treated with considerable leniency, and failed to abide by conditions which were imposed when large elements of his sentences were suspended."

52. Birmingham J. continued at para. 32:-

> "32. …However, like McDermott J., I do not believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before judgment in *Moore* that it follows automatically that Mr. Clarke is entitled to be released. The position is that Mr. Clarke committed offences of the utmost gravity…. There was a full and fair hearing in the Circuit Court over two days which addressed the issue of whether the sentence should be activated. The judge in the Circuit Court decided to activate the sentence. Mr. Clarke has a right of appeal from that decision and has invoked that right by lodging a notice of appeal. On the hearing of that appeal Mr. Clarke can argue that the activation of the sentences in full was an excessive and disproportionate response.

33. In those circumstances I cannot see how it can be said that there was a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises from a departure from fundamental rules of natural justice to use the language of *State (McDonagh) v. Frawley* and *State (Aherne) v. Cotter*."

This Court notes that the Supreme Court has refused leave to appeal in this matter.

No extant appeal prior to the extension of time

53. Insofar as this applicant may argue that there is an extant appeal of the trigger offences, it is noted that this was taken late and required an extension of time. In those circumstances, counsel for the respondent said there was no appeal, read alongside *Murphy v. Governor of Trading Unit, Mountjoy Prison* [2015] IECA 259, in which Birmingham J. noted:-

"37. It is true that in the case of Mr. Carberry he lodged a notice of appeal out of time which was addressed to a quite separate issue to the point that succeeded in *Bederev*. Like the President of the High Court, this Court is of the view that it cannot truly be said in the *Carberry* case that there was an appeal in existence at the time of the first application. An appeal is not brought by means of an application for an extension of time within which to appeal. Like the President, I am of the view that to conclude otherwise would be to eliminate the distinction between valid appeals and invalid appeals."

54. Counsel for the respondent argued that the applicant had no extant appeal from the trigger offences as and from the date of the decision in *Moore v. Ireland* [2016] IEHC 244, a decision that he now seeks to rely on. Counsel states that the applicant cannot be given an opportunity to launch a collateral attack, by virtue of being granted an extension of time to appeal in July 2016, *after* (this Court's emphasis) the decision of *Moore v. Ireland* had been delivered.

55. In *DPP v. Hughes* [2012] IECCA 69, the Court of Criminal Appeal refused an extension of time to lodge an appeal from convictions in the Special Criminal Court in circumstances where the applicant sought to rely on *Damache v. DPP & Ors* [2012] I.R. 266. The Court noted that the sentence was imposed on 6th December, 2011, and the *Damache* decision had been given on 23rd February, 2012:-

> "All of the considerations set out above suggest that, in the interest of legal certainty, and in defence of the enduring regularity of proceedings fully legal and regular at the time when they occurred, the applicant's present application should be refused. No system of law could operate if decisions intended to be final could subsequently be set aside on the basis of developments which occurred only after their completion. Indeed, as is expounded in my judgment in *A. v. The Governor of Arbour Hill Prison*, cited above, the fear of disturbing important events decided long in the past would be a disincentive to needed change or might otherwise tend to inhibit a finding of unconstitutionality in an appropriate case."

Jurisdiction on the face of the warrant

56. In relation to the jurisdiction, he stated the following information was stated or ascertainable on the face of the warrant exhibited to the certificate of detention:-

(a) three suspended sentences were imposed by the Circuit Court on 18th October, 2011;

(b) each of the sentences were suspended for a period of seven years;

(c) the sentence was activated on 6th April, 2016, within the period of suspension;

(d) the warrants in respect of the trigger offence were also included in the certification; and

(e) these warrants showed that the applicant was sentenced in respect of the offences on the attached charge sheets which sets out the dates of the offences which fall within the period of suspension.

57. It was submitted by counsel for the respondent that the proceedings in respect of the activated suspended sentence have reached finality and cannot be reopened and the detention, as certified, is sufficient to show jurisdiction.

Section 99 of the Criminal Justice Act 2006

58. In the judgment or Moriarty J. in *Moore & Others v. the Director of Public Prosecutions, Ireland and the Attorney General* delivered on the 19th of April, 2016 stated:-

> "Section 99 of the Criminal Justice Act, 2006, has had a relatively chequered history since its enactment, and judges in all Irish jurisdictions have on occasion expressed concerns about the manner in which it has sought to address what in theory might ought not to be an insuperable aspiration, namely to address and provide a balanced and operable framework that will address what has long been a recurring situation arising in Irish courts."

Counsel for the applicant provided the Court with a history as to the enactment of section 99. Under the common law procedures, it was often a matter of chance if a suspended sentence would be re-entered, for a consideration of whether or not the suspended sentence should be reactivated. The section 99 procedure was introduced to tighten up the suspended sentence regime. Where an accused is convicted of a later offence, occurring during the currency of the suspension bond, the legislation stipulated that the second court before imposing sentence on the trigger offence ought *automatically* (this Court's emphasis) remand the person to the next sitting of the court that had imposed the original suspended sentence, when presented before court.

This Court notes *obiter* that the legislation is unclear as to when the court considering the 'second in time' offence should remand the person back to the court that imposed the original suspended sentence, and this remains the case. The legislation does not state whether the court should remand the person when, for example, the person is presented before the court and charged with an offence, when the person is awaiting trial, when the case has been heard and sentence has yet to be imposed, or when the person has been convicted. In *Moore v. Ireland* [2016] IEHC 244, the applicant had been convicted and sought to appeal his conviction, but the court automatically remanded him back to the court that had imposed the suspended sentence, in order to activate the suspended sentence. In these circumstances, Moriarty J. held that section 99 (9) and (10) fell to be unconstitutional, in the context of the facts reviewed and the arguments made.

59. Some problems in relation to s. 99 were commented upon by the Supreme Court in the case of the *Director of Public Prosecutions v. Jeffrey Carter and Sean Kenny* [2015] IESC 20, with Hardiman J. stating:-

> "Only one thing is clear and beyond dispute. Section 99 is in need of urgent and comprehensive review."

60. This is all the more so in the light of the decision of Moriarty J. in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244 where the learned judge commented as follows:-

> "In all the circumstances of the case, and having given the matter as much careful consideration as I can, I am persuaded that notwithstanding the presumption of constitutionality that exists in relation to enactments, and the regard and respect that Courts must show to enactments of the Oireachtas, the subsections under review of s. 99(9) and (10) fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made."

That decision was given by Moriarty J. on the 16th of May, 2016 and in the year following the decision, there have been a substantial number of cases where persons have sought release by way of judicial review or Article 40 enquiry seeking their release, in line with *Moore v. Ireland*.

61. Whilst the Court is conscious of the legislative functions of the Oireachtas, it appears that the legislator has not paid appropriate attention to the issues identified by Moriarty J. in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244. The Court is mindful of circumstances where applicants seek to exercise their right to appeal a conviction, however, the Court is equally mindful that the legislation as it stands has lead to circumstances where serious repeat offenders may be able to avoid the consequences of failing to comply with a suspended sentence.

62. The relevant chronology of this case is as follows:-

> (a) On the 10th of May, 2011 the applicant pleaded guilty before the Circuit Court to three counts on Bill No. TYDP25 of

2009.

(b) On the 18th of October, 2011 he was sentenced to serve seven, five and three year sentences all of which were suspended in full for seven years on condition. He did not appeal the conviction or the sentence.

(c) On the 29th of December, 2014 the applicant committed four offences within the period of suspension (the triggering offences).

(d) On the 21st of September, 2015 the applicant pleaded not guilty to these offences in the District Court but was convicted. He was then remanded back to the next sitting of the court that imposed the suspended sentence.

(e) On the 5th of April, 2016 Judge Teehan activated the seven year sentence and the applicant was remanded from the Circuit Court back to Nenagh District Court on 12th April, 2016, for sentencing on the trigger offences.

(f) He was sentenced to six months imprisonment, due to commence on the legal termination of the sentence of seven years imposed at Nenagh Circuit Court on the 6th of April, 2016.

(g) On the 19th of April, 2016 Moriarty J. delivered judgment in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244 striking down s. 99(9) and (10) of the Criminal Justice Act 2006, and on the same date the time to lodge an appeal against the Circuit Court activation expired.

(h) On the 26th of April, 2016 the time for lodging the appeal from the District Court conviction and sentence to the Circuit Court expired.

(i) On the 9th of June, 2016 an application for leave to seek judicial review was refused by Stewart J, however, this judicial review did not relate to the decision of Moriarty J. in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244.

(j) On the 15th of July, 2016 an application to extend the time for appealing the trigger offences was lodged.

(k) On the 19th of July, 2016 the District Court extended the time for appealing the trigger offences.

(l) On the 20th of July, 2016 notices of appeal were served in respect of the District Court triggering offences.

(m) The 31st of October, 2016 is set as the hearing date for the District Court appeals in respect of the triggering offences.

63. In relation to the Circuit Court sentence, no appeal has been lodged by the accused. The Court notes that *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244 was decided on the basis that a person may suffer unfairness if a suspended sentence is reactivated in advance of any appeal of a *triggering offence* (this Court's emphasis). On the 19th of July, 2016, the District Court extended the time for the applicant to appeal the sentences arising from the trigger offences. It is this issue, the extension of time to appeal the District Court sentence which forms the crux of this case.

Can it be said that a person deemed to be in *lawful custody* can in effect change his status to that of *unlawful custody* by obtaining an extension of time to appeal?

64. In *A v. Arbour Hill* [2006] 4 I.R. 88, the Supreme Court held that there was neither an express nor an implied principle of retrospective applications of unconstitutionality in the Constitution. It was not a principle of constitutional law that cases that have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and of no effect.

65. The Supreme Court also held that the approach to be taken with an application of retrospectivity was to assess whether the compulsion of public order and the common food would allow the application to succeed.

66. On the 26th of April, 2016 the time limit for an appeal from the District Court sentence had expired, and on the principles of *A v. Arbour Hill* [2006] 4 I.R. 88, this Court holds that finality had been reached by this date.

67. Neither in the Circuit Court at the time of activation of the suspension, nor at the time of the District Court sentence on the 12th of April, 2016 was any issue raised on behalf of the applicant in relation to the complaints made by the applicants in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244. The Court notes that the time for appeal against the District Court sentence expired a week after the decision in *Moore v. Ireland*.

68. The Court follows *A v. Arbour Hill* [2006] 4 I.R. 88 that it did not necessarily follow that a court order lacked binding force due to the orders being made in proceedings based on an unconstitutional statute. The issues raised in *A v. Arbour Hill* related to the finding of the unconstitutionality of a criminal law offence contrary to section 1 (1) of the Criminal Law Act 1935. The decision in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244 related to procedural due process, and is thus of less consequence than that of *A v. Arbour Hill*.

69. This Court does not believe that the extension of time granted to the applicant to appeal his District Court conviction does not render his detention unlawful. The Court is of the view that this is not an appropriate case to take by way of seeking article 40 relief, but as in *Edward Moore v. the Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244, it might be a case suitable for judicial review proceedings.

Is the Circuit Court Warrant Bad for Failing to Show Jurisdiction on its Face?

70. The Court is satisfied that the warrant exhibited in the certificate of detention recites:

a. three sentences suspended for seven years imposed by the Circuit Court on 18th October, 2011

b. the sentence was activated on 6th April, 2016 within the reactivation period.

c. the warrants in respect of the trigger offences include in the certification show that the applicant was sentenced in respect of the offences on the attached charge sheets, which fall within the period of suspension.

71. The Court finds that there is a difference between an order of Court and a warrant issued by a Garda officer, which was the subject matter *of Egerenwa v. Governor of Cloverhill Prison* [2011] IESC 41.

Decision
72. The Court is of the view that seeking release under article 40 is not the appropriate mechanism for determining the issue of the legality of the applicant's detention in this case. The issue relates to the extension of time for leave to appeal, which, in the Court's view, cannot render a lawful detention unlawful.

73. The Court is satisfied that the warrants in question show jurisdiction on their face.

74. In these circumstances, the Court is satisfied that the applicant is in lawful custody.