Neutral Citation: [2016] IEHC 334

THE HIGH COURT

[2016 No. 473 SS]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2. OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN

ANTHONY FOLEY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 14th day of June, 2016

1. This is an application for an inquiry under Article 40.4.2 of the Constitution. The applicant is detained pursuant to a warrant issued by the Court of Criminal Appeal on 12th November, 2012 whereby a suspended sentence which had been imposed by the court was revoked following an application made pursuant to sections 9 (9) and (10) of the Criminal Justice Act 2006 as amended. This application arises directly as a consequence of the decision of the High Court (Moriarty J.) in *Moore & Ors. v the Director of Public Prosecutions, Ireland & The Attorney General* [2016] IEHC 244 declaring that ss. 99 (9) and (10) of the 2006 Act were repugnant to the constitution and invalid on 19th April, 2016. It is submitted that because the applicant's detention is dependent upon the exercise of the statutory power which is now declared invalid there has been a default of fundamental requirements leading to his detention as a result of which he is entitled to his release under Article 40.

Chronology of Events

2. The applicant was convicted of a number of offences. These are fully described in the judgment of the Court of Criminal Appeal delivered on the 12th November, 2012 as follows:

> "On 11th October 2006 the respondent was sentenced at the Dublin Circuit Criminal Court in respect of three offences as follows. Firstly, handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001; that offence was committed on 25th January 2005. Secondly, false imprisonment contrary to s. 15 of the Non- Fatal Offences Against The Person Act 1997; that offence was committed on 12th October 2005. Thirdly, false imprisonment contrary to s. 15 of the Non- Fatal Offences Against The Person Act 1997, the offence was committed on 12th October 2005. The first offence involved the handling of a Volvo motorcar; the second and third offences were committed during what is being described as an attempted cigarette heist, where two workers delivering cigarettes were falsely imprisoned for a period of time. The respondent received from the Circuit Court a twelve month sentence on the first offence and a seven year sentence for the second and third offences respectively, the second and third being concurrent to each other. The second and third offences were committed when the respondent was on bail for the first offence; therefore the seven year sentence was to run consecutive to the twelve month sentence. However the full eight year sentence was suspended by the Circuit Court in its entirety on condition that the respondent keep the peace and be of good behaviour for a period of five years from the date of the sentence. The Director of Public Prosecutions applied to this court pursuant to s. 2 of the Criminal Justice Act 1993 for a review of those sentences on the grounds of undue leniency and by judgment of this court delivered on 19th April 2007 the court refused to interfere with the overall duration of the eight year sentence but varied the suspended element of the sentence so that only five years of the total sentence was suspended. Thus the respondent had to serve three years imprisonment and the balance of the sentence, that is five years, was suspended on condition that the respondent keep the peace and be of good behaviour for five years from the date of his release."

3. The applicant was released from prison on 20th December, 2007. He entered a bond before the Prison Governor to keep the peace and be of good behaviour from that date.

4. Subsequently, the applicant was convicted of two further offences before the District Court. On 11th February, 2009, he handled stolen property namely various cartons of cigarettes to a value of €2,546.62 knowing that they were stolen, or reckless as to whether they were stolen. He was convicted on 19th August, 2009, and was thereafter remanded to the Court of Criminal Appeal under s. 99(9) of the 2006 Act. The cigarettes recovered by the Gardaí in respect of that offence had been stolen from a DHL delivery van in Tullamore at approximately 1.45pm on 11th February, 2009.

5. He was also convicted on 16th September, 2009, that on 14th June, 2009, at Inchicore Road, Dublin 8, he had in his possession a screwdriver with the intention that it be used in connection with the theft of property from a motor vehicle in which he was found. Following his conviction on that matter he was remanded to the Court of Criminal Appeal under the same section.

6. A point was taken on the referral to the Court of Criminal Appeal, that the appropriate court to which the referral ought to have been made was the Circuit Court which had imposed the original sentences on the respondent in 2006. On 19th October, 2011, the Court of Criminal Appeal determined (Finnegan P.) that the court of Criminal Appeal had jurisdiction to determine the matter. The application was then considered by the Court of Criminal Appeal on 12th November, 2012, following which the court in an *ex tempore* judgment revoked the suspended sentence.

7. The court in revoking the sentence accepted that its jurisdiction was described in s. 99(10). Finlay J. stated:-

> "… Well its jurisdiction at this point is described in subs. 10, already referred to. Its position is in effect that it shall revoke the suspended sentence unless, firstly, it considers that it would be unjust to now in the circumstances of the case and

secondly if it does decide to revoke the sentence, it still has to decide what part would be just to require the respondent to serve, less any period already served. In this situation this court is put in the position of acting effectively as a first instance sentencing court and without any appeal other than an appeal through the mechanisms of s. 29 of the Court of Justice Act 1924 as amended."

8. The court considered the evidence offered by the two investigating Gardaí in respect of the two District Court convictions. However no evidence was advanced as to the personal circumstances or the behaviour of the respondent since his release or how he had fared since that release. The court, therefore, considered that it was not in a position to exercise any measured consideration of the sentence that should be imposed by virtue of his behaviour or any aspects of his character. It therefore concluded that, having regard to the seriousness of the original offences, it ought to activate the entirety of the five year sentence, to take effect from that date. The applicant has therefore been serving the sentence as activated since 12th November, 2012.

9. At the conclusion of the hearing before the Court of Criminal Appeal the court granted a certificate under s. 29 of the Courts of Justice Act 1924, certifying that the case involved a point of law of exceptional public importance namely:

> "Where the court of Criminal Appeal has varied a sentence pursuant to s. 2 of
>
> the Criminal Justice Act 1993 by wholly or partly suspending it, is the Court of Criminal Appeal the appropriate court vested with jurisdiction to consider the revocation of the suspended sentence pursuant to s. 99 (10) of the Criminal Justice Act 2006, as amended?"

10. It was submitted on behalf of the applicant in the Supreme Court that the Court of Criminal Appeal as an appellate court was *functus officio* once it had made its order varying the sentence imposed by the Circuit Court judge. Furthermore, it was submitted that s. 99(12) of the 2006 Act provided for an appeal against such a revocation. Thus if a suspended sentence were revoked by the District Court, there was an appeal to the Circuit Court. If it were revoked by the Circuit Court an appeal lay to the Court of Criminal Appeal. However, if a suspension were to be revoked by the Court of Criminal Appeal the only appeal available was the more limited form of appeal to the Supreme Court pursuant to s. 29 of the Courts of Justice Act 1924, as amended. Therefore it was submitted that s. 99 should be read as granting a full right of appeal where a suspension is revoked by allowing the revocation of a suspension by the Court of Criminal Appeal to be dealt with in the Circuit Criminal Court thereby giving an effective appeal to the Court of Criminal Appeal rather than simply an appeal with leave to the Supreme Court under section 29. Though the original alteration of sentence in the case arose as a result of an appeal against undue leniency brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, it was also submitted that it would be an unjustifiable discrimination to treat the respondent differently to a person whose sentence was suspended on foot of an appeal against the severity of their sentence pursuant to s. 3 of the Criminal Procedure Act 1993.

11. It was submitted on behalf of the Director of Public Prosecutions that s. 99(12) provided for a right of appeal where a suspended sentence order is revoked "to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked the order". It was submitted that this should be read in conjunction with an earlier clause in s. 99(12) which refers to the suspended sentence order under s. 99(1) being "revoked in accordance with this section". It was therefore contended that the plain meaning of the section was that the suspended sentence order must be revoked by the appropriate court, in this instance, the Court of Criminal Appeal. The prosecutor accepted that there was no distinction between cases that originate as appeals against undue leniency under s. 2 and those falling under s. 3 of the Criminal Procedure Act 1993.

12. The Supreme Court held that the Court of Criminal Appeal was the appropriate court to which application should be made for the revocation of a suspended sentence under s. 99(9) where appropriate. Denham C.J. (delivering the judgment of the court) stated, in respect of the appeal available to the applicant under s. 99(12), as follows:-

> "52. Section 99(12) of the Act of 2006, as amended, provides for an appeal. Appeals from the Court of Criminal Appeal to the Supreme Court are limited by statute to the terms of s. 29 of the Act of 1924, as amended. This limitation would have been known to the Oireachtas. The circumstances of an appeal against a revocation of suspended sentence by the Court of Criminal Appeal would arise in circumstances where there has been a trial, then an appeal to the Court of Criminal Appeal, where part of the sentence may have been suspended by the Court of Criminal Appeal on conditions. Then, if the convicted person breaches the conditions the matter may come back before the Court of Criminal Appeal which will then consider the issue of revocation. The words of s. 99(1), (9) and (10) of the Act of 2006, as amended, are clear and plainly establish a system by which a sentence may be suspended and the suspension subsequently revoked.
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> 53. The limited appeal from the Court of Criminal Appeal in such circumstances is not such a factor as to alter the clear wording of s. 99(1). …"

13. In addressing the specific argument concerning the alleged discrimination against the applicant in adopting such an interpretation Denham C.J. stated:-

> "55. (iii) The third argument of the respondent was that, while the original alteration of the sentence in this case arose as a result of an appeal against undue leniency by the prosecutor pursuant to s. 2 of the Criminal Justice Act 1993, it would be wrong in principle and constitute an unjustifiable discrimination to treat the respondent differently to a person whose sentence was suspended on foot of an appeal against the severity of their sentence under s. 3 of the Criminal Procedure Act 1993. In fact, as discussed above, convicted persons in both such appeals, namely those under s. 2 of the Criminal Justice Act 1993 and s. 3 of the Criminal Procedure Act 1993, are subject to a similar power of the Court of Criminal Appeal to quash the sentence of the trial court and to impose a new sentence."

It is clear therefore that whether a suspended sentence was revoked following its imposition under s. 2 of the Criminal Justice Act 1993 or s. 3 of the Criminal Procedure Act 1993 by the Court of Criminal Appeal, there was a similarly limited right of appeal available to either type of appellant in respect of such revocation under s. 29 of the 1924 Act. Thus, there was no discrimination between them.

14. The judgment of the Supreme Court in the applicant's case was delivered on 23rd January, 2014.

15. The applicant caused declaratory proceedings to be issued by way of plenary summons, Record Number 2014/5988 P, on 9th July, 2014. In those proceedings the applicant as plaintiff seeks a number of declarations, including declarations that ss. 99(9), (10) and (12) of the Criminal Justice Act 2006 as amended are invalid having regard to the provisions of the Constitution of Ireland and in

particular "the Preamble, Articles 34, 38 and 40 thereof and any rights implied therein". A declaration is also sought that s. 29 of the Courts of Justice Act 1924, as amended, insofar as it delimits an appeal under s. 99(12) of the Criminal Justice Act 2006, as amended, from the Court of Criminal Appeal to the Supreme Court, in the circumstances of the applicant's case, is also invalid having regard to the Constitution of Ireland. An order is also sought directing the release of the plaintiff from his detention in the event that it is established that there has been a breach of his constitutional rights with respect to his ability to appeal his sentence and that no provision exists for him to appeal.

16. A statement of claim was delivered and a defence was delivered on 21st November, 2014. No further step has been taken in these proceedings since that time.

17. In the particulars of alleged breaches of the Constitution alleged in the statement of claim, the applicant alleged breaches of Articles 38.1, 40.1 and 40.3 thereof. He alleged that the delimitation of an appeal against the revocation of a suspended sentence under s. 29 was unjust and unfair and that it constituted a breach of Article 40.1 of the Constitution. The applicant alleged:

> "It is the plaintiff's case that if he had received the partially suspended sentence from the Circuit Court rather than the Court of Criminal Appeal, then by the operation of s. 99(12) of the 2006 Act, the plaintiff would have been entitled to fully appeal any revocation order to the CCA. However, in light of the procedure followed by the DPP in bringing the matter before the CCA by way of an undue leniency appeal, the plaintiff, through no fault of his own, has lost his entitlement to appeal the revocation order made under s. 99 (10) of the 2006 Act. Thus he has been discriminated against without any lawful justification when compared to a person sentenced in a similar fashion by the Circuit Court."

18. It also alleged that any inequality in the manner in which he was treated as a result of the sentencing regime required by s. 99 of the 2006 Act was without any objective or reasonable justification and/or was disproportionate.

19. On 19th April, 2016 the High Court declared ss. 99(9) and (10) to repugnant to the Constitution and invalid.

The Article 40 Application

20. The applicant claims that he is entitled to the benefit of the retrospective application of the decision in *Moore & Ors v. the Director of Public Prosecutions & Ors*. in which ss. 99 (9) and (10) were declared invalid. The facts of each of the applicants in Moore are similar. Each was serving a suspended sentence: each was subsequently convicted of committing further offences during the period of suspension after a contested trial: each was then returned to the original sentencing court for a determination as to whether the suspended part of the sentence should be revoked under ss. 99 (9) and (10): each complained that the suspension of their sentences might be considered prior to any appeal which might be taken against the orders of conviction, resulting in their return to the sentencing court under section 99 (9). If subsequently acquitted, or if the verdict of a jury were set aside on appeal, the applicants claim that they would have suffered an injustice if, in the meantime the suspended sentences had been revoked and they had been returned to custody.

21. Moriarty J. in deciding that the subsections were repugnant to the Constitution concluded that the procedure mandated under s. 99 when invoked, unduly interfered with the right of appeal from the District Court or 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 40.1. This conclusion was reached "in the context of the facts reviewed and the arguments made". The final order declaring the subsections invalid states that this is so because they are repugnant to Articles 38.1 and Article 40.3 of the Constitution.

22. Moriarty J. identified two situations of potential jeopardy or prejudice that might arise under the subsections specifically concerning the right of appeal as follows:-

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

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

23. The learned judge also laid emphasis on the principles set out by Hogan J. in *McCabe v. Ireland and the Attorney General* [2014] IEHC 435. That too was a case concerning the right of appeal to be exercised under s. 99 (12) of the Act. The applicant in that case received a suspended sentence in the Circuit Court on appeal from the District Court. It was later reactivated following conviction for a subsequent offence. It was submitted that the applicant had a right of appeal against the revocation under Article 34.3.4 of the Constitution and that the failure to provide such an appeal was contrary to the equality guarantee of Article 40.1. Hogan J. held that this was so and granted the appropriate relief. On appeal it was held that a proper construction of s. 99 (12) afforded an appeal to the Court of Appeal even though the Circuit Court which revoked the sentence was a final court of appeal from the District Court order.. This was so because the jurisdiction vested in the reactivation court was said to be free standing and the exercise of a new jurisdiction. It required the application for the first time of a separate statutory test based on new facts which provided the basis for the revocation. As a first instance decision even though the court was operating as a court of appeal, the reactivation decision was not a decision made on appeal. Consequently the applicant had a right of appeal to the Court of Appeal from the reactivation under section 99 (12).

24. It was unnecessary for the Court of Appeal in those circumstances to address specifically the points raised by Hogan J. concerning the principle of equality before the law under Article 40.1 applicable to those facing reactivation of a suspended sentence. Moriarty J. relied upon the general applicability of these principles citing the following extract from the judgment of Hogan J.:-

"15. It must also be recalled that the policy expressed by the Oireachtas in s. 99(12) is that the re-activation of every suspended sentence should be capable of being appealed to a higher court. In these circumstances, it is not possible to discern any possible justification for the radically different treatment of persons whose suspended sentences for minor offences have been re-activated by the Circuit Court as distinct from the District Court. The equal treatment of similarly situated persons within the criminal justice system is at the heart of the concept of equality before the law which, as the language of that provision makes clear, is one of the fundamental objectives of Article 40.1: see, e.g., *Cox v. Ireland* [1992] 2 I.R. 305, *SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 I.R. 369, *BG v. Ireland (No.2)* [2011] IEHC 445, [2011] 3 I.R. 748 and *Byrne v. Director of Oberstown School* [2013] IEHC 562, [2014] 1 I.L.R.M. 346. This is especially so given that the fundamentally different treatment with regard to sentencing which would then obtain would so greatly impact on the core constitutional right to liberty under Article 40.4.1. […]

> 21. Given that in the present case the significantly differing treatment of otherwise similarly situated accused so far (as) rights of appeal are concerned is incapable of objective justification - and, let it be recalled, no such justification has really been advanced - the conclusion that such a state of affairs plainly offends the guarantee of equality before the law in Article 40.1 is, accordingly, inescapable. We can consider presently the implications of that particular conclusion. […]
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> 34. The right of appeal is subject to "law", but it is now clear - in a way which was not perhaps quite the case in 1972 at the time when *Hunt* was decided - that where this phrase appears in the Constitution, it does not simply refer to positive law only in the sense of a statute enacted by the Oireachtas. It is rather the case that any such "law" as is envisaged by Article 34.3.4 must comply with the principles subsequently articulated by Henchy J. in *King v. Attorney General* [1981] I.R. 233, 257 so that the law "must [not] ignore the fundamental norms of the legal order postulated by the Constitution." This principle was recently re affirmed by O'Donnell J. in *Murphy* in the context of Article 38.3.1 and the establishment "by law" of the Special Criminal Court. The application of the *King* principle meant that the question in that case thereafter became whether the provisions of the Offences against the State Act 1939 providing for the establishment of that Court were "compatible with the dictates of fairness postulated by the Constitution."
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> 35. If the matter is looked at this way it may be said that the existence of a right of appeal against a purely procedural ruling of a trial judge in matters relating to venue is not intrinsic to the fundamental norms postulated by the Constitution and nor is it central to the criminal justice system. As Geoghegan J. pointed out, the existence of a right of appeal against decisions in respect of venue would be likely to prove disruptive to the smooth and orderly administration of justice.
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> 36. The right of appeal of an accused against sentence is an entirely different matter. As a matter of history, a right of appeal on the part of the accused against sentence has been a fundamental feature of the criminal justice system since the Constitution was first enacted. […]
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> 37. In view of the centrality of sentencing to the criminal justice system and given that the protection of liberty, the trial of offences in due course of law and the existence of a right of appeal are themselves all fundamental norms expressly safeguarded by the Constitution, it is difficult to see how a law which did not provide for a right of appeal against sentence imposed by a court of local and limited jurisdiction could be said to be a law which respected those fundamental norms, so that it was a "law" in the sense identified by Henchy J. in *King* and by O'Donnell J. in *Murphy*. … It is … something which, at the very least, requires to be objectively justified."

The learned judge concluded that no objective justification for the absence of a right of appeal (subsequently found by the Court of Appeal to exist) was present in the case.

25. It is clear that Moriarty J. adopted and applied these principles in concluding that ss. 99(9) and (10) were repugnant to the Constitution:-

> "30. In all the circumstances of the case, and having giving 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 much show to enactments of the Oireachtas, the subsections under review of s. 99 fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made".

26. The applicant claims that as a person who has been returned to the Court of Criminal Appeal following his further conviction he is as a matter of course entitled to the benefit of the retrospective application of the declaration of invalidity in respect of ss. 99(9) and (10) because he at all stages during the revocation process contested the jurisdiction of the Court of Criminal Appeal to determine the matter and objected to the absence of a proper appeal procedure by issuing plenary proceedings contesting the constitutionality of ss. 99(9), (10), and (12). He did so on the basis that he and others who might have sentences revoked by the Court of Criminal Appeal following their imposition by that court were not accorded a right of appeal of a similar nature to that afforded to those whose sentences were revoked by the Circuit Court on appeal from the District Court or by the Court of Appeal on appeal from the Circuit Court following trial on indictment. It is submitted that by analogy with the principles set out by Hogan J. in McCabe the applicant is entitled to equality of treatment or if there is a disparity of treatment that such disparity should have a rational basis. As stated by Hogan J. in McCabe:-

> "15. The equal treatment of similarly situated persons within the criminal justice system is at the heart of the concept of equality before the law which, as the language of that provision makes clear, is one of the fundamental objectives of Article 40.1."

It is submitted that the significantly differing treatment of otherwise similarly situated accused, insofar as rights of appeals are concerned, is incapable of objective justification and as such a state of affairs offends the guarantee of equality before the law under Article 40.1 in this case.

Retrospective Application of the Declaration of Invalidity

27. In *A v. the Governor of Arbour Hill Prison* [2006] 4 I.R. 88 the Supreme Court rejected the proposition that a case which has been finally decided and determined in accordance with the statute which was later found to be unconstitutional must invariably be set aside. Murray C.J. summarised the general principle applicable to the retroactivity of such declarations as follows:-

"125. In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches 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, is unconstitutional. That is the general principle.

126. I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.

127. I do not consider that there are any grounds for considering this case to be an exception to the general principle. The applicant, like all persons who pleaded guilty to or were convicted of an offence contrary to s. 1(1) of the Act of 1935 had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including that the section was inconsistent with the Constitution. Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances the general principle should apply".

28. In this case the applicant's criminal proceedings concluded on the 23rd January, 2014 when the Supreme Court delivered its judgment on the certified point under s. 29 of the Courts of Justice Act 1924. The plenary proceedings then issued in July. No attempt was made to initiate a challenge to the constitutionality of ss. 99(9), (10) or (12) prior to their conclusion.

29. The applicant claims that this is a matter of no importance because the general principle set down by Murray C.J. in *A* refers to the impugning of the bringing or the conduct of the prosecution on any grounds including the constitutionality of the statute upon which they are based "before the case reaches finality on appeal or otherwise". The applicant emphasises the words "or otherwise" and submits that this implies that the applicant may avail of the retrospective application of the declaration of invalidity in circumstances where, subsequent to the finality of the criminal proceedings, the plenary proceedings which he submits are proceedings which fall within the phase "or otherwise" may be relied upon if they have not been finalised, even though commenced subsequent to the finalisation of the criminal proceedings. I am not satisfied that this is so. The rule in respect of the retrospective application of declarations of invalidity is calculated to set a boundary in time as to when a litigant may prima facie be entitled to the benefit of the determination. I am satisfied that the Supreme Court contemplated that applicants may seek to prohibit their trials or avail of the full range of remedies open to them during the course of criminal proceedings on numerous grounds including the inconsistency of a statute with the Constitution. However, as Murray C.J. noted in para. 127:-

"Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances (emphasis supplied) the general principle should apply".

The applicant's submission, if correct, would undermine the principle as set out by the learned Chief Justice insofar as an applicant could at any time following the conclusion of criminal proceedings initiate, by way of plenary summons, declaratory proceedings in respect of the constitutionality of the statute. If those proceedings were not concluded by the time a declaration of invalidity was delivered in parallel proceedings by another applicant, the plaintiff in the plenary proceedings could claim to be entitled to the benefit of the declaration notwithstanding the fact that he has not issued proceedings or taken any step to challenge the constitutionality of the statute during the course of his own criminal proceedings. He would claim to do so on the basis that his plenary proceedings had not concluded. I am satisfied that this is contrary to the spirit, intention and purpose of the principle established in A. As stated by Murray C.J.:-

"116 Save in exceptional circumstances, any other approach would render the Constitution dysfunctional and ignore that it contains a complete set of rules and principles designed to ensure "an ordered society under the rule of law" in the words of O'Flaherty J.

117 I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the *ab initio* principle to the exclusion of all others."

30. It is also appropriate to consider the nature of the challenge in this case. In *Moore*, the prejudice suffered arose from the inability of those convicted after a contested trial to appeal their convictions before the referral of the case to the original sentencing court for the consideration of the revocation of the suspended sentence under section 99(9) and (10). The applicants might have had their convictions set aside on appeal which would have removed the legal basis upon which the return to the sentencing court occurred under section 99(9). They were liable to be returned to custody following the revocation of the suspended sentence prior to the determination of their respective appeals. That issue does not arise in this case and nor is it suggested that it does. However, it is submitted that the statutory framework which precludes the applicant in this case from exercising an extensive right of appeal under s. 99(12) is an arbitrary limitation on that right for which there is no rational justification. It is submitted that the applicant ought to benefit from the declaration in *Moore* because the allegedly unfair and discriminatory right of appeal arises from the exercise of the statutory procedures under ss. 99(9) and (10) which have been declared invalid. It is claimed that the Moore judgment is based upon the proposition that the invalidity arises from the inequality of treatment of those dealt with under the section which is further compounded in this case by the inequality of treatment accorded to those whose revocation occurred in the Court of Criminal Appeal when they seek to exercise their right of appeal following the *Foley* Supreme Court decision.

31. As already stated, I do not consider that the difficulties raised in respect of the process of revocation which was the subject of the Moore judgment are relevant to this case. It is clear that the plenary proceedings initiated by the applicant following that judgment challenged the validity of sections 99(9), (10) and (12). It is equally clear that the main focus of the challenge is subs. (12) on grounds which are materially different to those relied upon in the *Moore* case. The applicant's claim is framed on the basis of a challenge grounded on the alleged unfairness and unjustifiable discrimination between those whose sentences were revoked under the procedures in respect of the right of appeal under section 99(12) and his own.

32. The court must also have regard to the judgment of the Supreme Court in Foley which found no discrimination between those in respect of whom suspended or partially suspended sentences were imposed whether after an appeal under s. 3 of the Criminal Procedure Act 1993 or following an appeal by the Director of Public Prosecutions on grounds of undue leniency under section 2 of the Criminal Justice Act 1993. Each was dealt with appropriately in accordance with the law which the Supreme Court interpreted as applying equally to each. The Oireachtas has determined that the right of appeal in such cases should be limited. The Oireachtas clearly had knowledge of the state of the appeal process and procedures applicable in different types of cases at the time of the

enactment of section 99(12). The court is obliged to apply the law as determined by the Supreme Court. The proposition advanced by the applicant, in essence, invites the court to consider the argument concerning the alleged discrimination and the procedure concerning the right of appeal under s. 99(12) as it applies to the revocation of suspensions by the Court of Appeal in the context of the statutory scheme as it existed and the declarations of invalidity. The court is invited to determine that the process results in an unlawful discrimination which has no rational or justifiable basis that is evident from the provisions of s. 99 itself or otherwise. It is therefore said that the retrospective application of the declaration of invalidity in *Moore* when considered in the context of this alleged unconstitutional discrimination in respect of the right of appeal arising out of the Supreme Court's interpretation in *Foley* justifies the granting of relief under Article 40 and the applicant's release.

33. I do not consider that the mere assertion of a claim for a declaration of invalidity is of itself sufficient to justify the granting of the relief claimed. Neither can I be satisfied that the court should grant relief because of the alleged discrimination identified on the principles set out in *McCabe* as adopted and applied by Moriarty J. in *Moore*. Section 99 (12) is not the subject of a constitutional challenge in these proceedings. The court specifically inquired of the applicant whether such a challenge was being made. It was informed that it was not. Therefore, the court must regard s. 99 (12), as interpreted by the Supreme Court, as defining the scope and nature of any appeal brought by the applicant against the revocation of the suspended sentence. That appeal has now concluded under the subsection which is now challenged in the plenary proceedings. The subsection carries a presumption of constitutionality in those proceedings. I note that one of the reliefs sought in those proceedings is the release of the applicant if the subsection is found to be invalid. However, on this application the court is invited in effect to disregard the decision in the *Foley* Supreme Court appeal and the course of events leading up to that determination. The granting of the relief claimed would in effect determine the constitutional challenge set out in the plenary proceedings. The court is not satisfied that such a consideration is consistent with the norms of constitutional challenge and the operation of the presumption of constitutionality that attaches to the statute in that process. There are a number of procedures which may be followed to challenge the constitutionality of a statute or any provision thereof. It may be done by plenary proceedings or by seeking timely relief by way of judicial review prior to the conclusion of the criminal proceedings concerned. It may, in limited, if not exceptional, circumstances be made during the course of an application under Article 40 of the Constitution. This is clearly contemplated under Article 40.4.3 (see also *Hardy v. Ireland* [1994] 2 I.R. 550 and *Brennan v. Ireland* [2008] 3 I.R. 364 per Geoghegan J. at p. 383). This procedure has not been invoked in this case. I am satisfied that it is quite inappropriate for this Court to consider the making of a ruling or determination that a statute enacted by the Oireachtas violates Articles of the Constitution, breaches the constitutional rights of applicants or is otherwise fundamentally and constitutionally deficient outside the framework of a properly constituted claim for a declaration that such a provision is repugnant to the Constitution and consequently invalid. I am satisfied that such an approach would be contrary to the fundamental duty of the court to apply constitutionally enacted statutes and the presumption of constitutionality.

Post Conviction Release

34. Following the making of an Order for an inquiry under Article 40, the respondent certified in writing the grounds of the applicant's detention on 20th May, 2016. The certificate contained the warrant of the Court of Criminal Appeal dated 12th November, 2012, which issued following a determination of the court that the suspended sentence ought to be revoked in its entirety. No point is taken in respect of the form or the content of the warrant. The point taken is in respect of the jurisdiction of the court to make the determination having regard to the declaration made in the *Moore* case.

35. The remedy available under Article 40 to direct the release of a convicted person is more limited than that available in other cases. As stated by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R.131 at p. 136:-

> "…Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment, he is prima facie detained in accordance with law and, as was held in the High Court by Maguire P. at p. 435 of the report of The State (Cannon) v. Kavanagh [1937] I.R. 428, it would require 'most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted….In a case such as the present, the production of the warrant by the governor of the prison would normally be a sufficient justification of the detention. The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded. For example, if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life, instead of penal servitude for life as required by the statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, s. 4, for it could not be said that the detention was not 'in accordance with the law' in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the court of trial for the imposition of the correct sentence…
>
> The confinement of orders of release under Article 40, s. 4, to cases where the detention is not 'in accordance with the law' in the sense I have indicated means that applications under Article 40, s. 4, are not suitable for the judicial investigation of complaints as to conviction, sentence or conditions of detention which fall short of that requirement. These fall to be investigated, where necessary, under other forms of proceedings. But in cases where it has not been shown to the satisfaction of the court that the detention is 'in accordance with the law' in the sense indicated, the release of the detained person must be ordered and, notwithstanding judicial dicta to the contrary, the order of release may not be coupled with an order of re-arrest…"

36. In *The State (Aherne) v. Cotter* [1982] I.R. 188 at p. 203, Henchy J. stated:

> "Before a convicted person who is serving his sentence may be released under our constitutional provisions relating to habeas corpus, it has to be shown not that the detention resulted from an illegality or a mere lapse from jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice, according as those rules require to be recognized under the Constitution in the fullness of their evolution at the given time and in relation to the particular circumstances of the case. Deviations from legality short of that are outside the range of habeas corpus."

37. It is submitted that the determination by the Court of Criminal Appeal to reactivate the sentence was the result of the procedural deficiency which was the subject of the declaration of invalidity in the Moore case. It is submitted that this procedural deficiency was "such as would invalidate any essential step in the proceedings leading ultimately to (the applicant's detention)" (*The State (Royle) v. Kelly* [1974] I.R. 259).

38. As already stated, I am not satisfied that the applicant is entitled to the retrospective benefit of the declaration on the basis of

principle adopted by the Supreme Court in *A. v. Governor of Arbour Hill Prison,* for the reasons already given. Even if this were not so, the court would be obliged to consider all other relevant aspects of the case and the words of Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326, whether the applicant has by reason of his circumstances, including his conduct, "lost not the right guaranteed by the Constitution but his competence to make claim to it in the circumstances of the case". Each case depends on its own facts.

39. In this case, the applicant was the subject of a carefully constructed suspended sentence to which conditions were attached under section 99(1). He undertook to abide by those conditions. A sentence of imprisonment appropriate to his crimes was determined but suspended on his solemn undertaking to abide by the imposed conditions. He benefited from the sentence and was duly released from custody. He broke the conditions by committing further offences. He could only have anticipated in those circumstances that an application would be made to seek the revocation of the suspended part of the sentence and return him to custody. This duly occurred. He was afforded full representation and an opportunity to make such submissions and adduce such evidence as was deemed appropriate to the Court of Criminal Appeal at the revocation hearing. He objected to the jurisdiction of the court on the basis that the matter should have been returned to the Circuit Court for the determination of the revocation issue. That point was lost. That point was certified under s. 29 to the Supreme Court and the ruling of the Court of Criminal Appeal was upheld. There is no suggestion and no evidence to indicate that there was any want of fair procedures or breach of natural justice in the determination of the revocation issue before the Court of Criminal Appeal. No such point is advanced in these proceedings.

40. The applicant pleaded guilty to the "trigger" offences which resulted in his return to the Court of Criminal Appeal under section 99(9). He did not and could not have initiated a challenge on the same basis as the applicants in *Moore* to the operation of the subsection in his case. He could not, therefore, have initiated or maintained a judicial review or an Article 40 application following the revocation of his sentence on the grounds which were ultimately successful in *Moore*. It is not, therefore, so much the case that the applicant acquiesced in not initiating any constitutional challenge to s. 99(9) and (10) on the *Moore* grounds, rather he had no basis for so doing.

41. The principles governing the circumstances and conduct that must be considered in determining the extent to which an applicant is entitled to the retrospective application of a declaration of invalidity have been considered in a number of decisions of the Court of Criminal Appeal which was set out in *Clarke v. Governor of Mountjoy Prison* (Unreported, High Court, 27th May, 2016, McDermott J. paragraphs 42-52).

42. This case was dealt with in accordance with the law then applicable. Though the applicant makes a claim in respect of the unconstitutionality of s. 99(12), no effort was made to make such a challenge during the course of the hearing or pending the determination of the Court of Criminal Appeal's decision to revoke. While the applicant continues to pursue that declaration of invalidity in the plenary proceedings which are still pending, he expressly declined to do so in this application. However, the submission was made, as already discussed, that the effect of the deficiency in the appeal procedure gives rise to a fundamental injustice in his case which constitutes a breach of his constitutional rights. In effect, that is another way of presenting the argument that he is entitled to the retrospective effect of the declaration of invalidity in Moore because the injustice caused by the application of ss. 99(9) and (10) is compounded by the deficiency in the appeal procedure set out in section 99(12). For the reasons already given I do not accept that the applicant is entitled to reliefs under Article 40 on the basis of this submission.

43. I do not consider that there are any circumstances exceptional or otherwise in this case which require that the declaration in the Moore case should have a retrospective effect.

44. I am also satisfied that the process whereby the applicant submitted to the terms of a suspended sentence is important to the administration of justice. The rehabilitation of a convicted person is a prime consideration in sentencing policy. It inures to the benefit of the applicant and an ordered society. It is essential for the advancement of the applicant's rehabilitation and protection of the rights of victims and the general public that the power to revoke a suspended sentence exists: otherwise the effectiveness of the administration of justice and public confidence in it will be eroded. The imposition of a suspended sentence involves each of the parties including the applicant, the Director of Public Prosecutions, An Garda Síochána and the Probation and Welfare Services and the Prison Service in an irreversible process once the initial period of limitation in respect of the right of appeal against such sentence expires. It seems to me that it is only in the most exceptional circumstances that an applicant may secure his release post conviction under Article 40 and that it should only be in the most exceptional circumstances that a declaration of invalidity within the rules as set out in *A v. Governor of Arbour Hill*, should apply retrospectively. I am not satisfied that the applicant has demonstrated any circumstances which establish such a default of fundamental requirements of fair procedures, in the determination of the revocation of his sentence, that would justify his release in this application.

Conclusion

45. For the reasons set out above, this application is refused.