APPROVED **[2021] IEHC 347**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 84 JR

BETWEEN

JAKUB KEDZIERSKI

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 June 2021

INTRODUCTION

1. This judgment concerns the circumstances in which a custodial sentence, which has been suspended, may be activated. In particular, it concerns the extent to which the legislative amendments introduced under the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 have retrospective effect.

2. A custodial sentence had been imposed upon the Applicant, but the execution of the sentence had been suspended for three years. The Applicant submits that—in accordance with the legislation then in force—he had been released from any obligation to serve out his suspended sentence upon the expiration of the period of suspension. It is further

submitted that this immunity from having to serve out the suspended sentence represents an accrued or vested right, with the consequence that it is presumed not to be affected by the *subsequent* enactment of amending legislation. In the alternative, the Applicant pleads that if the amending legislation has retrospective effect, then the legislation is invalid having regard to the Constitution of Ireland.

3. The relevant legislative amendments came into effect on 11 January 2019, when the provisions of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 were commenced by Ministerial Order. The amendments were made to the underlying legislation, namely section 99 of the Criminal Justice Act 2006. The shorthand "***the pre-2019 version***" and "***the post-2019 version***" will be used in this judgment to distinguish between the two versions of the Criminal Justice Act 2006.

FACTUAL BACKGROUND

4. The Applicant pleaded guilty to two counts of possession of a controlled drug for the purpose of supply ("***the first offence***") in 2015. The Applicant was convicted and sentenced to imprisonment for a period of two years on 29 July 2015 by the Circuit Court. The execution of the sentence of imprisonment was, however, suspended for a period of three years.

5. The terms of the suspended sentence are recited as follows in the Circuit Court order of 29 July 2015.

> "This matter having come into the list for sentence on this day and the accused Jakob Kedzirski (*sic*) having been arraigned and having pleaded guilty to count No. 2 and 4 in the Indictment preferred against him, and as set out in the Schedule to this Order.
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> AND THE COURT having heard the evidence tendered and submissions on behalf of the respective parties DOTH ORDER that the said Accused Jakob Kedzirski be imprisoned for the period of 2 years on Count Nos. 2 and 4 BUT suspend said sentences on the Accused, in open Court, acknowledging himself bound to the People

> of Ireland in the sum of €200.00, the conditions being 1, that he will keep the peace and be of good behaviour towards all the People of Ireland for a period of 3 years from this date AND FURTHER that he will come up if called on to do so at any time within said period of 3 years to serve the sentence imposed, but suspended on him entering into this Recognisance. Accused having acknowledged himself so bound was discharged"

6. Some two years later, on 19 February 2017, the Applicant was arrested and found to be in possession of controlled substances. Arising out of this arrest, the Applicant was charged with a number of offences under the Misuse of Drugs Act 1977 (as amended). The trial of these offences did not come on for hearing, however, for another two years. On 6 February 2019, the Applicant was convicted of a single offence and a fine of €1,000 was imposed ("***the second offence***").

7. The chronology may be summarised in tabular form as follows.

29 July 2015	Two-year custodial sentence (suspended for three years)
19 February 2017	Second offence committed
29 July 2018	Period of suspension expires
11 January 2019	Amending legislation commenced by Ministerial Order
6 February 2019	Conviction for second offence

8. The chronology of events is such that whereas the Applicant had *committed* the second offence within the three-year period of the suspended sentence, he was not *convicted* of that offence until after the three-year period had expired.

9. The significance of this is that, under sections 99(9) and (10) of the Criminal Justice Act 2006 (as enacted), the possibility of the activation of a suspended sentence only arose where the sentenced person had actually been *convicted* of another offence within the period of suspension.

10. The legislation was amended subsequently with effect from 11 January 2019. Insofar as the temporal limitation on the activation of a suspended sentence is concerned, two changes were introduced as follows. First, the relevant period is now the period of

suspension *plus* an additional period of twelve months ("***the extended period***"). Secondly, it is no longer necessary that a conviction have been entered within this extended period; it is sufficient that proceedings for the second offence are *instituted* against the sentenced person during the extended period.

EARLIER DECLARATION OF CONSTITUTIONAL INVALIDITY

11. Before turning to address the specific issues which arise in this case, it is necessary, first, to explain that the High Court had found aspects of the pre-2019 version of the legislation to be invalid having regard to the Constitution of Ireland.

12. In *Moore v. Director of Public Prosecutions* [2016] IEHC 244; [2018] 2 I.R. 170, the High Court (Moriarty J.) held that subsections (9) and (10) of section 99 of the Criminal Justice Act 2006 were invalid. The invalidity stemmed from the *sequence* in which (i) the original sentencing court and (ii) the court dealing with the second conviction were to discharge their functions. The court dealing with the second conviction had been required, prior to imposing sentence in respect of the second offence, to remand the convicted person to the original sentencing court. This sequence of events did not allow for the possibility that the conviction in respect of the second offence might be overturned on appeal. A person might thus have their suspended sentence activated on the basis of a conviction for a second offence, only for that conviction to be overturned subsequently on appeal. This would be unjust in that the suspended sentence would have been activated without there having been any further wrongdoing on the part of the sentenced person.

13. The High Court delivered its judgment in *Moore* on 19 April 2016. (The formal order was drawn up on 11 May 2016). The Oireachtas subsequently enacted amending legislation on 15 March 2017, namely the Criminal Justice (Suspended Sentences of

Imprisonment) Act 2017. The relevant provisions of this Act were not, however, commenced until 11 January 2019.

14. This delay in addressing the consequences of the declaration of constitutional invalidity meant that, for a period of some two and a half years, there was a significant lacuna in the legislation. There was no formal statutory mechanism in place which required the court seised with proceedings in respect of the second offence to remand the accused to the original sentencing court. It was only on 11 January 2019 that a procedure broadly analogous to that which had previously applied was reintroduced. This amended procedure does not have the same sequencing flaw as the pre-2019 version of the legislation.

15. The Applicant does not rely upon the declaration of constitutional invalidity for the purpose of his proceedings. The argument actually made by the Applicant is more straightforward, and is not predicated upon the fallout from the judgment in *Moore v. Director of Public Prosecutions*. On the Applicant's argument, his suspended term of imprisonment could not be activated once the three-year period of suspension had expired on 29 July 2018. It is said that this would have been the position even if the pre-2019 version of the legislation had, counterfactually, survived the constitutional challenge. Put otherwise, the Applicant is prepared to assume, for the purpose of these proceedings, that the pre-2019 version of the legislation had remained in full force and effect. Even on this assumption, the Applicant says that he had achieved immunity from the activation of his suspended sentence.

16. Notwithstanding that the Applicant does not require to rely on the declaration of constitutional invalidity, the line of case law subsequent to *Moore* is potentially relevant to these proceedings. This is because there are certain *dicta* in those later judgments which describe the legislative provisions as being *procedural* in nature. The significance

of this being that the presumption against retrospective legislative effect is generally understood as not applicable to amendments which are procedural (as opposed to substantive).

17. The judgment of greatest relevance is that of the Supreme Court in *Wansboro v. Director of Public Prosecutions* [2018] IESC 63; [2019] 1 I.L.R.M. 305. There, the accused had received a suspended sentence in respect of a first offence. The suspended sentence was activated following his subsequent conviction in respect of a second offence. The accused had not sought to challenge the validity of the legislation at the time, but had brought an appeal against the order activating the suspended sentence. Before this appeal had been heard, the High Court judgment in *Moore* was delivered. The accused then sought to take advantage of that judgment by instituting his own judicial review proceedings challenging the validity of the legislation.

18. The circumstances in which a person can seek to piggyback on a finding of constitutional invalidity in other proceedings have been authoritatively stated by the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88; [2006] 2 I.L.R.M. 481. Relevantly, the Supreme Court held that when legislation is declared unconstitutional, a distinction must be drawn between the making of such a declaration and its retrospective effects on cases which have already been finally determined by the courts.

19. The fact that the accused in *Wansboro* had brought an appeal against the order activating the suspended sentence in his case meant that the criminal proceedings against him had not yet been finally determined by the courts. Accordingly, the principles established in *A. v. Governor of Arbour Hill Prison* were not directly applicable. However, the Supreme Court in *Wansboro* confirmed that even where an appeal in criminal proceedings remained extant, an accused might be precluded from taking advantage of a

subsequent finding of unconstitutionality where that accused had adopted a particular course of conduct or strategy in the course of a criminal trial or could be said to have acquiesced in a particular course.

20. This principal finding is not directly relevant to the present proceedings. Rather, the relevance of *Wansboro* lies in certain observations made in the judgments. The first set of observations relate to the continued existence of an *alternative* mechanism under section 99 of the Criminal Justice Act 2006 by which a suspended sentence might be activated notwithstanding the striking down of subsections (9) and (10). Dunne J. stated as follows at paragraph 53 of her judgment.

> "I indicated previously that I would return to the issue of s.99(17) of the Act. The terms of s.99(17) have been set out above. There is no doubt that the provisions of s.99(17) have not been affected by the finding of unconstitutionality in *Moore* and that it is open to a court to consider the activation of a suspended sentence as provided for in that sub-section. It might be observed that the provisions of s.99(9) and (10) were procedural in nature in that they set out the steps that had to be taken for a person to be brought before the court and the sequence in which sentencing was to be carried out following a subsequent 'trigger' offence. Those procedures are no longer valid but that does not preclude a matter being brought back before the appropriate court for consideration of the question as to whether or not a suspended sentence should be revoked. There is no reason why that cannot be done in the event of a breach of the terms upon which the suspended sentence was imposed, if appropriate. In that regard, it is important to bear in mind the provisions of s.99(13) and (14) which make provision for members of the gardaí, prison governors, probation and welfare officers where there are reasonable grounds to believe that a person has contravened the condition(s) attached to a suspended sentence to apply to the court to fix a date for the hearing of an application for an order revoking the suspension."

21. The second set of observations relate to the procedural nature of section 99 of the Criminal Justice Act 2006. In addition to the reference to this issue in the passage from the judgment of Dunne J. cited above, it is also addressed by O'Donnell J. as follows (at paragraphs 6 to 8 of his judgment).

> "[…] Section 99 of the 2006 Act, as already observed, merely sets out a procedure for the reactivation of suspended sentences. There is

nothing wrong in principle with the idea that if a sentence is suspended on certain terms, then it should be open to reactivation in the event that those terms are not complied with, most obviously if a further offence is committed. Indeed, insomuch as the imposition of a suspended sentence is considered to be the administration of justice, then the prevention of any mechanism for reactivation of the sentence might be seen to be incompatible with, and indeed a frustration of, the administration of justice.

For my part, I do not think it is enough to shrug off this outcome as a consequence of insufficiently practical drafting, coupled with an unhealthy desire for legislative micromanagement of decisions in criminal cases, although there is, of course, merit in both observations. It seems likely that the impact of the decision in *Moore v DPP* [2016] IEHC 244 will be relatively limited, because of what is in this context almost the happenstance that s.99(17) may provide an alternative legislative route to reactivation of suspended sentences. If so, then that outcome is of little practical benefit to anyone, albeit achieved at some expense in terms of both time and cost. Even if that is the outcome (and I do not exclude the possibility of further argument in this or other cases in this regard), it would be a dispiriting exercise in legal futility, unlikely to enhance respect for the law. If however the outcome is that this and any other similarly situated convicted person were to end up serving less by way of sentence (with appropriate remission) than was imposed by the sentencing judge, then that is unlikely to inspire confidence in the system. I agree therefore that neither outcome should be readily accepted without careful scrutiny.

However, cases must be approached with the limits, even broadly interpreted, of the arguments advanced. For a number of reasons, the arguments in this case, although extensive, were not necessarily addressed to the broadest range of the issues arising in this case. First, it might well be that the decision in *Moore v DPP* [2016] IEHC 244 might have benefitted from a consideration of the possibility of suspending the declaration of invalidity to permit amending legislation. This is something touched upon in the subsequent decisions of this court in *NHV v Minister for Justice and Equality* [2018] 1 I.R. 246; [2017] 1 I.L.R.M. 105; and *NHV v Minister for Justice and Equality* [2017] IESC 82 and considered in some detail in the judgments in *C v Minister for Social Protection* [2018] IESC 57. Insomuch as s.99 of the 2006 Act is essentially procedural, or perhaps more accurately that the problem created by the invalidation of s.99(10) might be capable of being cured by procedural steps, it may have been possible to address that possibility, and thereby limit the extent of the invalidity to the repugnancy identified, consistent with Art.15.4.2°. I accept, however, that this was entirely speculative at the time, and is not by any means clear cut now."

22. As appears, O'Donnell J. places some emphasis on the "essentially procedural" nature of section 99 of the Criminal Justice Act 2006.

23. The discussion in *Wansboro* informed the subsequent judgment of the Court of Appeal in *Director of Public Prosecutions v. Kirwan* [2019] IECA 176. (See paragraphs 61 *et seq*. below).

DETAILED DISCUSSION

OVERVIEW OF ISSUES

24. The resolution of the dispute between the parties requires the consideration of three issues, in sequence, as follows. The first issue is the meaning and effect of the Circuit Court order in respect of the first offence. The second issue is whether the Applicant had, in fact, achieved immunity under the terms of the pre-2019 version of the legislation. This requires consideration of whether all the procedural mechanisms by which a suspended sentence could be activated were subject to a temporal limitation. The third issue only arises in the event that this court were to decide that the Applicant had achieved immunity under the pre-2019 version of the legislation. It would then become necessary to consider whether the post-2019 version of the legislation applies to his circumstances.

(1). MEANING AND EFFECT OF THE CIRCUIT COURT ORDER

25. The first issue to be addressed is the meaning and effect of the Circuit Court order in respect of the Applicant's first conviction. The operative part of the order of 29 July 2015 has been set out in full at paragraph 5 above. As appears, the order provides that the Applicant bound himself to keep the peace and be of good behaviour for a period of three years, and further acknowledged that he "will come up if called on to do so at any time within said period of 3 years to serve the sentence imposed".

26. The wording of the order thus imposes a temporal limitation on the Applicant's potential liability to serve out the suspended sentence of imprisonment. Unless called on to do so within the three-year period of suspension, the Applicant would thereafter be released from his obligation.

27. The existence of such a temporal limitation is entirely consistent with the version of section 99 of the Criminal Justice Act 2006 in force at the time the order was made, i.e. the pre-2019 version of the legislation.

28. It is common case that the Applicant was not "called on" within the three years of the period of suspension to serve the sentence of imprisonment imposed. The Director of Public Prosecutions ("***the Director***") seeks to overcome this difficulty by relying on the post-2019 version of the legislation. On this analysis, the potential to activate the suspended sentence revived on 11 January 2019, that is, some six months after the three-year period of suspension had expired.

29. Counsel on behalf of the Director sought to downplay the significance of the actual wording of the Circuit Court order, by suggesting that the language is simply a legacy from a time immemorial when there were no statutory provisions regulating suspended sentences. It is said that there is "no good reason" for this form of wording "to intrude" in an order now, and that it is "redundant" given the existence of statutory mechanisms by which the sentenced person can be required to serve out the suspended sentence as appropriate.

30. The form of order imposed at common law has been described as follows by the late Professor Nial Osborough in an excellent article published in the *Irish Jurist*, W.N. Osborough (1982) "A Damocles' Sword Guaranteed Irish: The Suspended Sentence in The Republic Of Ireland" 15(2) *Irish Jurist* 221-256.

> "The order embodying the simple kind of Irish common law suspended sentence is composed of five individual elements. The order is one warranting the imposition of (i) *a custodial sentence.* Attached is (ii) *an authority to suspend the execution of the sentence* for the duration of the prescribed probationary period. Suspension, in turn, is made conditional upon (iii) *an undertaking by the offender as to his future conduct.* Variation is permitted in the scope of the requisite undertaking but two conditions appear invariably to be insisted upon: (a) 'to keep the peace and be of good behaviour' (sometimes in more recent years restricted to 'to be of

> good behaviour' alone) ; and (b) 'to come up for judgment' if called upon to do so. The first condition incorporates the promise of real substance; the second additionally enshrines the procedural mechanism to which the prosecution is free to resort should the decision be taken to put the sentence into force. This undertaking is secured by (iv) *a requirement to lodge a money sum (or recognisance) as guarantee;* sometimes, independent or other sureties may also be sought. If the offender observes the terms of his undertaking for the prescribed period and so passes his 'test', the sentence is never put into force and its effect is extinguished (and the recognisance is returned). The order thus contains, finally, (v) *an inbuilt timed self-destruct element.*"
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> *Footnote omitted. Emphasis (italics) in the original.

31. As appears, the common law form of the order contained what is described as "an inbuilt timed self-destruct element".

32. It is certainly correct to say, as counsel for the Director does, that the Circuit Court order of 29 July 2015 bears a striking similarity to what might be described as the common law form of order. It might well be that such an elaborate form of wording is no longer strictly required, given that the inherent jurisdiction to suspend sentences is now regulated by section 99 of the Criminal Justice Act 2006. It does not follow as a corollary, however, that, in circumstances where a court has chosen to make an elaborate order, the terms and conditions of the order can simply be ignored. The Circuit Court order is final and conclusive, and is entitled to respect. The terms and conditions of the order of 29 July 2015 are such that, unless called on to do so within the three-year period of suspension, the Applicant could not be required thereafter to serve out the sentence. It would be contrary to the principle of legal certainty were an existing court order, by dint of amending legislation, to have a different meaning than that which appears on its face.

33. The logic underlying the argument made on behalf of the Director appears to be that the legislative amendments commenced on 11 January 2019 should be interpreted as having the legal effect of superseding the temporal limitation imposed under the Circuit Court

order. With respect, such an interpretation would require reading the amending legislation as intended to override the terms of a court order which had been made, and the effect of which had expired, prior to the commencement of that legislation. Were this to be the correct interpretation, then there would be a question as to the constitutional validity of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017. This is because the case law to date is strongly suggestive of the courts having an inherent jurisdiction to impose suspended sentences, and that the imposition and subsequent activation of a suspended sentence is an aspect of the administration of justice for the purpose of Article 34 of the Constitution of Ireland. Without deciding the point, there is a respectable argument to be made that it would represent a breach of the separation of powers were the Oireachtas to introduce legislation which purported to change the legal effect of a court order. This is especially so where the order had been made in compliance with the then applicable legislation.

34. Even if the contended for interpretation would not render the post-2019 version of the legislation unconstitutional, it would, at the very least, mean that the legislation had brought about a substantial alteration in the law. There is a presumption that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. (See, D. Dodd, *Statutory Interpretation in Ireland*, 2008, Bloomsbury Professional, §§4.110 to 4.116). There is nothing in the language of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 which even hints at an intention to trespass upon the role of a court by purporting to change the legal effect of orders made prior to the commencement of the legislative amendments. I am satisfied, therefore, that the Act was not intended to have the practical effect of rewriting earlier court orders.

35. (For reasons similar to those discussed at paragraphs 57 *et seq.* below, the contended for interpretation would also be inconsistent with the presumption against retrospective effect).

36. In summary, therefore, the terms and conditions of the Circuit Court order of 29 July 2015 are unaffected by the commencement of the post-2019 version of the legislation. The consequence of this is that the Applicant's obligation to serve out the suspended sentence of imprisonment came to an end on 29 July 2018 in circumstances where he had not been called on before that date.

37. This finding is sufficient on its own to dispose of the present proceedings. Lest this finding be incorrect, however, and out of deference to the detailed arguments advanced in respect thereof, I propose to address the other issues too.

(2). WHETHER IMMUNITY HAD BEEN ACHIEVED BY 29 JULY 2018

38. The Applicant's case is predicated on the proposition that—under the terms of the pre-2019 version of the legislation—the custodial sentence could not be activated once its three-year period of suspension had expired. The Director of Public Prosecutions disputes the proposition that the Applicant had achieved immunity under the terms of the pre-2019 version of the legislation.

39. To understand the rival arguments of the parties on this issue, it is necessary to describe briefly the scheme of the pre-2019 version of the legislation.

40. Section 99(1) of the Criminal Justice Act 2006 provides as follows.

> "(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order."

41. The principal mechanism prescribed under the pre-2019 version of the legislation for the activation of a suspended sentence had been that provided for under sections 99(9) and (10). These subsections obliged the court having seisin of the second offence to remand the sentenced person to the court which had imposed the suspended sentence. There is no doubt but that this mechanism had only been available during the currency of the period of suspension. This flows from the wording of section 99(9) as follows.

> "(9) Where a person to whom an order under subsection (1) applies is, *during the period of suspension of the sentence concerned*,* convicted of an offence, being an offence committed after the making of the order under subsection (1), the court before which proceedings for the offence are brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order."
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> *Emphasis (italics) added.

42. It follows that the risk of a suspended sentence being activated, under section 99(9) and (10), would have come to an end on the expiry of the three-year period of suspension. (Matters are complicated by the fact that these subsections were found to be invalid by the High Court in 2016. As explained at paragraphs 15 and 16 above, however, the Applicant does not seek to rely on the constitutional invalidity for the purpose of his case).

43. The disagreement between the parties centres on whether the *alternative* mechanisms for activating a suspended sentence under the pre-2019 version of the legislation were subject to a similar temporal limitation. Insofar as relevant to the Applicant, the alternative mechanism is to be found at sections 99(13) and (17) of the Criminal Justice Act 2006. These provisions allowed for a court application ("***revocation application***") to be made by a member of An Garda Síochána or by the Governor of the prison to which a person had been committed. Such a revocation application could be made where the relevant official had "reasonable grounds" for believing that a person to whom an order

imposing a suspended sentence applies has contravened the condition imposed under section 99(2).

44. Section 99(2) reads as follows.

> "(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—
>
> (a) the period of suspension of the sentence concerned, or
>
> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
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> and that condition shall be specified in the order concerned."

45. There is separate provision for a revocation application to be made by a probation or welfare officer, but that only arises where specific conditions have been imposed under section 99(4). No such conditions had been imposed in respect of the Applicant.

46. The nature of a revocation application is addressed as follows at section 99(17).

> "(17) A court shall, where it is satisfied that *a person to whom an order under subsection (1) applies** has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order."
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> *Emphasis (italics) added.

47. Counsel on behalf of the Applicant draws attention to the qualifying words "a person to whom an order under subsection (1) applies". It is submitted that the use of the present tense ("applies") signifies that the jurisdiction to activate a suspended sentence is only available during the period of suspension. This is because, once the period of suspension expires, the sentenced person is no longer a person to whom an order "applies". Rather,

the order has ceased to have effect, and the person has been released from their obligation to serve out the custodial sentence.

48. Counsel also draws attention to the use of the phrase "revoke the order" in section 99(17). This refers to the revocation of the order under section 99(1) which had suspended the execution of the sentence of imprisonment in whole or in part. It is submitted that one cannot sensibly be said to "revoke" something which has already expired by the effluxion of time. Ergo, a revocation application under section 99(17) is only available during the currency of the period of suspension.

49. In response, counsel for the Director of Public Prosecutions contrasts the wording of section 99(17) with that of section 99(9) (since declared invalid). The latter provision had contained a temporal limitation in express terms, i.e. the second conviction must have been entered "during the period of suspension of the sentence concerned". No equivalent time stipulation is to be found under section 99(17). Counsel submits that it would render the wording of section 99(9) otiose or redundant were the use of the present tense "applies" to be sufficient, without more, to introduce a temporal limitation.

50. Having carefully considered these rival submissions, I have concluded that the interpretation put forward on behalf of the Applicant is the correct one. The temporal limitation extends to all of the mechanisms by which a suspended sentence might be activated. This is confirmed by the use of the present tense "applies" in the qualifying words "a person to whom an order under subsection (1) applies" under section 99(17); and by the use of the word "revoke". These words signify that a revocation application may only be made during the currency of the period of suspension. Once the period has expired, the order no longer "applies" to the person; and the effect of the order having come to an end by the effluxion of time is that the order is no longer capable of being revoked.

51. The logic of the rival interpretation put forward by the Director, *reductio ad absurdum*, is that there is no temporal limitation on the obligation to serve out a suspended sentence. Provided only that the breach of condition occurred during the period of suspension, the sentenced person could be called upon to serve out the sentence at any time thereafter. This would represent a radical change from the approach taken to suspended sentences under common law. (The common law position is described in the article from the *Irish Jurist* cited at paragraph 30 above). There is a presumption that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. (See, D. Dodd, *Statutory Interpretation in Ireland*, 2008, Bloomsbury Professional, §§4.110 to 4.116). Whereas the objective of section 99 of the Criminal Justice Act 2006 was to regulate the imposition of suspended sentences, there is nothing in the statutory language which indicates an intention to change the very essence of a suspended sentence by removing the temporal limitation.

52. For the sake of completeness, the argument advanced on behalf of the Director (in particular, at §39 of the written submissions) to the effect that the interpretation of the pre-2019 version of the legislation can be informed by the post-2019 version is incorrect. It is generally impermissible to rely on a subsequent amendment to interpret earlier legislation. (See D. Dodd, *Statutory Interpretation in Ireland*, 2008, Bloomsbury Professional, §§4.33 to 4.35).

53. In summary, therefore, the alternative procedure under section 99(17) of the pre-2019 version of the legislation had been subject to a temporal limitation, and a revocation application had only been available during the period of suspension. It follows, on this interpretation, that on the expiration of his suspended sentence on 29 July 2018, the Applicant was no longer at risk of having the suspended sentence activated under any of the mechanisms under the pre-2019 version of the legislation.

Relevance of subsections (9) and (10)

54. It must be doubtful whether it is legitimate to have regard to subsections (9) and (10) of section 99 of the Criminal Justice Act 2006 as an aid to interpretation in circumstances where those provisions have been declared invalid by the High Court. Subject always to the principles in *A. v. Governor of Arbour Hill Prison*, those provisions are to be regarded as having been void *ab initio*.

55. For the sake of completeness, if and insofar as it might be said that it is legitimate to have regard to those provisions as part of the legislative history, and in circumstances where the Applicant has disavowed any reliance on the declaration of invalidity, I set out my views below. I reiterate that my conclusion on this issue rests on the reasons set out earlier.

56. The structure of the pre-2019 version of the legislation affords primacy to the mechanism under sections 99(9) and (10). The legislation envisaged that the activation of a suspended sentence would normally occur in the context of the conviction for a second offence. The other mechanisms are alternative to the primary mechanism, and are not intended to be more liberal in terms of temporal limitations. If and insofar as the express use of the phrase "during the period of suspension of the sentence concerned" in one subsection, and not the others, might be said to create an ambiguity, any such ambiguity must be resolved in favour of a sentenced person. This follows from the principle that penal statutes should be strictly construed. (See, generally, *Director of Public Prosecutions v. T.N.* [2020] IESC 26, at paragraphs 113 to 119).

(3). RETROSPECTIVE EFFECT / VESTED RIGHTS

Discussion

57. The next matter to be considered is whether the post-2019 version of the legislation applies to the Applicant's circumstances. Were the amending legislation to apply, then the Applicant would be liable to serve the suspended sentence notwithstanding that he would have been immune from doing so under the pre-2019 version.

58. The Applicant calls in aid, in general terms, the presumption that legislation is not intended to have retrospective effect unless clear words are used. It should be clarified, however, that the specific presumption being relied upon is that legislation is not intended to affect *vested rights* unless the contrary intention clearly appears. It is necessary to distinguish between these two closely related principles because, as explained by O'Donnell J. in *Minister for Justice v. Bailey* [2012] IESC 16; [2012] 4 I.R. 1 (at paragraph 485 of the reported judgment), the first presumption, which at common law is no more than a matter of statutory interpretation, becomes, at least to some extent, a constitutional rule by virtue of the provisions of Article 15.5 of the Constitution of Ireland.

59. The common law presumption in respect of vested rights is reflected, to an extent, under section 27(2) of the Interpretation Act 2005 as follows.

> "*Where an enactment is repealed*,* any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."
>
> *Emphasis (italics) added.

60. This section is not directly applicable because it is referable to circumstances where legislation has been *repealed*. On the facts of the present case, of course, the legislative provisions which the post-2019 version of the legislation are intended to replace had been

declared to be invalid by the High Court in 2016. The implications of a finding of constitutional invalidity fall to be addressed separately, in accordance with the principles set out in *A. v. Governor of Arbour Hill Prison* (discussed at paragraphs 18 and 19 above). These principles do not coincide with those under section 27 of the Interpretation Act 2005. For example, it is not the position that criminal proceedings could be "instituted" or "continued" in respect of an offence which had been created under legislation subsequently declared to be invalid. The unavailability of the statutory presumption does not, however, ultimately affect the analysis in the present case given the undisputed existence of the common law presumption.

Director of Public Prosecutions v. Kirwan

61. Before turning to address the specific argument advanced by the Applicant, it is necessary first to consider the judgment of the Court of Appeal in *Director of Public Prosecutions v. Kirwan* [2019] IECA 176. This is the leading authority on the temporal scope of the post-2019 version of the legislation. On the facts, the accused had been sentenced to a term of imprisonment in respect of a first offence on 21 March 2018, subject to an order suspending the sentence for a period of eighteen months. The Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 had been commenced before this eighteen-month period of suspension had expired. There was thus no question of the accused having achieved immunity under the pre-2019 version of the legislation. Indeed, no such argument was advanced on his behalf.

62. Instead, the accused alleged a different form of prejudice, namely that were the post-2019 version of the legislation to apply to his circumstances, he would be exposed to a risk of *consecutive* sentences. To elaborate: under the version of the legislation which had applied *prior to* the striking down of sections 99(9) and (10), where a suspended sentence was activated (in whole or in part), this term of imprisonment had to be served

consecutive to any term of imprisonment imposed in respect of the second offence. This risk of consecutive sentences did not exist during the hiatus between the making of the declaration of constitutional invalidity in 2016 and the commencement of the post-2019 version of the legislation on 11 January 2019. This is because the alternative procedure under section 99(17) did not mandate consecutive sentences. It was only if the post-2019 version of the legislation were found to apply that the accused would, once again, be exposed to the risk of having to serve consecutive sentences. The argument on behalf of the accused was that the changes effected by the amending legislation were substantive and penal in nature, and should not be applied retrospectively.

63. The Court of Appeal rejected this argument, and held that the presumption against retrospective effect did not apply in circumstances where the legislative amendments were procedural, and not substantive, in nature. Whelan J., delivering the unanimous judgment of the Court of Appeal, stated as follows at paragraph 52.

> "The mechanism whereby such a convicted person is brought before a sitting of the court which imposed the suspended sentence in the first place for consideration of reactivation of sentence and revocation in whole or in part of the suspended sentence is a purely procedural matter that falls to be determined in accordance with the procedural law applicable as of the date when sentence is imposed for the triggering offence. The language of s.99(8A) makes this clear. […]."

64. The judgment explains that notwithstanding the finding in 2016 that sections 99(9) and 10 were unconstitutional, there remained at all times a statutory mechanism by way of sections 99(13) and 99(17) which permitted the revocation and reactivation application to be made. (Given the narrow argument advanced by the accused, it had not been necessary for the Court of Appeal in *Kirwan* to address the time-limit issue discussed under the previous heading in this judgment).

65. The Court of Appeal held that the key amendment effected by the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 had been to restore the process

whereby the court imposing sentence for the second, triggering offence is now empowered to remand the accused, either in custody or on bail, directly back to a sitting of the court that imposed the suspended sentence in relation to the first offence. The legislative measure addressed the constitutional issue identified by the High Court in *Moore* and reversed the sequence in which the sentences were to be imposed.

66. The Court of Appeal further held (at paragraphs 55 and 56) that the provisions of section 27 of the Interpretation Act 2005 did not avail the accused. The original six-month suspended sentence never changed and continued unaltered after the commencement of the 2017 Act. The accused had never acquired any entitlement not to have the order suspending the term of imprisonment revoked.

67. The argument that the risk of having to serve *consecutive* sentences would be offensive to justice was rejected as follows. Whelan J. emphasised the broad *discretion* enjoyed by a court in deciding whether or not to activate a suspended sentence. See paragraphs 72 and 73 of the judgment as follows.

> "The contentions advanced on behalf of the defendant that he risks that a reactivation hearing may result in the imposition of a sentence greater than was available during the period of the statutory lacuna from 19th April, 2016 - 11th January, 2019, fails to have regard to the robust and comprehensively principled approach that is intrinsic to the discharge by a sentencing judge of their sentencing function, based on the principles of totality, justice and proportionality and the obligation to take into account the circumstances and the justice of the case.
>
> The statutory provisions now operative pursuant to s.99 (as amended) do not trench in any material respect upon those principles and there is no basis for the contention that they give rise to fundamental unfairness or could or might be offensive to justice. To advance such a contention is to disregard the broad discretion that a sentencing judge enjoys in this jurisdiction and the right of a defendant to appeal against severity in the event that the principles of totality, justice or proportionality are not properly applied. Furthermore, the clear language of the amending provisions and the spectrum of options available to the sentencing judge at a reactivation hearing are inconsistent with the arguments advanced on behalf of the defendant."

68. Counsel on behalf of the Applicant seeks to distinguish *Kirwan* on the basis that the period of suspension in that case did not expire until 21 September 2019, that is, many months subsequent to the commencement of the amending legislation on 11 January 2019. The accused in *Kirwan* had not achieved immunity under the pre-2019 version of the legislation and thus had no vested or accrued right.

69. Counsel submitted that the position is more analogous to that considered by Hardiman J. in *Director of Public Prosecutions v. Devins* [2012] IESC 7; [2012] 4 I.R. 491. The specific issue before the Supreme Court in *Devins* had been whether a common law offence (on the facts, buggery) which had been abolished outright by earlier legislation, without any saving provision, might lawfully be revived subsequently. The Supreme Court held that it would represent a breach of the constitutional right to be tried in due course of law for a person to be prosecuted in respect of an offence which had previously been abolished outright.

70. The majority judgment in *Devins* had been delivered by Denham C.J. Hardiman J. delivered a detailed concurring judgment. In the course of his judgment, Hardiman J. drew an analogy between (i) the abolition and purported revival of an offence, and (ii) the amendment of a statute of limitation with the effect of reviving previously statute-barred prosecutions. Hardiman J. cited, with approval, the judgment in *Stogner v. California* 539 U.S. 607 (2003). There, the Supreme Court of the United States held that a law, enacted after the expiration of a previously applicable limitation-period, violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution.

71. Hardiman J. stated that legislation which had the effect of removing an acquired immunity from prosecution and making an individual once again vulnerable to prosecution could not be said to be merely procedural in nature. In the event, however,

Hardiman J. concluded that the legislation in question in *Devins*, on its proper interpretation, did not have that effect.

72. In response, counsel on behalf of the Director submits that this discussion in *Devins* is by way of *obiter dicta* and does not form part of the *ratio* of Hardiman J.'s judgment. The Supreme Court's finding in *Devins* that the legislation in question did not revive the common law offence was informed by considerations such as (i) that the statutory wording was not clear and specific enough to be the foundation of a criminal liability, and (ii) that the revived offence would apply to consensual acts between adults.

73. More generally, counsel submits that there is a principled distinction between the rights of a person who has yet to be tried for an offence and thus enjoys the presumption of innocence; and a person who has been convicted and upon whom a suspended sentence has been imposed. Any subsequent decision as to whether to activate the suspended sentence does not engage the full range of the rights under Article 38.1 of the Constitution of Ireland. Counsel fully accepts, of course, that a convicted person is entitled to a fair hearing and to have the question of activation considered judicially in accordance with the principles identified in *Kirwan*. These rights are, it is submitted, of a different order.

Decision

74. The common law presumption is only applicable where a right has vested or accrued prior to the enactment of the amending legislation. It is not sufficient that an individual had no more than a mere right to take advantage of the earlier legislation.

75. It has always been a feature of suspended sentences under Irish law that they are subject to a temporal limitation. The position at common law, as reflected in the form of order described in the article from the *Irish Jurist* cited at paragraph 30 above, is that the court order itself contained an inbuilt time-limit. When suspended sentences were given a statutory footing under the Criminal Justice Act 2006, the Oireachtas also provided for a

temporal limitation. Under the pre-2019 version of the legislation, the activation of the sentence of imprisonment had to occur during the currency of the period of suspension. Thus, in the case of activation based on a conviction for a second offence, the conviction had to be entered within the period of the suspended sentence. In the case of activation based on the contravention of a condition of the suspended sentence, the court's jurisdiction under section 99(17) is only available in respect of a person to whom an order, i.e. a suspended sentence, applies. If the term of the suspended sentence has expired, then the order can no longer be said to apply. (See the discussion at paragraphs 50 to 53 above).

76. On the facts of the present case, the legal effect of this temporal limitation had been that on the expiration of the three-year term of his suspended sentence on 25 July 2018, the Applicant could no longer be obliged to serve out the suspended sentence under the legislation then in force. This was no happenstance, but rather the intended consequence of the legislation. Part of the punishment imposed on an individual subject to a suspended sentence is, of course, the threat of having the sentence activated. This threat was time-limited, and once the period of suspension had expired, the legislation treated the individual as having undergone and completed this part of their punishment.

77. It might be regarded as anomalous by some that a suspended sentence cannot be activated in respect of an individual, who has *committed* a second offence during the currency of a suspended sentence, unless the *conviction* is also entered during its currency. This, however, is the effect of the pre-2019 version of the legislation. The position is, of course, different under the post-2019 version, and it would be sufficient that proceedings for the second offence had been *instituted* within an extended period, consisting of the period of suspension *plus* an additional period of twelve months.

78. The question which arises for determination in this judgment concerns the applicability of the presumption that newly enacted or amending legislation is not intended to affect *vested rights* unless the contrary intention clearly appears. The issue is different from that presenting in *Kirwan* in that the post-2019 version of the legislation had commenced well before the expiry of the period of suspension in that case. The accused in *Kirwan* could not therefore contend that he had achieved immunity under the pre-2019 version of the legislation and thus had no vested right.

79. It should be emphasised that, for the purpose of analysing this aspect of the Applicant's case, the court is engaged in an exercise of statutory interpretation. The court is not required, at this point, to consider the constitutional validity of the post-2019 version of the legislation. This would only arise for consideration were it to become necessary to determine the Applicant's fall back argument.

80. As tentatively suggested by O'Donnell J., in *Minister for Justice and Equality v. Bailey* (at paragraph 488 of the reported judgment), there is a dual inquiry in deciding whether the presumption applies: does it appear that at the time the right was granted it was intended that it should be permanent; and the closely related inquiry as to whether it is unfair now to remove it, even for future events.

81. As to the first inquiry, the intent of the pre-2019 version of the legislation had been that, once the period of suspension had expired, the convicted person was regarded as having undergone and completed their punishment (including the threat of activation). The convicted person was treated as having been discharged from any obligation thereafter to serve out the suspended sentence. This release or right can accurately be described as intended to be permanent.

82. As to the second inquiry, it is apparent from the judgment of Hardiman J. in *Director of Public Prosecutions v. Devins* (discussed above) that legislation which affects limitation

periods in respect of criminal prosecutions has proved controversial. In particular, the judgment of the Supreme Court of the United States in *Stogner v. California*, cited with seeming approval by Hardiman J., held that legislation which authorised criminal prosecutions, which the passage of time had previously barred, had manifestly unjust and oppressive retrospective effects.

83. It should immediately be acknowledged that this holding by the Supreme Court of the United States had been made against a very different constitutional framework than that applicable under the Constitution of Ireland. It should also be acknowledged that the discussion of the US judgment appears in part of Hardiman J.'s judgment which is *obiter dicta*. The discussion is nevertheless of relevance to this extent: it illustrates that amending legislation, which revives the possibility of prosecution for an offence in respect of which an individual had achieved immunity under the earlier legislation, is seen as potentially unfair.

84. The Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 does not, of course, have the effect of reviving time-barred criminal prosecutions. It is addressed to persons who have already been tried and convicted, and is confined to the circumstances in which their suspended sentence may be activated. For a certain category of sentenced person, such as the Applicant, the effect of the amending legislation, if applicable, would be to *revive* their obligation to serve out the suspended sentence. This can properly be characterised as a significant detriment and the loss of a right which had vested or accrued under the pre-2019 version of the legislation. The loss of this right is, potentially at least, unfair. This is sufficient to engage the *presumption* that newly enacted or amending legislation is not intended to affect vested rights unless the contrary intention clearly appears. The Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 is silent on the question of whether it is intended to have such a dramatic legal effect. There is

nothing in the legislation which suggests that it is intended to affect persons who had previously been released from their obligations under a suspended sentence. Accordingly, the application of the presumption operates to produce an interpretation which excludes such an effect on vested rights.

85. Finally, and at the risk of belabouring the point, this finding is confined to the *interpretation* of the amending legislation. This judgment simply finds that the introduction of such a significant change in the legal position of an individual such as the Applicant would have to be provided for in clear terms. This judgment does not address the separate and distinct question as to whether it would have been open to the Oireachtas—assuming that it had used express statutory language—to introduce such a change consistent with the Constitution of Ireland. This judgment does not consider, for example, whether it represents an *ex post facto* enlargement of the sentence imposed to increase the period of time during which an individual is at risk of having their sentence of imprisonment activated.

CONCLUSION

86. This case can be resolved on the narrow ground that, under the terms of the Circuit Court order, the Applicant was to be released from his obligation to serve out the suspended sentence unless called on to do so within the three-year period of suspension. The three years expired on 25 July 2018, prior to the commencement of the amending legislation. There is nothing in the language of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 which even hints at an intention to trespass upon the role of a court by purporting to change the legal effect of orders made prior to the commencement of the legislative amendments.

87. Lest I be incorrect in this finding, I have also addressed the other issues arising as follows. I have concluded that the revocation procedure under section 99(17) of the pre-2019 version of the Criminal Justice Act 2006 had been subject to a temporal limitation, and had only been available during the period of suspension. It follows, on this interpretation, that on the expiration of his suspended sentence on 29 July 2018, the Applicant was not at risk of having his sentence of imprisonment activated under any of the mechanisms under the pre-2019 version of the legislation. (See paragraphs 38 to 53 above). Applying the presumption that newly enacted or amending legislation is not intended to affect *vested rights* unless the contrary intention clearly appears, I find that the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 does not affect the Applicant. (See paragraphs 74 to 85 above).

88. The application for judicial review is, therefore, allowed. If convenient to the parties, I propose to list these proceedings before me on Friday 2 July 2021 at 10.30 a.m. for final orders and to address the issue of costs.

Appearances

Feichín McDonagh, SC and Oisín Clarke for the Applicant instructed by Connolly Finan Fleming Solicitors
Conor Devally, SC and Conor Lehane for the Director of Public Prosecutions and the Attorney General instructed by the Chief Prosecution Solicitor and the Chief State Solicitor

Approved Gerrett Simons