

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	S:AP:1E:2016:000104
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

Paul Clarke	V	Governor of Mountjoy Prison
High Court Record Nr		Court of Appeal Record Nr 2016/270
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Paul Clarke	
Solicitors for Applicant(s)/Appellant(s)	John M. Quinn & Co.,	
Name of Respondent(s)	Governor of Mountjoy Prison	
Respondent's solicitors	Chief State Solicitor	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham, Sheehan and Edwards, J.J.
Date of order/ Judgment	28 July 2016

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Paul Clarke
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input checked="" type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	John M. Quinn & Co		
Email	johnquinn@capel.ie		
Address	Unit 232, The Capel Building, Mary's Abbey, Dublin 7	Telephone no.	01-8727360
		Document Exchange no.	
Postcode		Ref.	JQ/PC/SC

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Feichin McDonagh		
Email	eftmcd@indigo.ie		
Address	Law Library Four Courts Dublin 7	Telephone no.	018174523
		Document Exchange no.	
Postcode			

Counsel			
Name	Sandra Frayne		
Email	sfrayne@capel.ie		
Address	Unit 110, The Capel Building, Mary's Abbey, Dublin 7	Telephone no.	0868374178
		Document Exchange no.	301117
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Governor of Mountjoy Prison
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?			
	<input type="checkbox"/>	Applicant	<input checked="" type="checkbox"/>	Respondent				
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party				
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>					
					Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>

Solicitor			
Name of firm	Chief State Solicitor		
Email			
Address	Osmond House Little Ship St Dublin 2	Telephone no.	
		Document Exchange no.	
		Ref.	
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Conor Power SC		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	Gráinne O'Neill BL		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

The Applicant seeks leave to appeal the finding contained in the judgement delivered on the 28th July 2016 that the Applicant is in lawful detention (issues of costs having been adjourned to the 7th October 2016).

The relevant orders and findings were made in the High Court (McDermott J.) in a judgement delivered on the 28 May 2016 that the Applicant was in lawful detention and this was affirmed by the Court of Appeal in a judgement delivered on the 28 July 2016.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

1. It is a matter of general public importance that the remedy provided for in Article 40.4.2 of the Constitution should not be withheld from a citizen save on established legal principles;
2. It is a matter of general public importance that if a citizen is to be deprived of the remedy provided for in Article 40.4.2 on a basis other than one consistent with principles previously identified by the Superior Courts, that this have the sanction and approval of the Supreme Court. Otherwise the great remedy of Habeas Corpus will be rendered less effectual;
3. The Supreme Court decided in *DPP v Carter and Kenny* that a lawful activation of a suspended sentence under s.99(10) of the Act of 2006, depended upon a lawful invocation of the jurisdiction of the activating Court. The High Court in *Moore and Others v DPP and Others, (Moriarty J.)* held that s.99 (9) and (10) of the Act of 2006 were invalid having regard to the provisions of the Constitution. Notwithstanding the consequent absence of any jurisdiction in the Circuit Court (McCartan J.) requiring the current Applicant to serve a 7 year sentence, the Court of Appeal has held against the Applicant on the basis that on foot of an application under s.99 (17) of the Act of 2006, which the Applicant pointed out and the Respondent accepted had never been made, the Circuit Court could have exercised an alternative jurisdiction to activate the sentence. In doing so the Court of Appeal has failed to follow a clear authority of this Court and that is a matter of general and very significant importance for the future invocation of the Habeas Corpus jurisdiction in the High Court;
4. It is necessary in the interests of justice that there be an appeal to this Court: the Court of Appeal has effectively precluded the Court of Appeal, when the Applicant's Appeal comes on for Hearing, from reaching any conclusion other than that the absence of jurisdiction in the activating Court is irrelevant to the Appeal. The Applicant made extensive submissions to the Court of Appeal to the effect that the statutory provisions governing the type of and scope of Order available on

Appeal from the Order of the Circuit Court (McCartan J.) meant that the Court of Appeal would not be able to make any lawful Order on the Appeal. The decision now appealed against does not address these arguments but rather states that on the Appeal the Applicant can “argue the activation of the sentences in full was an excessive and disproportionate response”. Clearly the intention of the Court below was that an appeal be confined to these issues. If this be so the relevant arguments advanced both before the High Court and the Court of Appeal in respect of the scope and proper interpretation of s.99(12) of the Act of 2006, and or s.3(2) of the Criminal Procedure Act 1993 (as amended and adapted), which are addressed in neither judgement, will never receive the proper judicial consideration to which they are entitled having regard to the Applicant’s right of access to the Courts.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

1. The Court of Appeal refers to and relies upon the unamended version of s.99. In consequence it led itself into error and failed to engage with the relevant authorities in respect of the section as it had been amended by the Act of 2007. The leading authority cited to the Court of Appeal (but not mentioned in the judgement appealed against) was *DPP v Carter and Kenny* where this Court held that a lawful Order under s.99 (10) depended upon the proper and lawful invocation of s.99(9).
2. The only basis advanced before the Circuit Court for the activation of the seven year sentence was s.99 (10) following a remand under s.99 (9) of the Act of 2006 as amended. No other basis was ever put forward suggested or established for the presence of the Applicant before the Circuit Court on the 4th November 2014.
3. The Court of Appeal erred in law in engaging in conjecture as to whether a basis for the activation of the sentence could be found in s.99 (17) where no reliance had in fact been placed on that subsection in the Circuit Court and where the Applicant was manifestly before the Circuit Court on the basis of a remand under s.99 (9).
4. The Court of Appeal erred in law in mischaracterizing the “finality argument” as one relied upon by the Applicant. The Applicant relied upon the fact that Order which held him in custody was made under provisions which had been held to be invalid having regard to the provisions of the Constitution and that he had not lost the competence to seek his release.

5. The Court of Appeal erred in law in holding that the Orders of the Circuit Criminal Court were good and sufficient on their face because they do not mention s.99 (9) and (10). In truth the Orders do not assert any jurisdictional basis at all for their validity. A Court of local and limited jurisdiction is required to recite or invoke a lawful basis for its Orders. The Applicant did not rely upon this procedural inadequacy but the same procedural inadequacy cannot permit the Court of Appeal to put forward an entirely conjectural and historically incorrect basis for the Orders and then to deprive the Applicant of an Order for his release under Article 40.4.2. The historical narrative cannot be altered and adapted to fit a desired legal consequence.
6. Contrary to what is conjectured by the Court of Appeal at paragraph 30 of the judgement appealed against, the considerations taken into account by the Judge of the Circuit Court fell squarely within the parameters of s.99 (10). Even if they did not, that cannot give rise to a separate jurisdictional basis for the intervention of the Circuit Court. In any event this matter was not the subject of argument or submissions in the High Court or the Court of Appeal.
7. The Court below erred in failing to hold that a lawful invocation of s.99 (17) depended upon the lawful presence of the Applicant before the Circuit Criminal Court on the 4th November 2014. The finding at paragraph 31 of the Judgement appealed against that the route by which the Applicant came before the Circuit Court was not material was inconsistent with the decision of this Court in *DPP v Carter and Kenny*;
8. The Court of Appeal failed to address the fundamental submission of the Applicant that the default of fundamental requirements of the law upon which he had relied related to the fact that he was serving a seven year sentence for which there was no legal justification;
9. The Court of Appeal erred in law in relying on the Applicant's behaviour towards the Criminal Law (as opposed to any acquiescence by him in procedural steps taken in the conduct of his defence);
10. The Court below erred in failing to address the absence of jurisdiction in the Court of Appeal to entertain on a substantive basis the Applicants pending appeal. The Courts jurisdiction whether on a stand alone basis under s.99(12) of the Act of 2006, or under s.3(2) of the Criminal Procedure Act 1993, (as amended and adapted), could only be the same as that of the Circuit Criminal Court, which jurisdiction has been held to be invalid having regard to the provisions of the Constitution.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Feichin McDonagh; Sandra Freyne;

7. Other relevant information

Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

References to Law Report in which any relevant judgment is reported

DPP v Carter and Kenny [2015] IESC 20

Moore and Others v DPP and Others [2016] IEHC 244 (Appeal filed but withdrawn before Court of Appeal on 3 June 2016)

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An Order providing for the Applicant's immediate release pursuant to the provisions of Article 40.4.2 of the Constitution

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

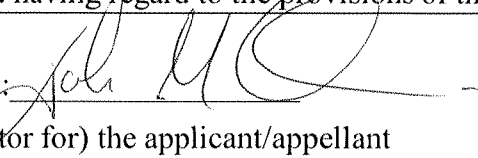
make a reference to the Court of Justice of the European Union? Yes No

If Yes, please give details below:

Will you request a priority hearing? Yes No

If Yes, please give reasons below:

The Applicant is in custody on foot of provisions of the law that have been declared to be invalid having regard to the provisions of the constitution

Signed: 
(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.