THE HIGH COURT

IN THE MATTER OF APPLICATIONS UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

Record Nos. H.SS.2026/1103, 2026/1105, 2026/1106, 2026/1107, 2026/1108, 2026/1109, 2026/1110, 2026/1111, 2026/1122, 2026/1124, 2026/1126

Neutral Citation: [2026] IEHC 554

BETWEEN:

CEILIGH McCORMACK, CONOR FOX, GLEN GUERIN, JAKE FITZGERALD, RICHARD RYAN, KEITH BRENNAN, RICHARD DALY, PETER LEECH, PATRYK MARKOWSKI, AND CONOR O'NEILL

Applicants

-and-

THE GOVERNOR OF MOUNTJOY WOMEN'S PRISON, THE GOVERNOR OF CLOVERHILL PRISON, THE GOVERNOR OF CORK PRISON AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

THE MINISTER FOR JUSTICE, HOME AFFAIRS, AND MIGRATION

Notice Party

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 29th of July, 2026

1. Introduction and Summary

1.1 Enquiries have been opened into the lawfulness of the detention of eleven Applicants. Each sought immediate release from custody pursuant to Article 40.4.2º of the Constitution. The Applicants were not legally represented in the District Court when they applied, or attempted to apply, for bail. Nominated solicitors had declined to accept new assignments under the criminal legal aid scheme, due to a dispute about recent changes to the legal aid payments.

1.2 This judgment does not address the validity of the new legal aid regulations, nor does it consider the reasonableness of the solicitors' withdrawal. These matters are irrelevant to the issue which was presented to the Court at a joint hearing on 24th July: whether each applicant was entitled to immediate release on the basis of the constitutional right to liberty guaranteed by Article 40.4.2°.

1.3 The Applicants claim that the absence of legal representation in each case led to a bail hearing that was fundamentally unfair, such that none of them was detained in accordance with the law. The transcript in each case was obtained so that the Court could assess the evidence and the nature of the hearings.

1.4 The Supreme Court has repeatedly emphasised the importance of the Article 40.4.2° remedy, and has granted the remedy in the context of bail hearings, but only where there was a fundamental denial of justice. While there are authorities to the effect that a bail hearing can be remedied by a *de novo* bail application to the High Court, this is a remedy for a hearing that involves errors within jurisdiction or that has deficiencies, rather than one that displays a diversion from justice so fundamental that the citizen at the heart of the hearing cannot be said to have received a hearing in accordance with the law.

1.5 The Respondents have been unable to satisfy the Court that the Applicants were detained in accordance with the law. This was, for the most part, not due to fault on the part of the District Judges, most of whom were assiduous in their efforts to assist the Applicants and who were placed in a very difficult position. Our judicial system is an adversarial one and this, together with the constitutional right of access to legal representation, renders it difficult, though not impossible, to provide a fair hearing without also ensuring that an accused person has reasonable access to a lawyer.

1.6 The important question asked in this case was not the one that I posed at one stage of the hearing: what more could the judges have done? The question was whether the hearings were conducted in accordance with the fundamental principles of fairness to which the Applicants were entitled in vindication of their constitutional rights. The answer is no.

Habeas Corpus – the right to release pursuant to Article 40.4.2°

1.7 A High Court judge must immediately release a person who complains that she is unlawfully detained unless satisfied that she is being detained "*in accordance with the law*": Article 40.4.2° of the Constitution. The phrase *habeas corpus*, which ancient writ is now comprised in the constitutional remedy

means, loosely translated: "*you shall have the body*". Chief Justice Denham described the extent of the courts' jurisdiction in Article 40 applications at paragraphs 23 and 24 of her judgment in *Ryan v Governor of Midlands Prison*, [2014] IESC 54:

> "*The traditional remedy of Habeas Corpus, now subsumed in Article 40 of the Constitution, is the great protection of the citizens' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so.*
>
> *But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure*."

1.8 Denham C.J. summarised the position at paragraph 18:

> "*Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw*."

2 Pragmatic Decisions, Mootness and Payments

2.1 The first of these applications was opened when Counsel filed papers in the Central Office, on Friday afternoon, 17th July, 2026. This Court opened the inquiry into Ms. McCormack's detention and directed that the relevant Governor be contacted. That Respondent, and the Director of Public Prosecutions, were represented by Counsel and in court by 4pm the same day. It was clear from the facts of that case, and the context of the impugned bail hearing, that this would be the first of numerous such applications. The Respondent Director opposed the application and indicated that they would oppose bail. She also asked for time to produce the certificate of detention.

2.2 The Court opened the enquiry and proposed conducting a bail hearing without prejudice to any argument that might later be made as to the appropriateness of the remedy of *habeas corpus*. This was due to the complexity and relative novelty of the legal arguments that were then anticipated, the number of similar cases which were expected to follow, the potential for the case to become a test case, and the flexibility of the Article 40 remedy which allows the Court to be somewhat innovative in managing the logistics of the relevant hearings and pleadings. It was also after 4pm on a Friday and it was not appropriate to adjourn the case to Monday when a bail hearing could be conducted quickly and fairly, allowing plenty of time for a full and considered inquiry into the first Applicant's detention and ensuring that later applications were dealt with at the same hearing, if possible.

2.3 The Court's understanding was that all parties agreed that the applications should not be treated as moot merely because this Court canvassed the option of an immediate bail hearing after opening each enquiry. This was a pragmatic approach which was somewhat undermined by the written submissions. The preliminary argument of the Respondents was that the cases were rendered moot, or unnecessary, as each applicant had been afforded a bail hearing while represented by solicitor and counsel.

2.4 While the relief available in *habeas corpus* proceedings is binary, release or refuse to release, the procedures in respect of this remedy are, of necessity, very flexible. This aspect of the remedy is discussed in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 and elsewhere and the Court has been guided by the comments of Barrington J. in *The State (Whelan) v. Governor of Mountjoy Prison* [1983] I.L.R.M. 52, at page 55:
"*It appears to me also that, on an application for habeas corpus the duty of the High Court is forthwith to enquire into the legality of the detention, but that once the enquiry is entered on, and provided the urgency and importance of the proceedings are kept in mind, the Court is entitled, after hearing the views of the prosecutor, the respondent and their legal representatives to conduct the enquiry in the manner which the Court thinks best calculated to resolve the issues of law and fact raised in the proceedings and to achieve the interest of justice.*"

2.5 This Court took the view that if the issue in question was the fairness of the bail hearing, albeit in an unusual context which appeared to have affected numerous applicants, there was no reason why the first named Applicant, a single mother who had no previous convictions, should remain in custody while lawyers prepared for the full hearing that would obviously be

necessary and, thereafter, for whatever period was required while a judgment was prepared. The interests of justice required two things: a speedy and fair resolution of the question of bail, and sufficient time for the parties to formulate and present their arguments so that the underlying issues could be considered and addressed in a comprehensive and coherent way.

2.6 The Respondent Governors and the Minister argue that "*the essential issue of controversy between the parties – namely, whether the Applicant should be released on bail – has been determined*". This mischaracterises the essential issue. The core issue is whether the Applicants should be released due to the constitutional imperative set out in Article 40.4.2° or whether via an application for bail or for judicial review made to the High Court. The issue as to which is the appropriate procedure remained live after the enquiries were opened, even where bail was granted, and is the main issue for resolution.

2.7 Moreover, adopting the language of the Supreme Court in *S.McG. and J.C. v. Child and Family Agency,* [2017] IESC 9, [2017] 1. I.R. 1, these issues are likely to have consequences in other cases such that the Court should determine the applications in the interests of the proper administration of justice.

2.8 For all of these reasons, the flexibility of the *habeas corpus* procedure, the imperative that justice be done in that context, the essential character of the dispute and its consequences for other applicants, I am satisfied that the dispute between the parties is not moot and that the main issues have yet to be determined. One of these issues is costs and it is helpful to understand, in very broad terms, the available payment structures in this regard as it clarifies the procedural history and explains why the costs issue is a significant one.

2.9 The decision as to whether applications for immediate release pursuant to Article 40.4.2° were appropriate in this case will determine who pays the legal costs of these applications and, in the case of any successful applicant, what level of costs should be awarded. The Applicants have all declined to ask for a recommendation under the Legal Aid Custody Scheme, which applies, *inter alia*, to bail applications. This is a publicly funded scheme available to those without the means to pay for a lawyer, if their case involves the potential loss of liberty. The Custody Scheme is not obligatory, in that it is always open to a lawyer to decide not to make such an application. This might arise if the lawyer takes the view that the case is a strong one and that she will obtain higher costs if she wins and secures a costs order against the opposing party. The Scheme is, to some extent, a safety net and a means to ensure that those at

risk of imprisonment and who are impecunious may have access to the courts, even outside the legal aid regulatory scheme. Payments made under the Custody Scheme do not reflect market values but ensure that those whose liberty is at stake have access to legal representation who will receive some payment for so acting. Understandably, therefore, payments under the publicly funded Scheme are usually less than would be available to a lawyer working for agreed fees from private clients.

2.10 That Custody Scheme is distinct from any payment under the Criminal Legal Aid Regulations, and it must be applied for at the outset of any proceedings to which it is said to apply. The Scheme includes applications for *habeas corpus*, bail and judicial review in certain cases. The general Criminal Legal Aid payments are made only to solicitors and barristers on the Legal Aid panel and none of the lawyers involved is appearing in that capacity. The new Regulations provide for a set fee in respect of District Court applications. It is the new fee structure and level of payments which led to the dispute. Again, the payments available under any legal aid system, including this one, are not as high as would be payable by a private client, as one would expect in respect of a publicly funded system. The legal aid system, together with the Custody Scheme, constitute the solutions offered by the State to fulfil its constitutional obligation to offer legal assistance to those who cannot afford it.

2.11 The decision of the lawyers in this case, to decline to seek payment under the new Regulations or the Custody Scheme, has the inevitable consequence that if any applicant is not successful, the lawyer has little or no prospect of obtaining her costs. If, however, an applicant succeeds, the relevant legal team is entitled to an award of costs against the Respondents, to be adjudicated in default of agreement. Those costs will not necessarily be limited to the costs payable under the legal aid system or the Custody Scheme as the lawyers in each case were retained privately and have taken the cases on the basis that they will not be paid if the client loses, or "*on the hazard*", as this arrangement is sometimes known.

2.12 The new Regulations are the subject of a pending judicial review action and will not be considered further in this judgment as the question of whether the new system is lawful is more appropriately considered by way of judicial review. The practice of solicitors charging for more than one charge sheet in respect of the same client, under the previous regulations, has been comprehensively addressed by Siobhán Phelan J. in *Cawley v. DPP* [2026]

IEHC 117. This case requires consideration of each application in the light of constitutional imperatives, and not an assessment of legal aid arrangements.

2.13 The Governor and Minister suggest that they are not required to guarantee the attendance of a solicitor, merely to ensure that a system, such as the panel in existence, is provided. They rely on the comments of Baker J. in this regard, in *Ward v Minister for Justice* [2017] IEHC 656 at paragraph 45: "*This restriction on the pool of persons available to be selected does not amount to a denial by the Oireachtas of the right to have the costs of one's legal representatives discharged, but is rather a reflection of the fact that the Oireachtas could not have compelled all solicitors and counsel with the right of audience in courts in the State to opt into the Criminal Legal Aid scheme, and the statutory and constitutional obligation is met by the provision of a panel and by permitting a person to elect to instruct a person from that panel*."

2.14 This case is about the right to liberty as guaranteed by Article 40 of the Constitution and, to that extent, the comments of Baker J. are not relevant to this case. The *Ward* case concerned an application for two legal aid certificates to be assigned to one solicitor in respect of one case. Baker J. refers, above, to the right to legal representation, and not to the right to immediate release for a person who has been detained otherwise than in accordance with law.

2.15 The original Applicants were eleven in number. Two have since been admitted to bail, Mr. Guerin and Mr. Daly. Their only live issue is in relation to costs. Another has withdrawn his application and is not named in the title.

2.16 Insofar as this section suggests that payment is the main, or even the only, concern of any of the parties involved, it is important to recall that what is at stake in these cases is not, primarily, a matter of money, but the availability and scope of constitutional guarantees and the circumstances in which the right of *habeas corpus* can be limited, delayed, or eliminated.

3 Submissions by the Parties

3.1 The parties agree that the burden in an Article 40.4.2º enquiry is on the detainer, who must justify the detention of the applicant. The Respondent Governors have, in each case, certified the detention of the Applicants and no issue has been raised with the certificates of detention on their face. Rather, the Applicants contend that the hearings which led to their detention form the basis for their applications.

3.2 The Applicants rest their case on what is described in some of the authorities as a fundamental denial of justice in their respective bail hearings in the District Court. In large part, this is because the Applicants had no legal representation but in each case the Court is invited to examine the evidence and to conclude that the accused person could not represent herself, and that the proceedings were so unfair as to justify an order for her immediate release. The Applicants expressly disavow the argument that the absence of legal representation, in and of itself, is sufficient to render a hearing so unfair as to trigger the exceptional jurisdiction of Article 40.4.2°.

3.3 The Respondents also contend that the Applicants had a right of appeal, or more accurately, the right to a full, *de novo*, bail application in the High Court, and that the Supreme Court has recently emphasised that such an appeal must be the default mechanism for the resolution of first-instance decisions, to be used in all but exceptional circumstances. The Respondents emphasise these Supreme Court decisions in respect of alternative remedies, submitting that they bind this Court and are applicable to applications made under Article 40.4.2°. The effect of these cases, they say, is that the Court must examine alternatives, such as an application for bail in the High Court, and must conclude that the urgent *habeas corpus* applications were unnecessary.

3.4 The Respondents also claim that the Applicants have oversimplified the issues and seek to rely on absolutist propositions which misinterpret of the scope of the right to legal representation identified in *State Healy v. Donoghue* [1976] I.R. 325.

3.5 The Respondents describe their position as based on principle rather than merely practice or preference, citing O'Donnell J. (as he then was) at paragraph 16 of *SMcG v CFA & Ors* [2017] IESC 9, [2017] 1 IR 1, to the effect that Article 40.4.2° would be "*quite distorted*" if used in inappropriate cases.

3.6 In order to properly test whether the State has complied with the obligations identified in *Healy*, the Respondents suggest the Court must assess evidence and consider detailed legal argument, which they submit is not the role of the Article 40 procedure. This last argument can be rejected, briefly, at this point. With the assistance of all parties, the hearing of these applications has been fast but thorough. All involved have deployed the flexibility of the remedy as discussed above, and the parties have responded to the urgency of the situation, so as to offer bail to those who may be entitled to be released and to

afford time for submissions and consideration of the issues raised, while abiding by the imperative that the initial enquiry be opened forthwith. The transcript of the evidence in each case has been obtained and circulated, and arguments were directed to the individual hearings, so that this judgment can address all submissions and the facts of each case rather than proceeding in the abstract, in the absence of full facts or by providing only statements of general principle, which might be difficult to apply in individual future cases. This process compares well with most, if not all, of the cases cited to the Court, whether relief was granted or not. To this extent, it cannot be said that the Article 40 procedure is unsuitable for a case which requires the assessment of evidence and detailed legal arguments.

4 The Right to Legal Representation: *The State (Healy) v. Donoghue*

4.1 *The State (Healy) v. Donoghue* [1976] I.R. 325, is the seminal case on the constitutional right to legal representation. It arose in circumstances similar to those of this case: a lawyers' dispute about fees. There, the Supreme Court made it clear that the right to representation was not a right derived from statute, but a constitutional right. The relevant statutes and regulations are simply a means of vindicating that right, which requires the State to assist those who cannot defend themselves when charged with criminal offences.

4.2 Two of the most-quoted paragraphs from *Healy* set the scene, historically speaking, against which this case arises. O'Higgins C.J., stated at page 350: "*If the right to be represented is now an acknowledged right of an accused person, justice requires something more when, because of a lack of means, a person facing a serious criminal charge cannot provide a lawyer for his own defence. In my view the concept of justice under the Constitution, or constitutional justice … requires that in such circumstances the person charged must be afforded the opportunity of being represented. This opportunity must be provided by the State. Only in this way can justice be done, and only by recognising and discharging this duty can the State be said to vindicate the personal rights of the person charged. To hold otherwise would be to tolerate a situation which the nature and extent of a man's ability to defend himself, when accused, would depend on the nature and extent of his means. That would be to tolerate injustice.*"

4.3 Later in the same report, Henchy J. concluded, at page 354: "*A person who has been convicted and deprived of his liberty as a result of a prosecution which, because of his poverty he has had to bear without legal aid has reason to complain that he has*

been meted out less than his constitutional due. This is particularly true if the absence of legal aid is compounded by the factors such as a grave or complex charge."

4.4 Insofar as this may be thought only to apply to trials on indictment, the judgments make it clear that this was not the intention of the Court. See, for example, O'Higgins C.J., again at page 350: "*However, criminal charges vary in seriousness. There are thousands of trivial charges prosecuted in the District Court throughout the State every day. In respect of all of these there must be fairness and fairness of procedures, there may be other cases in which more is required where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or livelihood, justice may require more than the application of normal and fair procedures in relation to his trial*."

4.5 The Respondents argue that Healy's case "*proceeded on the premise that there was no issue about the legality of keeping accused persons remanded in custody on a temporary basis where – as in these proceedings – no lawyer was available to act for them because of an industrial dispute*." This submission ignores the later Supreme Court authorities, including *McDonagh*, in which the Court made it clear (indeed barely debated the issue) that the exceptional remedy of Article 40 applies to bail hearings as it does to criminal trials.

4.6 The Respondents assert that the Applicants rely on *Healy* to support their claim that the District Court must automatically grant bail where no lawyer is available, because a decision to remand in custody on a temporary basis is automatically and, in all cases, unlawful. But this is not what was argued. Each Applicant claimed that the bail hearing that took place lacked fairness to the extent that it was a denial of justice. This Court has those transcripts and can make a decision on the facts of each case as to whether this is so.

4.7 The Respondents submit that this Court is asked to disregard entirely the role of third parties (presumably, they refer to the solicitors who have withdrawn their services, though this description might also encompass the Respondent Minister) in bringing about the factual situation which the court is being asked to address. But that is as it should be. This Court has no role in assessing the reasonableness of the Regulations, or views of the lawyers involved, in assessing whether a prisoner should be immediately released. The sole question for the Court is whether the Respondents have justified the

detention of the Applicants in the context of their constitutional guarantees under Article 40.4.2°.

5 Constitutional provisions and Procedural issues

5.1 The trial process must be conducted in due course of law pursuant to Article 38 of the Constitution. That process involves a consideration of fundamental human rights, including the right to liberty, specifically guaranteed by Article 40 of the Constitution and under which Article the remedy of immediate release or *habeas corpus* is provided. The same remedy is provided in many constitutions worldwide and its history is set out by Dr. Kevin Costello in '*The Great Constitutional Remedy of the Right to Liberty'; A Survey of Article 40.4.2°*, published in [2024] Irish Judicial Studies Journal, Vol. 8 at page 83. The author has also published a book on the same subject, (Dublin, 2006).

5.2 These constitutional protections are mirrored in international human rights instruments such as the European Convention on Human Rights, Article 6(3) of which provides that: "*Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*".

5.3 Returning to his article, Dr. Costello not only provides a comprehensive account of the history of the remedy but also incorporates an analysis of the case law and a discussion of the tensions that remain in the tests devised by the courts over the past hundred years. Several issues raised are relevant to these proceedings and it may be useful to address them, however briefly.

5.4 Dr. Costello notes that an interesting issue, suggested by authorities such as *The State (Whelan) v. Governor of Mountjoy Prison*, is whether "*on a strict reading of the text*" the procedure is bilateral, such that the only proper respondent is the governor of the relevant prison, who must establish lawful detention. In practice, the Chief State Solicitor's Office invariably notifies the Director of Public Prosecutions if the application arises out of ongoing criminal proceedings and that party becomes a respondent, as occurred here. The Minister also asked to take part in the proceedings. No party objected to the proposal that additional State bodies had an interest in the outcome and, in light of the flexibility of the process, these bodies were added as Notice Parties, filed submissions and took part in the hearing without objection.

5.5 While the State parties in this case took the same view of the arguments raised, and it may not have been strictly necessary for all to be separately represented, in an adversarial system where state bodies fulfil different functions and where, as here, it was not clear at the outset whether any single respondent would raise a different or contrasting argument to that of the other respondents, the most pragmatic solution to any potential argument that an interested party had not been afforded the right to be heard, or that relevant information was before the Court, was to allow appropriate notice parties to address the Court. Further, in the particular context of these cases, the Director appears to have existing systems to obtain ready access to court transcripts, for instance, whereas the Governors were those responsible for production of certificates of detention. In the interests of speed and effectiveness, the various parties were all afforded the right to file affidavits and submissions. Given the circumstances, this was the most efficient use of court time and insofar as there is any suggestion in previous case law that there should be no other party to such an action, it does not appear that this is an inflexible rule given the way in which such actions are now processed in practice. This is particularly so where, as here, the certificates of detention are not challenged and the Court must examine the hearing itself.

5.6 The body of Dr. Costello's article is concerned with the vexed question of whether a detention not in accordance with law means unlawful or *ultra vires*, as these terms are used in judicial review, or whether Article 40 relief requires something more, such as a '*default of fundamental requirements*' as the Court described it in *State (McDonagh) v Frawley* [1978] I.R. 131.

5.7 Rather than directly addressing, considering and deciding that issue, which was not specifically raised by the parties, the remainder of this judgment will summarise some of the most relevant cases laying particular emphasis on their facts. These decisions, seen in context, persuade me that (whatever other test may be deployed) the most frequently cited test requires a fundamental want of fair procedures or a denial of justice, rather than unlawfulness or a decision that is *ultra vires*, *per se.* Using that more rigorous test, the Respondents have not fulfilled the burden on them and each one of the Applicants is entitled to be released, based on the individual facts of her (or his) case.

6 The Cases and the Controversy

6.1 Twenty-two cases were filed in the book of authorities, and most were opened to the Court during the hearing. Throughout the case law, one can see a firm, and often repeated, view of the importance of the remedy. O'Donnell J. opens his judgment in *SMcG v CFA & Ors* [2017] IESC 9, at paragraph 6, as follows: "*I agree with the observations of the late Mr. Justice Hardiman in N v. HSE [2006] 4 I.R. 374 at p.534, that an Article 40 inquiry was "one of the great bulwarks of personal liberty and of a free society". Part of its strength is its clarity and simplicity: only one issue is to be determined, the liberty of the individual, and normally at least, the options for the High Court hearing such an inquiry are similarly limited: the High Court can make an order for release or refuse to do so.*"

6.2 In the past decade, there is an emerging trend that it is not always the most appropriate remedy to deploy, however. The decisions as to whether the remedy is appropriate or not have been highly fact specific. That is to say, once one considers the facts of the case under discussion, the reasons for the decision of the relevant court on the question arising under Article 40.4.2° are clear and the dicta, *obiter* or not, make more sense. This is no criticism of that approach, which is necessitated by our legal system and is precisely the approach I intend to take. It also helps explain some seeming contradictions, and even an apparent controversy as to the views of the Supreme Court.

6.3 The seminal authority, which gives its name to most objections to an order of bail, is that of *The People* v. *O'Callaghan* [1966] I.R. 501 and it can be very briefly summarised. A person is entitled to the presumption of innocence, she is entitled to bail while awaiting trial unless a court is persuaded, on the balance of probabilities, that she is unlikely to appear to answer her bail or that she is likely to interfere with witnesses or with evidence. This Supreme Court case was referred to in argument and counsel noted the year in which the judgment was delivered, 1965, suggesting that the principle that a bond or surety should not be set at so high a rate that an accused person cannot afford to take up her bail may no longer be good law. No authority was referred to in support of this submission, which was somewhat tentatively advanced, and I have no hesitation in rejecting it. Bail set at so high a rate that the accused cannot take up that bail is, in effect, a refusal of bail. That was the case in 1965 and remains the case today.

6.4 The only other basis on which bail may be opposed is contained in section 2 of the Bail Act of 1997 and amounts to an objection on the basis that the

accused will commit a serious offence if admitted to bail. In respect of this "*section 2 objection*" or either of the "*O'Callaghan objections*", the evidence is almost always a combination of previous conduct on the part of the accused (in particular, bench warrants, convictions for failure to appear in court or previous convictions generally or some combination of these) and descriptions of the alleged offence in respect of which bail is sought. Importantly, while evidence of the alleged offence may be highly relevant, in that it may suggest that the accused is a flight risk or that she might interfere with a prosecution witness, in general it must be remembered that, in respect of the offence charged, the accused is entitled to be presumed innocent.

6.5 The accused has a constitutional right to be legally represented during the criminal trial of any charges against him, as set out above, in the strident language of the Supreme Court in *State (Healy) v. Donoghue*. One of the issues raised the instant case was whether such rights extended to bail hearings. Given that the consequences of a bail hearing are that a person who is presumed to be innocent may be remanded in custody and the strong line of authority (perhaps best summarised in *Gormley and White* [2014] 2 I.R. 591) that the trial process begins at the investigative stage, it is very difficult to accept the suggestion that the applicant who is refused bail does not enjoy the same constitutional protection as the post-conviction applicant. In any event, *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394 appears to answer that question even if *Roche* (*Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53 [referred to hereafter simply as *Dumbrell*] poses the further question as to the scope of the protection required by the Constitution, not only in habeas corpus but including the right to a trial in due course of law.

6.6 I agree with submissions for the Applicants that the right to fully participate in a contested bail application is comprised in a suite of fair trial rights under the Constitution, which include the right to have notice of objections (*Galvin v. Cloverhill Prison* [2012] IEHC 497), the right to be given reasons when bail is refused (*Nasiri v. Governor of Cloverhill Prison* [2005] IEHC 471) and the right to take legal advice and to make submissions. As with the right to legal representation generally, however, the facts in each case will determine whether the breach of one or more of these rights creates a situation in which the applicant has not had a hearing in accordance with law, in the sense in which that phrase is used in Article 40 of the Constitution.

6.7 *McDonagh* is authority for the proposition that *habeas corpus* may be an appropriate remedy in the context of a bail hearing. There, the Supreme Court

found that the applicants were entitled to the presumption of innocence and that it was highly improper to find, in the absence of relevant evidence, that either of them would "*go out and assault someone again with a gun*" or "*go out and shoot someone*". McGuinness J. noted that these comments "*should not have been made in the context of a bail hearing or indeed in any context*" and went far beyond being merely "*unusual in phraseology*", as they were characterised in the High Court. The Supreme Court observed that many factors might justify the refusal of bail but there was no indication, in *McDonagh*, that any of these matters had been taken into account by the judge hearing the bail application.

6.8 *Nasiri v. Governor of Cloverhill Prison* [2005[IEHC 471 involved an applicant who was refused bail and was called a liar and a fraud in the ruling on his application for bail. These comments were based on information before a District Judge which was not disclosed to the applicant, and which was relied on in refusing him bail. MacMenamin J., sitting in the High Court, considered both *McDonagh* and *McSorley v. Governor of Cloverhill Prison* [1997] 2 I.R. 258 and decided he was bound by the Supreme Court authority of *McDonagh* to order the immediate release of the applicant and refused to direct that the matter proceed by way of judicial review.

6.9 As noted, it is well established that an accused person has a constitutional right to be legally represented during a criminal trial: *State (Healy) v. Donoghue [1976] I.R. 325.* The right is not unlimited, in that he is not entitled to a solicitor of his choice (see, for instance *The State (Royle) v. Kelly* [1974] I.R. 259). As also noted above, while the bald assertion that an applicant for bail must always be represented is clearly too broad a proposition (Mr. Royle remained unrepresented albeit by choice and was refused relief accordingly) it remains clear, and the facts of these cases confirm this view, that such a hearing will rarely be a fair one for reasons that a judge will not always be able to address. The comments of Simons J. in *O'Neill* [2025] IEHC 8, will be recalled in this context. There, a Judge who effectively cross-examined the applicant was held to have entered the fray. The application to quash the resulting conviction was granted. Judges must not take part in the adversarial process for all the reasons set out in *O'Neill*, and primarily because they are the impartial arbiters of the dispute and must be seen to maintain that role.

6.10 The Respondents rely heavily on *Dumbrell* to argue that *McDonagh* has been circumscribed, effectively, by that case and no longer applies to any but the most exceptional cases. There, Charleton J. noted that it was "*difficult to conceive*" of circumstances where it would be appropriate to invoke habeas

corpus as a remedy in the context of a bail hearing. He outlined the ready remedy of a *de novo* application for bail in the High Court, as indeed did Humphreys J. in *Grant v Governor of Cloverhill Prison* [2015] IEHC 768.

6.11 In the words of Charleton J.: "*An immediate right to invoke the full and original jurisdiction of the High Court was open to him should it be considered that some possible advantage would be available to him on putting his circumstances afresh before that Court. Given the wide breadth of powers in respect of bail available to any judge of the court before which an accused is to be tried, and bearing in mind the ready availability of review in respect of any such order, it is difficult to conceive of circumstances when resort to Article 40 is either appropriate or necessary. The Circuit Criminal Court had jurisdiction to revoke bail. The order committing the applicant to prison is regular on its face and does not recite or refer to the order of the 19 June and does not require interpretation of that order to be effective. The instant case is not a matter for the remedy under Article 40.4.2° but appropriately is a matter for recourse to the bail list in the High Court*."

6.12 This is characterised as the Supreme Court emphatically holding that Article 40 is not the appropriate remedy where a bail application is refused. I do not agree with this view. The facts of *Dumbrell* and indeed of *Grant*, were very different to the facts of this case. Mr. Dumbrell was the subject of an application to revoke bail. He had obtained a relaxation of his bail terms to go to Portugal with his girlfriend, under strict terms to be applied again on his return and set out in the order by reference to the expected date of return. Having had a row with said girlfriend, he returned early and ignored all the terms, arguing that he understood they were only to apply from the date in the order, and not from his return. It is hardly surprising that the Supreme Court refused to release him and confirmed that the Circuit Court Judge was the appropriate judge to hear the application and, if he was unsatisfied with her ruling, he had the opportunity to apply to the High Court in early course. The Applicant had a full and fair hearing, he was legally represented and his arguments in respect of the interpretation of the order were not accepted by the Judge. This was a case in which an appeal vindicated his rights. Any view expressed by Charleton J. in the passage quoted above is *obiter dicta*, in that it consists of comments which were unnecessary to the core decision of the case and not binding in respect of future cases based on different facts.

6.13 The facts of *Dumbrell* are not comparable to those arising here. There was no want of jurisdiction, nor was there any unfairness in Dumbrell's case, nor could there have been such a perception. The apparently conflicting

authorities can be reconciled by examining the relevant facts. Relaxation of bail in *Dumbrell* was for a specific purpose. Once that was abandoned, the bail terms were re-engaged and the *status quo ante* prevailed. There was no fundamental denial of justice.

6.14 Similarly, in *Grant*, the applicant was refused bail. There, the District Judge acted fairly throughout, rose to consider the case and referred somewhat loosely to *O'Callaghan* principles in his ruling, outlining some evidential concerns, without stating the test in clear terms and without stating, clearly, why he was refusing bail. The evidence and his references to *O'Callaghan* raised an inference that he considered that the applicant was a flight risk, but he did not consider whether any conditions would secure his attendance at future court hearings. This, again, was a case in which a High Court application for bail was available and appropriate to the case.

6.15 Having strongly endorsed the comments of Charleton J. in Dumbrell, Humphreys J. went on to acknowledge (in Grant, paragraph 98) that:
"*The availability of Article 40 relief remains open in a case where the hearing in the District Court is so exceptionally flawed that immediate intervention of the court is required (McDonagh v. Governor of Cloverhill), or where the court could never properly have refused bail. Thus, for example a remand in custody on a minor road traffic matter which could never properly attract a custodial sentence following conviction would warrant immediate release following the return by the governor under Article 40 (as would a custodial sentence on conviction for such an offence). But where the circumstances are such that the judge of the District Court could properly and lawfully have refused bail, any error in the process of doing so would seem to be almost always a matter for an originating bail application to the High Court rather than habeas corpus. Such a bail application to the High Court will therefore be the normal remedy for the vast majority of whatever complaints regarding lack of fair procedures or regarding breach of statutory or constitutional requirements as may be alleged against a judge of the District Court in the context of a bail refusal*."

6.16 Interestingly, what is anticipated in these comments is a situation in which the Judge errs but that is not the core of the case arising in the current circumstances. While individual arguments are made in respect of various errors, most (though not all) such errors or, more accurately, deficiencies arise out of the exceptional circumstance that none of the Applicants in this case had access to legal representation during their bail hearings.

6.17 Both *Grant* and *Dumbrell* stand in stark contrast with the situation in *McDonagh*, where the bail hearing was so lacking in fairness that a unanimous Supreme Court directed the immediate release of the applicant. There has been no subsequent authority in which *McDonagh* has been overturned or called into question and it binds this Court accordingly. It may be worth noting that the Court in *Dumbrell* included Mr. Justice MacMenamin, who had been the original High Court Judge in *McDonagh* and who applied *McDonagh* in *Naisiri*. There is little inconsistency in the approach of the Supreme Court in these two cases once the facts are considered and the emphasis on the exceptional nature of the remedy is recalled. Neither case suggests that the remedy is limited or an application is debarred if it arises from a bail hearing.

6.18 *Grant* also concerned an inadequate bail hearing, rather than one that was grossly deficient or amounted to a denial of justice. There was an issue in respect of the first remand which simply does not arise in the current cases, and it may not be necessary to consider that issue here. In that regard, the Court held (paragraph 75): *"The existence of a prior period of unlawful detention, whether administrative or judicial, does not contaminate a subsequent lawful period of detention ordered by a court (as opposed to administratively). The review of the detention by the court provides an independent and objective safeguard for the detainee which is independent of any previous error in the process. In the context of a remand by a court, there is no "fruit of the poisoned tree", no domino theory*.

6.19 Insofar as it may be argued that this *ratio* does apply in circumstances where this Court has released many of the current Applicants on bail, having conducted hearings at which they were represented, this was with the specific direction that such hearings could take place without prejudice to the Applicants' reliance on the Article 40 remedy and *Grant* case can be distinguished as having arisen in a completely different context.

6.20 Finally, in this regard, the Respondents argued that in *McDonagh*, while there was an egregious breach of the applicant's presumption of innocence and findings were made without evidence therefor, no arguments were made regarding bail as an effective remedy. They contrast this with the dicta in *Dumbrell* to construct the argument that the latter case effectively narrows, if not eliminates, the authority of *McDonagh* regarding habeas corpus applications arising out of bail cases. The language of the Court in *McDonagh* does not support this argument, in my view. Nor indeed, does the language of Charleton J. in *Dumbrell*.

6.21 Further, if no bail case justifies the remedy of *habeas corpus*, that remedy will be restricted in a way that the constitutional provision does not permit. Finally, it would be extraordinary if MacMenamin J., sitting as a member of the Supreme Court in *Dumbrell*, did not take the opportunity to clarify that the Court was revising, limiting or overturning *McDonagh*. Not only had he been the presiding Judge in *Naisiri*, he was the High Court Judge in *McDonagh* and later delivered the main judgment in *S.McD*. This Judge may be taken to have been particularly alert to the issues at stake.

6.22 I note the decision of *McSorley,* in which the Supreme Court appeared to limit the effect of the Article 40 remedy and which MacMenamin J. declined to follow in *Naisiri*. Humphreys J. described academic opinion on this judgment as "*unanimous and unforgiving*." It is no longer necessary to consider whether the case is good law and, as MacMenamin confirmed, *McDonagh* should be preferred.

7 **Alternative Remedies**

7.1 One of the key arguments made, in particular by the Respondent Governors and the Minister, was that the Applicants were obliged to exhaust alternative remedies and that the Court should consider the opportunity to make an early application for bail in the High Court, or to apply for judicial review, when deciding whether to order the release of any or all of the Applicants.

7.2 This argument is said to stem from the recent judgments of the Supreme Court in two cases, *Amariei v Chief Appeals Officer & Ors* [2026] IESC 28 and *AB v Chief International Protection Officer & Ors* [2026] IESC 23.

7.3 These Respondents submit that the Supreme Court has now made it clear that the onus rests on the party seeking to establish that theirs is one of "…*the exceptional and rare situations where the default rule will not apply*…." (*Amariei*, at paragraph 82), and that parties "…*must exhaust*…" all adequate alternative remedies before pursuing judicial review. (*Amariei*, at paragraph 62)

7.4 This argument is admitted that this is not a perfect comparison and the Respondents then contend that there has been no effort to grapple with the reasons for the withdrawal of solicitors from the scheme and that the evidence tendered by the Applicants does not support the proposition that applications for bail in the High Court bail list could not have been made.

7.5 This argument is not persuasive. Starting from first principles, no court can restrict, limit or eliminate a constitutional right. If the Supreme Court intended to restrict the right to apply for *habeas corpus*, or even to streamline the process by which it is sought under Article 40.4.2, I expect that it will say so, expressly. The context of the two judgments referred to could scarcely be more different to that in the present cases. Both were civil law applications for judicial review and, in both systems, there was an initial hearing before a non-judicial decision maker followed by at least one appeal to another decision maker and review mechanisms are also available. Against the backdrop of these elaborate, statutory structures whereby a citizen may obtain a fair decision, the Court urged applicants to exhaust these remedies for the many reasons set out in both judgments. The principles are set out in full at paragraph 105 of Amariei where Donnelly J. begins by noting that if the legislature has provided a remedy, that should be exhausted, in her words: "*To give effect to the legislative intent in the creation of alternative remedies*".

7.6 The Constitution is the primary source of the rule of law in this jurisdiction. This source of law may only be changed by the people, in a referendum. There, we read that a person whose detention is not in accordance with law is entitled to immediate release. I cannot find, in either judgment of Donnelly J., any suggestion that she intended to interfere with, or even refer to, that well established constitutional guarantee of liberty.

7.7 In *McCann v. Govneror of Castlerea Prison* 2011 IEHC 944, Hogan J. considered a bail hearing in which, while there were grounds on which bail could have been refused, the District Court had received and considered inadmissible hearsay evidence about a ramming incident and general criminality. Hogan J. granted the immediate release of the applicant, notwithstanding the availability of judicial review. He quoted Henchy J. in *Royle*, saying that the detention of the applicant was '*wanting in the fundamental legal attributes which under the constitution should attach to the detention*.'

7.8 Hogan J. described the remedy as follows (at paragraphs 12 and 13):
"*… The relief available under article 40 - unconditional release - is dramatic and immediate. While the applicant may have had other avenues of redress open to him, specifically, an application for judicial review to quash the decision of the District Court, this cannot be regarded as debarring the applicant from availing of the very remedy which the Constitution expressly affords him*."

7.9 These comments apply with equal force to the potential remedy of a *de novo*, bail hearing in the High Court. Hogan J. commented on the disruptive nature of *habeas corpus* applications, in that they are urgent and require immediate attention from courts, governors and Gardaí. He concluded that any perceived disadvantages were the price of living in a free and democratic society governed by the rule of law and added the following reminder: "*The drafters of the constitution were clearly alive to the necessity to safeguard carefully the protection of personal liberty. Specifically, the judges of this Court were enjoined by article 40.4.2 "forthwith" to inquire into any complaint that a person was unlawfully detained. While this obligation may - and, as we have just seen, does - discommode public servants such as court registrars, state solicitors, gardaí and prison officers by requiring expedited hearings in circumstances of great urgency, this simply reflects the high value placed by the constitution on personal liberty*."

7.10 Hogan J. noted, in respect of such practical concerns, that the constitutional remedy addressed detention but did not relieve the applicant from an obligation to abide by any pre-existing bail conditions. Likewise, here, the Respondents have agreed that, in the event an applicant is released, there is no bar to an immediate re-arrest if that is necessary in a case where, for instance, the Applicant had not been admitted to bail, and there were no pre-existing conditions.

7.11 The comment by Hogan J. while sitting as a Judge of the High Court, that "*other avenues of redress cannot debar the applicant from availing of the very remedy that the Constitution expressly affords him*" flatly contradicts the conclusion which the Respondents invite me to draw as a result of the *ratio decidendi* in *Amarei* and *A.B.* The civil context in which those cases must be read is so different that the cases cannot be viewed as authorities affecting the availability of the constitutionally guaranteed remedy of *habeas corpus*.

7.12 While one cannot argue with the statements of constitutional law set out in *McCann*, and the robust reinforcement of the importance of the remedy, the case borders on the edge of the availability of the remedy. The Supreme Court did not refer to the case in *Dumbrell* and, happily, I need not express a view on its correctness in terms of the result. The cases before me do not turn on the admission or exclusion of hearsay evidence, although that issue arose in many of the applications. Every one of these cases involves a combination of difficulties and deficiencies, most of which arose due to the fact that there was no lawyer in court to represent the interests of the Applicants.

7.13 The Applicants submit, correctly, that constitutional safeguards should be read together. One illustration they offer is set out in *S.McG and J.C. v. Child and Family Agency* at paragraph 74, where Charleton J. stated of Articles 38 and 40, read together with Article 34, "*a denial of procedural rights may be so fundamental as to undermine the nature of the resulting order of a court*". This is a case on which the Respondents rely also, in respect of a submission that Article 40 should be used very sparingly.

7.14 *S.McG* was a childcare case involving the right of parents to custody of their children. The Supreme Court held that legal representation was required to vindicate the constitutional rights and, albeit with some reluctance, granted relief under Article 40.4 but, unusually, on a staggered basis due to the context and with the consent of all the parties.

7.15 In the same case, O'Donnell J. warned that the Article 40 ought not to be used in such a way as to distort the remedy. It is important to consider not only the context of these words, but also the other passages from his judgment. O'Donnell J. opens his judgment, clearly intending to emphasise the limited nature of the remedy, with the following clear statement:
"An Article 40 inquiry should rarely be used in disputes as to the care and custody of children. In relation to the single issue upon which they differ, I agree with MacMenamin J. that the breach of fair procedures in the District Court hearing on 29 October 2015, even if the product of concern as to the safety of the children, and frustration with the difficulty in providing legal aid, was nevertheless a fundamental departure from the requirements of a fair hearing. I also agree that what is and was required from the court system in this case, whether by agreement at District Court level, or by an appropriate order at the level of the Superior Courts, was that the clock should be reset to zero and proceedings should recommence in circumstances where both parents here were fully and properly represented, and did not in any way suffer from the fact that there had been a determination made on the application…"

7.16 The breach in question in *S.McG* was that one of the parents was not notified of a childcare hearing and was not legally represented. The children were taken into care as a result of the hearing. That short description mirrors two key features arising in most of these applications: the Applicants were not on notice of objections to bail, nor were they legally represented.

7.17 While still expressing concern at the potential extension of the Article 40.4 remedy to childcare proceedings, notwithstanding its history, O'Donnell J. confirmed the necessity for the remedy nonetheless saying, at paragraph 12:

"*the breach of fair procedures here was fundamental and moreover clear-cut. A hearing inter partes which proceeds in circumstances where parties are either unrepresented notwithstanding the fact that legal aid has been granted, or where legal representatives have had effectively no opportunity of preparing for the case and taking instructions on the detail, falls far short of what the Constitution requires for all the reasons explained so vividly by Henchy J. in The State (Healy) v. Donoghue [1976] I.R. 325. There are a number of practical alternatives which the legal system provides on a daily basis. The case could be adjourned for a short period or, if it is considered that the matter is urgent, a court can sometimes proceed on an ex parte and contingent basis, even when the other side is represented and giving the right to have a full inter partes hearing within a short time*."

7.18 Unfortunately, there were very few practical options available to the District Judges in this situation, as there is no means by which lawyers may be obliged to represent clients. Insofar as there has been any suggestion that the lawyers refusing to attend are in breach of their professional obligations, this does not appear to be correct in any of the cases before me, which involved only new assignments which were declined. Further, an argument was made that they would be breaching a professional obligation by accepting work under the new regulations but that is a matter for argument in the judicial review proceedings. I mention it here to emphasise, again, that the reason that there was no legal representation in specific types of case is not the relevant issue in this case, it is the effect of that fact and the prospect that there was no immediate likelihood of legal representation in any bail application.

7.19 Even the remedy of a new hearing does not justify a pivot from the general tenor of the Supreme Court judgments to the effect that a hearing in which parties are unrepresented and in which liberty is at stake will often, though obviously not always, fall short of what the Constitution requires. This must be so when the applicant will not necessarily be represented by a lawyer at that new hearing, indeed it is likely that she will not. The fact that the District Judges here could not offer to vindicate the rights of the accused in a more robust or immediate way is not a reason to refuse the remedy.

7.20 The Respondents have submitted that the right to a High Court bail application is not, or should not be, affected by the dispute in respect of the Regulations. That may be so, but there is a right of appeal or of a de novo hearing in respect of many criminal processes. The language used by various judges, in particular in the Supreme Court, confirms the appropriateness of

the Article 40.4 remedy where the applicant's detention is otherwise than in accordance with law. The answer is not that he has an appeal, but that if his detention is not in accordance with law, in the sense in which that term is most often understood, then he is entitled to release. The sense in which I understand the term, having reviewed the authorities, is that there has been a fundamental denial of justice or, put otherwise, that an applicant was deprived of her liberty without the essential requirements of a fair hearing.

7.21 The Respondents referred me to paragraph 16 of the judgment of O'Donnell J. in *S.McG*, which reads:

"*If the High Court is to be held to have jurisdiction on an inquiry under Article 40.4 to quash or declare invalid routinely the orders of other courts or tribunals (in this case triggering the beneficial jurisdiction under s. 23) and at the same time can make an order for release which is so staggered that it does not result in release but instead permits the curing of the defect without any change in custody or liberty, then the remedy under Article 40 would be quite distorted. Its field of application might be considerably widened, but the strength of the remedy diluted. Accordingly I do not consider that the route adopted here could necessarily be replicated in other fields. In my view the essential clarity of the remedy requires that it be applied only in those cases where there is a fundamental defect which can and must be remedied by an order for release forthwith. This case should be treated as arising from the very specific history of the application of the writ of habeas corpus in the field of custody of young persons, and the present day application under Article 40 in the context of a Constitution which guarantees the rights of children*."

7.22 I am asked to read this as a warning not to extend the general availability of the Article 40 remedy. But, in my view, the facts of these cases do not extend that remedy. There is no suggestion here of staggered remedies, still less is it an application in respect of childcare in which many other considerations apply. These cases do not appear to raise the kind of situation under discussion in the above passage. Mindful of the words used, only applicants who can show a fundamental defect in their bail hearings are entitled to be released. Again, and as noted above in respect of *Dumbrell*, had the Supreme Court intended to limit or eliminate the right to the remedy of Article 40.4 in the context of a bail hearing, the Court would have said so, expressly. But it could hardly do so in *S.McG*, which involved completely different facts, arising in a wholly different context.

7.23 Most persuasively, MacMenamin J. delivered the main judgment in *S.McG* and O'Donnell J. expressly agreed with his judgment. At paragraph

33, this is what MacMenamin J. had to say about *Ryan* and *Roche (Dumbrell),* in the context of parties who were not legally represented:
"*It is right to say that both judgments deprecate the use of the Article 40 procedure in circumstances other than when there is a defect on the face of the order which goes to jurisdiction. But there is an exception to this rule, that is, where there has been some fundamental "denial of justice" (as Denham C.J. points out in Ryan v. Governor of Midlands Prison [2014] IESC 54, (Unreported, Supreme Court, 22 August 2014) at p. 3). Charleton J.'s judgment in this court in Roche [Dumbrell] v. Governor of Cloverhill Prison [2014] IESC 53, (Unreported, Supreme Court, 31 July 2014) is to the same effect. I would hold that what occurred in the District Court was a fundamental denial of justice, and of the constitutionally implied right to fair procedures. Fair procedures, especially in the circumstances, required that both parents be legally represented, and time given to take instructions, and comply with other procedural steps necessary (see, too, McMichael v. United Kingdom (App. No. 16424/90) (1995) 20 E.H.R.R. 205, at para. 87). The effective representation of parents is not only a vindication of their own rights, but of the children's rights.*

7.24 Finally, the Respondents ask me to consider the role of third parties in contributing to the situation. This is not relevant to the issues before me. Any such consideration is for a constitutional case or a judicial review in which the parent legislation or the relevant regulations are challenged. There is no systemic challenge made here and, insofar as the Respondents characterise the case as such, and this was expressed relatively tentatively, the Court does not agree that this is the true nature of the instant case. Neither the adequacy of the legal aid system nor the reasonableness of the solicitors' actions arises for consideration. My focus is the right of each Applicant to liberty, in the context of each bail hearing, and whether that right was vindicated as required by the Constitution. That being the case, it is appropriate to consider each of the applications in turn based on the transcripts of the evidence, in light of the principles set out above.

8 **Analysis of the Evidence – McCormack**

8.1 The first Applicant is single mother with no previous convictions. On the 4th of July, 2026 she was in the District Court, charged with robbery. She was not given notice of the garda objections to bail, nor was she informed of her right to cross-examine any witness, nor was she told that she could give or call evidence. Ms McCormack asked for a solicitor to represent her but none was available. She said, in respect of representing herself, "*I don't know how to*".

The Judge sensibly asked if there were reasons why she, the Judge, should let the Applicant go home.

8.2 The Applicant addressed the District Judge. She began to tell the Judge about the incident, without formally going into evidence. The Judge reminded her of her right not to incriminate herself. While this was another very sensible interjection, it effectively stopped the Applicant from addressing the Judge further. The Judge, with scrupulous fairness, adjourned the case to allow the Applicant to bring material to support her account that she was addressing addiction problems.

8.3 In a second bail hearing, four days later, on 8th July, the Judge heard further from the Applicant and from the garda witness. The objections to bail were outlined again and the Garda submitted that the charge was very serious and that there was strong evidence. There was evidence in respect of bench warrants. It is impossible to escape the conclusion that a lawyer would have drawn attention to the lack of evidence of previous convictions of any description, including of convictions in respect of any previous failures to attend court, the fact that conditions could assuage any evidence as to fear expressed by the victim, who appeared to be unknown to the Applicant, and the strong presumption in favour of granting bail.

8.4 As the second bail hearing concluded, the Garda answered simply, no, when asked would any bail conditions suffice to address her objections. The Judge then refused bail. An independent person sitting in court throughout both hearings must have perceived that, despite the Judge's efforts, the accused was not receiving a hearing in due course of law and indeed the Judge herself acknowledged as much, although this is not dispositive of the case. The Judge stated that she knew the rights of the accused had not been vindicated and that she would hear a further application for bail if the Applicant was not successful in a High Court bail application. The Respondents submitted that the arguments put forward in respect of the Applicants' hearings were vague and that no fundamental unfairness was established such as to justify the extraordinary remedy of immediate release under Article 40.4.2o.

8.5 This hearing was unfair, and so demonstrably lacking in vindication of the rights of the accused that it amounted to a denial of justice. This is a finding of fact which relies on a combination of events, including the failure to notify the Applicant of the grounds of objection, her ignorance of the right to give or call evidence or to cross-examine the garda witness and the clear inability of

the Applicant to represent herself effectively. She appeared incapable of distinguishing between giving details of the alleged offence and reassuring the Judge as to her intention to abide by conditions, for instance. There was a further and almost inevitable difficulty for this Applicant in addressing the Judge further, once she had been warned about the danger of incriminating herself. Without a lawyer, she could not test the evidence against her, identify the factors she ought to put to the Garda witness, or identify matters which ought to be advanced by her to the court, in evidence or by way of submission, whether in substance or regarding bail conditions. This Applicant was entitled to be released pursuant to Article 40.4.2°.

9 **Analysis of the Evidence – Fox**

9.1 The second Applicant appeared in the District Court on the 8th of July, charged with assault causing harm. He agreed that he wanted to go ahead with a bail application despite the fact that he had no solicitor. Evidence was given that he was alleged to have assaulted a woman, the mother of his girlfriend, causing a fracture to her face. The incident was captured on CCTV, and he had been arrested shortly afterwards. The woman gave evidence. The accused was not given notice of the objections, which were said to be on the basis of the *O'Callaghan* rules. There was evidence that he had seven bench warrants and that the garda witness apprehended interference with witnesses. The Applicant was given an opportunity to question the guard but stopped from making submissions which was legally correct, but did not appear to mean much to the accused man. This is a common difficulty for lay litigants, in that confining oneself to asking questions rather than making submissions is a skill that is far more difficult than it appears. This is one of many reasons to engage a lawyer in any criminal proceedings, another being the difficult question of how to conduct a fair cross-examination of a complainant in such a case, including in the context of a bail hearing.

9.2 When the complainant, who was referred to as the injured party throughout, gave her evidence, the Applicant was not afforded any opportunity to question her. She told the Judge many things, including the fact that the Applicant had just got out of prison, making broad allegations about his relationship with her daughter and with his own daughters and finally, when she was confined to the evidence as to her response to his application for bail, that she was in fear that he would kill her, effectively. The concern expressed in submissions was that he would interfere with the witnesses. It is not clear who the other witnesses were but there was evidence that he was still in a

relationship with her daughter and this may be the reason for the reference to witnesses in the plural. In his submissions the Applicant apologised but was not warned about his right not to incriminate himself and he offered to stay away from the complainant and the area where she lives. He was asked who lived at the address with him and he told the Judge that he was with the same girlfriend, the daughter of the complainant, and would reside with her.

9.3 Bail was refused immediately after the Judge received this information. It was never suggested or expressly stated that the Applicant would try to stop his girlfriend from testifying in support of her mother so there was no opportunity to consider or make any submission about this fear. The stated reasons were due to the bench warrants and "*a concern about interference with prospective witnesses*." There was no detail as to who these witnesses were.

9.4 This description of events does not imply that the garda witness or the Judge were at fault in any single, significant way, but it highlights why legal representation is so important in our adversarial legal system. The Respondents submitted that the arguments put forward in respect of the Applicants' hearings were vague and that no fundamental unfairness was established such as to justify the extraordinary remedy of immediate release under Article 40.4.2°.

9.5 This Court might not have granted bail to the Applicant either but, on this evidence, he did not receive a hearing in accordance with the law. This was due to a combination of factors: he had no advance notice of the objections, no fair opportunity to challenge the evidence nor did he understand the requirements of such a hearing including what factors should have been emphasised, what evidence should have been excluded, if any, and what the effect of the right not to incriminate himself might have had on the hearing. There was a lack of clarity in respect of the order made and the reasons why the order was made. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission, whether in substance or regarding bail conditions

9.6 This case contrasts with that in *Grant* where, after a fair hearing, the order was lacking in clarity. Here, the hearing was one-sided, proceeded with no notice to the accused as to the basis for the objections and an independent observer, had there been such a person in court, must have concluded that this accused

had little or no opportunity to make his case in a coherent or informed way. This Applicant was entitled to be released pursuant to Article 40.4.2°

10 **Analysis of the Evidence - Guerin**

10.1 This Applicant has been granted District Court bail since the date on which the enquiry was opened and the only outstanding issue is costs.

11 **Analysis of the Evidence - Fitzgerald**

11.1 This Applicant was charged with an offence of obstruction under the Criminal Justice (Public Order) Act, 1994. His bail hearing took place on 10th July. The specific offence was clarified by the garda witness, as the wrong subsection was referred to in the charge sheet. The objections to bail were the seriousness of the charge and failure to comply with a curfew which had been set in a previous High Court bail order. The offence is a summary offence with a maximum sentence, on conviction, of 6 months' imprisonment. The Court was told it carried a 12-month maximum sentence, which was incorrect.

11.2 The context was that the accused was in the company of his girlfriend's son, at about 2am, and that he ran as soon as he saw the gardaí. The gardaí were investigating a claim that he had fled from a hotel in the company of this 9-year-old "*for unknown reasons*." He resisted arrest, had to be tasered and restrained on the ground and was eventually handcuffed. The garda witness appeared to consider that the fact of his being charged with this offence was sufficient to prove that he had committed an offence and was thus in breach of a bail bond, entered into when he had obtained High Court bail. He had one bench warrant from 2022. There was no evidence of any previous convictions. The garda evidence was that he would not adhere to bail conditions.

11.3 When the Applicant said something, the transcript does not record what, the Judge correctly summarised this evidence for his benefit and told the accused that the sole objection was that he had breached his curfew. The Applicant explained that he was seeing his daughter, who was 3 years old.

11.4 The Judge ruled as follows: "*Well, you're in a very difficult situation today because you don't have a solicitor to represent you, ok? And I appreciate that that's a difficult situation. I've listened to your bail application. I'm not satisfied to grant you bail. I'm afraid, Mr. Fitzgerald, based on the evidence that the guard has set out, I'm*

not satisfied to grant you bail. But you can appeal this to the High Court, ok? You can make a High Court bail application. Do you understand?"

11.5 The accused replied: *on my own, just me only, Judge*? And the Judge replied, "*yes I can only put you in, it's the first remand for a period of seven days.... I'm afraid I'm not going to grant you bail. Do you have anything else you'd like to say? I don't want you to comment really in relation to the actual offence because you might tend to incriminate yourself, do you understand? So really I'm focusing on the bail at the moment. You don't have to say anything*." The accused man replied "Yes. No (inaudible).

11.6 The Respondents submitted that the arguments put forward in respect of the Applicants' hearings were vague and that no fundamental unfairness was established such as to justify the extraordinary remedy of immediate release under Article 40.4.2°.

11.7 Again, this was a hearing that was deficient in most of the characteristics of a fair hearing. The Applicant had no notice of the objections. While one objection was based on the seriousness of the offence, this was a minor offence, only triable summarily. The only aspect of it that might be said to be serious was the context but even here, there appears to have been an unspoken allegation that the Applicant had kidnapped the child who was with him. He was not offered any opportunity to question the witness. The inability to abide by bail conditions was based on one breach of a curfew condition, in the context of an offence carrying a maximum sentence of 6 months. As in earlier cases, the Applicant was invited to address the Court but was, in the same breath and perfectly appropriately, reminded of the importance of not incriminating himself. It is difficult to see this as having any other result than preventing him from speaking at all. In any event, he said no more. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission, whether in substance or regarding bail conditions.

11.8 In the Judge's ruling there was no indication of the basis for the refusal of bail, nor was there any consideration as to whether any conditions would suffice to assuage the Judge's concerns, which remained unspoken but presumably were that he would not abide by his curfew.

11.9 The Judge was conscious of the unfairness of the situation, but there was little she could do to alleviate it and the hearing amounted to a denial of justice. This Applicant is entitled to be released pursuant to Article 40.4.2°.

12 **Analysis of the Evidence - Ryan**

12.1 This Applicant appeared in the District Court on the 7th of July. He is is of limited means and has difficulty reading and writing. He was refused bail in the District Court on a summary offence. The Applicant had no notice of the objections to bail, which were handed to his wife.

12.2 The Judge gave the accused the following directions:
"…you have a right then if you want, you can ask the garda who's about to give the evidence, you can ask as many questions as you want. If you don't want to ask any questions, that's fine. At the end of the application, if you want, you have a right to give evidence under oath and you can cross examine but if you don't want to do that, if you don't want to give evidence under oath, you can -- I'll allow you because you're a lay person now, you can address me without formally giving evidence under oath. I'll bend the rules for you. You can address me because you're a lay person and while (inaudible) lawyers, but they're not here, so you can approach it both ways, you can give formal evidence or, if you don't want, to I'll allow you, whatever you want to seek, you can say it by way of submission without giving any formal evidence."

12.3 Evidence was given that this Applicant was arrested under sections 4 and 6 of the Criminal Justice (Public Order) Act 1994, and also charged with obstruction and an assault causing harm. This evidence having been given, the Applicant was handed the bail pack, which contained written copies of the evidence and notice of the objections. It became obvious from the transcript that the accused was in handcuffs. The Judge was told that he was a security risk and the case was put back to 2pm. After a lengthy exchange, the Judge also acknowledged that he had raised a fair issue about his visible injuries, and allowed family members to take pictures of his face and his elbow, even though he remained in garda custody.

12.4 When the matter was called again, the Judge confirmed that the Applicant had the bail pack but then learned that he could not read. His wife, who could read, had the pack. The Judge brought the garda through his evidence, in relatively plain language, so that the accused could understand that the objection was in respect of him being a flight risk and the apprehension that he was likely to commit further serious offences if released.

12.5 Evidence was given that, on the previous day, the Applicant was in a pub and refusing to leave. He was described as highly intoxicated, highly agitated, highly aggressive. He was said to be "*a threat to both the general public and the members that were present and was at risk of causing serious harm to members of the public if he hadn't been stopped at the time*".

12.6 After his arrest, it was said that "*Richard Ryan was in a highly abusive, aggressive and intoxicated state. Gardaí attempted -- while putting him in a cell, received multiple kicks from Richard Ryan*". The Judge was told there would be further criminal damage charges and noted: "*There's only one indictable charge which is the alleged criminal damage. They are also 100% summary charges".*

12.7 He had 36 previous convictions and was, on the date of the hearing, on bail for five counts of criminal damage. The Garda witness described a number of other charges arising from events during which Richard Ryan allegedly broke into a hotel room and assaulted a garda and the charges were pending before Tallaght District Court, with a hearing date on the 07/01/2027. The evidence concluded: *It is believed that the gardaí that accused, if granted bail, he would … commit offences of this nature and will not appear in court to answer for these charges*… [he] *is a huge danger to the public based on the manner of how he acted at the scene, the damage that he caused to both the pub and the injuries that he caused to the members that attended the scene."*

12.8 His bench warrant history was outlined and the last two warrants were one in 2023 and one in 2024. He had no convictions for failure to appear. The Applicant was then invited to ask questions and chose not to. The Judge explained the objections clearly. The Applicant was invited to give evidence, in these terms: "

Q. …So, they're all the objections okay, and you heard they gave you background as to what happened when they questioned you, which led to your arrest?

A. Okay.

Q. It's all fresh in my mind, fresh in your mind so it'll only be repeating, you were there, I wasn't there. Now, you've chosen of your own free will to give evidence. Feel free to talk to me and you chose not to cross examine the garda and you were offered the opportunity outside the box, which would have been an easier option for you, because (inaudible) so you're exposing yourself to be examined. But anyway, as you say -- you're not legally minded. So, yes? "

12.9 The Applicant then went into detail about events on the night of his arrest, albeit not giving formal evidence. At one point, the garda witness interrupted the Applicant and the Judge stopped him, saying:

Q I mean, it's bad enough being a lay person?
SERGEANT: It is Judge, yes.
Q. Please, don't do that. I mean, in my sights, and don't do that. Take a step back please, take a step back. Please, please, please.

12.10 For nine pages of the transcript, the Applicant gave evidence of what he said happened on the night he was charged and, clearly, sustained injuries. His understanding was that "all his bail was gone." There was a lengthy exchange about that.

12.11 The Judge made some comments about being in a difficult position, which one can understand, and ruled as follows:
"Obviously, there's a presumption -- you're presumed innocent. That goes without saying, Mr Ryan. There's also a presumption that exists in law (inaudible) a presumption to bail but obviously that presumption can be rebutted by the State. In this instance, the State have called one witness and (inaudible) for the gardaí in their attempt to rebut the presumption that exists on the above bail. As I said, they've objected to bail on a combination of O'Callaghan and the Bail Act, two in one. The evidence for both (inaudible)… and I've considered all the evidence in direct and cross examination and your evidence, Mr Ryan, and I am satisfied that the objections by the State are well-founded and have standing in law. I have also considered whether or not strict bail conditions would be appropriate in this particular case and I'm satisfied that strict bail conditions would not be appropriate in this particular case and I'm going to refuse the application for bail."

12.12 While the Judge, once again, was in an extraordinary position, and he did make several very sensible efforts to assist this accused, including ensuring that he received medical attention. However, it is inconceivable that the hearing would have unfolded in this way had his lawyer been present or at least, if it did, the Applicant would have been advised as to the wisdom of this course and could take that decision advisedly. He is illiterate. He was still visibly injured. He clearly did not know or understand what was at issue in the proceedings. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission. Nor could he make submissions regarding bail conditions. Finally, though not dispositively, the ruling was not clear as to what exactly the apprehension was, though one can deduce that it was the risk of further offending and apparently also an apprehension that he would not answer

bail. In the circumstances, this hearing amounted to a fundamental denial of justice. This Applicant is entitled to be released pursuant to Article 40.4.2°.

13 **Analysis of the Evidence - Brennan**

13.1 This Applicant appeared in the District Court on the 7th of July. There is no transcript in respect of an earlier part of the hearing and there appears to have been some trouble during that hearing as the Applicant begins by apologising. He was asked about his solicitor and confirmed to the Judge that his usual solicitor would not be coming and that he, the Applicant, had not spoken to him. The Applicant did not know, when later instructing his solicitor, what the charges were other than that they were public order offences. He had no means of writing down what happened in court. He did not know if it was an option to ask to wait until his solicitor could attend.

13.2 When asked if he was applying for bail, the Applicant replied: "*Yes, but I haven't got... I don't have any money because I know about the bench warrant thing honestly judge*." The judge asked what the Garda position was in relation to bail and was told that there was an objection on the basis of a bench warrant history. The applicant has forty previous warrants, with one dated 2026. In respect of the warrant history, it appeared as if the Judge was inclined to grant bail if the Applicant had any money to lodge, or was able to offer an independent surety. He confirmed that he was living with his parents. He told the court that his income was €246 a week. There was no further inquiry as to his means, savings, or as to his or his family's access to financial support. The judge set bail at €300 his own bond, cash lodgement €100, one independent surety to be approved by the court, €1000 bond in respect of the surety, €300 to be lodged in cash and a freezing order in respect of the balance, i.e. €700.

13.3 The Registrar then appears to ask the judge if the Applicant should sign on as well (while the transcript records this, it may be that the speaker was a garda witness) and the Judge agreed that he should indeed sign on. The Applicant tried to interrupt and was told not to interrupt and that he could ask his questions later. He was not, in fact, given any opportunity to ask the garda witness any questions and all of his further queries were ignored. As the judge and the registrar were discussing his local station, the Applicant intervened to tell the court that he had no cash. This was ignored. He then said, *so I'm going to prison basically*. And when this was ignored, he added: *But I am going to prison because I have no cash*. This too was ignored.

13.4 This Applicant struggles with addiction issues and was remanded in custody on charges in respect of which the maximum term of imprisonment that can be imposed on him is one of 3 months. His solicitor has confirmed that he has been attending an addiction course and is doing well on the course. Nobody in his family has the means to act as a surety for him. He looks after his children for two days a week, while his ex-partner is working.

13.5 In this case, the outcome of the hearing was profoundly unfair. The Applicant had no prospect of meeting the bail that was set. He was ignored by the Court when he tried to speak, despite being told that he would have a chance to ask questions. He had little or no prospect of finding a surety and having that person approved by the Court, on notice to the prosecuting garda, as he was in custody. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission. Nor could he make submissions regarding bail conditions. In this particular case, the consequences were stark in that he was remanded in custody for a period which had the potential to exceed the maximum sentence which could be imposed on him. This Applicant is entitled to be released pursuant to Article 40.4.2°.

14 **Analysis of the Evidence – Markowski**

14.1 This Applicant was in the District Court on 11th July. He was charged with intoxication under s.4 of the Criminal Justice (Public Order) Act, 1994. At the beginning of the hearing, when he said something inaudible, the Judge replied by telling him three times, "*you need to listen to me*" and "*if you don't listen… I'm going to remand you in custody if you continue to interrupt the court*." He interrupts with an expletive and the Judge responds, Monday it is. Counsel has candidly and, I think correctly, submitted that if that was the end of the hearing, he could have had no complaint.

14.2 The garda witness continues nonetheless and somehow, the hearing continues. At one point, the registrar makes suggestions about a witness being handed charge sheets if he wants to give evidence from the floor. It becomes clear that the accused is not coherent. He was not making sense. This could have been due to mental health reasons or due to intoxication. The only objection to bail was that he was coming to garda attention repeatedly

over a period of five months and was of no fixed abode. He had previously taken two bench warrants. The only condition sought by the witness was that he sign on daily.

14.3 The Judge granted legal aid on the apparent basis that he was sleeping in camps. Asked why he had not turned up in court he said he had been busy. Asked about the failure to turn up, he said that only God could charge him. He apologised for swearing and said "*My English*…" The Judge replied *no, you needn't talk over me. It doesn't work like that*. He again tried to interject "*my English is poor*" and the Judge replied that his logic was the difficulty. When asked if he wanted to apply for bail, he replied "*not really*". He referred to it being funny and said he was Polish. The Judge set bail at €500, his own bond, €200 to be lodged. The Applicant does not have this level of funds but no enquiry was made in respect of his means.

14.4 There are several obvious reasons why this hearing was fundamentally unfair. Given that the suggestion was that he was a regular in court, it is clear that he usually turns up. Otherwise, if not in relation to criminal offending, the evidence was irrelevant and inadmissible. More fundamentally, there was no evidence as to whether he had access to any cash, how he became homeless or what his income was. As a Polish national, he drew the Judge's attention to his ability to speak English, but was silenced.

14.5 The Judge finished by requesting a Polish interpreter at any future hearing. This Applicant has sworn an affidavit in which he avers that he spends all his money on alcohol and that he wishes that "*all this could have been conveyed to the judge that I had understood better what was going on.*"

14.6 In this case, again, the outcome of the hearing was profoundly unfair. The Applicant had no prospect of meeting the bail that was set. He was ignored by the Court when he tried to speak despite it being clear that he was struggling with both logic and the language. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission. Nor could he make submissions regarding bail conditions. This Applicant is entitled to be released pursuant to Article 40.4.2°.

15 **Analysis of the Evidence – O'Neill**

15.1 This Applicant was the subject of a bail revocation application on the 10th of July. He was not given notice of the objections to bail. The evidence was that he was in his father's house and on a bail bond in relation to other District Court offences due later in the month in Balbriggan (22nd July). The Garda witness told the Judge that he had 16 bench warrants and that he was arrested for criminal damage. His reply to caution was to say: "I'll be back up in 30 minutes…" The Garda objection was on the basis of his warrant history and on the basis that he would intimidate witnesses. The Applicant had been on bail and had entered a bond to stay away from his father. It was breached four times, twice on 3rd July 2026. The guards were called on each occasion. The garda view was that after caution, he said that he would return to his father's house and wreck the place.

15.2 The Applicant told the judge, *I'm not the problem, I'm the one on drugs here.* From the body of the court that his father was taking and stealing. He had nine bench warrants from 2026 alone. The Applicant was not offered an opportunity to question the garda witness. The witness objected to renewed bail on the new charge and asked the Judge to revoke the bail in respect of earlier charges. The Judge asked him about the warrants and told him nine was too many. The Applicant told the Judge that he was not the problem, "*I'm the one on drugs here and I have to go up to the home to give me few bits of my… to stop me from doing what I done yesterday and all.. I'm not going to breach my bail order… he is taking my… and stealing*".

15.3 The Judge ruled that he had to remand the Applicant in bail and the stated basis was that nine warrants was too many. He noted that his solicitors would be there for his hearing on the underlying matters as they related to earlier offences and there were pre-existing certificates of legal aid. He was remanded in custody for one week.

15.4 The test is not whether or not this Court would have granted bail but whether this Applicant received a hearing in accordance with the law. Here, he had no notice of the objections, no understanding or assistance in respect of cross-examination, nor was he offered the opportunity to ask any questions. He has no assistance as to when he should speak and when he should not. Without a lawyer, he could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of

submission. Nor could he make submissions regarding bail conditions. This Applicant is entitled to be released pursuant to Article 40.4.2°.

16 **Analysis of the Evidence - Daly**

16.1 This Applicant has been granted District Court bail since the date on which the enquiry was opened and the only outstanding issue is costs.

17 **Analysis of the Evidence - Leech**

17.1 This Applicant was in the District Court on 6th July. He was asked if he wanted a solicitor, he said he would represent himself. However, as the hearing went on, it became clear that he wanted a solicitor, but could not get one. The transcript suggests that his change of mind, as the Judge said, occurred when he had read the bail pack. This refers to the summary of the evidence and the objections which is prepared by the prosecutor in a bail application. The objections to bail were on O'Callaghan grounds and s.2. The application continued despite this change of mind.

17.2 The Applicant was charged with burglary and threats to kill or cause serious harm, possession of a meat cleaver under the Firearms and Offensive Weapons Act 1990 and assault causing harm. There was hearsay evidence of an extremely serious offence against a third party and an allegation that this had been committed by the Applicant. Certain apparent admissions were described by the garda witness. This Applicant was offered the opportunity to ask questions of the witness. He declined. He made a submission to the Judge which was partly by way of giving evidence as he clearly did not understand the difference and was advised of his right not to incriminate himself. He was advised by the Judge not to say any more. He was then asked "*is there anything else you'd like to tell the Court*…? And he replied: "*Not sure what to say at the moment, Judge*".

17.3 The Judge refused bail on the following grounds: the seriousness of the charges, the nature of the evidence, the likely sentence, the possibility of interference with witnesses, the fact that he was caught red-handed and to prevent the commission of a serious offence.

17.4 When an allegation is very serious, this is exactly the type of case in which the accused needs legal representation and this much is clear from the judgments in Healy. One cannot argue that if he would never have got bail,

Art 40 is not appropriate. The fundamental denial of fair procedures is the triggering factor for a successful application for habeas corpus, not a procedure whereby a High Court Judge decides that it was always a hopeless application.

17.5 The Applicant received notice of the extremely serious nature of the charges and the objections while sitting in court, seconds before the evidence began. It was clear that he wanted a solicitor. It was clear that he felt he could not speak further having been advised (for understandable reasons) not to say any more. Without a lawyer, the Applicant could not test the evidence against him, identify the factors he ought to put to the Garda witness, or identify matters which ought to be advanced by him to the court, in evidence or by way of submission. Nor could he make submissions regarding bail conditions. The hearing was deficient in most of the characteristics of a fair hearing. This Applicant is entitled to be released pursuant to Article 40.4.2°.

18 **Burden of proof, Bonus and Basic Rights**

18.1 The Respondents have not offered any detailed commentary on the evidence in the individual cases so as to persuade me that the hearings were fair. The onus is placed, by the Constitution, on the detainer, not on the Applicants. Insofar as the Director submitted that the burden was on the Applicants to show that bail was not an effective remedy and that they had failed to so, this is simply not correct.

18.2 The Respondents submit that the central issue in this case is whether a High Court bail application represents an effective remedy in the context of these cases, but I have no hesitation in rejecting this proposition. They further submit that the Court should ask whether an applicant has reached the threshold necessary to justify the "windfall" of unconditional release. The remedy of unconditional release is not some kind of bonus, granted to an undeserving chancer, but a basic constitutional right, granted to a citizen who has been deprived of her liberty in a manner that was fundamentally unfair such as to amount to a detention otherwise than in accordance with the law.

19 **Conclusions and Costs**

19.1 For the reasons set out above, each hearing described amounted to a denial of the Applicant's fundamental right to a hearing in due course of law and amounted to a denial of justice such as to justify the immediate relief of the Applicant in each case.

19.2 The issue of costs has yet to be determined. My preliminary view is that the Applicants, having been successful, are entitled to an award of costs as against the Respondents but if this is disputed, or if is not disputed but the amount of costs cannot be agreed, I will set a date for hearing in that regard.

Appearances

Mr. Michael Lynn S.C. and Mr Keith Spencer B.L. for the first named Applicant instructed by Mr. Donal Quigley Solicitor.

Mr. Colman Fitzgerald S.C. and Mr. Karl Monahan B.L. for the second and third, named Applicants instructed by Delahunty & O'Connor Solicitors.

Mr Colman Fitzgerald S.C. and Mr Karl Monahan B.L. for the fourth named Applicants instructed by Dempsey & Company.

Mr. Frank Crean S.C. and Mr. Paul Gunning B.L. for the fifth and sixth named Applicants instructed by Healy Law LLP.

Mr Colman Fitzgerald S.C. and Mr Luke O'Higgins B.L. for the seventh named Applicant instructed by Ferrys Solicitors.

Mr Colman Fitzgerald S.C. and Mr Karl Monahan B.L. for the eighth and tenth named Applicant instructed by Healy Law.

Mr. Michael L. O'Higgins S.C. and Ms. Kate Egan B.L. for the ninth named Applicant instructed by Donal Quigley Solicitors.

Ms. Sunniva McDonagh S.C. and Mr. Kieran Kelly B.L. for the fourth named Respondent instructed by the Director of Public Prosecutions.

Mr. Eoin McCullough S.C., Mr Eoin Carolan S.C., Mr. Hugh McDowell B.L. and Mr Davy Lalor B.L. for first, second and third named Respondents and for the Notice Party, instructed by the Chief State Solicitor's Office.