

THE HIGH COURT

IN THE MATTER OF APPLICATIONS UNDER ARTICLE 40.4.2 OF THE
CONSTITUTION

BETWEEN

STEPHEN ENNIS

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 5th day of August, 2026

INTRODUCTION

1. This judgment considers whether an application to release a person in custody, i.e. a habeas corpus application under Article 40.4.2 of the Constitution, which has been described as

the stable bulwark of our liberties,¹ is the appropriate remedy for the alleged unlawful detention in this case.

2. This issue arises because the alleged unlawful detention was caused by a solicitor choosing, for financial reasons, not to act for an accused on Monday in the District Court, but to act for him on a Tuesday in the High Court. The refusal of the solicitor to act in the District Court meant that the accused was not legally represented at his bail application, and thus this is the basis for the solicitor to claim in the High Court that the accused did not get a fair hearing and has therefore been unlawfully detained.
3. However, what might appear surreal to a lay person is that the solicitor, whose refusal to act in the District Court on Monday (for a bail application) and so who *caused* an alleged injustice to his client, then applies on Tuesday to the High Court (for the client's immediate release), to remedy the injustice *he caused*. To put it another way, the person who caused an injustice, is complaining about the injustice, *albeit* on behalf of his client. (Of course, by 'causing the injustice' this Court is not saying that the solicitor is to blame for not acting in the District Court, but rather that his failure to act for the accused, led to the alleged defect in the detention of the accused.)
4. It might become even more surreal for a layperson, when they realise that the solicitor, by refusing to act for the client in the District Court, provides his client with an entitlement to seek his *immediate release* from prison under Article 40 of the Constitution. Clearly this is not the intention of the solicitor, in refusing to act for an accused in a bail hearing, yet this is the effect of his refusing to act – his client, who has been charged with possessing a semi-automatic pistol could walk free under Article 40 (if an enquiry were to be ordered).

¹ William Blackstone, Commentaries on the Laws of England (Vol 1, Ch. 1, Clarendon Press 1765-1769) pg. 133.

5. A lay person might also find surreal the fact that by refusing to act in the District Court, the solicitor, instead of being paid say hundreds of euros (by the taxpayer) for acting in a bail application in that court, has provided himself with a basis for making a habeas corpus application to the High Court, for which he is likely to be paid thousands of euros (by the taxpayer). Thus, the solicitor's refusal to act in the District Court has led to the likelihood of his being paid multiples of what he would have been paid if he had *not* refused to act (as well as leading to payment to the counsel that he briefs to make the High Court application).
6. While all of these factors may appear surreal to a layperson, they are the consequences of *bona fide* dispute between solicitors and the Department of Justice regarding fees paid in the District Court, and so it is important to point out that there is no criticism of the solicitor involved or indeed the counsel acting in the High Court. They are looking at what happened in the District Court *in isolation* and so are applying to release a person who they believe has been unlawfully detained under our Constitution because he was not legally represented in the District Court.
7. However, the manner in which the alleged unlawful detention came about in this case is relevant to this Court's refusal to allow the habeas corpus application to proceed (i.e. the refusal to open an enquiry under Article 40.4.2). Instead, the appropriate application is an appeal/rehearing of the accused's bail application by the solicitor.

BACKGROUND

8. In brief, the facts are that a solicitor who represents² the applicant for habeas corpus ("**Mr. Ennis**") *chose* not to act for him, when Mr. Ennis applied for bail in the District Court on 3 August 2026. Mr. Ennis was applying for bail in the District Court as he had been charged

² In his affidavit, the solicitor gave sworn evidence that '*I say that due to the withdrawal of services that has been undertaken by the majority of solicitors in Dublin I did not represent [Mr. Ennis] on this occasion [in the District Court] and I say that he is a gentleman I have represented on occasions previously as his solicitor.*'

with possession of a semi-automatic pistol, which his counsel acknowledged was a serious offence.

9. The solicitor chose not to represent Mr. Ennis for financial reasons (and that is the solicitor's prerogative). This is because the solicitor has stated that he was not happy with the manner of payment under the new criminal legal aid scheme to represent Mr. Ennis in the District Court.³
10. In light of the detail which the solicitor provided in his affidavit, regarding the District Court bail application, which affidavit is stated to contain facts within his '*own knowledge*', it appears (but the solicitor does not confirm in that affidavit) that he was in the District Court at the hearing when Mr. Ennis was unrepresented.
11. In any event, it seems clear that as soon as Mr. Ennis was committed to prison, his solicitor *chose to act for him* again. This is because the following day, 4 August 2026, that solicitor made this application before this Court for an enquiry under Article 40.4.2.
12. It is important to point out that there is no criticism of the solicitor for declining to act for an accused in the District Court bail hearing, because of the dispute over fees, nor is there any criticism of the solicitor then agreeing to act for the same accused in the habeas corpus application in the High Court (rather than acting for the accused in the appeal of the bail hearing, which he also could have done). This is the solicitor's prerogative.
13. Since the solicitor refused to act in the District Court bail application because the financial terms were not satisfactory (and also decided not to act for Mr. Ennis in the appeal of the bail application), but he was willing to act in the High Court habeas corpus application, it seems clear that the fees for the habeas corpus application in the High Court were sufficient for him to act. In this regard, this Court has previously noted⁴ that while costs in the District

³ The solicitor gave sworn evidence that '*with the new Legal Aid Scheme there was no guaranteed right to be paid and, for that reason, I and my firm, were not taking on new cases under the new scheme.*'

⁴ *Putniene v McDonald and Others* [2025] IEHC 682, para. 12.

Court might, in very general terms, be hundreds of euros for a hearing, High Court costs for a similar length hearing can be thousands of euros. From a financial perspective therefore, there should be no surprise, and no criticism, that a solicitor is *willing* to act in the High Court, to remedy something that arose from the fact that he was *not willing* to act in the District Court. While there can be no criticism of the solicitor, it is a factor which this Court *can* take into account in determining whether Article 40 is the appropriate remedy, for the alleged unlawful detention, rather than some other remedy, such as the appeal of the bail refusal.

14. Indeed, it is ironic that, while the ‘*withdrawal of services*’ (to quote the solicitor’s affidavit) in other industries might lead to a loss of income for those persons withdrawing services, it seems in this dispute, for some solicitors this may not be the case. This is because by refusing to act for an accused in the District Court (for which a solicitor might have been paid *hundreds of euros*), and instead making an Article 40 application in the High Court (based on that refusal to act) the solicitor and barristers are likely to be paid *thousands of euro* (if the Article 40 application is successful). The party paying these increased fees is the taxpayer, since invariably the costs in Article 40 applications are paid by the State. While this Court has previously stated that it should have regard to the interests of the taxpayer,⁵ as no other party in court is doing so, it is important to point out that the additional sums paid for Article 40 applications is *not* a factor in this Court’s decision.
15. In light of the foregoing, it is perhaps no surprise that there has been a huge volume of applications by solicitors under Article 40 (rather than those solicitors appealing a bail refusal). The real-life consequences are that approximately twenty Article 40 applications were made before this Court on 4 August, when it is sitting to deal with emergency

⁵ *In the Matter of Treasury Holdings (In Liquidation) and in the Matter of the Companies Acts 1963-2012* [2022] IEHC 643, paras. 29-37.

applications during the vacation. However, it is equally important to emphasise that it is not being suggested that the refusal to act for a client in the District Court, was done by the solicitor in order to get paid more for acting for that same client in the High Court. This is simply a natural consequence of the solicitor's refusal to act, because of a *bona fide* dispute which is affecting the District Court, his decision not to appeal the bail refusal, but instead to make a habeas corpus application, combined with the different rates of pay for all these matters.

16. All of this means that Mr. Ennis, like a lot of people seeking bail during the current dispute, could not get a solicitor to act for him in the District Court bail application. However, it is not surprising that he had no problem getting a solicitor to act for him in the High Court habeas corpus application.
17. This background is relevant because the whole basis of this habeas corpus application under Article 40 in the High Court is that the accused could not get a solicitor to act for him at the bail hearing. Of course, there would be no habeas corpus application, if Mr. Ennis' solicitor, who acted for him in the habeas corpus application in the High Court, had acted for him in the bail application in the District Court (or had acted for him in appealing the bail refusal).
18. In this regard, in this habeas corpus application, the solicitor alleges that there has been a breach of Article 40.4.1 of the Constitution, which states that '*No citizen shall be deprived of his personal liberty save in accordance with law*' and so the solicitor claims that Mr. Ennis, who is charged with a serious offence, should be immediately released after an enquiry is held. In legal terms, the solicitor's application that Mr. Ennis should be released under Article 40 is based on the argument that, as Mr. Ennis was not legally represented in the District Court at his bail hearing, he was not afforded fair procedures, and so his current detention is unlawful. Of course, the reality is that Mr. Ennis' solicitor is saying, in the

High Court, that Mr. Ennis has been unlawfully detained because that same solicitor refused to act for him in the District Court.

19. In these circumstances, this Court has to decide whether to open an enquiry, which will be held at some future date, as to whether Mr. Ennis has been unlawfully detained.
20. In making this decision, what is relevant for this Court is not the fact that a solicitor *chose not to act* for Mr. Ennis on Monday in the District Court and then *chose to act* for him on Tuesday in the High Court. After all this is the solicitor's prerogative and there can be no criticism of a solicitor choosing to act in one instance, but not in another instance, because it is more lucrative.

DECISION

21. What this Court can take into account, however, in deciding whether, or not, to order an enquiry, is the fact that *the solicitor's refusal* to act for Mr. Ennis on Monday is the *very reason* why Mr. Ennis was not represented, and so is *the basis* for that same solicitor's application, on Tuesday, to release Mr. Ennis from prison (because his detention was not in accordance with the law, as he was not represented).
22. Is this the type of situation which Article 40 was intended to cover?
23. This Court thinks not. This is because this Court cannot ignore how this alleged unlawful detention came about,⁶ when it comes to considering whether an enquiry should be ordered. (Indeed, how the alleged unlawful detention came about would also be relevant, in this Court's view, as to whether to order the release of a prisoner, *if* an enquiry was to be ordered).

⁶ In *McCormack v Governor* [2026] IEHC 554 at para 4.7, reference was made by Gearty J. to the fact the 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'. This Court agrees with that view. However, Gearty J. does not appear to have been asked to consider the point which is now under consideration, whether Article 40 is the correct procedure for a situation where the alleged unlawful detention arises as a result of a solicitor picking and choosing when to act for an accused.

24. If this Court were to simply concentrate on the fact that Mr. Ennis had a bail hearing without legal representation (and ignore how this came about) then Mr. Ennis (who is charged with the very serious offences of possession of a semi-automatic pistol) might be entitled to an enquiry, and possibly to his automatic and immediate release under Art 40.4.2, after that enquiry – on the grounds that he was not legally represented and so the bail hearing was fundamentally unfair.
25. It is difficult to see how it is just, for a solicitor to be able to obtain the *immediate release* of a person, who has allegedly committed a serious offence, by the solicitor refusing to act for him in the District Court, and then the following day acting for him in the High Court, or indeed how it is just for a solicitor to provide his client, by refusing to act, with a basis for that client being immediately released from custody (irrespective of the seriousness of the offence).
26. Thus, the reason why this Court will not order an enquiry, which could lead to Mr. Ennis' release under Article 40, is because this Court does not believe that this alleged unlawful detention, which comes about as a result of *a solicitor picking and choosing when to act for the accused for financial reasons*, is the type of unlawful detention which Article 40 is designed to address.
27. As observed by Denham C.J. in *Ryan v Governor of Midlands Prison* [2014] IESC 54 at para 23, Article 40 is designed to protect citizens from
- 'arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes'*
28. In this Court's view, the idea that a person who is alleged to have possessed a semi-automatic pistol should be entitled to an enquiry (and then, after that enquiry, a likely immediate release under Article 40), simply because his solicitor *chose not to act* for him

on Monday (because he was only getting paid hundreds of euros), but *chose to act* for him on Tuesday (because he was getting paid thousands of euros) is very far-removed from internment without trial or other acts of dictatorial regimes, which the Supreme Court stated in *Ryan* was the purpose of Article 40.

29. Indeed, Mr. Ennis' detention could be described as antithesis of an '*arbitrary detention*', which the Supreme Court had in mind. This is because, rather than there being anything *arbitrary* about how this alleged unlawful detention came about, it seems to this Court that this alleged unlawful detention arose from the *deliberate choice* of Mr. Ennis' solicitor not to act for him one day, but to act for him the following day, as the High Court rate of pay was likely to be many multiples of the District Court rate of pay.

30. This is the solicitor's prerogative. However, an alleged unlawful detention that came about because of a solicitor's financial choice, is not a basis for ordering an enquiry under Article 40, in this Court's view. The remedy which Mr. Ennis has, in this Court's view, is not under Article 40, but it is to appeal the refusal of his bail, and this Court understands that such bail appeals/re-hearings are available practically every day during the vacation.

31. In *Roche (Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53 at para. 25, in relation to a refusal/revocation of bail (which was before him as a habeas corpus application under Article 40.4.2). Charleton J. noted that this was '*not a matter for remedy under Article 40.4.2 but appropriately is a matter for recourse to the bail list in the High Court*'. It is the same in this case. Mr Ellis' complaint about the bail hearing is a matter for the bail list in the High Court.

32. This is because, in this Court's opinion, Article 40 was *not* designed for a situation where a solicitor can *choose* to refuse to act for an accused, which choice then *causes the alleged unlawful detention*, and then the same solicitor can then *choose* to act for the accused in the High Court the following day, to challenge that alleged unlawful detention. The remedy of

habeas corpus, as the great bulwark of personal liberty, should not be used in this manner, in this Court's view.

CONCLUSION

33. It is important to emphasise once again that there is no criticism of the solicitor choosing to act in whichever cases he wishes, and like any professional choosing more lucrative areas, if he wishes. However, it is a separate matter entirely, when it comes to decide whether this is the type of case for which Article 40 was intended. In this Court's view, it can take account of the fact that the alleged unlawful detention came about because of a solicitor picking and choosing when to act, because of a dispute with the Department of Justice regarding fees. In this case, the remedy which Mr. Ennis has, is not Article 40, the great bulwark of personal liberty, but rather an appeal of his bail refusal.