

THE HIGH COURT

IN THE MATTER OF APPLICATIONS UNDER ARTICLE 40.4.2 OF THE
CONSTITUTION

BETWEEN

AARON KIELY

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 6th day of August, 2026

1. This is a case in which the same counsel, who acted in *Ennis v Governor of Cloverhill Prison* [2026] IEHC 575, acted for the applicant (“**Mr. Kiely**”).

2. While the facts of this case are not identical to those in *Ennis*, they are similar. Thus, it is not proposed to repeat all the reasoning as set down in *Ennis*, which should be read in conjunction with this case, as much of the reasoning therein applies equally to this case.
3. Mr. Kiely, who was charged with theft offences, was not legally represented when he was granted bail on the condition that he provide an address acceptable to An Garda Síochána. As he did not satisfy this condition, he was remanded in custody. He claims that his detention is unlawful, as he was not legally represented at his bail hearing.
4. It is not clear whether the solicitor applying for his release now under Article 40 chose not to act for Mr. Kiely in the District Court, because of the current dispute, or whether he is a new solicitor with no previous involvement with Mr. Kiely.
5. It is true that *Ennis* involved the same solicitor refusing to act in the District Court bail application, and then acting in the High Court habeas corpus application. However, it seems to this Court that it is not significant whether or not the solicitor making the application for habeas corpus ever previously acted for the accused or if he refused to act for the accused in the District Court.
6. For this reason, this Court will assume that Mr. Kiely's current solicitor did not refuse to act in the District Court, and so acted for the first time in the High Court habeas corpus application.

Preliminary matters

7. While not determinative of this Court's decision, in passing it is to be noted that Charleton J. in the Supreme Court case of *Roche (also known as Dumbrell) v The Governor of Cloverhill Prison* [2014] IESC 53, at para 25, held that in relation to a challenge, by way of Article 40, to a bail revocation, that the appropriate remedy is not Article 40, but rather an appeal/rehearing of the bail application in the High Court.

8. In that case, Mr. Dumbrell was seeking to be released under Article 40, and Charleton J. noted that:

‘[Dumbrell] then had an appropriate remedy. 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 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.’ (Emphasis added)

9. This case is referred to by Gearty J. in *McCormack & Ors v The Governor of Mountjoy Women’s Prison & Ors* [2026] IEHC 554. If this Court had to rely on *Dumbrell* for its decision, it would rely exclusively on *Dumbrell*, on the basis that it is a more recent Supreme Court decision on the issue, than the Supreme Court decision in *McDonagh v The Governor of Cloverhill Prison* [2005] 1 I.R. 394, [2005] IESC 4. Furthermore, this year the Supreme Court in *A.B. v. Chief International Protection Officer* [2026] IESC 23 cited with approval *Dumbrell*.
10. In this regard, there is some slight difference in emphasis, between this Court and Gearty J., regarding the reliance that might be placed on *Dumbrell*, since Gearty J. places reliance on *Dumbrell* and the earlier decision of *McDonagh*, while this Court would rely exclusively on *Dumbrell*, as the basis of its decision (and it is clear therefrom that it is only in truly exceptional cases that Article 40 would be the appropriate remedy to an alleged defect at a bail hearing.)

DECISION

11. The reason why this Court will not order an enquiry¹ is because this Court does not believe that this alleged unlawful detention, which comes about as a result of *solicitors choosing, for financial reasons, when to act for an accused* is the type of unlawful detention which Article 40 is designed to address.
12. Article 40 was *not* designed for a situation where solicitors *choose* to refuse to act for an accused, which choice then *causes the alleged unlawful detention*, and then solicitors *choose* to act for the accused in the High Court, 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.
13. 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'
14. In this Court's view, the idea that a person should be entitled to an enquiry (and then, after that enquiry, a likely immediate release under Article 40), simply because solicitors chose not to act for him one day (because they were only getting paid hundreds of euros), but chose to act for him the next day (because they are 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.

¹ 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 solicitors choosing not to act for an accused in the District Court and then choosing to act for an accused in the High Court.

15. Indeed, Mr. Kiely's detention could be described as the 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 solicitors not to act for him in the District Court, but to act for him in the High Court, as the High Court rate of pay was likely to be many multiples of the District Court rate of pay.
16. To put it another way, this Court does not regard the *unavailability* of solicitors in District Court bail hearings (for financial reasons), as a result of the current dispute over fees, but their *availability* for High Court habeas corpus applications (for financial reasons) as amounting to arbitrary detention or a '*default of fundamental requirements*' (to use the expression used in *State (McDonagh) v Frawley* [1978] I.R. 131) such as to order an enquiry under Article 40.
17. It is the solicitors' prerogative to act or not act because of a dispute over pay, and they cannot be criticised for doing so. However, an alleged unlawful detention that came about because of a solicitors financial choices, is not a basis for ordering an enquiry under Article 40, in this Court's view. The remedy which Mr. Kiely 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.
18. This does not mean that Mr. Kiely is without a remedy. His solicitor can appeal/have a rehearing of the bail application in the High Court. To use the words used by Charleton J., Mr. Kiely's 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.*'