

THE HIGH COURT

[2026] IEHC 588

Record No. H.SSP.2026.0000009

Record No. H.SSP.2026.00000010

**IN RE A PRISONER'S APPLICATION FOR AN
INQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION**

DAVID SMYTH

Applicant

-and-

GOVERNOR OF MOUNTJOY PRISON

Respondent

RULING of Ms. Justice Stack delivered 14 August, 2026.

1. This is a Ruling on two applications for an Inquiry pursuant to Article 40.4 of the Constitution, which are contained in letters dated 30 July, 2026, and 6 August, 2026, which have been sent by the applicant, who is a prisoner in Mountjoy Prison, to the President of the High Court. These were received on 10 and 11 August, 2026, respectively. The second letter explicitly states that the application contained in the letter of 30 July, 2026, was being withdrawn and is

replaced by the same application contained in the letter of 6 August, 2026. I have considered both letters which make, in substance, the same complaints in any event.

2. These letters were passed to me for consideration on 11 August, 2026, as I was the Duty Judge for the High Court Vacation sittings on that date. The consideration of these applications could not be given priority over most of the applications heard during those sittings as many of them also comprised applications by remand prisoners for release pursuant to Article 40 and urgent applications pursuant to the inherent jurisdiction of the High Court relating to the detention or proposed detention of persons who lack capacity. Having had an opportunity to consider the contents of this applicant's letters, I am now ruling on the application for the Inquiry pursuant to Article 40.4.2° of the Constitution.

3. There are two fundamental difficulties with the application which mean that it is not necessary to direct an Inquiry into the lawfulness of the applicant's detention pursuant to Article 40.4.2°.

The applicant is a convicted prisoner

4. First, the applicant says he was convicted of two offences contrary to the Child Trafficking and Pornography Act, 1998, by Dublin Circuit Criminal Court in April, 2026. He was sentenced to imprisonment for four and a half years in respect of one count and received a suspended sentence in relation to the other.

5. As a result, the applicant is detained as a convicted prisoner and appears to have been convicted after trial by jury. Only in extremely exceptional circumstances would Article 40 require the release of such a prisoner: see, for example, *State (Royle) v. Kelly* [1974] I.R. 259.

6. The applicant's complaints do not meet that threshold. He complains of the delay in prosecuting him for the charges in respect of which he was convicted, and about the admissibility of certain evidence admitted in the course of his trial. These are matters for appeal to the Court of Appeal, and the applicant has invoked his right to appeal.

7. I have considered the applications made by Mr. Smyth in writing on 30 July, 2026, and 6 August, 2026. While he cites a variety of Irish and European legal provisions, together with case law, ranging from the law relating to unconstitutionally obtained evidence to data protection laws, the fact is that Mr. Smyth has been convicted and it is only in extremely exceptional circumstances that he could obtain his release by way of Article 40 or indeed apply for bail. None of the many legal provisions referred to by him in his letters could justify an application for release: they appear to relate to potential grounds of appeal.

8. The applicant also criticises another judge of this Court for giving inadequate consideration to an application made in July by the applicant's partner. It is evident from those criticisms that my colleague dealt with the matter quickly because the view was taken that the matters complained of were appropriate to an appeal and not an Article 40 Inquiry. This was, in my view, manifestly correct.

The applicant seeks relief other than release

9. The second fundamental problem is that the applicant does not in fact claim release under Article 40. As O'Donnell J. (as he then was) pointed out in *S. McG. v. Child and Family Agency v* [2017] 1 I.R. 1:

“The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release.”

10. The applicant claims various reliefs, none of which amount to the right to immediate release on the basis that he is unlawfully detained.

11. First, he claims reliefs relating to his ability to represent himself for the purposes of his existing appeal to the Court of Appeal against his conviction. One of the matters he seeks is the return of five law books which he purchased with a view to representing himself in his appeal. It appears these are in Cloverhill Prison and there has been a delay in transferring them to him. This should be addressed in accordance with the usual procedures within the prison, but it is not grounds for relief under Article 40.

12. In addition, the applicant claims that the prison should provide him with legal research facilities so that he can prepare his appeal as a litigant in person. The applicant refers to his constitutional right of access to the courts. However, the applicant is entitled to legal representation in order to prosecute his appeal and therefore to be represented by experienced lawyers. He is also entitled to legal aid if he lacks the necessary means to retain his own lawyers. This is an adequate vindication of his right of access to the courts.

13. However, even if I am wrong in that, if the applicant has a complaint on this point, the appropriate procedure is to pursue plenary proceedings seeking a declaration as to his rights. Any cause of action that the applicant may have to the effect that denial of the requisite legal materials (and his own law books) is a breach of his right of access to the courts is therefore not one that can be litigated by way of an application for an Inquiry pursuant to Article 40.4.2°.

14. The other relief sought in this application is bail pending appeal and various humanitarian grounds are given as part of this application. However, an application for an Inquiry pursuant to

Article 40 is concerned solely with the lawfulness of the detention and not with any right to bail. If the applicant wishes to be released on bail pending appeal, he should make an application in the usual way. While the applicant points to the authority to the effect that this Court can award bail pending the determination of an Article 40 Inquiry (referring to *Knowles v. Governor, Limerick Prison* [2016] IEHC 33), such relief is given solely as ancillary relief, pending the ability of the Court to pronounce on the legality of detention. Bail itself cannot be the point of the application.

15. In addition, the applicant seeks a form of temporary release, referring to a 2023 Court of Appeal decision called *Burke v. Governor of Mountjoy Prison*, for which he does not give a reference or citation. This may be intended to be a reference to *Burke v. Wilson's Hospital School* [No. 4] [2026] IEHC 31, where this Court (Cregan J.) released the plaintiff, who had been imprisoned for contempt of court, in order to let him prepare for the hearing of civil proceedings which he had brought. The unique circumstances of that case, and in particular the fact that the plaintiff had not been convicted and imprisoned for a serious criminal offence, means that it does not have any application here. Cregan J. was not dealing with temporary release which may be afforded by the Executive to those serving a sentence of imprisonment.

16. Where a prisoner is serving a sentence having been convicted of a serious criminal offence, the detention of that person is a matter for the Executive and there is no entitlement to temporary release, which is in the nature of a privilege. There is no entitlement to release and therefore the refusal of the privilege of temporary release does not render the detention unlawful so as to justify an Inquiry under Article 40.4.2°.

17. I would add that Mr. Smyth is entitled to legal representation, including a possible entitlement to legal aid for the purposes of his appeal and this is a vindication of his right of access to the courts.

18. Although the applicant is entitled to represent himself, it is very much in his interest that he would now retain another experienced solicitor, in place of the solicitor who represented him at his trial, and with whom he is no longer satisfied.

19. There are no grounds for questioning the lawfulness of the applicant's detention and I therefore refuse the application to direct an Inquiry pursuant to Article 40.4.2°.