

APPROVED

[2026] IEHC 592



THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION

2026 1272 SS

BETWEEN

SEAN O'HANLON

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

NOTICE PARTY

**Approved Note of Ex Tempore Judgment of Mr. Justice Garrett Simons delivered
on 18 August 2026**

1. The reason I am giving judgment now is that I am going to direct the release of Mr O'Hanlon. To be clear, I have not decided the other four cases. I have given

priority in my mind to the three custody cases. I have yet to reach a conclusion in relation to Mr Irwin and Mr Ennis, but I have a very clear view in relation to Mr O'Hanlon and I am going to direct his release. That does not necessarily mean bad news for either Mr Irwin or Mr Ennis. I simply need to think more about those cases. They are closer to the line, as it were, but I am quite satisfied that Mr O'Hanlon's detention is not in accordance with law.

2. I will deliver an omnibus judgment on Wednesday of next week (26 August 2026) on all five applications (including Mr O'Hanlon's). I want time to consider the matter and to set out my reasons in detail. If I reach a conclusion before then that any other person is to be released, the parties will be notified. Realistically, however, Mr Irwin and Mr Ennis will have to wait until next Wednesday. I will give a brief outline of my thinking in relation to Mr O'Hanlon, but the matter will be dealt with in fuller detail in the omnibus judgment. The only reason I am giving an *ex tempore* judgment now is that I am directing his release and I do not want him to wait unnecessarily.
3. It may be useful to set the case in context. There has been much debate as to which of the High Court judgments should apply: the judgments of Twomey J. in *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 575 and *Kiely v. Governor of Cloverhill Prison* [2026] IEHC 576, or the judgment of Gearty J. in *McCormack and others v. Governor of Mountjoy Women's Prison* [2026] IEHC 554. With all due respect to both of my colleagues, in one sense that is a side issue because there is an extensive body of Supreme Court authority. I am bound to follow the Supreme Court authority. To a large extent, there appears to be agreement between the parties as to what that authority says,

subject to the relevance and effect of *A.B. v. Chief International Protection Officer* [2026] IESC 23.

4. The Supreme Court authority is to the effect that, in assessing whether a person is lawfully detained for the purposes of Article 40.4.2°, one does not simply look at the District Court bail hearing or the bail hearing before the court of trial. One must also recognise the existence of the High Court's full and original jurisdiction in bail matters. That jurisdiction is exercised *de novo* and is in no sense a form of appeal from the District Court or from any other court which may previously have dealt with the question of bail.
5. There has been some confusion in the use of the phrase "*alternative remedy*", and I want to be clear that this is not how I view the matter. The High Court Bail List is not an alternative remedy in the sense in which that phrase has a particular meaning in judicial review. Judicial review is a quintessentially discretionary remedy. For that reason, it makes sense to talk about refusing relief by reference to an alternative remedy. The High Court can do that in the exercise of its discretion. That is what *A.B.* and *Amariei* [2026] IESC 22 confirm. The position is different under Article 40.4.2°. There is no discretion to refuse release if the court is not satisfied that the detention is in accordance with law.
6. When the Supreme Court refuses relief under Article 40.4.2° by reference to the High Court Bail List, it is not saying that the Bail List is an alternative remedy which allows the court to exercise a discretion to deny relief. What it is saying is subtly different. The assessment of whether the detention is unlawful requires one to consider the decision-making structures and the court system as a whole. One needs to look at the architecture. In deciding whether the detention is unlawful, regard must be had to the fact that the High Court has full and original

jurisdiction. The availability of that jurisdiction helps to explain why an error of fact, law or procedure made within jurisdiction does not ordinarily render the resulting detention unlawful. In most cases, the High Court's full and original jurisdiction will be sufficient to allow the question of bail to be determined fully and afresh notwithstanding any defects at the stage of the District Court or the Circuit Court. The case law is all at one on that. Equally importantly, however, the case law emphasises that there will be exceptional cases. Where a case falls within that exceptional category, Article 40.4.2° applies. The real issue in these cases is which side of the line each case falls on.

7. Before looking briefly at Mr O'Hanlon's case, it is appropriate to say something about the relevance of *A.B.*
8. *A.B.* is a significant judgment at a number of levels. It confirms the long-standing approach apparent from at least as early as *Roche (otherwise Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53 and *Ryan v. Governor of Midlands Prison* [2014] IESC 54 in relation to the division between errors which are amenable to Article 40.4.2° and errors which are not. It reinforces that approach. Equally, it reiterates or restates the test to be met. That is significant. It is correct to say that the test is stated in the context of judicial review, but it is derived expressly from the case law under Article 40.4.2°.
9. Donnelly J., writing for the Supreme Court, stated as follows at paragraph 92:

“This perspective brings coherence to the test of when a remedy is adequate or when the exigencies of justice will require judicial review. An appeal is a full one when it exists for the very purpose of ensuring that mishaps or illegalities whether they be of procedure or of fact/law can be rectified. Where a breach of fair procedures is claimed in respect of a decision given at first instance for which there is an appeal capable of remedying that breach by providing the fairness missing at the earlier stage, it is only when the breach is such that there is a default of fundamental requirements, or some

kind of fundamental denial of justice or a fundamental flaw in the decision-making process, that the appeal does not provide an adequate remedy. Those phrases are chosen deliberately. They do not reflect ‘degrees of unfairness’; they indicate objectively identifiable situations where the initial ‘hearing’ may not have amounted to a hearing at all, or where a fundamental requirement has been ignored. A complete denial of rights will amount to a fundamental denial of justice such that rule of law considerations will require, exceptional to the general rule, that judicial review will be available despite the existence of a statutory appeal.”

10. Although those comments were made in the specific context of judicial review proceedings, they derive ultimately from the case law under Article 40.4.2°. That is stated at paragraph 83 of the judgment, where Donnelly J., having considered various judgments, including *Roche (Dumbrell)*, stated as follows:

“Although these judgments are directed to the specific article dealing with habeas corpus in the Constitution, the general principles have resonance in judicial review. Rule of law considerations are also at issue in the supervisory jurisdiction of administrative bodies and courts of limited jurisdiction. If the rule of law aspect in respect of liberty of the person can properly be addressed within the appellate structures established by law, it is difficult to see a compelling reason as to why rule of law concerns cannot be addressed within the appellate structure established by law in respect of decisions not affecting liberty, as in this case.”

11. *A.B.* begins by examining the case law under Article 40.4.2°. It recognises the distinction as to what is “*in accordance with law*”, which depends upon the appellate structures and the court machinery that are available, and then extrapolates those principles and applies them to judicial review. The observations concerning a fundamental flaw in the first passage quoted apply equally to Article 40.4.2°. That is significant because the Supreme Court reiterates that, although there is an exceptional jurisdiction, it arises only where there is a fundamental flaw. It does not involve degrees of unfairness. I think that represents, at the very least, a clarification of the previous case law.

12. That is significant because one of the submissions made to me is that I should follow, or regard myself as bound by, the judgment of my colleague Gearty J. in *McCormack*. With respect, I do not think that this would be a proper application of the principle of horizontal precedent. It is correct to say that a High Court judge should ordinarily follow another High Court judge. A High Court judge is not bound to do so, however, and, as explained in the judgment of Clarke J. in *Re Worldport Ireland Ltd (in liquidation)* [2005] IEHC 189 and in the more recent judgments in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 and *A. v. Minister for Justice and Equality* [2020] IESC 70, a High Court judge is entitled to depart where there are substantial reasons for believing that the earlier judgment was wrong.
13. I consider that such a reason exists in relation to *McCormack*. It seems to me that Gearty J. did not fully appreciate that *A.B.* had reasoned backwards, as it were, from Article 40.4. Gearty J. stated, mistakenly, that there was no reference in *A.B.* to personal liberty or to the case law concerning habeas corpus. It was an entirely understandable mistake: the judgment was produced under high pressure and within a very short period. The existence of that error is, however, sufficient to allow a departure from horizontal *stare decisis*.
14. *McCormack* uses language which indicated that a bail hearing without representation would rarely be a fair one. It seems to me that this approach is not necessarily consistent with *A.B.* The absence of representation may be highly relevant, but it does not of itself establish that a fundamental requirement was ignored or that the proceedings did not amount to a hearing.
15. The judgment in *McCormack* repeatedly asks whether the combined effect of several deficiencies rendered the hearings “*so unfair*”, deficient in “*most of the*

characteristics of a fair hearing”, or “*fundamentally unfair such as to amount to*” detention otherwise than in accordance with law. *A.B.*, by contrast, states expressly that the relevant formulations do not reflect “*degrees of unfairness*”. They identify “*objectively identifiable situations*” in which the initial proceeding may not have amounted to a hearing “*at all*”, or in which “*a fundamental requirement has been ignored*”. The difference is between evaluating the overall degree of unfairness and identifying the absence of an indispensable procedural requirement.

16. That brings me to the facts of the case in which I am directing release. Mr O’Hanlon was accused of a very minor offence, namely the theft of two cans of Coca-Cola valued at €3.60. I have reviewed the transcript. Mr O’Hanlon was not given a hearing. He was not given an opportunity to question the Garda. He was not given a meaningful opportunity to address the substantive points raised in the Garda objection.
17. The District Judge asked Mr O’Hanlon whether he was applying for bail. He answered that he was and then referred to the immediate allegation, saying that it concerned two cans of Coca-Cola, apologising and stating that it would not happen again. That response could not reasonably be understood as an informed answer to the Garda objection as a whole. Mr O’Hanlon was not invited to question the Garda witness, nor was he afforded an intelligible opportunity to address the 46 warrants, the alleged failure to comply with existing conditions or the possibility of conditions capable of meeting the asserted risks. The court then refused bail without inviting any further response from him.
18. It was only after bail had been refused that Mr O’Hanlon was able to say that he had recently obtained an address. That was clearly a matter which was relevant,

or at least potentially relevant, both to the risk of non-attendance and to the possibility of using bail conditions to address that risk. An effective opportunity to be heard must, by definition, precede the decision.

19. Moreover, bail was then revoked in relation to the other charges without hearing from Mr O'Hanlon at all. He had not been given notice that revocation would be sought and was not afforded an opportunity to answer the application before it was determined.
20. Regrettably, I have to say that the events before the District Court in relation to Mr O'Hanlon did not constitute a hearing. His case therefore comes within the exceptional category in which relief is available under Article 40.4.2°. Accordingly, I direct the immediate release of Mr O'Hanlon from prison.
21. I will deliver an omnibus written judgment on Wednesday 26 August 2026. It will be delivered electronically. If I form the view before then that any other person is to be released, I will indicate in advance that because I do not want anyone to spend one night extra in custody. As matters currently stand, however, I cannot form a clear view on the position of Mr Irwin and Mr Ennis and I need time to think about those cases.
22. The costs of Mr O'Hanlon's case are reserved. I will fix a date following delivery of the omnibus judgment to hear submissions on costs.

Appearances

Michael O'Higgins SC and Alexander Langan Mac Donnell for the applicant instructed by Michael Kelleher & Company.

Eoin McCullough SC and Davy Lalor for the respondent and the notice party instructed by the Chief State Solicitor's Office.

Sunniva McDonagh SC and Kieran Kelly for the Director of Public Prosecutions, instructed by the Chief Prosecution Solicitor

APPROVED

18 AUGUST 2026