

APPROVED



THE HIGH COURT

**IN THE MATTER OF APPLICATIONS UNDER ARTICLE 40.4.2 OF THE
CONSTITUTION**

[2026] IEHC 593

RECORD NUMBER H.SS.2026/1250

BETWEEN

MICHAEL SHERLOCK

APPLICANT

AND

**THE GOVERNOR OF CLOVERHILL PRISON AND THE DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENTS

JUDGMENT of Mr. Justice Twomey delivered on the 19th day of August, 2026

INTRODUCTION

1. On Wednesday 5th August 2026, this Court refused to open a *habeas corpus* enquiry into the detention of the applicant (“Mr. Sherlock”) in this case.
2. After this Court's refusal, Counsel for Mr. Sherlock asked for the costs of the unsuccessful application to be reserved.
3. The intention behind the application for costs to be reserved is clearly that the lawyers, who acted in this unsuccessful application, *might* have those costs paid for by the State/taxpayer at some future date (if the applicant was to be successful in a future *habeas corpus* application).
4. For the reasons set out in detail below, this Court does not believe that the costs of this unsuccessful *habeas corpus* application should be reserved. To summarise however:

An urgency created by solicitors, not by the State

5. The first reason costs should not be reserved is because this Court believes that the *habeas corpus* application should not have been made in the first place. This is firstly because this Court believes that the urgent remedy of *habeas corpus* is designed primarily to protect the liberty of citizens from unlawful detention by the State. In this Court's view, it is not designed for an urgency caused by a refusal of some solicitors to act in the District Court, because of a dispute with the Department of Justice over legal aid remuneration (which for short, and not as an accurate description, is called the current “industrial dispute”).
6. In particular, the remedy of *habeas corpus* is not designed for an urgency, which is created by (i) certain solicitors choosing not to act for an accused in the District Court (when an accused is refused bail) and then (ii) when other solicitors agree to act, those solicitors choosing not to appeal the refusal of bail (even though an appeal is the appropriate

remedy¹), and (iii) instead of appealing, those solicitors choose to make a *habeas corpus* application, and so claim, in effect, that it is *urgent* that the accused be *immediately* released from his unlawful detention.

7. Crucially however, the 'urgency' which has arisen (the loss of liberty by an accused) would not have arisen if the solicitors had represented the accused in the District Court. While not a perfect analogy, solicitors *refusing to act* in the District Court is akin to some firemen standing by and *refusing to put out* a few sparks because of a dispute over pay, yet if those sparks catch hold and a house catches fire (which could be said to be akin to the loss of a person's liberty), other firemen demand the highest level of State emergency response, even though there is an alternative and more appropriate solution (an appeal).

An appeal, unlike *habeas corpus*, does not lead to release of persons accused of serious offences

8. The second reason why this Court believes that a *habeas corpus* application was not the appropriate remedy for Mr. Sherlock's alleged unlawful detention (or indeed most alleged unlawful detentions arising from the current industrial dispute), is because the appropriate remedy, for accused persons who were allegedly wrongfully refused bail, is an appeal of the refusal of bail.
9. In particular, this is because if a *habeas corpus* application is successful, in relation to an accused who is refused bail, it leads to the automatic release of that accused, *irrespective of the seriousness of the offences*, with which he has been charged. This is because once their detention is held to be unlawful, there is no basis for their further detention and they must be immediately released. Thus, a person charged with, say, a serious sexual offence

¹ In light of Charleton J.'s judgment in *Roche (Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53 at para 25.

could be automatically set free (because he was unrepresented when he was refused bail), even though, if he had been represented at that bail hearing, it is most unlikely that he would have been granted bail.

10. Contrast this with what happens with the other, and more appropriate remedy, for applicants like Mr. Sherlock, i.e. an appeal of the refusal of bail. Firstly, those persons who should *not* have been refused bail (when unrepresented) will inevitably be granted bail on appeal (and so *justice can be achieved for these accused persons*). Secondly, and crucially, those accused persons, charged with serious offences, who were correctly refused bail (when unrepresented) will *not* be automatically released, as they are likely to be refused bail on appeal (and therefore *justice can be achieved for society*).

11. To put it another way, if, as a matter of principle, a *habeas corpus* application was the appropriate remedy for the issues arising from the current industrial dispute, this would mean that a person charged with a serious offence, who could be a danger to the public, would be entitled to seek his *automatic* release simply because solicitors chose not to act for him because of the current industrial dispute. This is not the purpose of *habeas corpus* applications, in this Court's view and it is why this Court believes, as a matter of principle, that *habeas corpus* is not, save in exceptional cases, the appropriate remedy for persons who were denied bail, when not legally represented.

12. As this Court can see no basis for the solicitors, who are now representing applicants, bringing *habeas corpus* applications (rather than an appeal), save in exceptional circumstances, this is the first reason why this Court believes that the costs of Mr. Sherlock's unsuccessful *habeas corpus* application, before this Court, should not be reserved.

A second *habeas corpus* application is not an appeal

13. A further reason why costs should not be reserved is of more general application, as it relates to the very nature of a *habeas corpus* application, i.e. the fact that each *habeas corpus* application is a discrete application. Thus, even if Mr. Sherlock was to be successful before another judge in the future in having an enquiry opened, and then in being released, that is a completely separate application from this one. It is not an appeal of this Court's decision, and so that judge in the future does not have jurisdiction, in this Court's view, to order the State to pay Mr. Sherlock's lawyers their costs in relation to an earlier application, before this Court, which the later judge did not hear.
14. In making these points regarding the choice of solicitors not to act in the District Court, it is crucial to point out that this Court is not criticising solicitors for *how* they wish to pursue pay grievances. How they do so is their prerogative. Indeed, a different counsel, at another *habeas corpus* application before this Court during the vacation sittings, implied that solicitors are perfectly entitled to pick and choose for whom they act, *unlike* barristers, who, he said, were obliged by their code of conduct to act whenever requested to do so, under the so-called 'cab-rank rule'.² This may well be the case, however it is also important to point out that whether some solicitors choose *not to act* for an accused one day, and other solicitors choose *to act* for that accused the next day, *is not the issue* for this Court. The *issue for this Court is the effect of those choices*, and in particular, whether it is appropriate for solicitors to pursue the 'urgent' remedy of *habeas corpus*, rather than an appeal, when one bears in mind that it was solicitors' choices, and not the State's actions, which led, in the first place, to the current emergency *habeas corpus* applications requiring the urgent release of those allegedly unlawfully detained (like Mr. Sherlock).

² On 4th August 2026, counsel appearing in the matter of *O'Sullivan v Governor of Cork Prison* (record number: 2026 1241 SS) stated that "no solicitor has to take on a new case, not like there is some sort of cab-rank rule that applies to barristers".

BACKGROUND

15. Senior Counsel for Mr. Sherlock claimed that the costs of his unsuccessful application for a *habeas corpus* enquiry should be "reserved". This would mean that if a judge, in the future, were to order a *habeas corpus* enquiry, and Mr. Sherlock were then to be released from prison, with an order for his costs to be paid for by the State in his favour (and that future costs order was to include "reserved" costs), then the costs of this *unsuccessful* application would also be paid for by the State.
16. It is necessary for this Court to outline in this judgment why it does not believe that costs should be reserved. This is because, in the particular circumstances of the hearing on 5th August 2026, this Court did, after some discussion with Counsel, agree to order that the costs be reserved, albeit with a caveat in the wording of the court order stating that this Court did not believe that the costs should be reserved.
17. Those circumstances were firstly that, although this Court disagreed with Counsel, he was adamant that a judge, at a future hearing, could award his client the costs of this unsuccessful *habeas corpus* application, if those costs were reserved now by this Court. Secondly, this was an *ex-parte* application, and so there was no State representative to contradict Counsel's submissions. Thirdly, as this was a vacation sitting, with other urgent applications to be heard, the quickest and most convenient way for this Court to deal with this issue, was to reserve the costs, with a caveat (to the effect that this Court did not believe those costs should be reserved, and if reserved, that it did not believe that they should be awarded to the applicant by a judge at a future hearing).

18. In this judgment this Court now outlines the reason it takes this view. By doing so, it enables Mr. Sherlock, if he so wishes, to appeal to the Court of Appeal or Supreme Court this Court's finding that the costs of an unsuccessful Article 40/*habeas corpus* application should *not* be reserved, or if reserved should not be awarded at a subsequent successful application.

(i) The nature of Article 40 applications arising from the current industrial dispute

19. The first reason why this Court concludes that the costs of the unsuccessful application should not be paid for by the State/taxpayer is that challenges to a refusal of bail such as this one, arising from a refusal of solicitors to act for an accused in the District Court, should not be taken as a *habeas corpus* application under Article 40, save in exceptional cases. In this Court's view, *habeas corpus* is not the appropriate remedy, whether the solicitor, who refused to act in the District Court, is now acting for the accused in the *habeas corpus* application, or if a different solicitor is now acting for the accused in the *habeas corpus* application.

20. This is because the more appropriate remedy is invariably an appeal/ re-hearing of the bail application in the High Court (which, for short, and not as an accurate description, is referred to as an "appeal"). In this regard, at the commencement of the current vacation period, judges of the High Court were informed that High Court bail hearings are available almost every weekday during the vacation, which hearings deal with applications for bail, where the District Court has allegedly wrongfully refused bail, which is the essence of Mr. Sherlock's claim (i.e. that he was unlawfully refused bail in circumstances where he was unrepresented).

21. This Court believes that a *habeas corpus* application is not the appropriate way to challenge a refusal of bail to an unrepresented accused (as a result of the current industrial dispute), save in exceptional cases, for the following reasons:

(a) Article 40 has been described as the stable bulwark of our liberties,³ protecting citizens from oppression by the State, whereby a court orders the State to urgently come to court, because someone is being (allegedly) unlawfully detained by the State.

(b) In Mr. Sherlock's case, and other similar cases arising from the current industrial dispute, it was not State oppression or the direct actions of the State that caused the alleged unlawful detention. It was the refusal of certain solicitors to act in the District Court, which was the direct or proximate cause of the alleged unlawful detention, as it led to Mr. Sherlock (and many others) having a bail hearing without legal representation. When bail was refused, this led to a situation where the accused's solicitor could claim that the accused was being unlawfully detained by the State (as he was imprisoned after a bail hearing without legal representation). Thus, the alleged unlawful detention arose because of the decision of certain solicitors to refuse to represent Mr. Sherlock (and others) at their bail hearing.

(c) Crucially however, when the solicitor, now acting for the accused, sought to remedy the alleged wrongful refusal of bail, he chose not to appeal the bail refusal, even though, on this Court's interpretation of Charleton J. in *Roche (Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53, an appeal is the appropriate way to deal with a wrongful refusal of bail, save in the most exceptional of cases, and so a *habeas corpus* application is generally *not* the appropriate remedy.

(d) Then, instead of appealing, the solicitor brings an application under Article 40 alleging that the State is unlawfully imprisoning a citizen, which is by its nature one of the most *urgent* court

³ William Blackstone, Commentaries on the Laws of England (Vol 1, Ch. 1, Clarendon Press 1765-1769) pg.13.

applications which can be brought, and it requires the immediate attendance in court of State officials to justify the detention.

22. In summary, the alleged unlawful detention and urgent *habeas corpus* application arose in Mr Sherlock's case (and in all the other cases heard by this Court during the vacation), not because of State oppression of a citizen (or similar cause) but because of the choice of solicitors to refuse to act in the District Court followed, crucially, by the choice of solicitors, to *not* appeal a bail refusal, but instead to demand the urgent immediate release of the accused via a *habeas corpus* application.

Not a genuine urgency and there is an alternative remedy

23. Since the rule of law requires court judgments to be accessible to all citizens,⁴ an analogy, and a hypothetical example, may clarify why this Court does not regard the alleged unlawful detentions, arising from the current industrial dispute, as being the type of urgency, for which Article 40 is designed, and why, instead, it considers an appeal to be the appropriate remedy, save in exceptional cases.

Firemen refusing to put out a few sparks and refusing to act until a home catches fire

24. While the analogy is not perfect (and it is not being suggested that firemen would refuse to put out a fire in pursuit of a pay grievance), the current situation is analogous to firemen who, because of a dispute over remuneration with the State, refuse to put out a few sparks on a citizen's property, with a bucket of water. Instead, the firemen choose to stand by and let the fire take hold because of their pay dispute. Then, only when a citizen's house begins to catch fire, do other firemen respond. Clearly the initial refusal of some firemen to intervene when there were a few sparks has created an emergency. However then, the other

⁴ See Bingham, *the Rule of Law* (Penguin, 2010) at page 37, where it was stated that the Rule of Law means that “[t]he law must be accessible and so far as possible, intelligible, clear and predictable.”

firemen, who are prepared to respond, decide not to use fire extinguishers to put out the fire, which would be sufficient. Instead, they escalate the response to the fire to the highest level (say, a type of code red or State emergency), which has the effect, whether intended or not, of highlighting the firemen's grievances.

25. This analogy seeks to highlight that the urgency or emergency around Mr. Sherlock's loss of liberty (and the emergencies arising in many other cases arising from the current industrial dispute) is caused by solicitors refusing to act in the District Court, and was not created by the State. For this reason, the appropriate remedy is, save in exceptional cases, not the urgent remedy of *habeas corpus*. Instead, it is an appeal of the alleged wrongful refusal of bail. It is important to point out that the citizen who has allegedly lost his liberty because of the action of solicitors should not be prejudiced, as he should still regain his liberty, albeit via an appeal, rather than via a *habeas corpus* application.

Habeas corpus could lead to immediate release of accused persons who might be a danger to public

26. A hypothetical example may further clarify why, as a matter of principle, this Court does not believe that *habeas corpus* is the appropriate way to deal with the alleged wrongful refusals of bail, arising from the current industrial dispute, save in exceptional cases.
27. Consider the position of a person who is accused of serious sexual offences or serious assault, for which he would be highly unlikely to be granted bail, and who is unrepresented at his bail hearing, as certain solicitors refuse to act for him. However, after being refused bail, he finds a solicitor, who is now willing to act for him. If, as a matter of principle, a *habeas corpus* application was the appropriate remedy for what occurred in the District Court, then that solicitor would be entitled to seek the accused's immediate release on the basis that he is being unlawfully detained by the State (as his bail hearing was held without legal representation for the accused).

28. All of this means that an accused, who is charged with serious offences, could then be entitled to his immediate release from unlawful detention. Undoubtedly the Gardaí would do their best to try and re-arrest him. However, if they do succeed in re-arresting him, he is likely to be unrepresented at his 'second' District Court bail hearing (assuming the industrial dispute continues). This will mean that he will be entitled to seek his immediate release at his 'second' *habeas corpus* application (and so on, in a never-ending loop).
29. In this Court's view, this example highlights why, in principle, an Article 40 application is not the appropriate remedy for cases where there is a challenge to the lawfulness of a refusal of bail (whether in respect of serious or minor offences), save in exceptional cases.
30. Instead, in general, where an accused person, who was not legally represented in the District Court, now has legal representation, like Mr. Sherlock in this case, that solicitor should represent him at the appeal of the bail application, and not in a *habeas corpus* application.
31. In this way, firstly those who are accused of serious offences, and may be a danger to the public, such as to justify the denial of bail, are *not automatically granted their liberty* by means of a *habeas corpus* application. Secondly, if appropriate, they are refused bail on appeal and are retained in custody. Thirdly, those accused persons who should have been granted bail (when not legally represented) are likely to be granted bail on appeal.
32. This Court does not believe that Article 40 was ever intended to be, or should be, used as a means for persons accused of any offence to be entitled to seek their liberty, simply because some solicitors choose not to represent them one day at the bail hearing and other solicitors choose to represent them at a *habeas corpus* application (rather than at an appeal of the bail hearing). The more appropriate remedy is an appeal of the refusal of bail, save in exceptional cases.

33. For all the foregoing reasons, this Court concludes that Mr. Sherlock should not have brought this *habeas corpus* application and for this reason, there is no basis for the costs of the unsuccessful application being reserved.

(ii) The nature of Article 40 applications generally

34. The other reason why this Court thinks that the costs of an unsuccessful *habeas corpus* application should not be reserved is because of the nature of *habeas corpus* applications.

35. In this regard, counsel for Mr. Sherlock seemed to take the view that successive *habeas corpus* applications work in the same way as appeals of a decision of a High Court judge, i.e. that just as an appellate court could award, not just the costs of the appeal to the winning appellant, but also the costs of the trial, which he had lost, so too a second judge, who opens a *habeas corpus* enquiry, can award the applicant the costs of a previous unsuccessful application. However, this Court disagrees.

36. It does so because it is clear that if one High Court judge refuses to open an enquiry in a *habeas corpus* application, it is possible for the unsuccessful applicant to go to another High Court judge. Indeed, it is not unheard of, that a second High Court judge agrees to open an enquiry for an applicant, after a first High Court judge refused the same applicant the opening of an enquiry.⁵ However, this is not an appeal. This second application is a new application before a second judge, it is not an appeal of the first application, or indeed a renewal of the first application before a second judge. Accordingly, if the second judge opens an enquiry, it does not mean that the first judge was in error, such that the costs of the first application should be awarded, by the second judge, in favour of the applicant. It simply means the applicant was successful before one judge and not before another.

⁵ In *Cureja v Governor of Wheatfield Prison* 2026 1221 SS, this Court heard an adjournment application on 4th August 2026, where a *habeas corpus* application was refused by Hunt J., but the applicant was successful in having an enquiry opened before Phelan J. (Sara).

37. Thus, successive *habeas corpus* applications by the one applicant (and indeed different applications by different applicants which arise from similar facts⁶) must each be considered on their own facts as then presented to that judge, and on the basis of arguments then raised/considered by that judge. As each application is distinct, there can be no basis for costs in relation to one unsuccessful application before one judge, being reserved, so as to be potentially allocated (to be paid for by the State) in a later successful application before another judge.

CONCLUSION

38. For the foregoing reasons, this Court concludes that even if Mr. Sherlock were to be successful, before another judge, in having an enquiry into his detention ordered, and then being released, that judge does not have the power to award Mr. Sherlock the costs of this first, and unsuccessful, application to have an enquiry ordered.

Michael Twomey

19th August 2026

⁶ Similarly, where there are different applicants, who rely on the same alleged illegality, before different judges, those judges may reach different conclusions because different arguments are considered in the two cases, as happened in *Ennis v Governor of Cloverhill Prison* [2026] IEHC 575, where this Court considered an argument, which did not appear to have been raised before Gearty J. in *McCormack v Governor of Mountjoy Women's Prison* [2026] IEHC 574 i.e. that the refusal of solicitors to act in the District Court, because of a dispute over remuneration, was not the type of urgent, illegal and arbitrary detention for which Article 40 was designed.