

APPROVED

[2026] IEHC 601



THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION

2026 1277 SS

2026 1287 SS

2026 1315 SS

BETWEEN

DAVID NEVIN
JONATHAN KELLY
MARTIN MCDONAGH

APPLICANTS

AND

GOVERNOR OF CASTLEREA PRISON
GOVERNOR OF LIMERICK PRISON
GOVERNOR OF CLOVERHILL PRISON
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 August 2026

INTRODUCTION

1. This judgment is delivered in respect of three inquiries under Article 40.4.2° of the Constitution. The inquiries were heard before me on 19 August 2026.
2. The inquiries arise against a backdrop where there is a dispute between the Minister and a large number of solicitors about the rates of remuneration payable in relation to the defence of criminal proceedings before the District Court.
3. One unfortunate consequence of this dispute is that, in many District Court cases, there are no readily identifiable solicitors who are willing to accept assignments under the fee arrangements introduced by the Criminal Justice (Legal Aid) (Amendment) Regulations 2026 (S.I. No. 303/2026). This has brought about a situation whereby individuals accused of criminal offences are now regularly appearing at bail hearings unrepresented.
4. For the reasons indicated in an *ex tempore* judgment, I directed the immediate release of one of the applicants, Mr McDonagh, on 19 August 2026. An approved note of that judgment has since been published: *McDonagh v. Governor of Cloverhill Prison* [2026] IEHC 595. I explained at the time that I would deliver an omnibus judgment addressing the position of all three applicants.

TITLE OF THE PROCEEDINGS

5. In each case, the proceedings were commenced with the relevant prison governor named as sole respondent. The Director of Public Prosecutions nevertheless participated in the inquiries as a respondent and was separately represented throughout the hearing. It does not appear that any formal order was made joining the Director to the proceedings. To ensure that the title of the

proceedings reflects the role actually played by the Director, and to preserve her right of appeal, I will make an order formally joining the Director as a respondent and amending the title to the proceedings accordingly. The amended title is reflected in this judgment.

6. I dispense with any requirement to re-serve the proceedings by reason of the amendment of the title. The Director of Public Prosecutions is to be joined as a respondent pursuant to the court's jurisdiction under Article 40.4.2° of the Constitution, and not pursuant to Order 15 of the Rules of the Superior Courts. The procedure under Article 40.4.2° is self-contained and is not governed by the Rules of the Superior Courts: *State (Ahearne) v. Cotter* [1982] I.R. 188 (at p. 200). The court may regulate the inquiry flexibly, consistently with the constitutional requirement that it be conducted forthwith.
7. Ordinarily, the person detaining the applicant is the appropriate respondent to an inquiry under Article 40.4.2°. It is for the detainer to certify the legality of the detention. The present inquiries are unusual, however, in that the applicants invite the High Court to “*look through*” the remand orders and to assess the conduct of contested bail hearings before the District Court. The objections to bail were advanced on behalf of the Director through members of An Garda Síochána. The resolution of the Article 40.4.2° inquiries requires the High Court to ascertain the grounds upon which bail had been opposed, the evidence adduced in support of those grounds, the opportunities afforded to each applicant to test that evidence and the reasons for which bail had ultimately been refused. The Director of Public Prosecutions has a direct interest in those issues and is the party best placed to address them.

8. The Director's participation also assisted in the expeditious determination of the inquiries. It enabled the prosecution position on the individual bail hearings to be addressed directly, without requiring the Governors or the Minister to speak to matters properly falling within the remit of the prosecution.
9. The joinder is consistent with the course adopted in *McCormack v. Governor of Mountjoy Women's Prison* [2026] IEHC 554. In those proceedings, the Director of Public Prosecutions was named as a respondent alongside the respective prison governors, while the Minister was separately named as notice party. The Director participated in the substantive hearing as a respondent. The same course is appropriate in the present proceedings.

APPLICABLE LEGAL PRINCIPLES

10. An accused person who has been refused bail by the District Court and remanded in custody is entitled to apply to the High Court for bail. This will be the proper procedure to pursue in most cases. The High Court has a full and original jurisdiction in bail matters. The application is heard *de novo* and determined afresh. The High Court does not sit on appeal from the District Court, and it is not necessary for the accused person to establish that the decision of the District Court was erroneous. The High Court may receive evidence, consider proposed sureties, and assess whether appropriate conditions can address the risks underlying the objections to bail. Where the accused person lacks the financial means to obtain legal representation, legal assistance may be available under the Legal Aid – Custody Issues Scheme administered by the Legal Aid Board.
11. It is only in rare and exceptional cases that an accused person who has been remanded in custody pursuant to a District Court order will be entitled to an

order for immediate release under Article 40.4.2° of the Constitution. This is because detention pursuant to a court order which is valid on its face and made by a court of competent jurisdiction will normally be regarded as being detention in accordance with law. An immediate release pursuant to Article 40.4.2° is only available where there has been a default of fundamental requirements, or some kind of fundamental denial of justice or a fundamental flaw in the decision-making process.

12. In the context of a bail hearing, the defect must involve the denial of a fundamental requirement, such that the proceedings could not properly be regarded as a bail hearing at all.
13. In *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599, I set out my understanding of the division between those cases which come within Article 40.4.2° and those which do not. I turn now to apply those principles to the circumstances of the three cases before me.

DAVID NEVIN

Overview

14. Mr Nevin appeared before the District Court (Judge Tom MacSharry) on 17 July 2026 in relation to charges of affray, assault causing harm and theft. The prosecution opposed bail under both the *O'Callaghan* principles and section 2 of the Bail Act 1997. The prosecution also sought the revocation of Mr Nevin's existing bail in relation to other charges.
15. Mr Nevin was already subject to a number of bail conditions. One of those conditions required him to stay off Main Street, Longford, save for the purpose of collecting social welfare on a Wednesday. He was also prohibited from having

direct or indirect contact with a named co-accused. The prosecution alleged that he had breached both conditions: first, by being on Main Street at approximately 8.30 p.m. on a Wednesday; and, secondly, by being in the company of the named co-accused. Mr Nevin's position was that he had understood the exception concerning Wednesday as permitting him to be on Main Street throughout that day.

Opportunity to seek legal representation

16. Mr Nevin's usual solicitor was present in court when the case was called. The solicitor informed the District Court that, regrettably, he was not in a position to act and then left the courtroom. The judge acknowledged the position. Mr Nevin did not request an adjournment to seek to obtain alternative legal representation.
17. The absence of legal representation did not, of itself, establish the denial of a fundamental requirement. The question is whether Mr Nevin was afforded a meaningful opportunity to understand, test and answer the objections to bail and revocation notwithstanding that he was unrepresented.

Notice of the objection and opportunity to prepare

18. The District Court judge asked Mr Nevin whether he had seen the bail pack. Mr Nevin confirmed that he had. When asked whether he had read and understood it, his answer appears to have been that he understood most of it. The judge offered him a pen and indicated a willingness to go through the document with him. Mr Nevin replied that this was not necessary.
19. The judge explained that the prosecution was objecting to bail under section 2 of the Bail Act 1997 and the *O'Callaghan* principles. The Garda witness was directed to speak slowly. Mr Nevin was told that, if anything said by the Garda was not understood or required explanation, he should raise his hand.

20. The transcript does not establish that Mr Nevin was afforded a distinct period in which to study the bail pack. It does establish, however, that he had seen the document, that the grounds of objection were identified, and that the judge offered to go through the document with him. Mr Nevin declined that assistance. He was also invited to seek clarification as the Garda evidence was presented.

Opportunity to cross-examine

21. The Garda witness was sworn in and gave his evidence. Before the evidence commenced, the District Court judge explained that Mr Nevin could give evidence and could ask questions. The judge also told him to indicate if he did not understand anything said by the Garda witness.
22. The judge did not return expressly to the question of cross-examination after the Garda had completed his evidence. Instead, the judge asked Mr Nevin whether there was anything he wished to say. Mr Nevin then began to address the bail objection directly.
23. It would have been better practice to ask Mr Nevin expressly, at that stage, whether he wished to put any questions to the Garda. The issue for the purposes of Article 40.4.2°, however, is whether the opportunity to question the witness was withheld. Mr Nevin had been told before the Garda evidence commenced that he could ask questions. He had also been invited to seek clarification during the presentation of the objection and was afforded an opportunity to respond when the evidence concluded. In those circumstances, I am not satisfied that the failure to renew the invitation amounted to the effective denial of an opportunity to cross-examine.

Opportunity to answer the objection

24. The Garda objection was set out in considerable detail. It addressed the fresh charges, the asserted strength of the evidence, Mr Nevin's previous convictions, the number of offences committed while on bail, the existing bail conditions and the alleged breaches of those conditions.
25. When the Garda evidence had concluded, the judge asked Mr Nevin whether there was anything he wished to say. Mr Nevin asked whether he was permitted to speak. He then addressed the bail condition requiring him to stay off Main Street, explaining that he had understood the condition as permitting him to be on Main Street on a Wednesday. He also stated that he had remained alcohol-free for a number of months but had suffered a relapse on the day in question. The judge cautioned Mr Nevin against saying too much about the alleged offence and redirected him to the reasons for the bail objection. Mr Nevin then said that he had been with the wrong people in the wrong place at the wrong time. The judge again cautioned him against saying anything further about the events in question.
26. Mr Nevin was afforded an opportunity to answer the objection before the ruling. His response addressed the alleged breach of the Main Street condition and his personal circumstances. He did not address separately the allegation that he had breached a condition prohibiting contact with a named co-accused, or the wider objection based upon the alleged commission of further serious offences while already on bail. The fact that a solicitor might have framed a more comprehensive response does not establish that the opportunity itself was absent.

Evidence and the privilege against self-incrimination

27. Before the Garda evidence commenced, the District Court judge explained that Mr Nevin could give evidence but that, if he elected to give sworn evidence, he could be cross-examined by the prosecution.
28. When Mr Nevin began to discuss the alleged incident, the judge cautioned him against saying too much and redirected him to the reasons for the bail objection. When Mr Nevin then said that he had been “*with the wrong people in the wrong place at the wrong time*”, the judge again cautioned him against saying anything further about the events in question.
29. The distinction between evidence and submissions was not explained in detail. Nevertheless, the judge’s interventions were directed to protecting Mr Nevin against self-incrimination and did not inhibit him from addressing matters relevant to bail. He was able to explain his understanding of the Main Street bail condition and to refer to his abstinence from alcohol and subsequent relapse.

Revocation of existing bail

30. Before the Garda evidence commenced, the Garda Inspector informed the court that revocation of Mr Nevin’s existing bail would also be sought. The judge asked whether that application was before the court, and the registrar indicated that the application could be made orally. The proposed revocation was therefore identified before the relevant evidence was given.
31. The Garda then identified the existing bail conditions and the two alleged breaches upon which the prosecution relied, namely, Mr Nevin’s presence on Main Street and his association with a named co-accused. Mr Nevin addressed the Main Street condition expressly before the ruling. He explained his understanding of the condition and why he did not consider that his presence at

the relevant location constituted a breach. He did not address the allegation concerning contact with the co-accused.

32. The judge subsequently revoked the existing bail. The revocation application was not the subject of a separate procedural stage, and the judge did not expressly ask Mr Nevin whether he wished to address each alleged breach before making the order. Nevertheless, the proposed revocation had been identified before the Garda evidence, the existing conditions and alleged breaches had been set out, and Mr Nevin had responded to one of them.

The ruling

33. The District Court judge considered the *O'Callaghan* objection separately from the objection under section 2 of the Bail Act 1997. The judge regarded the *O'Callaghan* ground as weak, noting in particular the absence of any bench warrant history. Bail was refused under section 2 by reference to the nature and strength of the evidence, the seriousness of the fresh charges, the allegation that the offences had been committed while Mr Nevin was already on bail, his previous convictions and the alleged breach of existing bail conditions.
34. The statement that the court was “*not taking any chances with public safety*” did not accurately formulate the statutory test. The question under section 2 was whether the refusal of bail was reasonably considered necessary to prevent the commission of a serious offence, rather than whether all risk to public safety could be excluded. There was a factual error concerning the conviction history. The Garda evidence was that Mr Nevin had 21 previous convictions overall and that 14 offences had been committed while he was on bail. The ruling referred instead to 21 previous convictions for offences committed while on bail. These errors were errors within jurisdiction.

Disposition

35. The proceedings retained the essential character of a contested bail hearing. Any deficiencies or errors concerned the conduct or outcome of that hearing rather than the absence of a fundamental requirement. Any such errors were errors within jurisdiction.
36. Mr Nevin's detention is in accordance with law, and he is not entitled to relief under Article 40.4.2° of the Constitution.

JONATHAN KELLY

Overview

37. Mr Kelly appeared before the District Court (Judge Darach McNamara) on 5 July 2026. He was before the court on three charges arising from events alleged to have occurred on 3 July and 4 July 2026, including possession of a stolen e-bike and possession in a public place of a knuckleduster with intent unlawfully to cause injury, incapacitate or intimidate. The prosecution opposed bail under both the *O'Callaghan* principles and section 2 of the Bail Act 1997.

Opportunity to seek legal representation

38. The judge explained that no solicitor was then available and presented Mr Kelly with two options. He could proceed with the bail application that day and represent himself, or consent to a short remand and renew the application on the following day or the day after. The judge made clear that there could be no assurance that any solicitor would be available in court on the adjourned date. Mr Kelly elected to proceed with the bail application, saying "*In light of the matters, I'd like to go ahead and apply for bail, Judge*".

39. Counsel submitted at the High Court hearing before me that this did not amount to a meaningful choice. Evidence was placed before the High Court that a solicitor who was not participating in the withdrawal of services would have been available in Limerick on the following day. It is said that this possibility was not brought to Mr Kelly's attention. There is also a factual dispute as to whether, while in Garda custody, Mr Kelly had been offered an opportunity to consult another solicitor who had not withdrawn from the criminal legal aid scheme.
40. It is not necessary to resolve this factual dispute for the purpose of the present inquiry. The relevant question is whether Mr Kelly was denied an opportunity to seek to obtain legal representation before the bail application was determined. The judge offered a short adjournment expressly for that purpose. Mr Kelly was offered the opportunity to postpone the bail application but chose to proceed. The fact that the judge could not assure him that a solicitor would be available on the adjourned date did not render the choice meaningless.
41. The absence of legal representation may have affected the skill with which he presented his case, but Mr Kelly was not denied an opportunity to seek to obtain legal representation.

Notice of the objection and opportunity to prepare

42. There was some initial confusion as to whether the bail pack had been handed to Mr Kelly. When the judge directed that the matter stand to allow him to read it, Mr Kelly said that he had not yet received it. The document was then given to him, and the court dealt with another party's case while he considered it. When his bail application was recalled, the judge asked whether he had looked at the bail pack and Mr Kelly confirmed that he had.

43. Counsel submitted at the hearing before me that Mr Kelly had not been afforded sufficient time to absorb the material and that his apparent misunderstanding of aspects of the prosecution case demonstrated that he had not understood the objection. Reliance is placed, in particular, upon his initial contention that he had not been charged with burglary. The relevant charge sheet did not use the word “*burglary*” but instead described the alleged trespass and the asserted intent to commit an offence. The judge explained the nature of the charge, and Mr Kelly confirmed that he understood the explanation.
44. Mr Kelly’s subsequent participation demonstrates that he understood the substance of the objection. He challenged the description of the burglary charge, disputed part of the Garda account concerning the removal of the electric bicycles, raised an issue concerning the number and circumstances of the recent bench warrants, and corrected the suggestion that medication found in his possession had not been prescribed. These matters demonstrate that he had identified particular aspects of the prosecution case which he wished to contest.
45. In the circumstances, Mr Kelly was afforded notice of the grounds upon which bail was opposed and a meaningful opportunity to prepare his response. A solicitor might have identified additional points or presented the challenges more effectively. This possibility does not deprive the proceedings of the quality of a hearing cognisable at law.

Opportunity to cross-examine

46. During the course of the Garda’s evidence, Mr Kelly attempted on several occasions to raise matters in response. The District Court judge directed him to wait until the Garda had finished his evidence and explained that he would then be afforded an opportunity to ask questions. The judge suggested that Mr Kelly

make a note of any questions which he might want to ask and arranged for him to be given a pen for that purpose.

47. When the Garda evidence had concluded, the judge expressly invited Mr Kelly to question the Garda. The judge reminded him of the presumption of innocence and cautioned him against unnecessarily addressing matters which might bear upon the trial of the charges. Mr Kelly then questioned the Garda in relation to two matters.
48. First, Mr Kelly disputed that he had been charged with burglary. The relevant charge sheet did not use the word "*burglary*"; it did describe an alleged trespass and the intent to commit an offence. The judge explained the legal character of the charge, and Mr Kelly indicated that he understood the explanation. Second, Mr Kelly disputed the Garda account of the manner in which the electric bicycles had been removed from the property. The judge required the Garda to clarify the evidence: the Garda explained that the alleged injured party had said the only access to the back garden where the e-bikes were stored was through the front door and through the hallway of the apartment. Mr Kelly was then asked whether he had any further questions and said that he did not.
49. Counsel submits that the questions asked by Mr Kelly did not address the matters which a lawyer might have explored and demonstrated that he did not understand how to challenge the bail objection effectively. Reliance is also placed upon his attempts to interject during the Garda evidence as indicating that he did not understand the distinction between questioning a witness and making submissions.
50. The issue is whether Mr Kelly was afforded a meaningful opportunity to test the Garda evidence, not whether he exercised that opportunity with the skill of a

lawyer. The judge explained that questions could be asked after the Garda had completed his evidence, facilitated Mr Kelly in noting questions which he might wish to ask, and then invited him expressly to question the Garda. Mr Kelly availed of that opportunity, challenged two aspects of the Garda evidence and obtained a response to each. The fact that a lawyer might have identified more effective or additional lines of cross-examination goes to the quality of the challenge which might have been made, and does not negative the existence of a meaningful opportunity to test the evidence.

Opportunity to answer the objection

51. Mr Kelly elected to give sworn evidence, saying that he would “*like to go into the box*”. He explained that he wished to give his reasons for seeking bail. He challenged aspects of the warrant history, stating that he had been in custody when one of the warrants was issued and disputing the number of warrants attributed to him in 2026. He addressed the asserted risk of further offending by referring to his participation in the LEAR programme (Ana Liffey), forthcoming counselling and his intention to seek residential treatment. He also referred to his family circumstances, his accommodation and the prospect of obtaining training and employment through Limerick City Build.
52. Mr Kelly addressed separately the risk that he would fail to attend court. He accepted that previous failures to attend were down to “*pure negligence*” on his part but stated that he had gotten older and more responsible and that nothing would stop him from attending future court dates. He also offered an explanation for his recent conduct, although the judge cautioned him against discussing the alleged offences in a manner which might operate against his interests.

53. Mr Kelly was cross-examined by the Garda Inspector concerning the risk of further offending. Mr Kelly maintained that he would not commit further offences if admitted to bail and gave his word to the court that he would comply.
54. Counsel submitted at the hearing before me that Mr Kelly did not understand what was required of him and that the matters which he advanced were not those which a lawyer would have identified as most relevant. Reliance was placed upon his statement that he wished to enter the witness box to explain why bail should be granted, his limited questioning of the Garda and the absence of separate closing submissions after his evidence had concluded.

Evidence and the privilege against self-incrimination

55. In the course of his evidence, Mr Kelly referred to having been highly intoxicated on the night in question and said that his previous offending was generally related to drug use and addiction. The judge intervened, saying: *“Mr Kelly, you mightn’t want to go down that route too far. I’m only making a suggestion.”* Mr Kelly nevertheless continued to refer to his alcohol and drug use, both in his evidence and when cross-examined by the Garda Inspector.
56. Counsel submitted that this intervention did not amount to an adequate explanation of the privilege. In particular, Mr Kelly was not expressly told that he was under no obligation to give sworn evidence or that evidence given by him might subsequently be relied upon at trial.
57. The issue for the purposes of Article 40.4.2° is, however, whether the manner in which the privilege was addressed inhibited the accused person from addressing matters relevant to bail. Mr Kelly was not so inhibited. He challenged the warrant history, addressed the asserted risks of non-attendance and further offending, and relied upon his participation in the LEAR programme,

forthcoming counselling, proposed residential treatment, family circumstances, accommodation and prospective training and employment.

The Ruling

58. The District Court judge considered the *O'Callaghan* objection separately from the objection under section 2 of the Bail Act 1997. The judge rejected the *O'Callaghan* objection, accepting Mr Kelly's assurance that he would attend court and finding no likelihood of interference with witnesses.
59. Bail was refused under section 2. The judge was satisfied that refusal was reasonably necessary to prevent the commission of a serious offence. In reaching that conclusion, the judge relied upon the nature and seriousness of the charges, the strength of the evidence, the likely sentence upon conviction, Mr Kelly's previous convictions and, in particular, the number of previous convictions for offences committed while on bail. The judge expressly stated that no weight was being placed upon Mr Kelly's addiction.
60. The ruling identified the statutory ground upon which bail was refused, the evidence relied upon and the reasons for the decision. Whether those matters were sufficient to justify refusal under section 2, or whether different weight should have been given to Mr Kelly's evidence and personal circumstances, goes to the *correctness* of the decision rather than to the existence of a hearing cognisable in law. Any error in the assessment of those matters was an error within jurisdiction.

Disposition

61. The procedure followed in the District Court afforded Mr Kelly a meaningful opportunity to understand, test and answer the bail objections. He was offered

an adjournment—albeit without any assurance that a solicitor would then be available—and elected to proceed. He was given the bail pack and an opportunity to read it. He was expressly invited to question the Garda witness and exercised that opportunity. He then elected to give sworn evidence, was cross-examined by the prosecution and addressed the warrant history, his personal circumstances, his treatment plans and the asserted risks of non-attendance and further offending.

62. A solicitor might have organised the response differently, identified further matters or made additional submissions concerning conditions. This goes to the quality of the case which might have been presented on Mr Kelly's behalf. It does not establish the absence of a meaningful opportunity to answer the bail objections.
63. The proceedings therefore retained the essential character of a contested bail hearing. Any deficiencies or errors concerned the conduct or outcome of that hearing rather than the absence of a fundamental requirement. Any such errors were errors within jurisdiction. Mr Kelly's detention is in accordance with law, and he is not entitled to relief under Article 40.4.2° of the Constitution.

MARTIN MCDONAGH

Overview

64. Mr McDonagh appeared before the District Court (Judge Catherine Hayden) on 11 August 2026. He was charged with assault causing harm, contrary to section 3 of the Non-Fatal Offences against the Person Act 1997, arising from an allegation that he had stabbed another man during an altercation on 10 August 2026. The prosecution opposed bail under the *O'Callaghan* principles, relying

upon the seriousness of the charge, the nature of the evidence, including CCTV evidence, the likely sentence in the event of conviction, an asserted risk of interference with witnesses and the contention that Mr McDonagh presented a flight risk. The District Court refused bail and remanded him in custody for one week.

Opportunity to seek legal representation

65. Mr McDonagh had been given the written objection to bail only when the case was called on for hearing and was required to respond immediately to a complex bail objection. He subsequently indicated that he wished to obtain legal advice, saying: *“If you give me a chance to see a solicitor”*.
66. The District Court judge replied: *“Well, I can’t do that before I decide bail today”*. The judge did not explore whether a solicitor might be contacted or offer even a short adjournment to allow Mr McDonagh to seek legal advice. Instead, the hearing proceeded and bail was refused.
67. This is materially different from a case in which an accused person is offered an adjournment to seek legal representation but elects to proceed personally. Mr McDonagh himself raised the possibility of seeing a solicitor. Rather than being afforded an opportunity to pursue that course, he was told that it could not be accommodated before the determination of bail.
68. The absence of legal representation did not, of itself, involve the denial of a fundamental requirement. The fundamental flaw lay in the failure to afford Mr McDonagh any meaningful opportunity to seek to obtain legal advice when he expressly sought it and was being required to answer, without time to prepare, a complex written bail objection. At the very least, the District Court judge should have offered him an adjournment for that purpose.

Notice of objection and opportunity to prepare

69. Mr McDonagh was not given the bail pack in sufficient time to allow him an opportunity to prepare a response. The term “*bail pack*” is a colloquialism used to describe the material that the Gardaí have put together setting out the reasons for a bail objection. Basic fairness of procedures requires that the accused person must be made aware of the grounds upon which bail is opposed and afforded sufficient time to understand the objection and prepare a response. Where the Gardaí have reduced the bail objection to writing, it should normally be provided to the accused person well in advance of the commencement of the hearing.
70. The prosecuting Garda swore an affidavit in the High Court proceedings and gave oral evidence before me at the hearing on 19 August 2026. She explained that she had prepared the bail pack prior to travelling to the District Court. She had come on shift at 7.00 a.m. and arrived at the courthouse between 10.00 a.m. and 10.30 a.m. The case was ultimately called at 3.00 p.m., some four to five hours later.
71. For reasons which have never been properly explained, the bail pack was not given to Mr McDonagh until the case was called at 3.00 p.m. That is a fundamental unfairness. It could have been fixed had the District Court judge adjourned the matter, even briefly, to allow him time to consider the bail pack. Mr McDonagh specifically asked for assistance, saying “*Well, how do I go about it then?*”
72. The District Court judge said that the bail pack would be given to Mr McDonagh there and then and read aloud by the Garda. That was a fundamental flaw. The course adopted by the judge did not afford Mr McDonagh a meaningful opportunity to read and understand the written objection or to prepare his

response. Mr McDonagh, who did not have the benefit of legal representation, was required to deal with a complex bail objection on the hoof.

Opportunity to cross-examine

73. Mr McDonagh was not advised of his entitlement to cross-examine the Garda witness. This was crucial because the Garda was permitted to give hearsay evidence, which the judge later mischaracterised as opinion evidence. Opinion evidence has a very specific meaning. As a general rule, a witness is required to give evidence of fact rather than opinion. There are exceptions, for example, in relation to membership of a proscribed organisation. There are also exceptions in the context of an expert witness.
74. Counsel on behalf of the Director of Public Prosecutions initially suggested that the following statement by the judge might have been interpreted as an invitation to cross-examine the Garda witness: “*Mr McDonagh, is there anything you wish to say in response?*”. With respect, as a matter of ordinary English usage and the plain meaning of the words employed, that statement cannot reasonably be interpreted as an invitation to cross-examine the Garda witness. It invited Mr McDonagh to say something in response to the evidence; it did not invite him to put questions to the witness or otherwise indicate that he was entitled to do so. The opportunity to test the Garda evidence was not exercised ineffectively; it was not afforded.
75. It is correct to say that a lay person, particularly a person who is not used to court, is unlikely to carry out a cross-examination that would be as skilled as a lawyer’s cross-examination. That is unfortunate, but that in itself would not necessarily render a hearing fundamentally flawed. Here, however, the District Court judge skipped an essential stage of the process. She did not advise the

accused that he was entitled to cross-examine the Garda witness. This occurred in circumstances where the judge expressly relied upon the “*credibility*” of the Garda witness and her supposed “*opinion evidence*”.

Opportunity to answer the objection

76. Mr McDonagh was invited to say something in response to the Garda evidence. That invitation did not, however, cure the preceding failures to afford him time to consider the written objection and to inform him that he was entitled to question the Garda witness. He was required to formulate an immediate response to a complex objection which he had received only when the case was called.
77. It is necessary to distinguish between the ineffective use of an opportunity which has been afforded and the absence of a meaningful opportunity to answer the objection. Mr McDonagh had no time to prepare, had been refused an opportunity to obtain legal advice and had not been informed that he could test the Garda evidence.

Evidence and the privilege against self-incrimination

78. It is vitally important that an accused person be told that he has a privilege against self-incrimination but may waive it. An accused person is entitled to elect to give relevant evidence. The accused person may be advised that it might be better to confine that evidence to matters relating to bail, for example, a willingness to comply with particular conditions, the surrender of a passport, or family connections. An accused person is, however, perfectly entitled to say something about the alleged offence which is the subject matter of the bail application. That is the accused person’s prerogative. It may ultimately redound

against the accused because the evidence may be relied upon at trial. The District Court judge should explain this to the accused in intelligible terms.

79. I accept that a District Court judge is not required to give some highfalutin explanation of the kind one might find in a leading textbook. Indeed, it would not be helpful to do so. The explanation must, however, convey the substance of the privilege and the choice available to the accused person. What the judge said here simply did not achieve this. She said: *“I’m conscious that you may self-incriminate yourself with the road you’re going down, but you’re still free to talk. But I just want to let you know that”*. That warning identified the risk of self-incrimination but did not explain the nature of the choice available to Mr McDonagh or the possible consequences of giving evidence concerning the alleged offence.
80. It also appears that the warning inhibited Mr McDonagh from continuing with the account which he had begun to give of the alleged incident. Immediately before the warning, he had stated that two men, both with weapons, had come to the house and that he was the only man there. Upon receiving the warning, he asked: *“Can I say this then at least?”*. He did not continue with that account. Instead, he pivoted his response to the matters raised in support of the alleged flight risk. He discussed his previous failures to attend court, the age of the bench warrants, his family circumstances, his addresses in the United Kingdom and Ireland, and his willingness to surrender his passport, sign on and comply with any conditions imposed by the court.
81. The warning given did not convey the substance of the privilege against self-incrimination or the choice available to Mr McDonagh. His immediate change of course following the warning indicates that it inhibited him from continuing

with the account which he had begun to give and which he might otherwise have considered relevant to the bail objection.

82. This was not merely an imperfect explanation of the privilege. In circumstances where Mr McDonagh had received the bail pack only when the case was called, had not been afforded an opportunity to obtain legal advice and had not been informed of his entitlement to cross-examine the Garda witness, the warning further impaired his ability to answer the bail objection in a meaningful way.

The ruling

83. The District Court judge refused bail by reference, *inter alia*, to the credibility of the Garda witness and what the judge described as her opinion evidence.

Disposition

84. The defects identified were not errors in the assessment of the evidence within an otherwise functioning bail hearing. Such an error in the assessment of evidence would be an error within jurisdiction. The defects here are anterior to the assessment of the evidence.
85. Mr McDonagh had not been given the bail pack in sufficient time to allow him an opportunity to prepare a response. He was required to deal with a complex bail objection on the hoof. He was not afforded an adjournment to seek to obtain legal advice when he expressly sought it. He was not advised that he was entitled to cross-examine the Garda witness, notwithstanding that the judge later relied upon that witness's credibility and her supposed opinion evidence. Nor was the privilege against self-incrimination explained in intelligible terms. The District Court judge thus skipped essential stages of the process by which Mr McDonagh

was to be afforded a meaningful opportunity to understand, test and answer the bail objection.

86. For all of those reasons, I was satisfied that fundamental requirements had been wholly or effectively denied, such that the proceedings before the District Court on 11 August 2026 could not properly be regarded as a bail hearing at all. Mr McDonagh's detention was not in accordance with law. Accordingly, on 19 August 2026, I directed his immediate release pursuant to Article 40.4.2° of the Constitution.

SUBSEQUENT REMAND ORDERS

87. The Director of Public Prosecutions advanced a specific argument by reference to the fact that there was a series of remand orders. It was submitted that any alleged defect in a first remand hearing would be "*cured*" by a subsequent lawful remand. Counsel cited the judgment in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 in support of this argument.
88. The submission was developed as follows by reference to the chronology of Mr McDonagh's case. The impugned bail hearing took place on 11 August 2026, following which the applicant was remanded in custody for one week; the High Court directed an inquiry under Article 40.4.2° on 17 August 2026; the District Court made a further remand order on 18 August 2026; and the inquiry came on for hearing before the High Court on 19 August 2026.
89. Counsel emphasised that the order which was certified for the purpose of Article 40.4.2° was the District Court order of 18 August 2026, not the earlier remand order made consequent upon the impugned bail hearing.

90. Counsel submitted that even if there had been any defect in the bail hearing on 11 August, which was denied, it would be cured by the order of 18 August 2026 because the later order represented “*a new consideration by a judge and a new remand*”. Counsel accepted that there had been no fresh bail hearing on 18 August 2026 but relied upon the absence of any challenge to that remand order. Counsel further submitted that *Grant v. Governor of Cloverhill Prison* demonstrated that where the detention originally challenged “*had moved on a few orders thereafter*”, the lawfulness of the current detention fell to be determined by reference to the current remand order.
91. With respect, I cannot accept that this argument is correct. The normal sequence of events is that an accused person is brought before the District Court, has a bail hearing, and is ordinarily only entitled to make a fresh application for bail where there has been a change in circumstances. The remand hearing on 18 August proceeded on the basis that the question of bail had already been determined on 11 August 2026. There was no fresh bail hearing or independent determination on 18 August 2026. The latter remand order simply continued to remand Mr McDonagh in custody on the footing that the earlier refusal of bail governed the position. The breach of fundamental requirements identified under the previous headings is not spent as a result of the expiration of the first remand order: it infects the legal basis for Mr McDonagh’s continued detention.
92. Counsel suggested that the coming on record of a solicitor before the District Court might constitute a change in circumstances which would justify a renewed bail application. As a general proposition, it is correct to say that the securing of legal representation would be a relevant change in circumstances. However, this has not happened in the present proceedings. The fact of the matter is that

whereas Mr McDonagh is represented in these High Court proceedings by solicitor and counsel, he still does not have legal representation before the District Court. There was no change in circumstances and there is no suggestion that the District Court judge offered him the possibility of a fresh bail hearing on 18 August 2026. It seems simply to have been a standard remand from week to week.

93. The circumstances of the present case are distinguishable from those at issue in *Grant v. Governor of Cloverhill Prison*. The defect is not confined to an earlier remand order which is now spent. The District Court refused bail on 11 August 2026 in proceedings which are not cognisable in law as a bail hearing. The refusal of bail underpinned Mr McDonagh's continued detention pursuant to the second remand order.
94. By contrast, the judgment in *Grant* addressed a scenario whereby the detained person sought to rely on defects on the face of the earlier remand orders to challenge his current detention. This is the context in which Humphreys J. held that a prior period of unlawful detention, whether administrative or judicial, does not contaminate a subsequent lawful period of detention ordered by a court. The judgment does not suggest that a fundamentally flawed decision to refuse bail should be regarded as spent once the first period of remand is spent.
95. This is apparent from the structure of the analysis in the judgment itself. Humphreys J. expressly recorded that the complaint concerning the allegedly flawed bail hearing in *Grant* was not to be treated as moot merely because further remands had occurred. The learned judge proceeded to determine separately whether the original bail hearing had been affected by a defect sufficiently fundamental to justify relief under Article 40.4.2°. It was only after deciding

that issue against the applicant that the judgment moves on to a consideration of the distinct question of whether *ex facie* errors in the earlier, spent committal warrants affected the lawfulness of the detention under the current warrant. It was in that latter context that Humphreys J. held that a prior period of unlawful detention does not contaminate a subsequent lawful period of detention ordered by a court and that there is no “*fruit of the poisoned tree*” or “*domino theory*”.

96. In the present case, the remand of 18 August 2026 involved neither a fresh bail hearing nor an independent reconsideration of the grounds for detention. It did not cure the fundamental denial of a hearing cognisable in law on 11 August 2026.

CONCLUSION

97. Mr Nevin and Mr Kelly were each afforded a meaningful opportunity to understand, test and answer the objection to bail. In each case, the proceedings retained the essential character of a bail hearing, and the detention is in accordance with law. Mr McDonagh’s case falls on the other side of the line. He was not afforded a meaningful opportunity to answer the bail objections. The fundamental requirements identified in *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599 were wholly or effectively denied, such that the proceedings could not properly be regarded as a bail hearing at all. His detention was therefore not in accordance with law, and I directed his immediate release at the conclusion of the hearing on 19 August 2026.
98. As to legal costs, my provisional view is that Mr McDonagh is entitled to an order for costs in his favour. I also propose to exercise my discretion to measure those costs in gross. Mr McDonagh’s case appears to me to be an appropriate

one in which to do so for two reasons. First, I have a good appreciation of the nature and extent of the work carried out by virtue of having to review precisely the same material as the lawyers. The paperwork is minimal, with the principal documentation consisting of the transcripts of the respective bail hearings. None of the applicants has personally sworn an affidavit and the solicitors' affidavits were largely *pro forma*. Put otherwise, this is not a case where there will have been significant work "*behind the scenes*", as it were, in respect of which the court will have had little visibility.

99. Second, the measurement of costs by the court is consistent with the urgent nature of an inquiry under Article 40.4.2° because it allows the issue of costs to be determined expeditiously.
100. The parties will have an opportunity to make submissions on the *provisional* approach to costs outlined above before any final decision is made. In the event that I do decide to measure costs in gross, then in accordance with the principles stated in *Landers v. Dixon* [2015] IECA 155, [2015] 1 I.R. 707, the parties will be afforded further time to adduce such evidence as they consider appropriate in respect of the measurement of costs.
101. I have not formed even a provisional view of the proper allocation of costs in respect of Mr Nevin and Mr Kelly. I will require to hear counsel further on this issue.
102. I propose to list all three cases for mention before me on 5 October 2026 to fix a date to hear submissions on the allocation of costs.

FORM OF ORDER

103. The result of the inquiry pursuant to Article 40.4.2° is that Mr Nevin and Mr Kelly are being detained in accordance with law. Their applications are each refused. It remains open to Mr Nevin and Mr Kelly to make applications to the High Court in the exercise of its full and original jurisdiction in bail matters.
104. Mr McDonagh's detention was not in accordance with law. Accordingly, I directed his immediate release at the conclusion of the High Court hearing on 19 August 2026.

Appearances

Barry Ward SC and Eoghan Weldon for Mr Nevin instructed by McGarry Law

Barry Ward SC and Amy Nix for Mr Kelly instructed by Herbert & Company Solicitors

Eoin Lawlor SC and Luke O'Higgins for Mr McDonagh instructed by Ferrys Solicitors LLP

Kieran Kelly for the Director of Public Prosecutions instructed by the Chief Prosecution Solicitor

Davy Lalor for the Governors and Minister instructed by the Chief State Solicitor's Office