

**APPROVED**

**[2026] IEHC 604**



THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION

2026 1273 SS

BETWEEN

PATRICK KINANE

APPLICANT

AND

GOVERNOR OF CORK PRISON  
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

NOTICE PARTY

**JUDGMENT of Mr. Justice Garrett Simons delivered on 31 August 2026**

## **INTRODUCTION**

1. This judgment is delivered in respect of an inquiry under Article 40.4.2° of the Constitution. The striking feature of the present case is that the Applicant, Mr Kinane, had already been released from custody on High Court bail *prior* to

the inquiry coming on for hearing. As will be explained, this has implications for the outcome of the inquiry.

2. The inquiry arises against the backdrop of an ongoing 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. Mr Kinane was one such individual.
4. This judgment should be read in conjunction with *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599.

## **PROCEEDINGS BEFORE THE DISTRICT COURT**

### ***Hearing on 30 July 2026***

5. Mr Kinane was brought before the District Court (Judge David Waters) on 30 July 2026 in relation to four charges of theft, contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The prosecution opposed bail under both the *O'Callaghan* principles and section 2 of the Bail Act 1997. The prosecution relied principally upon the allegation that the four offences had been committed while Mr Kinane was already on bail.
6. Mr Kinane had been granted bail at Clonmel District Court on 15 July 2026. The conditions included requirements that he stay away from the Showgrounds Shopping Centre, provide a mobile telephone number to the Gardaí, have a

mobile telephone on him at all times, be of good behaviour and not commit any further offences. The fresh charges concerned alleged thefts on 19, 21, 26 and 29 July 2026. One of the alleged thefts was said to have occurred at the Showgrounds Shopping Centre.

7. Bail was refused and Mr Kinane was remanded in custody to appear before Clonmel District Court by video link on 4 August 2026.

***Hearing on 4 August 2026***

8. Mr Kinane appeared by video link before Clonmel District Court (Judge Edward Carroll) on 4 August 2026. The judge noted that he had been refused bail on 30 July 2026 and asked whether he had a solicitor. Mr Kinane said that he did not know the man's name but that the solicitor had represented him the previous week. Mr Hayes then identified himself as the person who had stood in, and referred to the current impasse.
9. The Garda asked that the matter go back to 18 August 2026 for directions. The judge explained to Mr Kinane: *"The guards want the matter to go back to the 18th of August in Clonmel District Court for DPP directions on that date"*. Mr Kinane replied: *"I want to apply for bail again now, your honour"*.
10. The judge said that Mr Kinane was not in a position to apply for bail because he had been refused five days earlier. When Mr Kinane asked why he could not apply again, the judge explained: *"There has to be a change of circumstances. Maybe if legal representation became available to you or other change of circumstances, you could make that application again but not today"*.
11. Mr Hayes said that he would assist Mr Kinane by furnishing instructions to a Dublin-based colleague to make an application to the High Court. When Mr Kinane asked how he was to go about that himself, the judge said: *"Mr Hayes*

*has mentioned to the Court that he's going to assist in the process. So, let that take its course and for the moment I'm going to remand you in custody to the 18th of August to this Court by video link".*

12. The hearing on 4 August 2026 did not involve a fresh determination of the objections to bail. The judge treated the refusal of bail on 30 July 2026 as continuing to govern the position unless there had been a change of circumstances. The judge identified the availability of legal representation as a possible change of circumstances but found that no such change had occurred.

### **PROCEEDINGS BEFORE THE HIGH COURT**

13. Counsel on behalf of Mr Kinane applied *ex parte* to the High Court on Friday, 7 August 2026, for an inquiry into the lawfulness of his detention. The High Court (Brett J.) opened an inquiry pursuant to Article 40.4.2°, returnable to Monday, 10 August 2026.
14. On the return date, counsel for Mr Kinane addressed the court saying that she was *"pleased to update the court that bail has been agreed"*. Counsel stated that the agreed conditions had been reduced to writing and would be handed in to the court. Those conditions required Mr Kinane to reside at Colman, Fethard, Clonmel; to sign on at Clonmel Garda Station, in a sober and intoxicant-free state, between 9.00 a.m. and 10.00 p.m. each Monday and Friday; to provide a mobile telephone number to An Garda Síochána within 24 hours of his release and remain contactable at all times; to stay out of the Showgrounds Shopping Centre, including Shaws, the Poppy Fields Shopping Centre, including Woodies, Dunnes Stores on Davis Road, and Tesco Express in Powerstown Centre, Carrigeen, Clonmel; and not to commit any offence and otherwise to be of good

behaviour. Mr Kinane was further required to appear at his next scheduled remand before Clonmel District Court 2 on 18 August 2026 and at each subsequent remand until the charges were disposed of according to law, unless specifically excused.

15. The bail conditions had not been explained to Mr Kinane prior to the hearing. They were accordingly read aloud in court. Brett J. asked Mr Kinane whether he had heard the conditions and whether he accepted them. Mr Kinane confirmed that he had heard them and stated: *“I’m accepting everything”*. The judge explained that she wished to ensure that he accepted the conditions before admitting him to bail.
16. Mr Kinane was admitted to bail on the charges which had been before Cork District Court on 30 July 2026. He was admitted on his own bond of €100, without any requirement for a cash lodgement. The bond was to be entered before the Governor of Cork Prison, or the Governor’s nominee, prior to Mr Kinane’s release. The agreed bail conditions were subsequently embodied in the perfected order of the High Court.
17. Although the terms of the order had been agreed between the parties and a draft handed in to the judge, a dispute subsequently emerged as to the legal characterisation of the bail. Leading counsel for the Director, Ms McDonagh, SC, clarified that her side’s understanding was that bail was in the context of the charges only. Counsel submitted that the grant of bail would render the Article 40.4.2° inquiry moot.
18. Counsel for Mr Kinane, Ms Finnegan, summarised her side’s position as follows:

“The only bail application before the court in Mr Kinane’s case is in respect of the Article 40 proceedings. Although

bail has been granted by consent, it is without prejudice to the underlying Article 40 application.”

19. Brett J. did not make any express ruling during the hearing as to the proper legal characterisation of the order. The judge confirmed that bail had already been granted on the agreed conditions. The substantive Article 40.4.2° proceedings were adjourned for hearing on Monday, 17 August 2026, at 11.00 a.m. The costs of the application made on 10 August 2026 were reserved.
20. The matter came before me, sitting as the Duty Judge, on Monday, 17 August 2026. I heard the inquiry, together with four other inquiries, over two days. Counsel for the Director maintained her preliminary objection that the proceedings had been rendered moot by the grant of conventional bail.
21. I reserved judgment in Mr Kinane’s case.

## **TITLE OF THE PROCEEDINGS**

22. The proceedings were instituted with the relevant prison governor named as sole respondent. The Director of Public Prosecutions nevertheless participated in the inquiry 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.
23. 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 (Aherne) 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.

## OVERVIEW OF LEGAL ISSUES

24. The striking feature of Mr Kinane's case is that he had already been released from detention *prior* to the inquiry coming on for hearing. To assess the implications of this feature for the Article 40.4.2° inquiry, it is necessary to consider the legal character of the order releasing him from detention. More specifically, it is necessary to consider whether it is an order made pursuant to the High Court's full and original jurisdiction in bail matters, or whether, alternatively, it is an order made pursuant to Article 40.4.2°. The answer to this question will inform the outcome of the inquiry.
25. The High Court has full and original jurisdiction to admit to bail an accused person who has been remanded in custody in pending District Court proceedings. That jurisdiction is not appellate and is exercised afresh, although the effect of the order is to release the accused person pending, and subject to attendance at, the underlying criminal proceedings: *People (Attorney General) v. O'Callaghan* [1966] I.R. 501.
26. The discussion below will use the following terms to distinguish between the two types of "bail". The term "*conventional bail*" will be used to describe a bail order made pursuant to the High Court's full and original jurisdiction in bail matters, and the term "*interim release*" used to describe a bail order made pursuant to Article 40.4.2°.

#### ARTICLE 40.4.2° AND INTERIM RELEASE

27. Article 40.4.2° mandates the High Court to inquire forthwith into a complaint that a person is being unlawfully detained. As explained by Barrington J. in *State (Whelan) v. Governor of Mountjoy Prison* [1983] I.L.R.M. 52, this obligation stresses the importance and the urgency of *habeas corpus* proceedings but does not mean that the High Court should “*skimp its enquiry or proceed on an inadequate understanding of the law or the facts*”. Once the inquiry has been entered upon, and provided its urgency and importance are kept in mind, the court is entitled to conduct it in the manner best calculated to resolve the issues of law and fact and to achieve the interests of justice.
28. Barrington J. went on then to say that where an inquiry raises difficult issues of law or fact, the court may have to consider whether the detained person should be admitted to bail until these issues are resolved. As explained earlier, the term “*interim release*” will be used by me to describe this form of bail.
29. The existence of a jurisdiction to direct interim release must not be allowed to displace the urgency of an inquiry under Article 40.4.2°. It would not be appropriate to allow an inquiry to drift merely because an applicant has been granted interim release. The Constitution requires that a determination be made urgently in respect of the lawfulness of the detention. The need for a prompt determination is especially acute in circumstances where the interim release is subject to conditions, such as a requirement to reside at an approved address or to surrender one’s passport. Such conditions arguably affect the individual’s liberty and should not be prolonged any more than is necessary to complete the inquiry.

30. Although the existence of a jurisdiction to direct interim release has long been recognised, there is little discussion in the case law as to the threshold to be applied in determining whether to direct the interim release of the detained person pending the completion of the inquiry under Article 40.4.2°.
31. Approaching the matter from first principles, the threshold cannot simply be the same as that governing a conventional bail application in the context of criminal proceedings. This is because the starting point for the analysis is different in each instance.
32. In a conventional bail application, the accused person enjoys the presumption of innocence and, as a corollary, a presumption in favour of bail. The burden of proving that the accused person should not be admitted to bail lies upon the prosecution. The allocation of the burden of proof is more complex in an application for interim release. The accused person, of course, continues to enjoy the presumption of innocence. However, there is no presumption in favour of interim release in cases where the accused person is being detained pursuant to an order which is valid on its face and made by a court of competent jurisdiction. Such an order is *prima facie* valid.
33. It is correct to say that the High Court—in an exceptional case—has the capacity to direct the release of an applicant notwithstanding the existence of such a court order. Crucially, this is normally only ever done following the completion of the Article 40.4.2° inquiry and the making of a determination that the detention is not in accordance with law. An applicant who seeks interim release takes on the burden of persuading the High Court that his is an appropriate case in which to “*look through*” the District Court’s remand order *prior* to the completion of the

inquiry. Such an applicant invites the High Court to disregard the legal effect of an order which is *prima facie* valid prior to a final determination of the inquiry.

34. It would be inappropriate to do so unless the applicant had satisfied a threshold related to the *underlying merits* of the complaint that he is being detained unlawfully. It would not be enough for an applicant who is, for example, held pursuant to a post-conviction order, to establish that he is not a flight risk.
35. A loose analogy can be drawn with the approach taken to interim orders in judicial review proceedings. In *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, [2012] 3 I.R. 152, the Supreme Court held that the burden rests upon the applicant seeking a stay to establish an arguable case on the merits. An applicant must justify the court's departure from the existing legal position by demonstrating that the risk of injustice from allowing the *prima facie* valid order to take effect is greater than the risk of injustice from staying it. In carrying out that assessment, the court must give all appropriate weight to the orderly implementation of the order unless and until it is set aside.
36. It is not necessary for the resolution of these proceedings to attempt to articulate the precise threshold which has to be met by a detained person who seeks interim release. The point for present purposes is a narrower one. It is that whereas an application for interim release may partake of some of the characteristics of a conventional bail application—for example, in terms of the assessment of flight risk—the starting point is different. The detained person must meet a minimum threshold related to the merits: he must be able to demonstrate to some objective standard that he has arguable grounds for saying that the detention is unlawful.
37. The fact that an inquiry has been directed does not, without more, establish an entitlement to interim release. The opening of an inquiry merely establishes that

a sufficient question has arisen to require the detainer to justify the detention. An applicant seeking interim release must additionally persuade the court that release is appropriate pending completion of that inquiry, having regard to a provisional assessment of the underlying merits, the consequences of continued detention, the *prima facie* validity of the remand order and any countervailing considerations relevant to bail.

38. The balance of justice will ordinarily favour the expeditious completion of the inquiry under Article 40.4.2°, rather than the grant of interim release pending its determination.
39. In summary, an application for interim release involves a different and more layered test than that governing an application for conventional bail. An applicant who institutes Article 40.4.2° proceedings and then seeks to be released prior to the completion of the inquiry without addressing these additional factors is, in effect, making an application for conventional bail.

### **PROPER CHARACTERISATION OF THE CONSENT ORDER**

40. Having identified the distinction between conventional bail and an interim release pending the determination of the Article 40.4.2° inquiry, I turn now to the proper characterisation of the order made on 10 August 2026.
41. A court order falls to be interpreted objectively by reference to the ordinary and natural meaning of the words used, read in the context in which the order was made. This is especially important where a breach of the terms of the order could result in the loss of personal liberty as a result of bail being revoked. It is essential that the parties understand what the order requires them to do. For this

reason, it is impermissible to interpret an order by reference to the *subjective* views of one party or the other.

42. Subject always to the primacy of the words of the order, it may be permissible to have regard to the broader context in which the order was made. Brett J. had expressly informed all of the parties in court on Monday, 10 August 2026, that she was available to hear bail applications that day, i.e. there was no necessity to apply to the High Court Bail List in the Criminal Courts of Justice.

43. The operative part of the order reads as follows:

“Upon the application of the Applicant and the Respondent that the within application be treated as a Bail application

And there being no objection to bail on behalf of the Director of Public Prosecutions

And on Application of Counsel for the Respondent

IT IS ORDERED that the Minister for Justice Home Affairs and Migration be added as a Notice Party to these proceedings herein

BY CONSENT

IT IS ORDERED that the said Applicant be admitted to bail on the charges before Cork District Court on the 30th day of July 2026 as set out in Charge Sheet Numbers 29034542, 29034478, 29034501, 29034518 on entering into a bond before the Governor (or their nominee) of the Prison where the Applicant is currently detained Cork Prison in the following terms:

[...]

appear at his next scheduled remand date at Clonmel District Court 2 on the 18th day of August 2026 and all further adjournments thereof, unless specifically excused appear in Court at each and every remand until the charges shall be disposed of according to law –

AND THE COURT DOTH FURTHER ORDER that the substantive proceedings be adjourned to Monday the 17th day of August 2026 at 11.00 am in the forenoon before the

Vacation Sitting of the High court in the Four Courts on Inns Quay in Dublin 7

And the Court doth reserve the costs of today's application"

44. The distinguishing feature of the order is that its duration is fixed by reference to the criminal proceedings before the District Court and not by reference to the proceedings before the High Court. Mr Kinane was required to enter into a bond which obliged him to appear at his next scheduled remand date at Clonmel District Court on 18 August 2026, and at every subsequent remand until the charges were disposed of according to law, unless he was specifically excused. Put shortly, the order regulates Mr Kinane's status pending the determination of the criminal proceedings. This is the hallmark of a conventional bail order.
45. By contrast, an order for interim release is intended to regulate the interregnum between the opening of an inquiry under Article 40.4.2° and its determination. The rationale for this type of bail has been explained as follows in *State (Aherne) v. Cotter* [1982] I.R. 188 (at p. 204):

“The grant of bail to an applicant in habeas corpus proceedings is not unusual, but the rationale for granting it is to ensure that, if at the end of the proceedings the detained person is successful, he will not be able to say with any justification that he was unnecessarily deprived of his liberty during the habeas corpus proceedings.”
46. For this reason, the duration of the interim release is coterminous with the inquiry. The applicant is temporarily released from detention pending the conclusion of the inquiry.
47. The order of 10 August 2026 cannot sensibly be interpreted as an order for interim release pending the determination of the Article 40.4.2° inquiry by reason of the fact that the currency of the order is delimited by reference to the District Court proceedings. The recognisance expressly regulates Mr Kinane's

attendance at future District Court remand dates and continues until the criminal charges are disposed of according to law. The wording of the order stands in marked contrast to that in *McCormack v. Governor of Mountjoy Women's Prison* [2026] IEHC 554: Ms McCormack's interim release had been expressly linked to the duration of the Article 40.4.2° inquiry in her case.

48. Any contrary interpretation of the order of 10 August 2026 would be less favourable to Mr Kinane. The logic of interim release is that the detained person is released only pending the determination of the Article 40.4.2° inquiry. If the court were to determine that the detention pursuant to the District Court's remand order was lawful, the interim release would come to an end, and Mr Kinane would have to return to custody.
49. It is apparent from the proceedings before Brett J. on 10 August 2026 that Mr Kinane's counsel sought to characterise the order as being something other than a conventional bail order. Counsel referred to it as an order arising within the proceedings pursuant to Article 40.4.2°. With respect, there is no basis for such a characterisation.
50. It will be recalled that the terms of the order had been agreed between the parties in advance and a written draft had been handed in to the judge. The bail conditions embodied in the order were read aloud to Mr Kinane and the judge asked him to confirm that he agreed to same. There is no ambiguity in the wording of the perfected order. It is clearly referable to the criminal proceedings and is properly characterised as conventional bail rather than an interim release pending the determination of the Article 40.4.2° inquiry. Although the parties subsequently differed as to the correct legal characterisation of the order, they

were *ad idem* as to its terms. The order was made with the consent of the parties on the basis of an agreed draft order.

51. In summary, Mr Kinane was admitted to conventional bail on 10 August 2026. The bail period is coterminous with the criminal proceedings, not the Article 40.4.2° inquiry.

#### **APPLICANT IS NOT CURRENTLY BEING DETAINED**

52. It is next necessary to consider the extent, if any, to which the inquiry may have been overtaken by the grant of conventional bail. The purpose of an Article 40.4.2° inquiry is to determine whether the applicant is being detained other than in accordance with law. The case law indicates that the inquiry is directed to the position pertaining at the date of the inquiry.
53. The principle has been explained as follows by Baker J. in *Miller v. Governor of the Midlands Prison* [2014] IEHC 176 (at paragraphs 13 and 14):

“The article is framed in the present continuous and requires the court, in regard to the applicant, to be ‘satisfied that he is being detained in accordance with the law’ (emphasis added). If the court is not so satisfied it must order the release of the person from ‘such detention’. The focus of the inquiry is whether the detention complained of is lawful and the procedures set out in the Article itself envisage a two stage process: A High Court Judge enters upon a full hearing of the basis of the detention following on the giving of notice to the respondent and other State authorities of the making of the conditional order.

Accordingly, in my view, the inquiry this court makes on the full hearing of the application is a hearing into the lawfulness of the current detention of the applicant and on the evidence adduced at that hearing.”

54. The fact that the person is on bail as of the date of the Article 40.4.2° inquiry may be a decisive consideration in some cases. This will depend on the character of the bail. Where the bail takes the form of an interim release pending the

determination of the inquiry, it would be wholly circular to dismiss the proceedings on the basis that the person is not currently in detention. The interim release is ephemeral and merely “*holds the ring*”, as it were, pending the completion of the inquiry.

55. The position is different where, as here, the person has been released on conventional bail pending the determination of the criminal proceedings and makes no complaint as to the validity of the High Court bail order or the conditions imposed under it. Such a person is not being “*detained*” at all.
56. The Applicant’s complaint is that he had been unlawfully detained for the period between 30 July and 10 August 2026. The Applicant has never suggested that the bail conditions imposed by the High Court on 10 August 2026 are invalid, still less that the restrictions on his freedom of movement—for example, his exclusion from specified retail premises and the requirement to reside in a specified place—can be characterised as a form of detention within the meaning of Article 40.4.2°.
57. On the facts of the present case, the Applicant was not in detention at the date on which the inquiry was heard. It follows that there was no current detention from which an order for release could be made under Article 40.4.2°.
58. I have carefully considered whether it might be appropriate to examine *de bene esse* the legal status of Mr Kinane’s detention between 30 July 2026 and his release on High Court bail on 10 August 2026. For the reasons which follow, I have decided that it would be inappropriate to do so.
59. The question of the legal status of the earlier period of detention is now a moot point in the sense that its determination cannot affect the outcome of the

Article 40.4.2° inquiry. The Applicant is not being detained. The proceedings must, therefore, be dismissed.

60. The general position is that a court will not determine a moot point in proceedings. As explained by the Supreme Court in *Odum v. Minister for Justice and Equality* [2023] IESC 3, [2023] 2 I.L.R.M. 164, there are three interlinked considerations underlying this approach. The first is the importance of a full adversarial context for a legal decision. The second is the management of scarce and expensive court resources. The third is, in cases likely to become precedents, the desirability, and perhaps necessity, of avoiding purely advisory opinions. A court which decides an issue, and thereby makes law, without being compelled to do so by the requirement to resolve a real dispute between the parties risks exceeding the proper bounds of the judicial function.
61. It seems to me that the same logic pertains where an issue which was “live” at the time an inquiry commenced has ceased to be of relevance to the only relief which can be granted under Article 40.4.2°. The issue is moot. The court must determine the inquiry by reference to the position pertaining as of the date of the inquiry.
62. It is correct to say that there have been a number of instances where an appellate court has entertained an appeal in Article 40.4.2° proceedings notwithstanding that the underlying claim for release was moot. This approach was adopted in *Farrell v. Governor of St Patrick’s Institution* [2014] IESC 30, [2014] 1 I.R. 699.

Denham C.J. held that the appeal was moot, saying as follows:

“Clearly the appeal is moot; the respondent has been released. The respondent brought an application for an inquiry under Article 40.4.2° of the Constitution. The relief which may be granted on such an inquiry is to release an applicant. The High Court granted the relief and released the applicant. Consequently, the appeal is moot.”

63. The Chief Justice went on to say that the court has a discretion which it may exercise as to whether or not it will hear and determine a moot appeal. On the facts of *Farrell*, the issue which underpinned the argument that the District Court's remand order had been unlawful was described as being one of systemic importance to judicial review proceedings in criminal matters. The Supreme Court considered it appropriate to decide the appeal.
64. The position pertaining in the present case is very different. First, these are proceedings at first instance. An appellate court may be more willing to determine a moot point because of the precedential effect of the judgment appealed from: the judgment would remain in place, unreviewed, as a precedent if the appeal were disposed of without determination of that point.
65. Second, setting out a detailed analysis of the District Court bail hearings in the present case, by way of *obiter dicta*, would not address any legal issue which has not already been traversed in depth in other judgments. There is already a series of recent judgments of the High Court, delivered after full argument following an *inter partes* hearing, which address the type of circumstances in which a bail hearing can be characterised as fundamentally flawed: *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599 and *Nevin v. Governor of Castlerea Prison* [2026] IEHC 601. The legal principles have been analysed by reference to a broad range of factual scenarios. There is nothing peculiar to the facts of the present case which would add to that analysis.
66. The present case is distinguishable from *Kiely v. Governor of Cloverhill Prison* [2026] IEHC 603. In that latter case, a novel factual issue arose in that Article 40.4.2° proceedings had been pursued notwithstanding that the District

Court had, in fact, given consent to bail. This was different from the fact pattern of the six previous cases considered by me.

67. Third, for this court to embark upon a determination of the inquiry would cut against the second of the considerations identified in *Odum*, namely, the management of scarce and expensive court resources. A significant number of Article 40.4.2° proceedings stand adjourned before the High Court in circumstances where the particular applicants have been released on bail. In those cases where the bail takes the form of conventional bail, as opposed to an interim release, the question of the legal status of the earlier period of detention is now a moot point by reason of the fact that the applicants are not now detained. The inquiries must nevertheless be determined, but the determination will ordinarily be confined to recording that there is no current detention and dismissing the proceedings. It would impose an unnecessary strain on scarce judicial resources—and divert resources from those urgent cases where individuals are in custody—for the High Court to embark upon a consideration of what is a moot point in each of these cases.
68. For all of these reasons, then, I decline to embark upon a consideration of the proceedings before the District Court in circumstances where the question of the legal status of the earlier period of detention is now a moot point by reason of the release of the Applicant by the High Court on conventional bail. If and insofar as the Applicant may wish to pursue a claim for damages or declaratory relief, it is open in principle for him to do so by way of plenary proceedings or judicial review proceedings. These are not matters suitable for disposal in the present proceedings.

## CONCLUSION AND PROPOSED FORM OF ORDER

69. The High Court has jurisdiction to direct the interim release of a detainee pending the hearing and determination of an inquiry under Article 40.4.2° of the Constitution. The character of such release differs from conventional bail in a number of respects. In particular, the detainee must satisfy a threshold related to the *underlying merits* of the complaint that the detention is unlawful. The duration of the interim release is fixed by reference to the date of the determination of the inquiry.
70. An applicant who institutes Article 40.4.2° proceedings and then seeks to be released prior to the completion of the inquiry without addressing these additional factors is, in effect, making an application for conventional bail.
71. The question whether a person is being detained otherwise than in accordance with law will generally fall to be determined by reference to the position pertaining at the date of the Article 40.4.2° inquiry. Where, as here, the person has been released on conventional bail pending the determination of the criminal proceedings and does not challenge the bail order, that person is not being “*detained*” at all. Even if the conditions imposed under the High Court bail order are characterised as involving some restriction upon personal liberty, those restrictions derive from an order which is valid on its face and has not been challenged. There is no suggestion that the criminal proceedings are being pursued improperly or that the bail conditions are invalid.
72. For the reasons explained at paragraphs 58 to 68 above, I decline to embark upon a consideration of the proceedings before the District Court in circumstances where the question of the legal status of the prior period of detention is now a

moot point in the sense that it cannot affect the outcome of the Article 40.4.2° inquiry.

73. I have concluded that the Applicant is not currently being detained for the purposes of Article 40.4.2°. The proceedings will be dismissed.
74. As to costs, my provisional views are as follows:
- (1) The Applicant is not entitled to recover any costs associated with the inquiry. The Applicant applied for and was granted conventional bail pursuant to the High Court's full and original jurisdiction. This relief was available without any necessity to invoke Article 40.4.2°.
  - (2) The Applicant is entitled to recover his reasonable costs in relation to the application for conventional bail made on 10 August 2026.
  - (3) I propose to measure any costs in gross. It is only fair to flag to the parties that my provisional view is that the costs properly recoverable on the bail application are likely to represent a fraction of the costs identified in the fee estimate for the Article 40.4.2° proceedings. The fee estimate gave an indicative total of between €42,815 and €45,815, including a solicitor's general instructions fee of between €16,000 and €19,000. These figures are exclusive of VAT.
75. 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.

76. Finally, for the avoidance of doubt, it should be recorded that the Applicant remains bound by the terms of the conventional bail order made by the High Court on 10 August 2026.
77. I propose to list these proceedings before me on 5 October 2026, for mention only, to fix a date to hear submissions in relation to costs.

*Appearances*

Colman FitzGerald SC and Aislinn Finnegan for the Applicant instructed by Aonghus McCarthy Solicitors

Eoin McCullough SC and Davy Lalor for the Minister and the Governor 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