

APPROVED

[2026] IEHC 630



THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION

2026 1223 SS

BETWEEN

JAMIE WALSH

APPLICANT

AND

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 18 September 2026

INTRODUCTION

1. This judgment is delivered in respect of an inquiry under Article 40.4.2° of the Constitution. The Applicant is detained in custody pending trial. The Applicant has made two unsuccessful applications for bail, the first to the District Court

and the second to the High Court. The Applicant was unrepresented at the bail hearing before the District Court but was represented by solicitor and counsel at the bail hearing before the High Court.

2. One of the principal issues for determination in this judgment is the effect of the High Court bail determination upon the outcome of the Article 40.4.2° inquiry. The Applicant continues to pursue complaints concerning the earlier District Court bail hearing, notwithstanding that he has since had a High Court bail hearing in respect of which no complaint is made.
3. The Article 40.4.2° inquiry arises against the backdrop of an ongoing dispute about the rates of remuneration payable in relation to the defence of criminal proceedings before the District Court. One 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 unrepresented at bail hearings before the District Court.

PROCEDURAL HISTORY

District Court

4. The Applicant was arrested, and brought before the District Court (Judge Treasa Kelly) on 20 July 2026. He was charged with robbery, contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001; burglary, contrary to section 12 of that Act; and failure to appear, contrary to section 13(1) of the Criminal Justice Act 1984. A bench warrant was also executed in respect of an

earlier charge of possession of stolen property, contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

5. The robbery and burglary charges arise from two incidents alleged to have occurred in Dublin city centre on the evening of 18 July 2026. It is alleged that the Applicant entered a Spar shop at Johnson's Place, went behind the counter and used force against a member of staff before taking a quantity of cigarettes valued at €77.80. It is also alleged that the Applicant entered a Circle K shop at College Green and, while a member of staff was away from the counter, jumped over the counter and took cigarettes valued at €72. The Applicant is presumed to be innocent of these charges.
6. The District Court refused bail under the *O'Callaghan* principles. The judge expressed serious concern that the Applicant would not attend his next court appearance, having regard to his bench-warrant history. The judge stated expressly that it was unnecessary—in light of that conclusion—to determine the objection under section 2 of the Bail Act 1997.
7. The judge granted legal aid and informed the Applicant that he could make an application to the High Court for bail or renew his application for bail before the District Court if his circumstances changed. The Applicant was remanded in custody to appear before the District Court on 24 July 2026.
8. The Applicant attempted to renew his bail application on the return date of 24 July 2026 but was told by a different District Court judge that he would have to apply to the High Court for bail.

High Court

9. The Applicant retained solicitor and counsel to make an application for an inquiry pursuant to Article 40.4.2° of the Constitution. The High Court (Hunt J.)

opened an inquiry on 30 July 2026. The proceedings were adjourned twice and ultimately came before the High Court (Brett J.) on 7 August 2026. The Applicant was present in person and was represented by solicitor and counsel.

10. Counsel on behalf of the Applicant moved an application for bail. The application followed the course of a conventional bail application. The prosecution called Garda Colm Carroll. Garda Carroll outlined the alleged offences, the evidence said to connect the Applicant to those offences, the history of bench warrants and previous convictions, and the basis of the bail objections. The Garda was cross-examined by counsel on behalf of the Applicant. The Applicant then gave sworn evidence concerning his personal circumstances, accommodation, drug treatment, prospective employment and willingness to comply with bail conditions. The Applicant was cross-examined on behalf of the Director of Public Prosecutions. Counsel for the Applicant made submissions and proposed conditions of bail.
11. Brett J. refused bail by reference to the *O'Callaghan* principles and section 2 of the Bail Act 1997. The ruling referred to the Applicant's demonstrated history of failing to attend for court appearances and to the significant number of offences which he had committed while on bail previously.
12. The Article 40.4.2° inquiry came on for hearing before me on 16 September 2026. The committal warrant ultimately certified by the Governor as the basis of the Applicant's detention is dated 28 August 2026.
13. Written submissions on behalf of the Director of Public Prosecutions and the Applicant were filed on 7 September 2026 and 11 September 2026, respectively. I have had regard to those submissions, together with the oral evidence and oral submissions presented at the substantive hearing.

TITLE OF THE PROCEEDINGS

14. The proceedings were instituted with the relevant prison governor named as sole respondent. The Director of Public Prosecutions and the Minister nevertheless participated in the inquiry and were separately represented throughout. It does not appear that any formal order was made joining either to the proceedings. To ensure that the title of the proceedings reflects the respective roles played by the Director and the Minister, and to preserve their respective rights of appeal, I will make an order formally joining the Director as a respondent and the Minister as a notice party, and amending the title accordingly. The amended title is reflected in this judgment.
15. I dispense with any requirement to re-serve the original proceedings by reason of the amendment of the title. The Director of Public Prosecutions is to be joined as a respondent, and the Minister as a notice party, 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.

APPLICATION FOR CONVENTIONAL BAIL OR INTERIM RELEASE?

16. There was a dispute at the hearing before me as to the legal character of the application made to the High Court on 7 August 2026. The dispute centred on whether the application had been for interim release or for conventional bail. The Applicant submits that the application was made “*within the Article 40 proceedings*” and while the inquiry was awaiting the transcript of the District Court hearing.
17. To assist the reader in understanding this dispute, it is necessary to say something about the two different types of bail. The term “*conventional bail*” is used here

to describe bail granted by the High Court pursuant to its full and original jurisdiction in bail matters. That jurisdiction is not appellate and is exercised afresh: *People (Attorney General) v. O'Callaghan* [1966] I.R. 501 and *Roche (otherwise Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53. The effect of the bail is to release the accused person pending the underlying criminal proceedings, subject to the obligation to attend before the criminal court.

18. The term “*interim release*” is used to describe the High Court’s jurisdiction to direct the release of the detained person pending the completion of an inquiry under Article 40.4.2°. The rationale for this latter 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.”

19. 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.
20. As explained in *Kinane v. Governor of Cork Prison* [2026] IEHC 604, the starting point for the analysis is different for the two types of bail. 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.

21. Having described the distinction between conventional bail and interim release pending the determination of the Article 40.4.2° inquiry, I turn now to the proper characterisation of the order made on 7 August 2026.
22. 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 through the revocation of bail. 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.
23. The operative part of the order of 7 August 2026 reads as follows:

“And the proceedings before the Court being treated as a bail application

Whereupon and on reading the Affidavit of Brian Keenan filed on the 30th day of July 2026 and the documents and exhibits referred to therein and on hearing the oral submissions of said respective Counsel and the oral evidence of Garda Colm Carroll of Pearse Street Garda Station and the oral evidence of the Applicant presented to the Court on this day

IT IS ORDERED that the said Application for bail on the charges before the Dublin District Court (Court No. 10 CCJ) as set out on case numbers 2026/118982 (1) 2026/131794 (1) 2026/131796 (1) 2026/131797 (1) and charge sheet numbers 28921053 28995834 28995859 28995867 do stand refused

AND IT IS ORDERED that the substantive proceedings be adjourned to Friday the 11th day of September 2026 at 11.00 am in the forenoon [ADVCN] in the Four Courts on Inns Quay in Dublin 7 and that the said Applicant Jamie Walsh be produced via video link at that time”

24. The order cannot sensibly be interpreted as having been made in response to an application for interim release pending the determination of the Article 40.4.2° inquiry. First, the order expressly states that the proceedings were being treated as a bail application. Second, the order describes the bail sought by reference to the charges pending before the District Court. Had an interim release been sought, the bail would have been sought for the duration of the Article 40.4.2° inquiry. It is correct to say, as counsel for the Applicant does, that the order separately adjourned the substantive Article 40.4.2° proceedings. That provision confirms that the inquiry remained extant, but it does not translate what is clearly the refusal of conventional bail into a refusal of interim release.
25. The Applicant seeks to liken the application made on 7 August 2026 to the bail applications made within the Article 40.4.2° proceedings in *McCormack v. Governor of Mountjoy Women's Prison* [2026] IEHC 554. The Applicant submits that, as in *McCormack*, the application was made to secure his liberty pending completion of an inquiry which had already been opened and was awaiting the transcript of the District Court hearing.
26. The terms of the order made in *McCormack* are, however, crucially different. That order expressly admitted the applicant to bail “*pending the determination of the proceedings in this Court*”, required her to attend the High Court during the hearing and at the final determination of those proceedings, and provided for her surrender to the prison if the proceedings were dismissed. The purpose and duration of the release were thus defined by reference to the Article 40.4.2° proceedings. The order of 7 August 2026 contains no equivalent language. It records instead that the proceedings were being treated as a bail application and refuses bail on the identified charges pending before the District Court.

27. Counsel for the Applicant submits that “*the bar is set much higher*” in an application for interim release and that the refusal of such relief signifies only that the particular applicant has not met the “*more onerous conditions*” applicable in that context. There is, however, no indication that the Applicant was required to satisfy a threshold related to the arguability of his complaint of unlawful detention: the application on 7 August 2026 was determined solely by reference to the *O’Callaghan* principles and section 2 of the Bail Act 1997.
28. Subject always to according primacy to the words of the order, it may be permissible when interpreting a court order to have regard to the broader context in which the order was made. Here, the High Court judge discussed the legal character of the bail application with counsel for the Applicant. Brett J. described the bail application in the following terms:

“Mr. O’Higgins, even taking all of that as the case, that’s an argument in respect of Article 40. All this court has heard today is a bail application, the same bail application that could have been heard by the bail judge in the CCJ. In other words, nothing that I’ve heard today deals with anything that occurred in the District Court, deals in any way with the fundamental denial of justice, or deals in any way with an Article 40.”

29. Towards the end of the exchange with counsel, Brett J. summarised the position as follows:

“I’m just conscious that clearly there are judges who are well familiar with bail applications, and as I understand the Supreme Court jurisprudence, it indicates that a bail application before the High Court is a full inherent jurisdiction issue for bail. But either which way, I’m conscious this application before me, which was run as a bail application, is at an end. So I’ll make no further comment one way or the other.”

30. It is apparent that Brett J. understood the application before her as having been an application for conventional bail. This is entirely consistent with the approach

taken to the application: it was decided by reference to the *O'Callaghan* principles and section 2 of the Bail Act 1997, and without any consideration of the bail hearing before the District Court.

31. In conclusion, the hearing before the High Court on 7 August 2026 took the form of an application for conventional bail and the resulting order is an order refusing conventional bail, not interim release. No application has been made to amend the order. This is so notwithstanding that counsel for the Applicant accepted at the hearing before me that “*the order doesn't reflect*” the characterisation now advanced on behalf of the Applicant.

DETENTION IN ACCORDANCE WITH THE LAW

32. Article 40.4.2° protects the right not to be deprived of liberty save in accordance with law. The general principle is that 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 detention in accordance with the law.
33. This general principle is subject to an exception where the detention is wanting in the “*fundamental legal attributes*” which under the Constitution should attach to the detention: *State (Royle) v. Kelly* [1974] I.R. 259.
34. The High Court has the capacity to direct the release of a detainee notwithstanding the existence of a court order which has not been set aside in other proceedings. The case must be exceptional, and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the High Court to proceed in that fashion.
35. O'Donnell J. (as he then was) put the position as follows in *S.McG. v. Child and Family Agency* [2017] IESC 9, [2017] 1 I.R. 1 (at paragraph 9):

“The remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty. It carries with it its history in the common law as the vindication of the rule of law against arbitrary exercises of power. It is and remains the classic remedy when a person’s liberty is detained without any legal justification, or where the justification offered is plainly lacking. However the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case for the High Court to, as it were, ‘look through’ an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so, and direct the release of the applicant. [...]”

36. These principles have been applied in the specific context of pre-trial detention, i.e. to circumstances where an accused person is being detained in custody prior to his or her criminal trial. The leading judgment is that of *Roche (otherwise Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53. The Supreme Court explained that there are many instances where, within jurisdiction, a court may fall into an error of interpretation or base its decision on a mistaken view of the law. This does not in consequence remove jurisdiction. There are legal structures in place to deal with such commonplace situations, and these fall outside the obligation of the High Court to inquire into and declare whether a detained person is lawfully detained. The Supreme Court rejected the applicant’s argument that the distinction between errors within and without jurisdiction does not apply in bail cases.
37. The fundamental legal attributes attaching to pre-trial detention are to be found in *People (Attorney General) v. O’Callaghan* [1966] I.R. 501, read in

conjunction with Article 40.4.6° of the Constitution. The accused person must continue to be treated as an untried person who benefits from the presumption of innocence until conviction. Detention must not be punitive and must not be preventive, save upon the grounds for the refusal of bail authorised by Article 40.4.6° of the Constitution and provided for by section 2 of the Bail Act 1997.

38. The necessity for detention under the *O'Callaghan* principles must be assessed by reference to the probability of the accused evading justice and, more particularly, the single fundamental question, “*Is the applicant likely to stand his trial?*” In addition, where the accused is charged with a serious offence, bail may be refused under section 2 of the Bail Act 1997 if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.
39. The detention of an accused person pending trial must rest upon a judicial determination that there are lawful grounds for refusing or revoking bail. As stated in *Roche/Dumbrell*, it is for the court of trial, or for the High Court exercising its full and original jurisdiction, “*to arrange for the bailing or the custody of the accused on proper constitutional grounds and by exercising fair procedures*”.
40. The procedural protections have been elaborated upon in the more recent case law, including *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599. The fundamental requirement is that the accused person be afforded a meaningful opportunity to understand, test and answer the grounds upon which pre-trial detention is sought. The accused person must be made aware of the grounds upon which bail is opposed. The form and timing of the notice required will

depend upon the circumstances: in some cases, the objection may be so straightforward that it will be sufficient that it is outlined for the first time at the hearing; in other cases, the nature or complexity of the objection may require that written material be provided in advance so as to allow the accused person sufficient time to understand the objection and prepare a response. Where a witness gives oral evidence in support of the objection, the accused person must be afforded an opportunity to question that witness and must be informed, in intelligible terms, of the entitlement to do so. The accused person must also be afforded a proper opportunity to answer the objection, whether by evidence, oral submissions or both. Finally, the court must adjudicate upon the objection actually advanced and give sufficient reasons to identify the basis upon which bail has been refused or existing bail has been revoked. The reasons need not be elaborate, but they must identify the ground upheld and the basis upon which it has been accepted. If the court proposes to refuse bail on a different ground raised of its own motion, the accused person must be given notice of that ground and a proper opportunity, by evidence or submissions, to challenge it. These requirements are not to be applied as a formulaic checklist; the hearing must be assessed as a whole.

41. The ultimate question remains whether the accused person was afforded a meaningful opportunity to understand, test and answer the case for detention, or whether a fundamental requirement was wholly or effectively denied, such that the proceedings could not properly be regarded as a bail hearing at all.

EFFECT OF THE HIGH COURT BAIL DETERMINATION

42. Logically, the first issue to be resolved in this judgment must be the effect of the High Court bail determination upon the outcome of the Article 40.4.2° inquiry. In particular, the court must consider whether, as asserted by the respondents, the effect is that the current detention is in accordance with the law.

THE DIRECTOR'S ARGUMENTS

43. The Director submits that the High Court hearing on 7 August 2026 afforded the Applicant an effective remedy for the underlying complaint, in the sense that his entitlement to bail was determined afresh following a procedurally compliant hearing. Counsel for the Director confirmed that she was not saying that the Article 40.4.2° inquiry has to be “*stopped*”, but was saying, instead, that the defence is that the Applicant is in lawful custody.

THE APPLICANT'S ARGUMENTS

44. The first argument advanced on behalf of the Applicant is that the High Court bail application does not speak to anything that occurred in the District Court. Counsel asked rhetorically: “*How [could] a bail application determine the lawfulness of a person's continued detention in circumstances where it is completely neutral on the issue that we contend made it unlawful?*”
45. With respect, this argument misunderstands the significance of the High Court's determination of the application for conventional bail. There is no suggestion that the determination involved a consideration of whether the proceedings before the District Court represented a bail hearing cognisable at law. The High Court determined the application for bail afresh, in the exercise of its full and

original jurisdiction in bail matters. Indeed, Brett J. expressly stated that she had not considered the proceedings before the District Court.

46. The significance of the High Court's determination lies in the fact that, by the date of the hearing of the Article 40.4.2° inquiry, there had been a judicial determination, reached following a bail hearing cognisable at law, to the effect that the Applicant should not be admitted to bail. That determination did not retrospectively validate the earlier District Court proceedings. Its significance is that the alleged unlawfulness arising from those proceedings no longer attaches to the Applicant's continuing detention. Article 40.4.2° is directed to the lawfulness of the detention as it presently exists, rather than to the retrospective adjudication of its legal status at an earlier point in time.
47. The second argument advanced on behalf of the Applicant is that his current detention is "*anchored*" in the refusal of bail by the District Court on 20 July 2026. It is said that the Applicant continues to be remanded pursuant to District Court orders which can be traced back to what counsel described as the "*initial unlawful order*", and that the carriage of the criminal proceedings remains linked to that order. It is further said that the Applicant is not detained pursuant to an order of the High Court.
48. The argument does not fully reflect the interaction between the orders of the High Court and the District Court. The jurisdiction to remand a person from time to time to appear before the District Court resides with the District Court alone for as long as it has carriage of the criminal proceedings. The question whether the accused person is to remain in custody or be admitted to bail may, however, be determined by either the District Court or the High Court exercising a concurrent jurisdiction. In the case of the District Court, the jurisdiction is

conferred by section 22 of the Criminal Procedure Act 1967. In the case of the High Court, the jurisdiction is a full and original jurisdiction.

49. The relationship between the two jurisdictions is best illustrated by example. Suppose that an accused person is remanded in custody by the District Court for a period of fifteen days. Suppose further that, before the expiration of that period, the High Court admits him to bail. He must be released forthwith upon perfecting his recognisance. This is so even though the High Court order does not formally set aside, or purport to set aside, the District Court committal warrant. The prison governor must give effect to the High Court bail order notwithstanding that the committal warrant has not yet expired.
50. The accused person is still obliged to appear before the District Court on the return date. Unless and until there is a further application in relation to bail, the District Court will ordinarily remand him on bail, the terms of the bail having been fixed by the High Court.
51. Where, as in the present case, the High Court refuses bail to a person remanded in custody by the District Court, its order does not take the form of an appellate order affirming the District Court's decision. The High Court determines the application for bail afresh and does not purport to affirm, set aside or vary the District Court order.
52. Whether bail is granted or refused, the High Court has determined whether the accused person should be admitted to bail. That determination remains operative unless and until bail is reconsidered on a further application to either court. The court having carriage of the criminal proceedings continues in the meantime to make the necessary remand orders.

53. The fundamental legal attribute which the Applicant says is lacking is a judicial determination, reached following a bail hearing cognisable at law, that there are lawful grounds for refusing bail. The Constitution does not require that determination to be made by the court having carriage of the criminal proceedings.
54. Here, the High Court, in the exercise of its full and original jurisdiction in bail matters, made a fresh determination on 7 August 2026 that lawful grounds existed for refusing bail. From that date, the Applicant's continuing detention possessed the fundamental legal attribute alleged to have been absent from the earlier period following the District Court refusal, namely, a proper judicial determination as to whether the Applicant should be admitted to bail. Each subsequent remand in custody, including that evidenced by the current committal warrant, post-dated and occurred against the background of that intervening and unchallenged determination. The Applicant's detention is now in accordance with the law.
55. The point may be tested in this way. Suppose that, instead of applying to the High Court for conventional bail, the Applicant had made a renewed application for bail before the District Court on the basis that he now had legal representation. Suppose further that bail had been refused following a bail hearing cognisable at law. The detention of the Applicant thereafter would rest on a judicial determination properly made. In such a scenario, the fundamental legal attribute said to have been lacking from the initial period of detention would have been supplied by the second bail hearing and the detention thereafter would be in accordance with the law.

56. Yet the committal warrant in that scenario would be indistinguishable in form from the warrant now before the High Court. The District Court, having refused bail a second time, would simply have remanded the Applicant in custody. The committal warrant would be in the same form; the prison governor would similarly certify detention pursuant to that warrant; and nothing on the face of the instrument would disclose whether the custodial character of the remand followed the first hearing or the second. The only distinction between the posited scenario and the present case is the identity of the court which made the second bail determination. In the posited scenario, that determination would have been made by the District Court; here, it was made by the High Court. Each court has jurisdiction to determine whether the Applicant should be admitted to bail.
57. The logical terminus of the Applicant's argument is that a proper judicial determination by the District Court could supply the fundamental legal attribute said to be lacking, whereas an equivalent determination by the High Court could not. With respect, no principle has been articulated which is capable of supporting such a distinction between courts exercising concurrent jurisdiction in bail matters.

DECISION ON WHETHER DETENTION IS IN ACCORDANCE WITH LAW

58. The Applicant is currently being held pursuant to a committal warrant issued by the District Court on 28 August 2026. The District Court has jurisdiction to issue such a committal warrant pursuant to section 22(1) of the Criminal Procedure Act 1967. The section provides that where the District Court remands a person or sends him forward for trial, it may commit him to prison or other lawful

custody. The committal warrant is valid on its face and records an order made by a court of competent jurisdiction. Save in an exceptional case, a person detained in such circumstances will be regarded as being detained in accordance with the law.

59. If the inquiry were to be decided solely by reference to the committal warrants, the detention would be held to be in accordance with the law. To succeed in his application, therefore, the Applicant must persuade the High Court to treat this as an exceptional case and to “*look through*” the chain of committal warrants. The High Court is invited to examine the legal character of the bail hearing which took place before the District Court on 20 July 2026 and to hold that the hearing could not properly be regarded as a bail hearing at all.
60. Thus far, the Applicant’s argument resembles that pursued in several recent cases, including *Ennis*. The distinctive feature of the present case, however, is that there has been a *subsequent* bail determination. The Applicant had applied to the High Court for conventional bail, and this was refused by the High Court on 7 August 2026. Crucially, the Applicant makes no complaint in relation to the procedural fairness of that bail hearing and determination.
61. The “*looking through*” exercise in the present case thus reveals two bail determinations, namely, those of the District Court and the High Court. Even if one assumes—without deciding—that the District Court hearing had been deficient, there has since been a judicial determination, reached following a bail hearing cognisable at law, that the Applicant should not be admitted to bail. It follows that the Applicant is being detained pursuant to a committal warrant which is valid on its face, and that he has had the benefit of a proper judicial determination, reached on constitutionally permissible grounds, that he should

not be admitted to bail. The Applicant is being detained in accordance with the law.

ASSESSMENT OF DISTRICT COURT HEARING IS NOW MOOT

62. The decision under the previous heading that the Applicant is currently being detained in accordance with the law is determinative of the Article 40.4.2° inquiry. I have carefully considered whether it might be appropriate to examine *de bene esse* the legal status of the Applicant's detention between 20 July 2026 and the High Court's refusal of conventional bail on 7 August 2026. This would necessitate a consideration of whether the hearing before the District Court on 20 July 2026 was a bail hearing cognisable at law.
63. Notwithstanding that I have heard full argument on the legal character of the District Court hearing, and heard oral evidence from both Garda Carroll and the Applicant, I have decided that it would be inappropriate to determine the issue.
64. 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 being detained in accordance with the law. The outcome of the inquiry must, therefore, be a determination that the Applicant is being detained in accordance with the law and a refusal of the application for release.
65. The general position is that a court will not determine a moot point. 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.

66. 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 existing as of the date upon which the inquiry is heard and determined.
67. 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.”

68. 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.

69. The position 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.
70. Second, setting out a detailed analysis of the District Court bail hearing 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, each delivered after full argument at 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, *Nevin v. Governor of Castlereagh Prison* [2026] IEHC 601, *Doros v. Governor of Cloverhill Prison* [2026] IEHC 610 and *Cronin v. Governor of Cloverhill Prison* [2026] IEHC 618. The legal principles have been analysed by reference to a broad range of factual scenarios. There is nothing peculiar to the facts of the District Court hearing in the present case which would add to that analysis.
71. The present case is distinguishable from *Kiely v. Governor of Cloverhill Prison* [2026] IEHC 603. In that 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 previous cases considered by the High Court.
72. Third, for a court to embark upon a determination of a moot point 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 await determination. It is important that court hearing time and judicial writing time are not expended unnecessarily on moot issues while “*live*” controversies remain unresolved.

73. For all of these reasons, I decline to determine whether the proceedings before the District Court on 20 July 2026 represented a bail hearing cognisable at law. The legal status of the earlier period of detention is now moot. Any claim for damages or declaratory relief in respect of that period would require to be pursued in appropriately constituted plenary or judicial review proceedings. These are not matters suitable for determination in the present proceedings.
74. For the avoidance of doubt, the finding is that the legal status of the earlier period of detention is a moot issue in these proceedings. It is not a finding that the Article 40.4.2° inquiry is moot. The inquiry is determined by reference to the current status of the Applicant’s detention.

CONCLUSION

75. An accused person who believes that he has not had the benefit of a bail hearing cognisable at law is entitled to apply to the High Court for an inquiry into the lawfulness of his detention. There is no obligation on such a person to exhaust his parallel right to apply to the High Court for conventional bail. An application for conventional bail is not an “*alternative remedy*” in the sense that that term is used in judicial review proceedings.
76. In circumstances where an accused person pursues an application to the High Court for conventional bail, and makes no complaint in respect of the procedural fairness of the ensuing hearing and determination, that determination may have implications for the outcome of the Article 40.4.2° inquiry. If the High Court

grants conventional bail, then the accused person is not being detained, and the outcome of the inquiry will be a determination to that effect. If the High Court refuses conventional bail, the accused person will continue to be detained but the detention will be in accordance with the law. This is because the High Court bail determination supplies the “*fundamental legal attribute*” which was said to have been wanting. The detention rests upon a judicial determination, reached following a bail hearing cognisable at law, on the question of whether pre-trial detention is justified on constitutionally permissible grounds. The outcome of the inquiry will be that the accused person is being detained in accordance with the law.

77. Each of these outcomes follows from the fact that the mischief which Article 40.4.2° is designed to remedy does not arise. In the first contingency, there is no detention; in the second, the detention is in accordance with the law. Neither outcome precludes the accused person from seeking redress in respect of the earlier period of detention. It is open, in principle, to the accused person to pursue judicial review proceedings or a claim for damages.
78. The Applicant characterises the Respondents’ position as being that “*the very act of asking to be admitted to bail*” vitiated his right to have the inquiry completed and brought to an end his complaint concerning the District Court hearing. That is not the basis upon which the present inquiry is determined. The outcomes described above do not depend upon the accused person being precluded or estopped from pursuing an Article 40.4.2° inquiry by reason of having made an application for conventional bail. Nor do they rest upon any theory of waiver or acquiescence. Rather, the outcomes follow from the objective legal position at the date upon which the inquiry is determined. Where bail has been refused

following a hearing cognisable at law, the particular deficiency upon which the complaint depends no longer attaches to the current detention.

79. On the facts of the present case, the Governor has certified that the Applicant is currently detained pursuant to the committal warrant issued by the District Court on 28 August 2026. To succeed, the Applicant invites the High Court to “*look through*” the committal warrant.
80. The “*looking through*” exercise reveals two bail determinations, namely, those of the District Court and the High Court. The High Court bail determination supplies the detention with the “*fundamental legal attribute*” which is said to have previously been lacking. Even if one assumes, without deciding, that the District Court hearing was deficient, there has now been a judicial determination, reached following a bail hearing cognisable at law, to the effect that the Applicant should not be admitted to bail. It follows that the Applicant is currently “*being detained*” in accordance with the law. He is being detained pursuant to a committal warrant which is valid on its face, and he has had the benefit of a proper judicial determination on the question of whether pre-trial detention is justified on constitutionally permissible grounds.
81. The Applicant submits that a person who contends that he is unlawfully detained has, “*both as a matter of common sense and in contemplation of potential future litigation*”, an obligation to mitigate his loss. The making of an application for bail is said to be consistent with that obligation, to have no bearing upon whether the original detention was lawful or unlawful, and to be “*neutral in this regard*”.
82. I accept that the Applicant sought conventional bail in an attempt to secure his liberty and mitigate the consequences of his detention. The significance of the application does not, however, derive from his motive in making it, but from the

independent judicial determination which resulted. The Applicant is not disadvantaged because he sought conventional bail. The outcome of the Article 40.4.2° inquiry must nevertheless reflect the fact that, by the date upon which it is determined, lawful grounds for refusing bail have been established following an unchallenged hearing and determination by the High Court.

DISPOSITION

83. The outcome of the inquiry pursuant to Article 40.4.2° is that the Applicant is being detained in accordance with the law. Accordingly, I refuse to direct the release of the Applicant. I will hear any applications as to costs on 5 October 2026.

Appearances

Michael O'Higgins SC and Orla Doolin for the Applicant instructed by Keenan & Company Solicitors LLP

Hugh McDowell 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