

APPROVED



**THE HIGH COURT
IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION**

**Record No. 2026 1221 SS
Record No. 2026 1222 SS
Neutral Citation: [2026] IEHC 634**

BETWEEN:

FRANTISEK CUREJA

and

PATRIK MATE

APPLICANTS

-and-

**THE GOVERNOR OF WHEATFIELD PRISON and THE DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENTS

-and-

THE MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

NOTICE PARTY

JUDGMENT of Ms. Justice Cathleen Noctor delivered on 17th September 2026

Introduction

1. This judgment is delivered in respect of two inquiries pursuant to article 40.4.2° of the Constitution into the lawfulness of the applicants' detention at Wheatfield Prison arising from orders made by a Circuit Court judge on 17th July 2026. Orders directing the inquiries were made on 30th July 2026 and they came before me on 11th September 2026. It was agreed that the two inquiries would proceed simultaneously. On this date, I indicated that I would deliver a joint judgment in respect of both applicants and I initially reserved judgment to 16th September 2026. In the meantime, counsel appearing in these two inquiries appeared before me in an entirely different matter on 15th September 2026. On this occasion, I brought the attention of counsel to specific judgments of the superior courts (see below at paragraph 26) that I considered might be relevant to the issues in the case and, in particular, given that the two applicants in these inquiries were in custody awaiting sentence for various offences to which they had pleaded guilty. I invited counsel to address the court in relation to these additional judgments on 16th September 2026. Having heard further from counsel for all the parties on 16th September 2026, I reserved judgment to today's date.
2. These inquiries arise against a backdrop of a dispute between the Minister for Justice, Home Affairs and Migration ("*the Minister*") and certain solicitors about rates of payment in respect of representing persons accused of criminal offences in the District Court ("*the dispute*"). As a result of the dispute, it appears that few or no solicitors are willing to accept assignments under the new Criminal Justice (Legal Aid) (Amendment) Regulations 2026 (S.I. No. 303/2026) ("*the new Regulations*") before certain District Courts. More pertinently, the two applicants before me appeared before the Circuit Court on 25th June 2026 and 17th July 2026 without, in effect, formal legal

representation when their cases were listed for sentence.

3. When these proceedings came on for hearing before me on 11th September 2026, the Director of Public Prosecutions (“**DPP**”) was joined as a respondent and the Minister as a notice party to the proceedings.

Background

4. Mr. Cureja and Mr. Mate (“**the applicants**”) have been in custody in the State since a date in January 2026. On 27th March 2026, and before Fermoy District Court, the applicants signed pleas of guilty to six offences of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (“**the 2001 Act**”) and one offence of handling stolen property contrary to section 17 of the 2001 Act.
5. There is nothing in evidence before this court that demonstrates what, if anything, occurred in court between the date upon which the applicants went into custody (in January 2026) and the date upon which they signed guilty pleas in the District Court on 27th March 2026. Likewise, there is no evidence as to what, if anything, transpired between the signing of the guilty pleas on 27th March 2026 and their court appearance on 25th June 2026. This is notwithstanding the fact that the applicants must have been sent forward to Cork (County) Circuit Court (“**the Circuit Court**”) for sentence and indeed they must have affirmed their guilty pleas before the Circuit Court. The foregoing aside, the applicants appeared before the Circuit Court on 25th June 2026 and 17th July 2026.
6. In these inquiries, and regarding Mr. Mate, the parties had the benefit of a transcript of the proceedings before the Circuit Court on 25th June 2026 (“**the June Mate transcript**”) and 17th July 2026 (“**the July Mate transcript**”). Similarly, regarding Mr. Cureja, the parties had the benefit of a transcript of the proceedings before the Circuit

Court on 25th June 2026 (“*the June Cureja transcript*”) and 17th July 2026 (“*the July Cureja transcript*”).

7. On 25th June 2026, the Circuit Court judge dealt with the applicants simultaneously. However, the June Mate transcript is more extensive than the June Cureja transcript. For this reason, it is only the June Mate transcript that will be referred to in this judgment.
8. On 17th July 2026, the Circuit Court judge dealt with the applicants separately. For this reason, both the July Mate transcript and the July Cureja transcript will be referred to in this judgment.

Proceedings concerning Mr. Mate

9. Mr. Patrick Langsch acts for Mr. Mate in this inquiry. From reading the June Mate transcript, the July Mate transcript, the principal affidavit of Mr. Langsch, solicitor, sworn on 30th July 2026 and a supplemental affidavit sworn by him on 31st July 2026 in support of Mr. Mate’s application for an inquiry, the position appears to be as follows: -

- (a) Mr. Mate has been in custody since January 2026;
- (b) Mr. Mate pleaded guilty to the offences described at paragraph 4 above in the District Court on 27th March 2026;
- (c) Mr. Langsch solicitor (“*the second solicitor*”) averred that, on an unspecified date in June 2026, Mr. Mate informed him that the relationship as between him and Mr. O’Meara solicitor (“*the first solicitor*”) had broken down and Mr. Mate wished to retain the second solicitor to act for him. This, it would appear, occurred on or before 25th June 2026 and the second solicitor averred that it occurred prior to “*the general withdrawal of criminal legal aid services in June 2026*”. The second solicitor agreed “*in principle*” to act for Mr. Mate and “*began taking steps with a*

view to assuming responsibility for [Mr. Mate's] representation". However, the second solicitor averred that the "proposed transfer [was not] formally completed" and "the extant legal aid certificate" (granted on 27th March 2026) "continue[d] to identify [the first solicitor] as the assigned solicitor";

- (d) the second solicitor averred that, in light of the withdrawal of criminal legal aid services and the position adopted by practitioners concerning the new legal aid arrangements, *"I was of the opinion that I could not come on record or undertake the substantive legal aid work required to prepare and conduct [Mr. Mate's] sentencing hearing"*.

25th June 2026

- (e) when Mr. Mate was listed for sentence on 25th June 2026, counsel appeared on his behalf ("***the first counsel***") instructed by the first solicitor. The first counsel informed the Circuit Court judge that he had previously appeared on behalf of both applicants, he had "*no instructions*" and he believed that a new counsel was coming "*on record*". Another counsel then informed the court that he was standing in for a named counsel ("***the second counsel***") who was instructed by the second solicitor. However, it became apparent that the second solicitor was not proposing to come on record on this occasion;
- (f) having made enquiries of counsel, the Circuit Court judge considered that she could not progress matters because "*[n]obody has any instructions*". The second solicitor averred that the consequence of the foregoing was that the applicants appeared for sentence "*without a functioning solicitor on record, without counsel in a position to take instructions and without effective legal representation*". The Circuit Court judge adjourned Mr. Mate's matter to 17th July 2026 and remanded him in custody to that date;

17th July 2026

- (g) when Mr. Mate's case was called on 17th July 2026, the first counsel (instructed by the first solicitor) informed the Circuit Court judge that he "*had instructions but those instructions have been withdrawn*" because the second solicitor wished to come on record. The second counsel informed the court that he appeared in the matter and was instructed by the second solicitor. The second counsel informed the court that they (as in he and the second solicitor) were in "*an invidious position*" because "*coming on record would itself be a positive action*" in the context of the dispute. Simultaneously, the second counsel asked the court to note "*for notification purposes*" that the second solicitor intended to withdraw from the criminal legal aid panel. The second counsel also said that "*officially we're not on record, and I can't advance it any further*"; and
- (h) when the Circuit Court judge enquired as to what was anticipated, counsel for the Director of Public Prosecutions ("***the DPP***") requested that the matter be adjourned for sentence on 28th October 2026. Ultimately, however, the matter was adjourned for mention on 28th October 2026, and on the basis that a sentence date would be fixed at that time. The second counsel was present at this time, insofar as he confirmed to the court that Mr. Mate's appearance by video-link (rather than an appearance in court in person) would be sufficient for 28th October 2026 and he also requested a Czech interpreter for Mr. Mate for that date.
10. In these inquiries, the parties agree that 28th October 2026 will be the first day of the next criminal sessions before the relevant Circuit Court in Cork.
11. The theft charges encompass property to the value of approximately €10,800 and the value of the property encompassed by the handling charge is circa €5,100. The seven offences were committed at six different locations and on six different dates between

1st December 2025 and 6th January 2026.

12. The second solicitor averred that Mr. Mate has no recorded convictions in the State and has a number of road traffic convictions in the Czech Republic, including for driving while disqualified.

Proceedings concerning Mr. Cureja

13. The second solicitor also acts for Mr. Cureja in this inquiry. From reading the June Mate transcript, the July Cureja transcript, the principal affidavit of the second solicitor, sworn on 30th July 2026 in respect of Mr. Cureja and his supplemental affidavit sworn on 31st July 2026, the position appears to be as follows:-

- (a) Mr. Cureja's circumstances and the proceedings concerning him are identical to those set out in respect of Mr. Mate at paragraph 9(a)-(f) above;
- (b) on 17th July 2026, the Circuit Court judge was apprised that the situation was the same as that pertaining to Mr. Mate (thus as set out at paragraph 9(g)-(h) above). The Circuit Court judge told Mr. Cureja that the State wished to adjourn the matter to 28th October 2026 for mention and that a sentence date would be fixed on that occasion. The Circuit Court judge also informed Mr. Cureja that the second counsel had no instructions because of "*an industrial strike*" and "*a legal strike*". Mr. Cureja requested that his solicitor contact him and the second counsel said that he would inform the second solicitor of this request; and
- (c) the second counsel (who was instructed by the second solicitor) informed the court that there was no necessity to make a production order on 28th October 2026 for Mr. Cureja because it was only listed for mention to fix a sentence date.

14. The details of the offences, the value of the relevant property and the dates of the offences as set out at paragraph 11 above apply equally to Mr. Cureja.
15. It appeared that Mr. Cureja had 13 convictions in the Czech Republic. These

convictions were for a variety of offences, including four for theft and three for “*unauthorised measure, counterfeiting and alteration of payment instruments*”. He also had one conviction for each of the following: counterfeit and alteration of money; obstruction of execution of an official decision and expulsion; disorderly conduct; restriction of personal freedom; threatening the upbringing of a child; and illicit production and handling of narcotic and psychotropic substances and poisons. A number of custodial sentences were imposed upon him for certain of these offences.

Position of the parties

The applicants

16. Identical written submissions were presented on behalf of the applicants on 11th September 2026. These submissions asserted that:-

- (a) sentences had not been imposed because each applicant “*is presently unable to secure legal representation for the sentencing hearing in consequence of the ongoing withdrawal of services by solicitors practising under the criminal legal aid scheme*”;
- (b) the purpose of the remand in custody was to secure the applicants’ attendance for the imposition of sentence as opposed to being a punishment pursuant to a judicially determined sentence. A detention that may have been lawful at its commencement cannot simply continue *indefinitely* without regard to its duration, purpose and proportionality, there was “*no presently ascertainable date upon which sentence [could] effectively proceed*”, and the applicants were exposed to “*an open-ended period of imprisonment*” pending sentence. The essence of this submission was (and as set out in the conclusion to the applicants’ written submissions) that “*[t]here comes a point at which continued remand is no longer reasonably*

incidental to the administration of the sentencing process but becomes punishment without sentence". This submission was somewhat repeated elsewhere, insofar as it was asserted that where an accused is "*already imprisoned, has pleaded guilty, is ready to be sentenced, has not caused the delay, cannot safely and fairly be sentenced without representation, and no effective date can be identified upon which representation and sentence will become available, continued detention cannot be justified indefinitely by reference to the original remand order*". Likewise, it was asserted that neither applicant had "*contributed to the present delay ... They seek to have sentence imposed. They have not declined representation, sought unnecessary adjournments or manipulated the process. Their inability to obtain representation arises from circumstances outside their personal control*";

(c) while the applicants were unrepresented, the Circuit Court judge could not proceed to sentence them. Upon enquiry from this court, counsel for the applicants confirmed that, had the Circuit Court judge sentenced the applicants absent legal representation, it was likely that an application under article 40.4.2° would have been brought *or* the imposition of any sentence without representation would have been challenged in some form. Counsel for the applicants submitted that the Circuit Court judge in the present cases was in a "*difficult position*" of the nature described by Gearty J. in *McCormack and others v. Governor of Mountjoy prison and others* [2026] IEHC 554 (at paragraph 1.5);

(d) there was a real prospect or real possibility that "*the period already spent, and prospectively to be spent, on remand will approach or exceed any proportionate custodial sentence ultimately imposed*" and the Constitution did not permit "*remand detention*" to become, in substance, "*an indeterminate sentence imposed*

without a sentencing hearing". In both written and oral submissions, it was clear that the foregoing submission was predicated on the basis that the "*likely sentencing range [was] modest*", the offences were not the most serious, the monetary value of the property was only in excess of €10,000, and the applicants were sent forward to the Circuit Court on signed guilty pleas.

17. Further, on behalf of the applicants, the following emerged from the written submissions (and was elaborated upon in oral submissions):-

(a) reliance was placed on *Mõtsnik v. Estonia* (Application no. 50533/99) 24th

September 2003, wherein the applicant claimed a violation of article 6 § 1 of the European Convention on Human Rights ("***the Convention***") on the basis that certain criminal charges against him were not determined within a reasonable time.

The applicants relied on paragraph 40 of the judgment of the European Court of Human Rights ("***the ECtHR***"). This reiterated the principle that "*persons kept in detention pending trial are entitled to 'special diligence' on the part of the authorities. Consequently, in cases where a person is detained pending the determination of a criminal charge against him, the fact of his detention is itself a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met*". The ECtHR in *Mõtsnik* held that the length of the proceedings (or at least the period that it was entitled to consider) did not breach the "*reasonable time*" requirement in article 6 § 1, having regard to the handling of the case by the authorities after the applicant had been taken into custody;

(b) it was sought to distinguish *Pafitis and Others v. Greece* (Application No. 20323/92) 26th February 1998, wherein the ECtHR found that, insofar as a delay in civil proceedings might be attributable to a strike by the Athens Bar, this was a

professional association defending its professional interests and the consequential delays could not be attributed to the State (at paragraph 96). Counsel for the applicants accepted that *Pafitis* did not apply to the present cases. However, it was asserted that the issue in the present case was that “[a]bsence of fault does not equal lawful authority for unlimited detention” and that the applicants sought “vindication of their present constitutional liberty”. Indeed, reliance was placed upon paragraphs 74-79 of *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599 and, in particular, the observations by Simons J. (at paragraph 76) that no solicitor has the power to cause the detention of another person and that, even if one were to assume that the existence of the dispute might have contributed indirectly to circumstances in which an individual accused person was being detained unlawfully, responsibility for those circumstances could not be visited upon that individual;

- (c) *R v. Nguyen* [2022] EWCA Crim 1444 was relied upon as exposing the dilemma that arose “*acutely*” in the present cases. There, the Court of Appeal (Criminal Division) of England and Wales quashed the appellant’s sentence in circumstances where, notwithstanding the fact that she was the recipient of legal aid, the sentencing judge conducted a sentence hearing and imposed sentence upon her notwithstanding the voluntary absence of her counsel in consequence of a barristers’ strike. The appellant had no legal representation in court whatsoever. The applicants relied on the Court of Appeal’s observation that “[i]t may also be the case as the respondent also submitted, that there was no obvious legislative mechanism to deal with the [unprecedented problems caused by the voluntary absence of counsel], and someone in the appellant’s precise position could remain unsentenced for an indeterminate period” (at paragraph 37). The Court of Appeal

considered that “[w]hether that is so or not, the appellant was in no different position to that of someone whose counsel was ill on the day of the hearing or had been delayed by a rail strike” and it was unlawful to sentence her unless and until, for proper reason, her representation order was revoked or withdrawn (at paragraph 37). Of the foregoing, this court observes that the Court of Appeal was concerned that “[t]he appellant had a representation order and she retained the benefit of it, including the right to be represented by her solicitors and counsel, who remained willing to act for her, even if not willing to attend on the day of the sentence hearing” (at paragraph 34). Counsel for the applicants emphasised the illness or rail strike analogy and asserted that the disruption (caused by the voluntary absence of counsel) “did not extinguish the entitlement to legal representation merely because respecting that entitlement created serious practical difficulties for the administration of justice”;

(d) in oral submissions, counsel for the applicants emphasised the entitlement to legal aid for one who is not in a financial position to pay for legal representation (citing *State (Healy) v. Donoghue* [1976] IR 325, *Carmody v. Minister for Justice* [2010] 1 IR 635 and *Joyce v. Brady* [2011] 3 IR 376). Reliance was also placed upon Simons J.’s analysis and application of *Ryan v. Governor of Midlands Prison* [2014] IESC 54 and *Roche (also known as Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53 in *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599.

18. Counsel for the applicants concluded his oral submissions by referring to *FK v. Minister for Justice and Law Reform* [2008] 4 IR 1. He relied on the statement of principle therein to the effect that, once an inquiry was opened under article 40.4.2°, it was for the High Court to determine whether or not the detention was in accordance with law. His position was that an inquiry should not be diluted through the State negotiating a

form of release with the detainee and presenting it as a *fait accompli* to the court. At this point, counsel for the applicants submitted that the fact that the applicants could have sought bail was irrelevant (either in terms of interim release or conventional bail to use the terminology of Simons J. in *Kiely v. Governor of Cloverhill prison* [2026] IEHC 603 and *Kinane v. Governor of Cork Prison* [2026] IEHC 604).

19. With respect to the foregoing, the applicants' written submissions assumed that the respondents were relying upon the option of the applicants applying for bail in the High Court (and the availability of the Legal Aid – Custody Issues Scheme) as “*an answer*” to the applicants' detention. However, that assumption was misplaced. Counsel for the DPP submitted to this court that it would be extraordinarily unusual, if not unheard of, for a person, in custody, awaiting sentence in the Circuit Court to obtain High Court bail. That aside, counsel for the DPP confirmed that the potential of obtaining High Court bail was not being relied upon in the cases before me. Therefore, this court will not further consider this aspect of the applicants' submissions.
20. Further, in oral submissions, counsel for the applicants appeared to place great emphasis on the fact that, while Hunt J. refused to open inquiries in respect of the applicants, Phelan J. subsequently did so. I attach no weight to the foregoing and, in my view, the reasons for either decision are irrelevant to this court's determination of these inquiries.
21. In reply to the submissions made by the other parties (set out below), counsel for the applicants informed the court that the Convention case law and *R v. Nguyen* [2022] EWCA Crim 1444 were relied upon as persuasive authorities only. In answer to the DPP's submission (see paragraph 23(m) below) that the applicants could have proceeded by means of judicial review, counsel for the applicants relied on *Ennis v. Governor of Cloverhill Prison* [2026] IEHC 599, wherein Simons J. stated that the High

Court does not have discretion to refuse relief under article 40.4.2° (to an otherwise qualified applicant) on the ground that there was an alternative remedy available to them (paragraph 39). The applicants' alternative submission was that relief by way of judicial review would not have rectified the applicants' "*endless deprivation of liberty*" pending sentence. Upon enquiry from this court as to how the applicants' position was thus categorised, counsel for the applicants submitted that: the applicants do not know when they will be sentenced; the dispute prevented them from being sentenced in July 2026; and there was no way of being satisfied that a sentence date would in fact be fixed on 28th October 2026.

The DPP

22. The written submissions delivered on behalf of the DPP asserted as follows:-
- (a) the transcripts from the Circuit Court demonstrated that the "*procedural impasse*", upon which the applicants relied, arose from the fact that the applicants wished to change legal teams and be represented by the second solicitor who had indicated his (i) willingness and intention to come on record in general terms and (ii) unwillingness to do so at the particular time. The sentence hearings were adjourned in circumstances where the second counsel (instructed by the second solicitor) informed the Circuit Court judge that he did not have instructions to proceed with sentence hearings;
 - (b) the Circuit Court judge did all that could reasonably be expected of her, namely she adjourned the applicants' sentence hearings to the first available date in the next sessions. It was hoped that sentence hearing dates would be fixed on this date (28th October 2026). This was consistent with *State (Healy) v. Donoghue* [1976] IR 325 and appeared to meet with the approval of the two legal teams that were present for the applicants or, at the very least, nothing to the contrary was suggested by either

legal team; and

- (c) the Circuit Court order of 17th July 2026 (remanding the applicants to 28th October 2026 for mention with a view to fixing a sentence date) was made within the jurisdiction of the court, was valid on its face and justified the detention of the applicants.

23. In supplemental oral submissions, counsel for the DPP: -

- (a) accepted that an obvious issue would arise if a person was remanded in custody for a period(s) that exceeded the maximum potential penalty for the relevant offence, but submitted that no such issue arose in the present case because the maximum penalty for theft was 10 years;
- (b) submitted that the factual background demonstrated that the applicants could have been sentenced on 25th June 2026 but for the fact that there was some breakdown in the relationship as between the applicants and the first solicitor. On this occasion, both the first and second counsel informed the court that they had no instructions. The point that was made was that, while the DPP was not suggesting that the consequences of the dispute should be visited upon the applicants, the sentence hearings could have proceeded on 25th June 2026 but for the fact that the applicants wished to change legal representation;
- (c) submitted that, insofar as no objection was made by either the first counsel or second counsel to the applicants being remanded to 28th October 2026, no one asserted the right to an expeditious trial, and this was a factor that must be considered in deciding whether or not there was a breach of the right to an expeditious trial;
- (d) relied upon the fact that the applicants were remanded to a date that the parties agreed would be the first day of the next criminal sessions (28th October 2026), and

would be dealt with speedily thereafter if the sentences were in position to proceed at that time;

- (e) submitted that the “*procedural impasse*” described by counsel for the applicants arose because the second solicitor could not come on record because of the dispute and that there may or may not be other solicitors willing to come on record;
- (f) contended that, while the court could have regard to decisions of the ECtHR, article 6 of the Convention could not be directly relied upon before an Irish court and, in any event, the cases relied upon were of limited value insofar as the applicant in *Mõtsnik v. Estonia* did not succeed and the delay in *Pafitis and Others v. Greece* was one of years;
- (g) acknowledged the jurisprudence regarding the right to expedition, submitted that this right was not breached and submitted that the applicants did not assert that the process could have been speeded up in respect of their matters;
- (h) submitted that the absence of legal representation was open to being abused as a litigation strategy;
- (i) submitted that the case law, upon which counsel for the applicants relied, demonstrated that the fact that a lawyer declines to appear over a lengthy period did not necessarily afford rights to an applicant as against the State;
- (j) submitted that the present cases fell squarely within *FK v. Minister for Justice and Law Reform* [2008] 4 IR 1;
- (k) submitted that there was a high burden upon, and a large evidential hurdle to be overcome by, a convicted person who, having lost the presumption of innocence, contended that their detention was fatally flawed or amounted to a denial of justice by virtue of the period of time spent in custody while awaiting sentence. This was explained as meaning that the burden shifted to an applicant once the relevant

governor certified a detention and the detention order was valid on its face. It was submitted that the applicants were obliged to demonstrate that their cases were within the category of rare and exceptional cases for which a remedy was available under article 40.4.2° on the basis that there was a fundamental denial of justice;

- (l) submitted that, independently of the dispute, there must be many cases in which sentence is not imposed as quickly as one might have hoped and the applicants had failed to identify *any* case in which a convicted person, awaiting sentence, was unconditionally released in consequence of such a delay and on the basis that this gave rise to a fatal flaw or a fundamental denial of justice;
- (m) submitted that if the applicants considered that the adjournment of the sentencing hearing (from July to October) was unreasonable, irrational or breached the applicants' right to an expeditious trial, and was a decision outside the Circuit Court judge's jurisdiction, one avenue that might appropriately have been considered was an application for judicial review in respect of the adjournment and therein asserting a breach of article 38 of the Constitution;
- (n) submitted that the applicants invited the court, without producing any evidence, to conclude that the "*point in time*" had been reached whereby their detention had become unlawful;

The Governor of Wheatfield Prison ("*the Governor*") and the Minister

- 24. Counsel for the Governor and the Minister filed extensive omnibus submissions in respect of the present cases and 15 other cases that were listed for hearing on 11th September 2026, and also adopted the submissions made on behalf of the DPP.
- 25. It was submitted that *Mõtsnik v. Estonia*, *Pafitis and Others v. Greece* and *R. v. Nguyen* were irrelevant to the present inquiries because those judgments of the ECtHR concerned retrospective claims and the latter was an application for leave to appeal

against sentence. In addition, the applicants were not asserting a breach of article 6 of the Convention.

Further submissions

26. On 15th September 2026, this court invited the parties to consider, and thereafter make such submissions as any of them considered appropriate on 16th September 2026, in respect of any or all of the following: *The State (Wilson) v. Governor of Portlaoise Prison* (unreported decision of the Supreme Court of 11th July 1968); *Hardy v. Ireland* [1994] 2 IR 550; *The State (McDonagh) v. Frawley* [1978] I.R. 131; *The State (Cannon) v. Kavanagh* [1937] IR 428; *Mthethwa v. Governor Cork Prison* [2010] IEHC 380; *Granahan v. Governor of Mountjoy Prison* [2025] IEHC 247; and *The State (Richardson) v. The Governor of Mountjoy Prison* [1980] ILRM 82 (“***the additional cases***”).
27. On 16th September 2026, counsel for the DPP provided further written submissions. Reliance was placed on *The State (Cannon) v. Kavanagh*, *The State (Wilson) v. Governor of Portlaoise Prison*, *The State (Royle) v. Kelly* [1974] IR 259, *The State (McDonagh) v. Frawley*, and *Granahan v. Governor of Mountjoy Prison*. The DPP emphasised that the applicants lost the presumption of innocence when they pleaded guilty and submitted that this distinguished them from persons who were accused but not yet tried. The DPP relied on *The State (Cannon) v. Kavanagh* and contended that, by analogy with a sentenced person (as Cannon was), a person detained pending sentence is *prima facie* detained according to law and it would require “***the most exceptional circumstances***” for the Court to grant even a conditional order of *habeas corpus*. Furthermore, the present applicants did not even seek bail from the Circuit Court judge and instead, within two weeks of their legal teams implicitly accepting that their further remand in custody was appropriate, sought their release pursuant to article

40.4.2°. It was submitted that, as convicted persons, a heightened scrutiny should attach to their applications, nothing was advanced to undermine the remand orders of the Circuit Court that were valid on their face and there were no exceptional circumstances.

28. In addition to adopting the DPP's submissions, counsel for the Governor and Minister reiterated their submissions that: the threshold was high and exceptional in a post-conviction case; there must be some fundamental denial of justice; and that the additional cases underlined the submissions previously made by the respondents to this court.
29. Counsel for the applicants submitted that, while the threshold to be reached was high, it was no higher or lower for applicants who were convicted. Counsel submitted that: the additional cases all concerned "*post-sentence*" situations; there was no case law governing the applicants' circumstances (i.e. pre-sentence); they were in a highly irregular and indeterminate limbo; and they might find themselves remaining in this situation for two weeks, two months or indeed two years.

Applicable Principles

30. The applicants are detained pursuant to orders of a court of competent jurisdiction which are valid on their face.
31. In *Ryan v. Governor of Midlands Prison* [2014] IESC 54, the Supreme Court reaffirmed the principle that not every error, illegality or procedural defect occurring within jurisdiction renders a detention unlawful. A distinction must be maintained between errors made in the exercise of jurisdiction and defects which destroy jurisdiction altogether. In that case, Mr. Ryan succeeded before the High Court in his claim that his continued detention was unlawful on the basis that he was entitled to one-third remission in respect of the sentence he was serving at the time that the inquiry was

conducted by the High Court. The appeal against the order for his release under article 40.4.2° was allowed. This judgment of Denham C.J. (for the court) is highly instructive in the present case and provides a thorough exposition of the relevant legal principles:-

- “11. As the respondent was a detained person he is entitled to apply for an enquiry under Article 40. However, the High Court had received certification from the appellant exhibiting a valid warrant for detention and that order was sufficient to establish the validity of the detention.*
- 12. The respondent then collaterally attacked his continued detention by urging that the Minister’s decision of the 16th April, 2014, was procedurally flawed. The question arises as to whether this attack is within Article 40.*
- 13. The Court follows and applies the statement of law given in FX v. Clinical Director of the Central Mental Hospital [2014] IESC 01, where it was stated at paragraphs 65 and 66:-*

*‘65. In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of *habeas corpus* is not the appropriate approach.*

66. An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an

appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in *The State (O.) v. O'Brien* [1973] 1 IR 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court’.

14. *Most recently, in Roche (also known as Dumbrell) v. Governor of Cloverhill Prison [2014] IESC 53, Charleton J. pointed out, and this Court would endorse:-*

‘21. 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 enquire into and to declare that a detained person is either lawfully detained or not’. [Emphasis added]

15. *The proposition that not every defect or illegality attached to detention will invalidate that detention has long been established.*
16. *This is not a novel exposition of the law. In McDonagh v. Frawley [1978] IR 131 at 136 it was stated: -*

‘The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a citizen may not be deprived of his liberty save "*in accordance with law*" does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of

fundamental requirements that the detention may be said to be wanting in due process of law. For *habeas corpus* purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded.’

17. *Also, in The State (Royle) v. Kelly [1974] IR 259, Henchy J. stated at p 269:-*

‘The mandatory provision in Article 40, s. 4, sub-s. 2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained “*in accordance with the law*” is but a version of the rule of *habeas corpus* which is to be found in many Constitutions. The expression “*in accordance with the law*” in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if—but only if—the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.’

18. *Thus, the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw.*

19. *This is not a case such as Cirpaci v. Governor of Mountjoy Prison [2014] IEHC 76, where there was a complete absence of jurisdiction in the District Court where he had pleaded guilty and not been informed of his entitlement under*

Article 38 to a trial by jury. Nor is it such a case as State (O.) v. O'Brien [1973] IR 50, where a person underage was sentenced to a term of imprisonment in circumstances where that jurisdiction was not available in the Central Criminal Court. Nor is it similar to Sweeney v. Governor of Loughan House Open Centre [2014] IESC 42.

20. *In the cases cited above there was an absence of jurisdiction.*

...

23. *The traditional remedy of Habeas Corpus, now subsumed in Article 40 of the Constitution, is the great protection of the citizens' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so.*

But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure...

24. *In this case the order of the Circuit Criminal Court shows no invalidity on its face, indeed it was not contested that it was a valid order.*

25. *Habeas Corpus is not the appropriate remedy for the issue of remission, as raised by the respondent".*

32. *In The State (Wilson) v. Governor of Portlaoise Prison, an unreported decision of the Supreme Court of 11th July 1968, Walsh J. stated:-*

"On a habeas corpus application by a person detained by order of a court whether under sentence following conviction or otherwise, matters dealing with

the weight of the evidence or irregularities of procedure which do not go to the jurisdictional basis of the trial or other court proceedings are not relevant unless the irregularities or the procedural deficiencies complained of are shown to be such as would invalidate any essential step in the proceedings leading ultimately to his detention.”

33. In *The State (McDonagh) v. Frawley* [1978] IR 131 at pages 136-137, O’Higgins C.J. pronounced the position in the following terms:-

“The position of a person duly convicted and properly sentenced is quite different. Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment, he is prima facie detained in accordance with law and, as was held in the High Court by Maguire P. at p. 435 of the report of The State (Cannon) v. Kavanagh [[1937] 1 IR 428], it would require ‘most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted’. To the same effect, see the judgments of Andrews L.C.J. and Black and Brown JJ. in Re Beggs [[1944] N.I. 121] and the judgment of the (English) Court of Criminal Appeal (Goddard L.C.J., Parker and Donovan JJ.) in Re Featherstone [(1953) 37 Cr. App. R. 146] at p. 147 of the report, where the exceptional circumstances justifying the release by habeas corpus of such a person are said to be exemplified by a case where the term of sentence has expired. In a case such as the present, the production of the warrant by the governor of the prison will normally be a sufficient justification of the detention”.

34. Having then said that which is reproduced at paragraph 16 of the judgment of Denham C.J. in *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (and set out above within paragraph 31), O’Higgins C.J. continued: -

“For example, if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life, instead of penal servitude for life as required by the statute [see [1966] IR 361], the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, s. 4, for it could not be said that the detention was not ‘in accordance with the law’ in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the court of trial for the imposition of the correct sentence: see the unanimous opinion expressed in the House of Lords in Athanassiadis v. Government of Greece [[1971] A.C. 282] at p. 289 of the report which shows that a mere technical defect is not a good ground for release on habeas corpus.

The confinement of orders of release under Article 40, s. 4, to cases where the detention is not ‘in accordance with the law’ in the sense I have indicated means that applications under Article 40, s. 4, are not suitable for the judicial investigation of complaints as to conviction, sentence or conditions of detention which fall short of that requirement. These fall to be investigated, where necessary, under other forms of proceedings. But in cases where it has not been shown to the satisfaction of the court that the detention is ‘in accordance with the law’ in the sense indicated, the release of the detained person must be ordered ...”.

35. In *Hardy v. Ireland* [1994] 2 IR 550 at page 562, Hederman J. stated the principle propounded in *The State (McDonagh) v. Frawley* [1978] IR 131 at page 136, thus: *“post-trial inquiries under Article 40 of the Constitution cannot be concerned with some alleged legal error or impropriety”.* *Hardy* did, however, concern a convicted

and sentenced applicant and whose appeal to the Court of Criminal Appeal had concluded before he made an application to the High Court under article 40.4.2°.

36. Similarly, in *Mthethwa v. Governor of Cork Prison* [2010] IEHC 380, at paragraph 8, Charleton J., albeit in the context of a sentenced prisoner, held “[i]t is only in circumstances of a fundamental denial of the fair procedures that are inherent in the criminal process that any detention based on a sentence following on conviction at a criminal trial could be argued to lack a lawful basis”.
37. Finally, in *Granahan v. Governor of Mountjoy Prison* [2025] IEHC 247, at paragraph 9, Heslin J. said “...when the court is dealing with an Article 40 application in a ‘post-conviction’ scenario, as here, a higher standard applies and authority for that proposition can be seen in the decision of Mr. Justice Hederman in *Hardy v. Ireland* [1994] 2 IR 550, at p. 562”.

Discussion

38. The applicants’ position is set out in detail above at paragraphs 16-21. Critically, in this court’s view, counsel for the applicants submitted that that which was undoubtedly a lawful detention may cease to be so “at some stage” and that that “stage” had been reached in the present cases. When this court enquired about the submission that “the lawfulness of the custody must fall away at some point” and specifically regarding the point in time at which it was claimed that the lawfulness “fell away” in the present cases, the response was “it has fallen away now” (i.e. 11th September 2026). Counsel for the applicants was pressed to answer the foregoing and, in particular having regard to the fact that, in oral submissions, it was submitted on behalf of the applicants that “[e]ither a person is in lawful detention, or [they] are not” (by reference to *FK v. Minister for Justice and Law Reform* [2008] 4 IR 1 at paragraph 19) and that the essence of the applicants’ submission was that their detention was lawful on 17th July 2026.

Counsel responded in the following terms: *“I am not suggesting that there is a fixed point at which that will happen which is applicable to every factual situation simply because ... it would depend entirely on the nature of the offences and the circumstances of the applicants. And I say that must be so...”*. This was elaborated upon as referring to *“the nature of the offending, the offences to which somebody has pleaded guilty, the circumstances of the offending, the particulars, the details of the offending and the particular details of a particular defendant”*. It was said that that these factors fed into the sentence that might be imposed. Thereafter, counsel for the applicants submitted that, with respect to a person, in custody awaiting sentence for an offence carrying a maximum penalty of 12 months, their detention would become unlawful after a period of 9 months in custody. Counsel further submitted that the time (at which a detention awaiting sentence would become unlawful) would be different for more serious offences. It was submitted that, because the applicants had been in custody for 8 months (January to September 2026), this was *“too long”* having regard to the nature and circumstances of the offending. At the same time, counsel for the applicants acknowledged that there were differences between the applicants, insofar as one had 13 convictions and the other had an unspecified number of road traffic convictions. Counsel concluded his general submission by asserting that no *“cut-off point”* covered all situations and that a *“cut-off point”* could only be considered in the context of identifying what conceivable sentence could be imposed because it was in that context that the potential deprivation of liberty, while awaiting sentence, must be considered.

39. In the present cases, the orders of the Circuit Court show no invalidity on their face. Indeed, it was not suggested that the Circuit Court orders of 17th July 2026 were invalid at the time of their making. No claim was made that the Circuit Court judge acted without jurisdiction or that there was a *“fundamental denial of justice”* or *“fundamental*

flaw” when the Circuit Court judge remanded the applicants in custody on that date for mention to 28th October 2026 with a view to a sentence hearing date then being fixed within the currency of the scheduled criminal law sittings. On the contrary, the submission was that, by virtue of the passage of time *after* 17th July 2026, the applicants’ detention *became* unlawful and *was unlawful* as of the date of the hearing of the inquiries (i.e. 11th September 2026). On behalf of the applicants, and at best, the claim appears to be that, with the passage of time, a fundamental denial of justice or a fundamental flaw has emerged. This is not the test upon which an order, that is good on its face, might be the subject of an inquiry under article 40.4.2°. Further, in the view of this court, no analogy may be drawn between the applicants’ position and that of a person who is sentenced to a period of imprisonment that exceeds the maximum sentence provided for by law.

40. In essence, these applications were founded on an assertion (or speculation) that, had the applicants been sentenced on the day the inquiries commenced before me (i.e. 11th September 2026), they would not have received sentences exceeding the periods of time that they had already spent in custody on remand for the offences to which they pleaded guilty on 27th March 2026. This assertion was made by reference to the offences themselves, the circumstances of the offences and the applicants’ personal circumstances (including previous convictions).
41. It is the view of this court that the present applications are misconceived. The net effect of the applicants’ overall submission is that this court (while exercising a civil jurisdiction) must (and presumably acting as a reasonable sentencing judge) in effect conduct a theoretical sentence hearing and, to that end, consider evidence, *inter alia*, of the offences, the circumstances of their commission and the applicants’ personal circumstances (including previous convictions). Ignoring the fact that the only material

of this nature held by this court was the general particulars of the offences and certain information concerning the applicants' personal circumstances (e.g. their respective dates of birth, nationalities and previous convictions), at the core of the applicants' submission was a demand that this court:-

- (a) establish (or more appropriately speculate as to) the appropriate headline sentences that might be identified by a reasonable judge in respect of the offences to which the applicants pleaded guilty;
- (b) establish (or more appropriately speculate as to) the discount that would be afforded by a reasonable judge to such identified headline sentences having regard to, *inter alia*, mitigating factors (which this court would also have to establish);
- (c) conclude (or more appropriately speculate) that a reasonable sentencing judge would not impose an actual sentence on either applicant of a period greater than the approximate period of eight months that both have spent in custody prior to 11th September 2026; and
- (d) on the basis of (a)-(c) above, declare that the applicants' detention became unlawful on 11th September 2026 and direct their immediate release.

42. No authority was cited in support of the above submission. The applicants' submissions ignore the statements of principle set out at paragraphs 30-37 above, including that a court order that is good on its face should not be subject to an article 40.4.2° inquiry in the absence of some fundamental flaw or fundamental denial of justice. Indeed, it is this court's view that, as a matter of general principle, there is no reason to distinguish between an order for post-conviction detention of a person who has been sentenced *and* one who has pleaded guilty but has not yet been sentenced. Both have lost the presumption of innocence. By virtue of the statements of principle referred to above, the route of the constitutional and immediate remedy is not appropriate. As regards the

applicants, the Circuit Court orders made on 17th July 2026 are good on their face, were made within jurisdiction and there was no fundamental flaw or fundamental denial of justice in their making. Article 40.4.2° is not intended to cater for the situation in which the applicants now find themselves. The applicants are *prima facie* detained in accordance with law and no exceptional circumstances arose that would render relief under Article 40.4.2° available to the applicants in these cases.

43. The above aside, and for completeness, I make the following general observations which have no bearing whatsoever on this court's determinations of the inquiries before it, but which touch upon issues that may fall consideration in a future case(s): -

- (a) there was no evidence before this court to the effect that, as of the date of the inquiries, neither applicant could secure legal representation in the context of the Circuit Court prosecution;
- (b) the submission that the applicants did not themselves cause any delay ignores the fact that it appears that the sentence hearings could have proceeded on 25th June 2026 had the applicants not decided to change their legal representation;
- (c) there was no evidence before the court regarding the progression of the applicants' cases between the unspecified date that they went into custody (in January 2026) and the date upon which they signed guilty pleas in the District Court on 27th March 2026 nor of what (if anything) transpired in the period between 27th March 2026 and 25th June 2026. The foregoing said, it may be surmised that the applicants were sent forward from the District Court to the Circuit Court on their respective signed pleas and presumably they affirmed their guilty pleas before the Circuit Court.
- (d) the applicants submitted that they could not be fairly sentenced without legal representation. Indeed, counsel for the applicants confirmed to this court that it was likely that, had the applicants been sentenced without legal representation, the

- sentences imposed would have been challenged. Thus, it appears that regardless of the outcome in the Circuit Court on 17th July 2026, some challenge (whether pursuant to article 40 or otherwise) was destined to have been made. Notably, however, the second solicitor averred that, to the best of his knowledge and belief, no application was made in the presence of the applicants pursuant to section 215 of the Legal Services Regulation Act 2015 (albeit he averred this with respect to 24th June 2026, whereas it appears that the relevant date was 25th June 2026) and such an averment was supported by the transcripts from the Circuit Court; and
- (e) the second counsel clearly had some instruction on 17th July 2026, insofar as he submitted to the court that a production order was not necessary, but a translator was necessary, for 28th October 2026. On one view, at least one legal team actively participated, or at the very least acquiesced, in the process of the applicants being remanded in custody to 28th October 2026 without complaint;
 - (f) it is not necessary for this court to consider the circumstances (if any) in which the applicants might have sought relief by way of judicial review in respect of the order remanding them in custody on 17th July 2026 or indeed whether or not consideration might have been given to making a bail application to the Circuit Court judge in the period between 17th July 2026 and 30th July 2026, the latter being the day upon which the applicants made their first application under article 40.4.2°.

Conclusion

- 44. For the reasons set out above (excluding the observations at paragraph 43) I refuse relief under Article 40.4.2°.
- 45. I reserve the costs of the inquiries, and I will hear the parties in respect of any application for costs.

Appearances

Colman Fitzgerald SC and Patrick Barrett BL, instructed by Langsch & Cunnane solicitors LLP for the applicants.

Eoin Carolan SC and Hugh McDowell BL for the Minister and the Governor, instructed by the Chief State Solicitor's Office

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