

[2026] IEHC 663

THE HIGH COURT

2026 No 1499 SS

IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4.2º OF THE CONSTITUTION OF IRELAND

BETWEEN

SHANE MASON

APPLICANT

AND

GOVERNOR OF LIMERICK PRISON

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

AND

THE MINISTER FOR JUSTICE, HOME AFFAIRS, AND MIGRATION

NOTICE PARTY

JUDGMENT OF MR JUSTICE DAVID HOLLAND, DELIVERED ON 2 OCTOBER 2026

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INTRODUCTION¹

1. This judgment is delivered in an inquiry pursuant to Article 40.4.2° of the Constitution into the lawfulness of the Applicant's detention in Limerick Prison on foot of a District Court order refusing bail made on 22 August 2026 and a District Court warrant dated 22 September 2026 for committal on remand to Limerick Prison. The prison governor has certified the legal basis of the detention accordingly. The Applicant had no professional legal representation at the bail hearing. An Article 40 inquiry was ordered by the High Court on 22 September 2026. I heard that inquiry on 30 September 2026 and 1 October 2026 – at which hearings the Applicant was produced by videolink from Limerick Prison.

2. The Applicant explains in logistical terms the lapse of almost a month between the District Court order refusing bail on 22 August 2026 and the application for an Article 40 inquiry on 22 September 2026. That lapse explains the difference between the dates of District Court order refusing bail and the committal warrant of 22 September 2026 which is before me. I confess to some concern at the delay and have difficulty understanding how logistical issues explain it in the context of the urgency of Article 40 applications. As was said in **Ryan**²: *“The Courts must always enquire immediately into the grounds of any person’s detention, when called upon to do so.”* The urgency accorded to such matters by the courts implies the necessity for similar urgency in the preparation of such applications – the premise of which preparation is that the Applicant asserts that he or she has been unlawfully denied his or her constitutional and fundamental human right to liberty. However, no party suggests that anything turns on that delay for purposes of the decision I am to make.

3. The inquiry arises against a backdrop of a dispute between the Minister for Justice, Home Affairs and Migration (“the Minister”) and certain solicitors about rates of fees for representing persons accused of criminal offences. As a result of this dispute, it appears that few solicitors will, at present and for some months past, accept assignments in the District Court under the new Criminal Justice (Legal Aid) (Amendment) Regulations 2026³. One consequence is that accused persons are regularly appearing at District Court bail hearings without legal representation. Many Article 40 applications have recently ensued from refusals of bail in such circumstances. Some have succeeded. More have failed.

4. As occurred in **Nevin, Kelly & McDonagh**,⁴ these proceedings were commenced against the prison governor as sole respondent. The Minister was joined on his own application. The Director of Public Prosecutions participated in the proceedings but no formal order for her joinder was sought or made. I drew this to the attention of the parties at the hearing. By consent of all parties, I made the same orders as were made in **Nevin, Kelly & McDonagh**, in exercise of the same power and for the same reasons - joining the Director as a respondent, amending the title to the proceedings accordingly and dispensing with re-service upon her. The amended title is reflected in this judgment.

¹ Headings are for navigational purposes only and are not determinative of content.

² *Ryan v Governor of Midlands Prison* [2014] IESC 54.

³ S.I. No. 303/2026.

⁴ *Nevin, Kelly & McDonagh v Governor of Castlereagh Prison* [2026] IEHC 601.

5. The Applicant moved on two affidavits sworn by Cathal Quirke, solicitor, of Herbert & Co. Solicitors – the first sworn before and the second after the DAR transcript of the bail hearing of 22 August 2026 came to hand. The Applicant tendered no evidence himself. The substantive affidavit in response is that of Garda John Togher, who was involved in the investigation which resulted in the relevant charges, made at his suit, against the Applicant and who gave evidence opposing bail. On 1 October 2026, the second day of the Article 40 hearing, I admitted, without opposition, an affidavit sworn for the Applicant by John Herbert, solicitor, of Herbert & Co. Solicitors. I had the benefit of written and oral submissions from all parties. The Minister confined his submissions to the law – he did not address the particulars of the case.

BACKGROUND

6. Late on the night of 15 August 2026, Gardai responded to and commenced investigation of a complaint of an alleged robbery by an armed male in a car park in Johnsgate Village, Limerick. On foot of that investigation Gardai, at 08:10 on 21 August 2026, arrested the Applicant and brought him to Henry Street Garda Station, Limerick where he arrived at 08:25. There, at 21:15 on that date, three charges were preferred against him by charge sheet – all offences alleged to have been committed on 15 August 2026. These alleged offences were assault with intent to cause bodily harm⁵; possession of realistic imitation firearm at Johnsgate Village, Limerick⁶; and possession of realistic imitation firearm at John's St Limerick.⁷ It will be noticed that no charge of robbery was preferred. Following charge, the Applicant was told he would be brought before the District Court and that the Gardai would oppose bail.

7. Returning to the morning of 21 August 2026, at 09:53, the Applicant was facilitated in making a phone call to his solicitor Mr John Herbert – whose phone did not answer. At this point, the custody record records, the Applicant was offered the opportunity to consult with another solicitor. It is unclear if this was a general offer or was an offer specific to a particular solicitor in the Limerick area known not to be participating in the general withdrawal of services. If the latter, the evidence of Mr Quirke is that such solicitor could not have acted due to a conflict of interest – though it is not apparent that the Applicant, at the time of the offer, knew of that conflict. In any event, the Applicant refused the offer for reasons not recorded or given in evidence. However, it seems reasonable to infer that he hoped Mr Herbert would call him back – which he did shortly afterwards.

8. Mr Herbert deposes that he contacted the Applicant on foot of concerns raised with him by the Applicant's family after his arrest. They told him the Applicant was recently released from a lengthy prison sentence, suffered from diagnosed mental illness, was abusing cannabis and alcohol and had become volatile. I note from the custody record and bail pack that the Applicant admits heroin addiction and that while detained in Henry Street Garda Station he was twice attended by a medical practitioner for

⁵ Contrary to Section 18 of the Criminal Justice (Public Order) Act, 1994 as amended by Section 22 of the Intoxicating Liquor Act, 2008.

⁶ Contrary to section 9A of the Firearms and Offensive Weapons Act, 1990 as inserted by section 40 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

⁷ Contrary to section 9A of the Firearms and Offensive Weapons Act, 1990 as inserted by section 40 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

administration of methadone. Mr Herbert's purpose in making contact was to check on the Applicant's welfare.

9. Mr Herbert had a phone consultation with the Applicant, which concluded at 10:05. In that consultation he told the Applicant that, due to the solicitors' withdrawal of services, he would not advise him as to the Garda investigation or represent him in any court appearances. Later in the day, and again to check on the Applicant's wellbeing and mental health, Mr Herbert came to the station and consulted in person with the Applicant between 17:22 and 17:39. He again told the Applicant that due to the solicitors' withdrawal of services, he would not advise him as to the Garda investigation or represent him in any court appearances.

10. At interview at 17:55 the Applicant is recorded as having repeatedly replied to questions by the investigating Gardai that, on the advice of his solicitor, he had nothing to say. At the Applicant's request during that interview, he again, by phone, consulted Mr Herbert between 19:20 and 19:25. Afterwards, in resumed interview, he again repeatedly replied to the investigating Gardai that on the advice of his solicitor he had nothing to say. At 20:54, the Applicant was told he would be charged and he again sought to consult Mr Herbert. After the Applicant had been charged at 21:15 and told that bail would be opposed, he again consulted Mr Herbert, by phone, between 21:59 and 22:10.

11. Counsel for the Applicant has suggested that the Applicant's replies that on the advice of his solicitor he had nothing to say were formulaic rather than prompted by actual advice from his solicitor. Mr Herbert has sworn that gave no such advice. Ultimately, it does not seem to me that my decision turns on whether or in what degree the Applicant benefitted from solicitor's advice (which would in any event be privileged) while in custody. The evidence of Mr Herbert as to his purpose in consulting the Applicant and that he gave him no legal advice was not impugned - much less was it undermined. I accept that his purpose in contacting the Applicant was to check on his welfare and mental health and that he did not seek instructions or give advice referable to the Garda Investigation or as to any bail hearing which might ensue if charges were laid. In any event, it is the events of the following day in the District Court which primarily determine my decision.

12. However, the evidence of Mr Herbert is significant in one respect. Having established his purpose in consulting the Applicant as being that of checking on his welfare and mental health, he says nothing as to the impression he formed of the Applicant in those regards. I must infer that had he been alarmed in those regards he would have so deposed. Nor did Mr Herbert, as far as he deposes, do anything by reason of any such alarm. He did not call for medical attention or make representations to the Gardai or advise the Applicant's family to do either. Nor does he suggest that his being in dispute with the Minister would have inhibited his taking any such humanitarian steps: indeed, I am sure that he would rightly recoil at the suggestion. In that context, it is important to say that counsel for the Applicant disavowed any assertion or case that the Applicant, at any material time, lacked capacity or suffered from materially impaired capacity as it related to the bail hearing.

BAIL PACK & ITS PERUSAL BEFORE BAIL HEARING

13. On 22 August 2026 at 15:30, the Applicant was taken from Henry Street Garda Station to a special sitting of Limerick District Court to commence at 16:00. His was one of a number of cases to be considered at that sitting. It seems his case was initially mentioned to the Court, but I do not have a transcript of that. Thereafter at the Court's request, the Applicant was given the Bail Pack which set out in writing the basis of Garda opposition to bail. He was brought to a foyer outside the courtroom (while the court dealt with another matter in camera). There, he spent about 25 minutes going through the Bail Pack. A member of the Gardai unconnected to the matter helped him, explaining in ordinary language the Garda opposition to bail. He gave the Applicant a pen and is said to have assisted the Applicant in making notes. The Applicant was handcuffed during his perusal of the Bail Pack. Garda Togher's averment is uncontradicted that he

"... asked the Applicant whether he understood the bail pack and whether he had any questions about it. He informed me that he understood it. He also told me that he had notes and questions prepared for me for the hearing. I observed a number of notes on his copy of the bail pack. During the hearing, the Applicant referred to the bail pack on a number of occasions."

14. In any event, counsel for the Applicant accepts that this is not a case of failure to give adequate notice to the Applicant of bail pack contents or of the basis of the Garda objection to bail and accepts that I need not resolve any controversy as to the efficacy of the efforts of the Garda in question to assist the Applicant in understanding it.

15. Via Mr Quirke's first affidavit, the Applicant says he was "surrounded" by gardai while perusing the Bail Pack. Garda Togher recollects differently – he says other gardai were generally present in the area accompanying other prisoners. Garda Togher's is the only direct evidence. But, in any event, I do not see that anything turns on the Applicant's assertion.

16. The Bail Pack content is set out under the following headings listed in a contents list.

1. Introduction and Background of Incident
2. Seriousness of the Offences Under Investigation
3. Nature and Strength of the Evidence
4. Likely Sentence on Conviction
5. Previous Convictions
6. Convictions for Offences Committed While on Bail
7. Bench Warrants
8. Addiction
9. Belief of Objector

Appendices

- A. Previous Convictions Shane Mason

17. The Bail Pack runs to 17 pages - plus Appendix A which tabulates brief details of previous convictions.⁸ I am told and accept that is an unusually lengthy document for a bail pack. However, its narrative content, items 1 – 4 and 8 – 9, occupied a total of less than 6 double-spaced pages. The remaining pages tabulated an enumeration of the Applicants' 198 previous convictions of many kinds, of which 98 committed while on bail were tabulated in more detail. It should be said, without discounting their importance, that 113 of the 198 were traffic offences. 7 instances of bench warrants issued for failure to appear in court were also listed. Many of the convictions and bench warrants relate to the first decade of the century and early in the second decade. Also recorded is a charge of escape from lawful custody taken into consideration in 2004. But it is notable that, arising out of an incident of May 2010 involving discharge of a firearm, he was sentenced in 2012, inter alia, to 17 years imprisonment for attempted murder. He described himself at the bail hearing as "only out of prison".⁹

18. The Bail Pack introduces Garda Togher's objection to bail as grounded in his belief that the Applicant, if granted bail,

- will continue to commit further serious and similar crimes while on bail – a basis for objection for which section 2 of the Bail Act, 1997 provides.
- will fail to meet that bail by attending court for trial – a basis for refusal of bail for which the **O'Callaghan** case¹⁰ provides.

19. Bail Pack §1.1 describes in some detail the Garda investigation of the alleged incident of 15 August 2026 which resulted in the charges against the Applicant. §2 describes the seriousness of the offences charged - by reference primarily to their being punishable by imprisonment for up to 5 years. §3 describes the evidence against Mr Mason as "extremely strong" for stated reasons. They include CCTV and mobile phone footage allegedly clearly showing him holding and committing assault with a suspected firearm, witness statements allegedly supported by CCTV and mobile phone footage, his alleged statement that what he was holding was not a real firearm and that item being seized by Garda at the location to which his alleged statement sent them. Of course, whether this evidence is in due course admitted and given weight at any trial is not for me. And, beyond a general assessment of its strength, it was not for the District Judge. It remains, and was at the bail hearing, open to the Applicant to dispute the content of the Bail Pack and the evidence described therein. But overall, I consider that the Bail Pack to this point did not present any particular complexity or difficulty of comprehension – accepting that the issue must be considered from the perspective of the accused person (as it was in **Cronin**¹¹).

20. The same can in my view be said for Bail Pack §§ 7 – 9. The list of bench warrants is simple and clear – as is the description of the Applicant as addicted to heroin and as on a methadone programme. §9, headed "Belief of the Objector" is also simple enough to understand and serves as a pithy summary of the basis of the Garda objection on the Bail Act basis. It reads as follows:

⁸ Garda Togher's exhibit "JT3" of the Bail Pack did not include its Appendix. It was handed into court by agreement of the parties.

⁹ Transcript Page 16, Line 3.

¹⁰ The People (Attorney General) v O'Callaghan [1966] IR 501.

¹¹ Cronin v Governor of Cloverhill Prison [2026] IEHC 618.

"It is my belief that if granted Bail the applicant will commit further serious offences.

This belief is grounded on the fact that he has amassed a total of 198 previous convictions, with 98 of these offences committed while on bail.

I do not believe that there are any bail conditions which could be applied that will prevent the commission of future, similar crimes by the accused. This is founded on the fact that he has two previous convictions for firearms offences as well as attempted murder and assault causing serious harm where he was sentenced to a total of 17 years imprisonment.

Further, due to the circumstances of this incident, I also would fear for the public's safety if the applicant was to be released. Shane Mason's actions on the night completely show no regard for public safety and can only be described as anarchy, where he produced a suspected firearm at a man and his two children aged 13- and 6-years old travelling in their car on a public road. Followed a short time later pointing a suspected firearm at an innocent delivery driver who he assaulted with the suspected firearm. It is the Garda's belief that the safety of the public is at risk if Shane Mason is released on bail."

21. Despite its length, I am satisfied that the Bail Pack, as to all but §§5 and 6 thereof was not complex in any degree presenting excessive demands on the ordinary reader.

22. Bail Pack §5, headed "Previous Convictions", is a relatively simple table, referencing an attached printout (i.e. the Appendix), enumerating the numbers of offences of various broad kinds as making up the total of 198. It is essentially an exercise in quantification of numbers of offences by category. Some offence descriptions - for example: "UC, section 112" and "Section 3 Assault" – might well be somewhat opaque to the lay reader. Others are very clear – for example: "attempted murder" and "handling stolen property". But the general gravamen of the table, as relevant to a bail application, is readily understood. In any event, the Appendix consists of a tabulated brief description of each offence by reference to Case #, Court, Date of Conviction, Date of Offence, Nature of Offence, Penalty Imposed and an alphanumerical entry the precise significance of which is unclear to me. At hearing, I criticised these tables for lacking headings – which are simple to insert. I respectfully suggest that the simple word processing remedy required be adopted as general practice. The absence of headings is doubtless not a problem for solicitors reading such tables but could be something of a problem for unrepresented persons. Even so, the information tabulated is broadly comprehensible. In any event, I do not consider that this issue would sound in Article 40 relief. Nor did the Applicant suggest that it would or that it caused any problem for him. That issue apart, the system of quantification of the number of offences in the Bail Pack proper and their elaboration in an Appendix strikes me as a well-structured, useful and intelligible one and even though the number of line items, at 198, is large, it does not present significant complexity.

23. Though it is necessarily lengthier, the same can be said for Bail Pack §6, headed "Convictions for Offences Committed While on Bail". 98 offences are listed. Even allowing for multiple convictions arising out of single events (which appear to exceed 20 – a significant number in itself), the significance of the tabulated

information for the purposes of the bail hearing clearly lay, not in the detail, but in the overall history.

24. Accordingly, I consider that Bail Pack §§5 and 6, as they were relevant to the bail hearing and considered compendiously as opposed to in detail, were not complex in any degree presenting excessive demands on the Applicant. It follows that, despite its length, the Bail Pack as a whole did not impose excessive complexity or demands on the Applicant. Indeed, taken as a whole, its thrust was simple enough.

BAIL HEARING & DECISION

25. I have a transcript of the Bail hearing. As stated earlier, the Applicant was unrepresented at the hearing and himself opposed the Garda objection to bail. The transcript does not record time. Counsel for the Applicant submitted, to no disagreement, that it was a lengthy bail hearing as such hearings go. He portrayed that as indicative of the complexity of the matter. I respectfully take a different view – that the length of the hearing was in fact a reflection in considerable part of the appreciable care taken by the district judge to ensure that the Applicant was heard, both in cross-examination and in submissions, and to clarify matters for the Applicant.

26. It is also clear from the transcript, at least as a general observation, that the Applicant availed of his opportunity to participate in the hearing and appreciated, at least in appreciable degree, the substance of the impediment to bail posed by the Bail Pack contents. Not least, he pertinently sought to undermine the assertions that, if released on bail, he would be a danger to the public and would not answer his bail. He also, and pertinently, sought to undermine the Garda assertion of the strength of the evidence against him by arguing that the Gardai had not merely failed, but refused, to take a statement from his girlfriend who was a witness to the events of 15 August 2026 and that the evidence of a child as to his brandishing a gun was unreliable. He offered to submit to conditional bail.

27. While I have considered the entire transcript and the following elements must be taken in context, they include those drawn to my particular attention:

“JUDGE: Mr Mason, yes. Now, Mr Mason, you had a chance of looking at that document?”

ACCUSED: Yes, yes.”¹²

“JUDGE: Does he need to be in cuffs, Sergeant? That's up to yourselves, if you consider he does, then that's --

PROSECUTING SERGEANT: Judge, I think it would be prudent, Judge, at the moment.

JUDGE: All right. That's fine. That's fine.

.....

¹² Page 1 from line 2.

JUDGE: Well, I am just asking the sergeant but in the circumstances if the sergeant wishes, I'll take advice from the sergeant in relation to it but ...

ACCUSED: No problem.

PROSECUTING SERGEANT: Yes, Judge.

JUDGE: You'd consider that it would be prudent in the circumstances.

PROSECUTING SERGEANT: Yes, Judge, yes.

*JUDGE: All right. Well, that's fine. "*¹³

"JUDGE: Sorry, before we start, you're satisfied again, I am going to ask you another question, Mr Mason, you don't have legal advice, you're still happy to go ahead with your bail application today without a solicitor?

ACCUSED: Yes.

*JUDGE: Yes, all right. Now, go ahead."*¹⁴

28. There followed Garda Togher's evidence in terms of the content of the bail book. As to the list of 98 convictions while on Bail, the following appears:

"JUDGE: Okay. I don't require you to read through all of those. Obviously it's up to Mr Mason if he wants to question you in relation to any of those but I don't require. Do you require the garda to give all of that in evidence

ACCUSED: I don't understand what he means about me escaping out of the CCJ¹⁵ because I don't know how you can escape out of the CCJ.

JUDGE: All right. You will have a chance now in a moment to question the garda.

ACCUSED: All right.

.....

*JUDGE: But there's 98, I am not asking him to read through 98 different convictions, they're all listed there. If you want to take issue with any of them, you certainly can do that but I am not requiring that. Okay. Go ahead, Garda. What else?"*¹⁶

29. At the end of Garda Togher's evidence, the following appears:

"JUDGE: Okay. All right. Now, Mr Mason, to explain to you, you may very well know how this works but I will explain it to you for the purposes that you're not here with legal advice today. You have the opportunity now to question the garda in relation to the objections to bail. It is not to deal with the underlying offences. You have the presumption of innocence in relation to those offences and you remain innocent until proven otherwise by a court. So, the objections today are that the State have set out in the bail pack, and you have heard what the garda has said, have you any questions for the garda on the evidence he has given?

¹³ Page 1 from line 9.

¹⁴ Page 1 from line 29.

¹⁵ The Criminal Courts of Justice, Parkgate Street, Dublin.

¹⁶ Page 6 from line 28.

ACCUSED: I have. I am really confused. I'm really confused because, like, he says I've done a robbery, like, there was no mention of a robbery in any interview and I'd like him to get a CD to mention it -- where I mentioned it that I done the robbery or anything like that."¹⁷

30. It is clear that the Applicant, by reason of the Garda's reference to having answered a complaint of alleged robbery, misunderstood him as accusing the Applicant of robbery. As has been seen, no robbery charges had been preferred. That was soon clarified to the Applicant.¹⁸ So too a misapprehension by the Applicant that it was asserted that he had escaped from the CCJ. Counsel for the Applicant accepts that these issues were clarified but relies on the fact of the Applicant's initial confusion.

31. Thereafter¹⁹ the Applicant clearly availed of his right to cross-examine Garda Togher: his thrust was that the lapse of time between the alleged events of 15 August 2026 which resulted in the charges and his arrest on 21 August 2026 is inconsistent with the Garda view that he represents a danger to the public. Had they truly held such a belief they would, he said, have arrested him sooner. The Applicant was dissatisfied with the answer – which related to the requirements of investigation. He also put it to the Garda that he had not attempted to evade arrest – to “*run away and hide*”. The District Judge framed that question to Garda Togher as the Applicant putting it that “*.... he didn't run away and what have you to say about that because you are saying that he is likely to run away or likely not to turn up?*”

32. The Applicant also accused Garda Togher of excessively repeated stress in the Bail Pack on his attempted murder conviction. This resulted in the following exchange:

“ACCUSED: Yes, yes. But you mentioned the murder I think it was six times you mentioned it. I done a sentence for that. Six times he is after mentioning it there now. I don't think I intended to murder anyone six times. Six times you mentioned it.

JUDGE: You might confirm that, Garda, as to why you mentioned it that many times?

GARDA TOGHER: I suppose going through each section of the bail pack, it was -- I can't recall how many times I did mention it but I mentioned it maybe at a couple of different sections of the bail pack.

ACCUSED: Oh he can't recall now. Sure you have it right in front of you there on paper.

JUDGE: Can you confirm, Garda, just in terms of what's in the bail pack, just to be clear, it wasn't that there were six separate --

GARDA TOGHER: No, no. It's one incident.”²⁰

33. The Applicant next²¹ cross-examined Garda Togher on the basis that he had, incredibly, asserted that the Applicant had “*escaped from the CCJ*”. At this point the “Prosecuting Sergeant” intervened to say, correctly and as Garda Togher confirmed, that Garda Togher had cited escape from custody in June 2004 but not from specifically the CCJ. Again, counsel instances this as evidence of confusion on the Applicant's part.

¹⁷ Page 8 from line 14.

¹⁸ Page 9 from line 3.

¹⁹ Page 9 from line 9.

²⁰ Page 11 from line 15.

²¹ Page 12 from line 5.

34. The Applicant's cross-examination then returned to the delay in arresting him, "*if I'm so dangerous*", despite his being well-known to the Gardai. He also criticised their refusal to take a statement from his girlfriend or to answer the question why they had not done so.²² He returned to the latter issue later.²³ The implication presumably was that his girlfriend's statement would be exculpatory and so weaken what the Garda had characterised as strong evidence against the Applicant.

35. The Judge asked the Applicant if he had any further questions and he, presumably again hoping to undermine the strength of the evidence against him, quoted the Bail Pack:

"ACCUSED: Yes. He says that a girl six years old knew what a firearm was, how would a girl six years old know what a firearm is and what colour it is?"

GARDA TOGHER: Again, Judge --

ACCUSED: Can you answer that question?

GARDA TOGHER: Judge, I never said girl. It was his two sons.

ACCUSED: It says it here. It says it right here in the paper in front of you, I have it marked out here, the guard marked it out for me actually. It says it right there. You said father was from Afghanistan, the girl 13 and a girl 6 years old.

.....

ACCUSED: That's what you said, you said the two kids were in the back seat, the father was driving on John Street. So, if I was in a car and a man was so dangerous, I'd have him off the street and picked up immediately.

PROSECUTING SERGEANT: Can I just ask where it says that in the bail pack?

ACCUSED: That's what I can't make out, I'm baffled here and I'm confused, I'm really confused, you know what I mean. I know --

PROSECUTING SERGEANT: I'm confused myself.

ACCUSED: -- you're stating the following but I have no one here representing me and I'm confused here and I'm really confused cause --

PROSECUTING SERGEANT: And I think the judge has been very fair, Mr Mason, in relation to --

ACCUSED: The judge has been completely fair."²⁴

36. The Judge having twice again asked the Applicant if he had further questions²⁵ and on the second occasion being told no, the following appears:

"JUDGE: That's what the State's case is. At this point in a bail application, it's up to you, you can give evidence yourself or you can make submissions from the body of the Court. Now, if you give evidence, obviously the State are entitled to cross-examine you. You have heard what the State are saying as to

²² Page 13 from line 5.

²³ Page 15 from line 5.

²⁴ Page 13 from line 27.

²⁵ Page 14 line 23 and page 15 line 12

why you shouldn't get bail, all right. Now, do you want to go into evidence yourself or do you want to make a submission from the body of the Court?"

.....

"JUDGE: If you give evidence the State can obviously cross-examine you but this is only about the bail application, it's not about the underlying charges. All right.

ACCUSED: Can I talk, your honour?

JUDGE: Absolutely, yes.

*ACCUSED: I am no danger to the public and I haven't been. I have been a long time in jail, a long time. I done 20 years actually, not 16 or 17."*²⁶

.....

ACCUSED: I am only out of prison to get my head right, getting it back together. That's what I am doing.

JUDGE: Okay. So, you're asking the Court to give you -- to grant you bail --

ACCUSED: And that's what I'm saying.

JUDGE: -- that you're not a danger to the community.

ACCUSED: Grant me bail and grant conditions on it if you want.

JUDGE: Okay. Now, you don't want to give evidence then, do you? No?

ACCUSED: I don't think so. I will stand here and talk to you.

JUDGE: Okay. So, Sergeant, can I ask at this point in the proceedings are there any conditions that would satisfy the State in relation to the matters, the objections that are placed --

PROSECUTING SERGEANT: Judge, given the seriousness of the matters before the Court, Judge, there's absolutely no conditions whatsoever the State would be satisfied with in relation giving Mr Mason bail."

37. Thereafter the Judge decided the bail application in terms which commenced:²⁷ *"Now, Mr Mason, you're here without legal advice. You have wished to proceed with your bail application without getting the advice of a solicitor."* Inter alia, the Judge observed that while the evidence against the Applicant on the charges preferred appeared to be very strong, *"the Court doesn't give an awful lot of weight to that"*. However, while the Court noted that the Applicant had spent a considerable time in prison, the history of 198 convictions, of which 98 were while on bail, was *"of huge concern to the Court."* It was clearly by reference to this consideration and s.2 of the Bail Act that *"I am going to have to refuse bail"*. To this, the Applicant replied: *"No Problem"*.

THE LAW

38. An accused person is presumed innocent and is *prima facie* entitled to bail. The burden of establishing that bail should be refused rests on the prosecution. In practical terms, and assuming he or she wants bail, an unrepresented accused person has two options at a bail hearing: to proceed, unrepresented, to apply for bail or to defer making a bail application and seek a reasonable adjournment to try to obtain legal representation. In the latter case, the accused person will be detained during the adjournment. Where

²⁶ Page 15 from line 17.

²⁷ Page 16 from line 17.

legal representation is, as it usually is, readily available, such detention may be very brief – often less than a day – and may not require remand. In the context of the current dispute however, the duration of such an adjournment may be far more unpredictable and may involve remand overnight or longer.

39. There is now a long list of judgments, most recent, on the availability of Article 40 relief to unrepresented accused persons refused bail. Particularly, the law has been developed and clarified in recent months in the context of the dispute as to fee structures for solicitors representing accused persons. The cases include, in chronological order, **McDonagh (2005)**,²⁸ **Heinullian**,²⁹ **Galvin**,³⁰ **McCormack**,³¹ **Ennis, Irwin & O’Hanlon**,³² **Nevin, Kelly & McDonagh**,³³ **Kiely**,³⁴ **Kinane**,³⁵ **Doros**,³⁶ **Cronin**,³⁷ **Walsh**³⁸ and **Michalzyk**.³⁹ Though a case on judicial review, **AB**⁴⁰ is important as its principles derive from the caselaw on Article 40 applications and have since, notably by Simons J in **Ennis, Irwin & O’Hanlon**, been held applicable in Article 40 applications.

40. **Ennis, Irwin & O’Hanlon**, notably relying on **AB**, confirms a threshold requirement, before Article 40 relief will issue, of fundamental denial of justice in the impugned detention - such that the rule of law has been undermined and the impugned hearing which resulted in the detention, considered objectively, did not amount to a hearing at all or was one in which a fundamental requirement was ignored. Any flaw, defect or unfairness less than fundamental in that sense, even if very serious, will not justify Article 40 relief. As Nolan J said in **Doros**: “... Article 40.4.2° is concerned not with whether the hearing was ideal, nor even whether it was affected by procedural imperfections, but whether there was a default of the fundamental requirements which are essential if the proceedings are to be regarded as a hearing at all.”

41. There are good reasons for the exceptionality of Article 40 relief. Article 40 relief is the “*great protection of the citizens’ liberty*” – **Ryan**.⁴¹ It is “*the great constitutional remedy of the right to liberty*” - **S. McG**.⁴² Article 40 relief consists in the immediate and unconditional relief of the detained person. In that sense, it is a blunt instrument. Or, as the same observation has been made more positively, its virtues include “*clarity and simplicity*” – and it is those features which require that “*it be applied only in those cases where there is a fundamental defect which can and must be remedied by an order for release forthwith*” - **S. McG**. As Simons J said in **Ennis, Irwin & O’Hanlon**, were it too widely available there would be a countervailing pressure to qualify the nature of the remedy. (I note, by way of analogy, that in recent times the phenomenon of remittal to re-decision following certiorari of administrative law decisions has become

²⁸ McDonagh v. Governor of Cloverhill Prison [2005] IESC 4, [2005] 1 I.R. 394.

²⁹ Heinullian v. Governor of Cloverhill Prison [2011] 1 ILRM 1.

³⁰ Galvin v. Cloverhill Prison [2012] IEHC 497.

³¹ McCormack et al v Governor of Mountjoy Women’s Prison et al [2026] IEHC 554.

³² Ennis, Irwin & O’Hanlon v Governor of Cloverhill Prison [2026] IEHC 599.

³³ Nevin, Kelly & McDonagh v Governor of Castlerea Prison [2026] IEHC 601.

³⁴ Kiely v Governor of Cloverhill Prison [2026] IEHC 603.

³⁵ Kinane v Governor of Cork Prison [2026] IEHC 604.

³⁶ Doros v Governor of Cloverhill Prison [2026] IEHC 610.

³⁷ Cronin v Governor of Cloverhill Prison [2026] IEHC 618.

³⁸ Walsh v Governor of Cloverhill Prison [2026] IEHC 630.

³⁹ Michalzyk V The Governor of Cloverhill Prison [2026] IEHC 641.

⁴⁰ AB v Chief International Protection Officer [2026] IESC 23, [2025] 2 I.L.R.M 305 (25 March 2026).

⁴¹ Ryan v Governor of Midlands Prison [2014] IESC 54.

⁴² S. McG. v. Child and Family Agency [2017] IESC 9, [2017] 1 I.R. 1. – cited in Ennis.

much more prominent in judicial review.) Simons J gave the example that it might be thought disproportionate to direct the immediate and unconditional release, by reference to a less than fundamental defect in the proceedings at first instance, of an accused whose circumstances were such that they would inevitably have been refused High Court bail had that route been pursued. Inter alia for that reason, and as less inflexible remedies are available for lesser legal defects, cases justifying Article 40 relief are objectively identifiable, exceptional and rare, and are not matters of degree of unfairness. So, the cumulative weight of multiple sub-fundamental flaws will not amount to a fundamental defect. The distinction, at very least, is between error within jurisdiction and error without or destructive of jurisdiction. **Cronin** cites **Ryan** for 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. There is authority that even some defects inadvertently in excess of jurisdiction will not ground Article 40 relief.⁴³ But I need not here explore that possibility. Most errors of law are within jurisdiction and are remediable not by Article 40 application but by other means in the legal architecture of decision-making structures and the court system as a whole – notably as to refusal of bail by appeal to the High Court⁴⁴ or by invocation of the High Court’s full original jurisdiction in bail in which the application is heard *de novo* and determined afresh without the need to prove error in the lower court. That is the proper procedure to pursue in most cases.

42. More specifically as Article 40 relief may relate to bail hearings, Ennis, Irwin & O’Hanlon confirms that the absence of legal representation does not, of itself, render a bail hearing fundamentally flawed. In the ex-tempore judgment of Simons J in **O’Hanlon**,⁴⁵ in a passage which did not make it into the “omnibus” judgment in Ennis, Irwin & O’Hanlon, he disagreed with a proposition, made in McCormack in an Article 40 context, that a bail hearing without representation would rarely be a fair one. He considered that approach *“not necessarily consistent with A.B. The absence of representation may be highly relevant, but it does not of itself establish that a fundamental requirement was ignored or that the proceedings did not amount to a hearing.”* I respectfully agree.

43. Simons J in Ennis, Irwin & O’Hanlon observed that the constitutional concern is not the formal presence or absence of a lawyer, but whether the accused person has had a practical and effective opportunity to participate in the bail hearing. The threshold for Article 40 relief as to refusal of bail is high. It is whether, in the particular circumstances of the case, the want of representation prevented the accused person’s real and meaningful engagement with the hearing on foot of a meaningful opportunity, which is fundamental, to understand, test and answer the case for detention – the objection to bail. If the nature or complexity of the objection, the volume of written material, the need to test disputed evidence and/or the personal circumstances of the accused person are such that meaningful engagement cannot realistically occur without legal assistance effective legal representation may be necessary to secure the fundamental opportunity to understand, test and answer the case for detention and the absence of such representation may justify Article 40 relief. Simons J said: *“The relevant question is not whether the accused person could have presented the application more skilfully with the assistance of a lawyer, but whether the absence of*

⁴³ McDonagh v. Frawley [1978] IR 131, cited in Ryan v. Governor of Midlands Prison [2014] IESC 54, in turn cited in Cureja & Mate v Governor of Wheatfield Prison [2026] IEHC 634.

⁴⁴ S.28(3) Criminal Procedure Act 1967.

⁴⁵ O’Hanlon v Governor of Cloverhill Prison [2026] IEHC 592.

representation prevented real and meaningful engagement with the proceedings.”

44. Ennis, Irwin & O’Hanlon inexhaustively lists some elements of the fundamental requirement of a meaningful opportunity to understand, test and answer the case for detention, as follows:

- Notice: An accused person must be made aware, in good time and in form and detail adequate to the circumstances, of the grounds on which bail is opposed. Often in practice that will mean being given a bail pack sufficiently before the bail hearing to allow the accused person to properly prepare for the hearing.
- Cross-examination: The accused person must be told, intelligibly, that he or she may test, by cross-examination, evidence given in opposition to bail and must be given adequate opportunity to do so. That does not require that cross-examination be by a lawyer.
- Answer: The accused person must be given opportunity to answer the objection to bail by either or both of testimony or submission and told that if he/she testifies he/she may be cross-examined.

Ennis, Irwin & O’Hanlon also requires – indeed as a matter of vital importance - that the accused person be cautioned as to the privilege against self-incrimination. For myself, I confess to doubting that failure to caution would be necessarily a fundamental flaw in the bail hearing leading to detention. Its vital importance may be not to the bail hearing but to the later trial and, if needs be, any unfairness in that respect could be corrected by the trial judge. In *Nevin, Kelly & McDonagh*, Simons J said, as to cautioning against self-incrimination, that *“The issue for the purposes of Article 40.4.2° is, however, whether the manner in which the privilege was addressed inhibited the accused person from addressing matters relevant to bail.”* In *Nevin, Kelly & McDonagh*, the problem in the case of Mr McDonagh was not a failure to caution but an imperfect caution which actively inhibited his pursuit of a point which might have availed him as to bail. In any event, I need not decide the issue as, though no caution was given in this case, the point was explicitly not taken as in fact the Applicant did not incriminate himself.

- Adjudication: The Court must adjudicate upon the objection to bail actually made and give sufficient reasons to identify the basis on which bail has been refused. In **McDonagh (2005)**⁴⁶ the District Court did not adjudicate on the bail objections actually made: it refused bail on a materially different ground, raised of its own motion, of which the applicants had no notice, which they had no proper opportunity to challenge and for which there was no relevant evidence.

45. However, apropos this list, Ennis, Irwin & O’Hanlon and Walsh emphasise that

- It is inexhaustive and is not to be applied as a formulaic checklist.
- The hearing must be assessed as a whole.
- 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 proceeding could not properly be regarded as a bail hearing at all.

⁴⁶ McDonagh v. Governor of Cloverhill Prison [2005] IESC 4, [2005] 1 I.R. 394.

46. Ennis, Irwin & O’Hanlon is also authority that

- An accused person who wishes to seek representation should be given a reasonable opportunity to do so – if needs be by adjournment of the bail hearing.
- Whether an adjournment is needed, and its appropriate duration, will depend upon the circumstances, including the complexity and seriousness of the objection, the personal capacity of the accused person and the likelihood that representation can be obtained within a reasonable period, and any genuine urgency requiring the application to be determined immediately.
- Where an accused person is offered a reasonable adjournment to get representation but elects to proceed personally, the absence of representation will not, without more, involve the denial of a fundamental requirement.

47. The ideal or close to it is perhaps represented by the case of Mr Kelly.⁴⁷ There, the judge explained that no solicitor was then available and presented Mr Kelly with two options. He could proceed with the bail application that day and represent himself, or consent to a short remand and renew the application on the following day or the day after. The judge made clear that there could be no assurance that any solicitor would be available in court on the adjourned date. Mr Kelly elected to proceed with the bail application, saying *“In light of the matters, I’d like to go ahead and apply for bail, Judge”*.

48. But this account of the law as to adjournments to seek representation must be understood in the context that Ennis, Irwin & O’Hanlon addressed the facts of O’Hanlon, to whom Article 40 relief was granted for other reasons, to the effect that:

“The transcript does not record any enquiry as to whether he wished to obtain legal representation or any offer of an adjournment for that purpose. The absence of legal representation did not, of itself, establish the denial of a fundamental requirement. It is necessary to consider whether Mr O’Hanlon was afforded a meaningful opportunity to understand, test and answer the objections to bail and revocation notwithstanding that he was unrepresented.”

49. The law regarding adjournments to seek representation must also be understood in the context that Simons J in Ennis, Irwin & O’Hanlon refused Article 40 relief in the case of **Irwin**. In that case, the judge hearing the bail application asked Mr Irwin whether he had a solicitor. Mr Irwin identified a solicitor but stated that he had not spoken to him. That enquiry went no further before the bail application was determined. There was no recorded attempt to contact the solicitor, nor was Mr Irwin expressly offered an adjournment to seek legal representation. Only after he had refused bail did the judge state that if Mr Irwin got a solicitor that would be regarded as a change in circumstances appropriate to allow Mr Irwin to renew his application for bail before the District Court. Yet, taking the bail hearing as a whole, Simons J refused Article 40 relief to Mr Irwin.

⁴⁷ Nevin, Kelly & McDonagh v Governor of Castlereagh Prison [2026] IEHC 601.

50. It appears, therefore, that while a failure to offer an adjournment to seek representation is relevant, it does not seem, without more, to be a basis for Article 40 relief. However, in this context I should mention two more cases.

51. In *Nevin, Kelly & McDonagh*, Simons J directed the release of Mr McDonagh. In so doing he said, inter alia, the following:

“65. Mr McDonagh had been given the written objection to bail only when the case was called on for hearing and was required to respond immediately to a complex bail objection. He subsequently indicated that he wished to obtain legal advice, saying: “If you give me a chance to see a solicitor”.

66. The District Court judge replied: “Well, I can’t do that before I decide bail today”. The judge did not explore whether a solicitor might be contacted or offer even a short adjournment to allow Mr McDonagh to seek legal advice. Instead, the hearing proceeded and bail was refused.

67. This is materially different from a case in which an accused person is offered an adjournment to seek legal representation but elects to proceed personally. Mr McDonagh himself raised the possibility of seeing a solicitor. Rather than being afforded an opportunity to pursue that course, he was told that it could not be accommodated before the determination of bail.

68. The absence of legal representation did not, of itself, involve the denial of a fundamental requirement. The fundamental flaw lay in the failure to afford Mr McDonagh any meaningful opportunity to seek to obtain legal advice when he expressly sought it and was being required to answer, without time to prepare, a complex written bail objection. At the very least, the District Court judge should have offered him an adjournment for that purpose.”

52. In *Cronin*, Noctor J accepted that failure to offer adjournment to seek legal representation would justify Article 40 relief *“in the particular circumstances of this case”*.⁴⁸ In any event, her view that in *Cronin* the *“applicant should have been offered an adjournment”*, while undoubtedly correct, was obiter as to whether that error would support Article 40 relief. She described determination of that issue, as *“probably unnecessary”* after she had already decided that Mr Cronin’s detention was not in accordance with law. She had done so on the basis of distinct, complete and “quite straightforward” failures to inform Mr Cronin that he was entitled to cross-examine the prosecuting garda and entitled to give evidence himself.

53. The “particular circumstances” were that at the outset, Mr Cronin had said he had *“tried to speak”* to his solicitor that very day but he was not available. The District Court judge then assigned legal aid. He announced that *“this is a serious charge”* and told the applicant *“... you need to have -- get legal advice and you need legal representation but we have to deal with the issue of bail today. Right”*. Counsel for the Governor and the Minister considered this merely an unfortunate remark. But Noctor J unsurprisingly observed:

⁴⁸ §§23 & 37.

“There was no compulsion to decide the issue of bail on the applicant’s first appearance on the charge before the court. The District Court judge’s statement could only convey the message that there could never be an adjournment before bail was determined.” She considered that “In the particular circumstances of this case, and by analogy with McDonagh 2026, it is my view that the applicant should have been offered an adjournment and having regard to McDonagh 2026 and the ratio decidendi in Ennis (including at paragraphs 81-83). This failure was a fundamental flaw. If I am incorrect in my view that it was a fundamental flaw at the commencement of the hearing, I am also of the view that the failure to offer an adjournment most certainly became a fundamental flaw at the point in time at which the applicant’s reading difficulties became apparent.”

The last observation as to reading difficulties must be contextualised. The bail pack, though much shorter than that in the present case, was first given to Mr Cronin during the bail hearing and he was required to read it, at least in appreciable part, as the bail hearing was proceeding.

54. Given all the circumstances of Cronin, I respectfully agree with Noctor J’s view of the significance of the failure to offer an adjournment in that case.

DISCUSSION & DECISION

MEANINGFUL OPPORTUNITY TO UNDERSTAND, TEST & ANSWER OBJECTION TO BAIL.

55. One cannot, here, reason back from the result of the bail application – any more than one could have done so had the Applicant been legally represented and refused bail. Nor, in fairness, did counsel for the Applicant so argue. That, on the facts, the Applicant was fighting an uphill battle in which he ultimately failed, primarily by reason of his significant history of offences committed on bail, does not imply – or even of itself suggest - that he did not understand the gravamen of the objection to bail or was deprived of meaningful opportunity to attempt to undermine it. It is quite clear from the transcript that the Applicant understood that gravamen and, indeed pertinently, sought to undermine it. He impugned the Garda opinion that he would be a danger to the public if bailed. He disputed the depiction of the evidence against him as strong by asserting that the Garda investigation was incomplete as having ignored the possibility of exculpatory evidence from his girlfriend and by seeking to impugn the weight of a child’s evidence that what he had was a gun. He sought, though on a misapprehension, to undermine the evidence of past escape from custody. He offered to submit to conditional bail. Indeed, one may say that while the Applicant lacked ammunition, far from not understanding the position in which he found himself as to getting bail, he picked his targets well.

56. It is convenient to here record that counsel for the Applicant accepted that he could not dispute the evidence of escape from custody. He sought to make something of the fact that it was as long ago as 2004. But that submission really went to an implicit assertion that the District Judge had attributed excessive weight to the issue. The submission doesn’t bite. First, the judge’s decision attributes no weight to the issue.

Second, had she done so, that could not be a ground for Article 40 relief. The other posited implication: that the Applicant's failure to make the argument that the escape was ancient history demonstrated his confusion and lack of meaningful opportunity to challenge the Garda objection is an implication of which the facts simply cannot bear the weight.

CONFUSION/CAPACITY

57. Counsel emphasised in submissions the Applicant's assertions at the bail hearing that he was confused. Mr Quirke deposed that

- the Applicant left school in his first year of secondary school and his very limited educational attainment was evident from his inability to read and understand the contents of the bail pack and
- the District Judge did not enquire as to his education level or whether he needed assistance to understand the Bail Pack. The significance of this latter assertion was unclear in that the affidavit acknowledged that he had been given the Bail Pack and did not assert that he had got it too late.

58. These assertions were made before the hearing transcript and the evidence of Garda Togher came to hand. They combine to make it very clear that the Applicant had about a 25-minute opportunity to peruse the Bail Pack before the hearing and had assistance to understand the Bail Pack from a garda who explained it to him and helped him make notes. The transcript also discloses that at the hearing he was well able to articulate what he considered to be errors or contradictions in the Garda objection. While he expressed confusion, it was confusion deriving from what he considered to be erroneous evidence which he challenged. It is clear that he was well able to discern, formulate and articulate his concerns. He made no complaint to the District Judge as to

- the facility given him to consider the Bail Pack and the assistance provided him in doing so.
- his being distracted or intimidated in doing so by being "surrounded" by gardai.
- his ability to read comprehend and absorb its content.
- the accuracy of the account of his previous convictions, including those committed while on bail.

59. As I have said, and importantly, the Applicant's counsel disavowed any submission that the Applicant, at any material time, lacked capacity or suffered from materially impaired capacity as it related to the bail hearing. Mr Herbert's evidence, for reasons I have stated, is clearly consistent, if by omission, with the position taken by counsel. The transcript, in my view, amply confirms the wisdom of that position. Ultimately, in my view, counsel's reliance on the Applicant's articulation of confusion does not bite in any respect which could justify the rare and exceptional grant of Article 40 relief.

CROSS-EXAMINATION & SELF-INCRIMINATION

60. The Applicant in written submissions suggested that the judge and the prosecuting sergeant interrupted the Applicant's cross-examination. But that was not pursued in oral submissions - I think correctly. My impression is that in this respect the judge was trying to assist the Applicant and did not at all inhibit or limit cross-examination.

61. While his affidavit ventilated the Judge's failure to caution the Applicant against self-incrimination, counsel at hearing, again wisely in my view, disavowed that issue as, he said, the Applicant had not in fact incriminated himself. I may as well say that while the Article 40 cases on refusal of bail to unrepresented accused persons advert to the necessity of such a caution, I do not read them as holding that failure in that regard would necessarily require Article 40 relief – though it might have implications for the admission of evidence at trial. In any event, as the point was not pressed, I need not decide it.

OPPORTUNITY TO GIVE EVIDENCE & MAKE SUBMISSIONS & EVIDENCE AS TO CONVICTIONS

62. At hearing, essentially, two points were made:

- That, in the judge's phrase "you can give evidence yourself or you can make submissions", the word "or" must be read disjunctively as offering a choice between alternatives - whereas the Applicant was in law entitled to both to testify and to make submissions.
- That, other than as to exposure to cross-examination, the difference between sworn evidence and making submissions was not intelligibly explained to the Applicant. Specifically, he was not told that if he wished to contradict the Garda evidence as to fact, he had to testify as the court could not weigh his unworn submissions against that evidence.

63. The argument that the judge presented the Applicant with the options to either testify or make submissions but not both seems to me a grammarian's point more suited to textual analysis than to an understanding of an oral hearing. In the latter context, the word "or" could as readily be used disjunctively as conjunctively. Perhaps the judge's phrase was not ideal (and even that may be a harsh observation) – but that is not the point. Indeed, there is no evidence from the Applicant as to how the Applicant understood the offer. What is clear is that at the end of the hearing and just before she decided the issue and after the Applicant had already cross-examined and made submissions (even if as the hearing went along rather than by way of formal closing submissions) the Judge again inquired whether the Applicant wished to testify and he confirmed that he did not.⁴⁹ So, in point of fact, he was invited to both testify and make submissions.

64. As to the second point, the Applicant argued that the Judge, in fundamental breach of fair

⁴⁹ Transcript page 16 line 9.

procedures, accepted Garda evidence as to previous convictions, not accepted by the Applicant, without requiring the Garda witness to prove those convictions. This is a reference to the fact that the Judge absolved Garda Togher from reading into evidence the list of 98 convictions for offences committed on bail. With some validity, counsel for the DPP criticised this as a highly theoretical objection. There is no evidence or suggestion, even in hindsight, that the list was erroneous. More to the point, the Applicant did not submit to the Judge that the list was erroneous – much less erroneous in any degree which could even arguably have materially altered the overall impression conveyed by a multiplicity of such convictions. The Judge twice articulated Mr Mason’s entitlement to require that the Garda give the detailed evidence in that regard and to challenge that material.⁵⁰ Given his participation in the hearing, as evidenced in the transcript, it is clear that, had the Applicant considered the list erroneous, he had every opportunity to say so and would have had little hesitation in saying so by way of submission. Had he done so and had the Judge doubted him in doing so then, clearly, the Judge would have explained to him that he might wish to testify on that issue so that the possibility would be created of her preferring his evidence as to his history of convictions to that of the Garda. In my view, this complaint savours of unreality - not of fundamental defect of law.

PERUSAL OF BAIL PACK & HANDCUFFS

65. I should mention again that, though there had been complaint that the Applicant was handcuffed while perusing the Bail Pack, at trial counsel for the Applicant disavowed any case that the Applicant’s opportunity to consider the Bail Pack and prepare for the hearing was deficient such as to warrant Article 40 relief.

66. The Applicant does complain, by Mr Quirke and counsel, that he was in handcuffs throughout the hearing – which, it is suggested, physically inhibited him in handling the Bail Pack, taking notes and the like. Nor did the judge inquire whether the Applicant could adequately handle the documents or represent himself while restrained. His presence in handcuffs, he says, also ran the unacceptable risk of prejudicing the judicial mind as to the garda objection to bail based on likelihood to reoffend and danger to the public. I see merit in neither point as a basis for Article 40 relief.

67. The Applicants cite **McCowan**⁵¹ and **Davis**⁵² for both the prejudicial effect on others of seeing an accused in handcuffs and the deleterious effect of wearing handcuffs in court on the morale of an accused person. Further, they criticise the District Judge for, as they say, abdicating her decision on that issue to the Gardai and so seeking no reasons from them as to why the handcuffs should be kept on and for not forming her own view on that issue. Accordingly, the judge was never given the reasons to which Garda Togher later deposed: that the decision as to handcuffs was informed by a dearth of Gardai to secure the Court and the presence of a large number of the Applicant’s family members.

⁵⁰ Transcript p6 line 29; p7 line 3.

⁵¹ The People (Director of Public Prosecutions) v. McCowan [2003] 4 I.R. 349.

⁵² The People (Director of Public Prosecutions) v. Davis [2001] 1 I.R. 146.

68. There is, in my view, some merit in the Applicant's submissions. A judge is in control of his/her courtroom and is responsible for any decision whether, as is not the norm given **McCowan** and **Davis**, an accused should remain shackled during a hearing. Doubtless, a judge is entitled, for obvious reasons, to give great weight to the views of the Gardai in that regard. And a detailed forensic inquiry is unnecessary, not least in the reality of a District Court – often very busy – in which there is no jury to be prejudiced by the sight of a shackled prisoner. However, the decision is for the judge not the gardai and the gardai should give reasons, even if brief, for their view. That did not occur in this instance.

69. I do not doubt that, as Garda Togher deposes, the Garda view as to leaving handcuffs on the Applicant was informed by a dearth of Gardai to secure the court and the presence of a large number of the Applicant's family members. I assume that, as to those factors, the view taken was reasonable and it is understandable that Garda Togher deposed to those factors. However, they are not the central issue. Neither factor would matter absent a perception in the Gardai that, if unshackled, the risk would be unacceptable that the Applicant would attempt escape or engage in action disruptive or worse. Maintaining him in handcuffs was capable of amplifying the impression that the Applicant was dangerous. It conveyed those views to the Judge and the Judge deferred to that view without interrogating it and making her own decision.

70. However, this must be placed in context:

- First, though the decision is for the judge not the Gardai, there is clearly a power to have an accused person remain in handcuffs where there is an appreciable risk of escape or to the safety of others in the courtroom.
- Second, a judge is not a jury and has a particular understanding of the importance of proceeding only on evidence.
- Third, a judge is well capable of discounting any prejudicial impression created by a shackled prisoner.
- Fourth, and importantly, the Garda position that the Applicant was dangerous in any event became readily and understandably apparent from the evidence of Garda Togher as to the results of the investigation of the events of 15 August 2026 and the strength of the resultant evidence against the Applicant and as to the Applicant's history of convictions, including for very serious violent offences. Whatever effect the handcuffing might have had on the Judge's first impression, there is simply no reason to infer that the handcuffing in any substantive way informed the Judge's decision as bail by reference to danger to the public.
- Fifth, and in any event, the Judge in her decision explicitly discounted the strength of that evidence as informing her decision. Her decision was explicitly grounded in the history of convictions while on bail.

71. As to the proposition that the Applicant was discommoded by the handcuffs in presenting his bail application and challenging the Garda's opposition to bail, there is simply no evidence to that effect. The Applicant gives none. And the transcript discloses the opposite: it records his active participation in the hearing, actively facilitated by the Judge and with, on his part, an impressive appreciation of where his targets lay – even if he lacked ammunition to hit them.

72. For these reasons I cannot see that, even taking it that the decision should have been substantively by the Judge not the Gardai, the fact that the Applicant was handcuffed had the effect of depriving him of meaningful opportunity to understand, test and answer the objection to bail or of fundamentally denying him justice or of undermining the rule of law or had the effect that the bail hearing did not amount to a hearing at all.

NOT OFFERED ADJOURNMENT.

73. As has been seen, the only transcript record of a discussion whether the bail application should proceed absent legal representation reads as follows:

“JUDGE: Sorry, before we start, you're satisfied again, I am going to ask you another question, Mr Mason, you don't have legal advice, you're still happy to go ahead with your bail application today without a solicitor?

ACCUSED: Yes.

*JUDGE: Yes, all right. Now, go ahead.”*⁵³

74. As I observed at the hearing, the word “still” is ambiguous. It could mean “still” in the sense of “despite” the absence of legal assistance. Or it could mean “still” in the sense of “remain” - referring back to an earlier discussion when the case was first mentioned – of which discussion I have no transcript and no evidence. The sense could be that the Applicant had already expressed a willingness to proceed absent legal representation and may, indeed, have declined an adjournment. It would not have been unusual had the absence of legal representation been discussed at that point and it would make sense to revisit that issue once the Applicant had read the Bail Pack and discerned the substance of the objection to bail. The Applicant did not impugn the State’s compliance with the duty to produce the entire transcript. However, as that duty to provide the transcript rests on the State I will make such assumptions as favour the Applicant. So, I assume the Judge meant “still” in the sense of “despite” the absence of legal assistance and that nothing relevant to the issues before me was said when the matter was first mentioned.

75. Even on that basis, however, the Judge’s utterance was, in the first instance, an inquiry of the Applicant. That it was an inquiry implied and conveyed to the Applicant that he had a choice – that he might answer the judge’s question one sense or in another. That in turn implies that he knew both that he could say he was unhappy and that the judge would consider that response – even if we assume that he may not have known that the response might have been an offer of adjournment. However, in context, the judge’s question at least implies the possibility that, were he unhappy, steps of some kind could be attempted to remedy the absence of legal advice. It is readily to be inferred that, had he said he was unhappy, the ensuing conversation would have at least canvassed the possibility of adjournment to get legal representation. The Applicant’s argument that the Judge had presented the Applicant with a false choice is only superficially attractive. It does not survive close examination.

⁵³ Page 1 from line 29.

76. This case seems to me to be far from the situation in which the district judge told Mr McDonagh that his bail hearing had to proceed even absent legal representation.⁵⁴ It seems to me that, in its provision of options to the Applicant, this case is at least the equivalent of and in a fact a little better than the facts in the cases of O’Hanlon and Nevin – which I have briefly described above. And in both those cases Simons J refused Article 40 relief by reference to the ultimate question, taking the bail hearing as a whole, whether the Applicant was afforded a meaningful opportunity to understand, test and answer the objections to bail and revocation notwithstanding that he was unrepresented. Even on the arguably stricter view of such issues taken obiter by Noctor J in Cronin *“in the particular circumstances of this case”*, the particular circumstances of the present case are far removed from those of Cronin and display none of the egregious features of the hearing identified in Cronin as grounding its ratio.

77. Counsel for the Applicant argued for a specific analogy with Cronin in that Noctor J held that *“failure to offer an adjournment most certainly became a fundamental flaw at the point in time at which the applicant’s reading difficulties became apparent.”* He said that once the Applicant’s confusion and bafflement and fixation on irrelevancies became apparent, an offer of adjournment was required. I accept there might be analogy between reading difficulties and mental health issues or educational issues. But counsel disavowed an incapacity point and Garda Togher is uncontradicted in his averment that the Applicant had said he understood the Bail Pack. Nor did he suggest to the Judge that he didn’t understand it: what is different, he said that he was baffled that the Garda were incorrect as to factual matters. As to focus on irrelevancies he would not be the first advocate, lay or professional, to throw up chaff when in a difficult position. In my view, overall and for reasons I have given, the Applicant in fact displayed a good eye for the proper target of his arguments and his errors of fact (as to being accused of robbery and escaping from, specifically, the CCJ) were clarified in the hearing and were not such as to require an offer of adjournment.

78. I hold that while, as to the possibility of adjournment to seek legal representation, the hearing fell short of the ideal represented in Kelly, it was considerably better than the situations which arose in McDonagh and Cronin and was better also than the situations in O’Hanlon and Nevin – in which Simons J refused Article 40 relief. As in O’Hanlon and Nevin, I consider that taking the bail hearing as a whole, the Applicant was afforded a meaningful opportunity to understand, test and answer the objections to bail and revocation notwithstanding that he was unrepresented. He was also offered the explicit opportunity to express unhappiness at proceeding absent legal representation but expressed the opposite view. In the particular circumstances of this case, the failure to explicitly offer him an adjournment to seek legal representation is not a fundamental flaw such that in reality he had no bail hearing at all and that failure cannot ground an Article 40 release from detention.

⁵⁴ Nevin, Kelly & McDonagh v Governor of Castlerea Prison [2026] IEHC 601.

APPLICANT HAS NOT SOUGHT BAIL SINCE

79. The DPP argued that I should have regard to the fact that the Applicant, in the unusually long interlude since the Impugned bail hearing, has not sought High Court bail. I have considerable doubts that I should do so. That could be relevant to the grant or refusal of discretionary relief, but Article 40 relief is not discretionary relief. It appears to me that, unlike the situation in Michalzyk, in which the applicants had been refused High Court bail, the present Applicant's detention remains based on the impugned District Court bail hearing and the legality or illegality of that detention was established by and upon the making of the order made at that hearing. However, I need not decide that issue to decide this case.

BAIL CONDITIONS

80. The Applicant raised an argument that the Judge had failed to give him, just prior to the Judge's decision, opportunity to dispute the Garda view that no conditions would suffice to protect the public. It would have been better had he been invited to do so. However, Garda Togher had, much earlier, made the same assertion.⁵⁵ The Prosecuting Sergeant at the end of the hearing was merely repeating that view⁵⁶ and was doing so not by way of introduction of a new matter but in direct response to the Applicant's invitation of conditions. Knowing what Garda Togher had said, he could undoubtedly at that point have suggested specific conditions as protective of the public had he wished to do so. This is a point on which the observation of Simons J of the position of Mr Kelly, applies: *"The absence of legal representation may have affected the skill with which he presented his case"*. Simons J nonetheless refused Mr Kelly Article 40 relief. So too by analogy the following observation by Simons J in Ennis – albeit made as to the issue of cross-examination:

"It is correct to say that a lay person, particularly one who is not accustomed to court proceedings, is unlikely to conduct a cross-examination with the skill of a lawyer. That is unfortunate, but it would not, of itself, necessarily render the hearing fundamentally flawed. The relevant distinction is between the ineffective use of an opportunity which has been afforded and the absence of any meaningful opportunity to test the evidence."

As Simons J said in Ennis:

"The relevant question is not whether the accused person could have presented the application more skilfully with the assistance of a lawyer, but whether the absence of representation prevented real and meaningful engagement with the proceedings."

81. Also applicable here is the observation of Nolan J in **Doros**:

"The Applicant's complaint seems to me to centre on the effectiveness of his participation rather than the absence of participation. That distinction is critical. An accused person may later feel that different

⁵⁵ Transcript p7 line 12.

⁵⁶ Transcript p7 line 16.

questions should have been asked, additional evidence should have been called, or more persuasive arguments could have been advanced. Such matters may be relevant to a fresh bail application or to the exercise of the High Court's original bail jurisdiction. They do not, without more, establish that the original proceedings were devoid of the fundamental characteristics of a hearing."

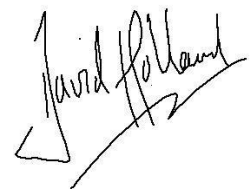
RIGHT OF AUDIENCE

82. Finally, I should mention that the transcript discloses evidence by Garda Togher and contributions by a person identified as "Prosecuting Sergeant". On the first day of hearing, counsel for the Applicant argued that the latter enjoyed no right of audience and that a ground for Article 40 relief arose accordingly. On the second day of hearing, counsel for the applicant, in my view correctly, wisely and helpfully, abandoned that argument.

CONCLUSION.

83. It follows from the foregoing that the Applicant is being detained in accordance with the law and that I refuse the application for Article 40 relief.

84. As, in the cause of speed of delivery, this judgment is delivered electronically, there will be liberty to apply to me. The case will be for hybrid mention in Cork High Court on 12 October 2026 with a view to fixing a date for the hearing of any application for costs.

A handwritten signature in black ink, appearing to read 'David Holland', with a stylized flourish underneath.

David Holland
2/10/26