'THE GREAT CONSTITUTIONAL REMEDY OF THE RIGHT TO LIBERTY';[1] A SURVEY OF ARTICLE 40.4.2°

Abstract: This survey of Article 40.4.2° (habeas corpus) of the Constitution of Ireland reviews nine procedural features of the process: the meaning of detention; the informal manner of the complaint; the right of third parties to initiate complaints on behalf of detainees; the right to go to a second judge when the first judge has refused to further the enquiry; the right to choose one's judge; the pace of the Article 40.4.2° process; the remedy of release; the detainer's right of re-arrest, and the issue of costs. A second theme is the scope of review on an Article 40.4.2° enquiry. The survey examines the character of Article 40.4.2° review of (i) the detainer's certificate, (ii) the detainee's conditions of detention and (iii) the administrative or judicial order on which the prisoner's detention is predicated. The article opens with a note on the history of habeas corpus in Irish law.

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Introduction

Article 40.4.2° is one of the most inspirational provisions of the Constitution of Ireland. Its sources are composed of a rich blend of 'text, tradition and history'[2] – a history that stretches back to the sixteenth and seventeenth centuries, and a text developed originally in Article 6 of the Constitution of the Irish Free State, and subsequently in Article 40.4.2° of the Constitution and in a 1941 amendment to Article 40.4.2°. This short survey addresses seven aspects of the process. It begins by identifying the earlier origins of the process in English and Irish law in the sixteenth and seventeenth centuries. A second section examines procedural aspects of the procedure: the meaning of detention; the procedure for making a 'complaint', the right to make successive applications, and the duty to enquire 'forthwith'. The third and fourth sections review the standard of review on Article 40.4.2°. What must the detainer's certificate show? What is the standard of Article 40.4.2° review where the detainee is undergoing imprisonment following conviction on indictment? What is the standard of review where the detainee is being detained as part of the administrative process? A fifth section examines the jurisdiction of the High Court under Article 40.4.2° to remedy improper conditions of detention. A sixth section reviews aspects of the Article 40.4.2° remedy of release. The final section brings together some of the features surveyed in the earlier sections in an exercise which compares Article 40.4.2° and judicial review.

The Historical Background

When did the writ of habeas corpus emerge at common law, in England and in Ireland? It is, as Charleton J, has noted a 'myth' that habeas corpus was created by magna carta 1215.[3] In fact, habeas corpus is Tudor rather than Plantagenet. The process emerged in England as a remedy against administrative detention during the early part of the reign of Queen Elizabeth[4] – between the 1560s and 1570 – when it was used to review detention by executive

[1] *Child and Family Agency v SMcG & JC* [2017] IESC 9 [8].
[2] *Cirpaci v Governor of Mountjoy Prison* [2014] IEHC 76 [32].
[3] *Child and Family Agency v SMcG & JC* (n 1) [20].
[4] John H. Baker, *The Reinvention of Magna Carta* (Cambridge University Press 2017) Ch 5.

institutions including the Council of the North, the Ecclesiastical High Commission and detention authorised by the centre of the administration, the Privy Council.[5] The creation of the writ of habeas corpus preceded certiorari and mandamus - which first began to issue in England seventy years later in the 1630s.[6] Habeas corpus was unique amongst the prerogative writs for its capacity – in existence since the sixteenth century – to issue directly against institutions of the Crown; it was not until the nineteenth century that certiorari and mandamus issued against departments of the Crown. [7]

The loss of the records of the sixteenth and seventeenth century Irish Court of King's Bench, most especially in the catastrophic destruction of the archives held in the Public Record Office in the Four Courts in 1922 (but also in earlier incidents),[8] makes it impossible to date the first instances in which the writ was issued by an Irish court. There is definite evidence, however, that in Ireland the process had begun to be used by persons detained by the government, in the early to mid-seventeenth century.[9] It was against that background that the Irish House of Commons attempted unsuccessfully in 1641 to have the English habeas corpus reform act, the Habeas Corpus Act 1640,[10] enacted in Ireland. In 1664, a group of Dominican friars had been committed by the Dublin government. The Earl of Ossory informed his father, the Duke of Ormond (the lord lieutenant) that the friars were contemplating a legal intervention. However, 'the Lord Chief Justice had just assured Ossory that if they sue for a habeas corpus, he will find a way to avoid it'.[11] Throughout the eighteenth century the Irish Parliament was repeatedly blocked by the English Privy Council, acting under Poynings' Law 1494,[12] from having an Irish equivalent of the English Habeas Corpus Act 1679[13] extended to Ireland. It was only in 1782[14] that this demand of an Irish habeas corpus act was realised.

Habeas corpus was embedded in Article 6 of the Constitution of the Irish Free State. It was not inevitable that habeas corpus would have been included in any post-independence Irish Constitution of the 1920s. In the early twentieth century habeas corpus was a relative obscurity. Short and Mellor's *The Practice of the Crown Office*[15] (the nearest thing to an administrative law textbook in the early twentieth century) devoted more than twice as much coverage to certiorari as it did to habeas corpus. In 1918, only two writs of habeas corpus were issued from the Irish High Court.[16] It was the dramatic success of habeas corpus in one political case in the summer of 1921 which explains why habeas corpus came to be embedded in the Constitution. In *Egan v Macready*,[17] John Egan, a member of the IRA had been tried

[5] *Howell's Case* (1587) 1 Leon 70.
[6] Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963) 46-117.
[7] *R v Lords Commissioners of the Treasury* (1835) 4 A & E 286 (mandamus); *Ex p Smith. In the matter of the Local Government Act 1858* (1861) 1 B & S 412 (certiorari).
[8] Peter Crooks, 'Reconstructing the Past: The Case of the Medieval Irish Chancery Rolls', in N.M. Dawson and Felix Larkin (eds.), *Lawyers, the Law and History: Irish Legal History Society Discourses and Other Papers, 2006-2011* (Four Courts Press 2013) 281.
[9] Kevin Costello, *The Law of Habeas Corpus in Ireland* (Four Courts Press 2006) 3.
[10] 16 Car 1, c. 10.
[11] Ossory to Ormond, 6 & 28 June 1664 (Oxford University, Bodleian Library, Carte MS 219, f 142); *Habeas Corpus in Ireland* 3.
[12] 10 Hen. VII, c. 4 (Ire).
[13] 31 Car. II, c. 2 (Eng).
[14] 21 & 22 Geo. III, c. 11.
[15] F.H. Short and F.H. Mellor, *The Practice of the Crown Office* (2nd edn, Stevens & Haynes 1908) 14-83 (certiorari) 305-337 (habeas corpus).
[16] Judicial Statistics Ireland 1918 (1919) (HC Cmd 43438) 185.
[17] [1921] 1 IR 265.

and sentenced to death by a military court sitting in Limerick. What happened in Egan's case had an electrifying effect on a generation of nationalist lawyers, including upon Hugh Kennedy (who represented Egan). First, when there was a delay in producing John Egan before the Master of the Rolls, an order of attachment was, sensationally, made against Sir Neville Macready, the commander of the British Forces in Ireland.[18] Second, Egan's detention was held to be unlawful. The court had been operating under the martial law prerogative; not under statute (Restoration of Order in Ireland Act 1920). Applying the doctrine that a prerogative power can be overridden where statute moves in and occupies the same territory,[19] O'Connor MR held that the common law power to operate martial law had been overridden by the statutory system of martial law courts established by the Restoration of Order in Ireland Act 1920. Since Egan had not been convicted under the 1920 Act, his detention was illegal. As is evident from the repeated references to the case in the Dáil Debates, *Egan v Macready* – a stunning victory for the nationalist bar – contributed to the decision to institutionalise the process in Article 6 of the Constitution of the Irish Free State.[20]

Article 40.4.2°: Aspects of the Procedure

The following section will review procedural elements of the text of Article 40.4.2°. The full text reads:

> Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.

'Detained'

Two interesting aspects of the definition of detention for the purpose of Article 40.4.2° arose – but, in the end, did not need to be judicially settled – in the 2021 quarantine-related case *Inbar Aviezer v Minister for Health*.[21] Those questions were: can detention be conditional? And, is there detention where that detention is avoidable or self-induced?

The case originated in a complaint by a traveller from Israel to Dublin Airport during the period of pandemic-related travel restrictions (when travellers from prescribed countries were required to undergo quarantine). Aviezer had been taken to a hotel which was being used as a 'designated facility' to accommodate air travellers to Ireland who were subject to the quarantine regime instituted by the Health Amendment Act 2021.[22] The rooms of the

[18] 'Bolt from the Blue. Dramatic Action by Master of the Rolls', *The Echo*, 29 July 1921.
[19] *AG v De Keyser's Royal Hotel Ltd* [1920] AC 508.
[20] *Habeas Corpus in Ireland* (n 9) 25; *Joyce v Governor of Dóchas Centre* [2012] IEHC 326 [8 - 13].
[21] Aodhan O'Faolain, 'Woman in Hotel Quarantine Claims she is being Unlawfully Detained' *The Irish Examiner* (9 April 2021).
[22] Health Amendment Act 2021, s 7; Vivienne Traynor, 'High Court to Inquire if Woman's Detention in Quarantine in Lawful' *RTÉ News* (10 April 2021).

hotel 'guests' were not locked; yet members of the Gardaí and the army were stationed outside the hotel. Any resident who attempted to leave was liable to be detained. Did such conditional detention constitute detention?

The Minister for Health conceded that the hotel arrangement did constitute detention.[23] The concession is consistent with the common law understanding of detention as either present actual immediate detention or the means of enforcing it.[24] In 2014, the UK Supreme Court in *P v Surrey County Council*,[25] said that the 'acid test' for determining detention involves circumstances in which a person is 'under the complete supervision and control of those caring for her and is not free to leave the place where she lives'.[26] This understanding is also consistent with earlier Irish decisions, like that in *The State (Rogers) v Galvin*[27] where a suspect receiving treatment in an open hospital ward - but liable to be seized if he attempted to escape - was regarded as detained. The 2021 concession was also in alignment with the ruling of MacMenamin J, in the *Child and Family Agency v McG and JC*,[28] that children 'placed under the complete supervision and control of the CFA [and] not … free to leave the custody of the persons in whose care they were placed' [29] were being 'detained'.

Is there a state of detention where that detention was avoidable or can be categorised as self-induced? In *Aviezer*, counsel for the Minister for Health was reported as arguing that the mandatory quarantine regime was 'triggered by a voluntary action and was fundamentally different from the type of detention that is normally challenged under Article 40 of the Constitution'.[30] The 'voluntary action' was, presumably, the voluntary action of the traveller flying to Ireland in the knowledge that they would be liable to quarantine; the detention was avoidable. Again, this point was not pursued and did not have to be considered by the High Court. But it is most unlikely that it would have succeeded. Many forms of detention result from conduct which is ultimately avoidable. The proposition would be inconsistent with that body of case law under Article 40.4.2° where persons voluntarily defying court orders and being imprisoned for contempt of court, are still regarded as detained for the purpose of Article 40.4.2°. [31]

'Upon complaint'

Article 40.4.2° begins with words 'upon *complaint* being made by or on behalf of any person'.[32] As Charleton J said in *Braney v Ireland,*[33] in 2021, 'such cases proceed without the need for the filing of documents'.[34] The complaint need not be accompanied by the statements and affidavits required to initiate judicial review;[35] there is a long established practice in Ireland

[23] Counsel for the complainant's account, reported in 'Travel advisory unit should meet more often – case SC' *Law Society Gazette* (12 April 2021).
[24] *Wales v Whitney* (1885) 114 US 564.
[25] *P v Surrey County Council* [2014] UKSC 19.
[26] ibid [54].
[27] 'Re-arrested Man is Charged with Capital Murder of Detective' *Irish Times*, 20 October 1980; the ruling was subsequently overturned by the Supreme Court on other grounds: [1983] IR 249.
[28] *Child and Family Agency v SMcG & JC* (n 1).
[29] ibid [23] (MacMenamin J).
[30] Vivienne Traynor, 'High Court to Inquire if Woman's Detention in Quarantine in Lawful' (n 22).
[31] *Moore v Governor of Wheatfield Prison* [2015] IEHC 147; *Burke v Governor of Cloverhill Prison* [2023] IEHC 180.
[32] Emphasis added.
[33] [2021] IESC 7.
[34] ibid [27].
[35] ibid [27]; RSC 1986 Ord 84, r 20(2) & 20(3).

of convicted prisoners making informal written applications to the High Court.[36] A 'complaint' under Article 40.4.2° may be initiated by phone call or remote hearing,[37] or by 'a simple oral application to any judge'.[38] There are at least two explanations for this relative tolerance of informality. First, the form of the 'complaint' in Article 40.4.2° is not qualified or glossed by the text of the Article. Second, the duty to act even on an informal petition is an incident of the duty of the 'High Court to 'forthwith enquire into the said complaint'; a requirement that formal documentation be prepared would compromise the accelerated pace of the process.

The complaint may - at least at the preliminary stage where there may not be time to have an affidavit sworn by the appropriate witness - be grounded on hearsay. In *Ryan v Governor of Midlands Prison*,[39] the issue was whether the applicant had complied with the Prison Rules so as to qualify for early release. Evidence was given by a solicitor setting out the prisoner's account. This hearsay evidence was admitted. The text of Article 40.4.2° refers to the High Court 'enquiring' not 'enquiring' according to the formal rules of evidence. The High Court, it was said, was free to 'order its procedures'[40] and to admit evidence which might, in other proceedings, be technically inadmissible; 'in a habeas corpus application it is for the court to order its procedures in accordance with the constitutional requirements as to fairness of procedures'.[41]

The *timing* of the Article 40.4.2° complaint is not glossed either. By contrast with judicial review (where the judicial review application usually must be made on the prescribed time day to the judge assigned to hear *ex parte* applications) there is no restriction as to the day of the week or time of day when a complaint may be made. In the mid-to late 1970s, the process begun to be used by solicitors on behalf of detainees in Garda custody, who were, in some cases, being physically mistreated, or being denied access to their solicitors. The High Court made itself available outside court hours to hear Article 40.4.2° applications. In *The State (Cahill) v Commissioner of An Garda Síochána*,[42] an application was granted by Hamilton J sitting at his residence at midnight on a Saturday night. Forty-six years later, in *Mulreany and McGrath v Governor of the Dóchas Centre*[43] a High Court judge (Burns J) attended the High Court at 2 pm on Easter Sunday lunch time to undertake an enquiry into the detention of two Health (Amendment) Act 2021 detainees.[44]

'by or on behalf of any person'

Article 40.4.2° provides that an application may be made 'by or on behalf of' a detainee. The right of another person to make an application on behalf of a detainee is a blend of two

[36] *Kane v Governor of Midlands Prison* [2012] IEHC 511. There are instances in the nineteenth century of the Irish Court of King's Bench receiving petitions from prisoners seeking relief from prison conditions: *R v Wallace* (1853) 6 Cox's Criminal Law Cases 193.
[37] *CI v Member in Charge of Dun Laoghaire Garda Station* [2020] IEHC 512 [11].
[38] *Braney v Ireland* (n 33) [27].
[39] [2014] IEHC 657; *O'Neill v Governor of Castlerea Prison* [2019] IECA 70 [7].
[40] ibid [10] (Barrett J).
[41] ibid [10].
[42] 'Solicitors search for arrested man. She called 27 Garda Stations in Dublin, High Court told', *Irish Times*, 15 Apr. 1975.
[43] Aodhan O'Faolain, 'Women Who Refused Quarantine After Dubai Return to Leave Prison for Hotel After Bail Conditions Amended' *The Irish Times* (4 April 2021).
[44] In *Burke v Governor of Cloverhill* [2014] IEHC 449 the application was brought out-of-term on a Saturday.

categories. The first category is analogous to public interest standing on judicial review.[45] Here the application is made on behalf of a detainee in a protective spirit. The applicant is not acting on the instructions of the detainee. Examples of this species of standing include the 1810 case where a representative of the abolitionist Africa Society made an application for habeas corpus on behalf of Sarah Baartman, a South African who was being exhibited as a curiosity, and without her consent, in London.[46] In November 1976,[47] Garrett Sheehan, then in practice as a solicitor (and subsequently, a judge of the Court of Appeal), made an application on behalf of Noel Harrington, an activist who had been arrested at his workplace. Harrington's employer had become anxious about Harrington's well-being and instructed Mr Sheehan who located Harrington in Fitzgibbon Street Garda Station. Here the complaint was being made by a concerned third party – Harrington's employer – acting entirely without instructions from Harrington; at the time that the application was initiated, the complainant had no idea where Harrington was. As with the framework regulating public interest standing on judicial review, in third party intervention on Article 40.4.2° the applicant must be acting bona fide[48] and the detainee should not be in a practical position to take the application on their own initiative.[49]

A second category of third-party application involves cases where a third party – a family member, a fellow prisoner or a political affiliate – makes an application upon the instructions of the detainee.[50] This is far more common in practice. But there is a limit to the capacity of such third-party representatives. In 1967, the Supreme Court held that while a layperson – in this case, Richard Tynan, a highly active jailhouse lawyer – could make the *initial* complaint, he did not have a constitutional right to present the substantive application.[51] Ó Dálaigh CJ politely but firmly told Tynan: 'you will now leave counsel's benches, Mr Tynan'.[52] There have been cases where third parties have been allowed to present the application.[53] But this is strictly a matter of concession, and not of constitutional right.

'to any judge thereof'

The complaint may be made to *any* judge of the High Court. This right of selection means that the applicant may approach a judge who may be regarded as more sympathetic – even more politically sympathetic. In *The State (Burke) v Lennon*,[54] the applicant, the brother of a detainee held under the Offences Against the State Act 1939, deliberately chose to make his (ultimately successful) habeas corpus application to Gavan Duffy J because he would have been perceived as the most pro-Republican judge on the bench.[55]

[45] *Irish Penal Reform Trust v Governor of Mountjoy Prison* [2005] IEHC 305; *Hall v Minister for Finance* [2013] IEHC 39.
[46] (1810) 13 East 195.
[47] *The State (Harrington) v Garda Commissioner*, High Court, 14 December 1976; 1975 WJSC-HC 1070, [1976] 12 JIC 1401.
[48] *The People (DPP) v Pringle (No 2)* [1981] 5 JIC 2201, G Frewen, *Judgments of the Court of Criminal Appeal 1979-193* (Dublin 1984) 96.
[49] *The State (Burke) v Lennon* [1940] IR 136.
[50] *Burke v Governor of Cloverhill Prison* [2023] IEHC 180; *McGee & Dignam v Governor of Castlerea Prison* [2023] IEHC 248.
[51] *The State (Tynan) v Governor of Portlaoise Prison,* Supreme Court, 19 December 1967, 1965 WJSC-SC 1717.
[52] 'Layman May Not Act as Advocate. Man's Outburst in Court', *Irish Times*, 20 December 1967.
[53] *Knowles v Governor of Limerick Prison* [2016] IEHC 33; *Burke v Governor of Cloverhill Prison* (n 50) *Fogarty v Governor of Portlaoise Prison* [2020] IEHC 154.
[54] *Lennon* (n 49)
[55] 'Surprise in Habeas Corpus Application', *Irish Times*, 25 Nov. 1939.

The entitlement to go to 'every' judge of the High Court implies that an applicant can proceed to another judge of the High Court after an earlier High Court judge has refused to convert the complaint into an order for the production of the prisoner and certification of the grounds. There have been instances where an enquiry has been ordered by a second judge after an earlier judge had rejected the application for an enquiry.[56] But, until recently, there does not seem to have been any reported instance of production being ordered by a third judge after two earlier judges had rejected the application for an enquiry. In 2023, legal history was made when in *Burke v The Governor of Cloverhill Prison*,[57] Barr J granted an application for the production of the prisoner after a similar application had been twice rejected.

There had, in the past, been a suggestion that an application to a third judge – like that to Barr J in the *Burke* case – could be regarded as presumptively abusive. In 2012, in *Joyce v Governor of the Dóchas Centre*,[58] Hogan J suggested that the literal right to go from judge to judge must be qualified in light of the doctrine that the 'Constitution is a living document' whose interpretation must be adjusted to 'modern realities'.[59] The High Court of 1937 consisted of six judges. Today it consists of fifty one judges. There should, he suggested, be pragmatic limits to the right to go from judge to judge seeking an enquiry. An application made to a second judge, he suggested, would be regarded as abusive unless there was a good reason such as a 'new authority or ... new facts corning to light'.[60] Third or successive applications would be regarded as per se abusive unless there were 'quite exceptional circumstances'.[61] It may be that the High Court in the *Burke* case declined to follow the suggestion in the *Joyce* case when it allowed Burke's third application: at least, no such 'quite exceptional circumstances' were identified in the *Burke* case.

'forthwith enquire'

Article 40.4.2° requires that the High Court 'shall forthwith' enquire into the complaint.[62] In 1983, Barrington J said that while later stages of the process may be adjourned, the word 'forthwith' used in Article 40.4.2° '[governs] the initial complaint.[63] The assessment of the initial 'complaint' could not be adjourned. In 2021, there were newspaper reports[64] of an initiating Article 40.4.2° complaint having been adjourned till the following day in order to enable lawyers for the State to make submissions in opposition to that complaint. These accounts – if, in fact, they are accurate- suggested that the hearing of the complaint was being processed much like an application for judicial review on notice under Order 84, rule 24 of the Rules of the Superior Courts. This was a creative innovation which could add balance to the procedure. But there are counter-arguments. (i) Under Article 40.4.2°, the judge of the High Court is required to enquire into the initial 'complaint' of the detainee or the third party alone; the Constitution does not refer to the High Court also enquiring into 'the response' to that complaint. (ii) Under Article 40.4.2° the High Court is required to assess the

[56] *Joyce* (n 20).
[57] [2023] IEHC 177.
[58] *Joyce* (n 20).
[59] ibid [22] (Hogan J).
[60] ibid [24].
[61] ibid [25].
[62] 'Applications pursuant to Article 40.4.2° are accorded the highest priority and are heard as a matter of urgency' *McGee v Governor of Castlerea Prison* [2023] IEHC 308 [9].
[63] *The State (Whelan) v Governor of Mountjoy Prison* [1983] ILRM 52.
[64] Aodhan O'Faolain, 'Woman in Quarantine Claims Before High Court that she is Being Unlawfully Detained' *Breaking News* (9 April 2021).

complaint 'forthwith' (and without delaying the process by an adjournment).[65] (iii) There is a line of authority which suggests that, on a strict reading of the text, the process under Article 40.4.2° is purely bilateral. [66] It is an enquiry instigated by the detainee in which the detainer is required to justify the detention. There are never more than two parties. If that is so, there is no role for third parties, including notice parties. At any rate, this interesting issue awaits further consideration.

'enquire': the complaint: the standard required to trigger a full enquiry

Like judicial review, the procedure under Article 40.4.2° involves a two stage enquiry. The first stage is a screening process: the High Court must 'forthwith enquire into the said complaint'. If it thinks that there is an 'arguable case'[67] or stateable case,[68] the High Court must direct production and certification. The notion of arguability is, of course, an elastic standard[69] and some formulae have tended towards a low level of arguability. It has been said that where there is a 'chance'[70] that the detention is illegal the court should institute a full hearing. On directing an enquiry in the *Burke* case, Barr J said that the standard required to order production and certification is low, and that the court prefers to err on the side of caution: 'If in any doubt as to the possible legality of a person's detention, the court should direct that an inquiry be held'.[71]

'on a named day'

Once the decision to hold an enquiry has been made, the Constitution requires that the detainee be produced on a 'named day'. In the case of short-term detention, a 'named day' is often interpreted as meaning *that* day. In *The State (Trimbole) v Governor of Mountjoy Prison*,[72] the High Court sat at 7 pm in order to dispose of an application initiated at 3 pm. That understanding of the phrase 'named day' has been perpetuated into the twenty first century. In *Mulreany* and *McGrath v Governor of the Dóchas Centre*,[73] the governor of the Dóchas Centre was directed to certify in writing the grounds of his detention that afternoon.

The Detainer's Certificate: The Scope of Review

Upon the production of the prisoner,[74] the detainer is required to exhibit a copy of the warrant or order under which the detainee is being held.[75] The Constitutional process envisages the High Court reading and checking the legality of that certificate. The technical

[65] *Whelan* (n 63).
[66] *Knowles v Governor of Limerick Prison* [2016] (n 53) [29-37]; *Lanigan v Governor of Cloverhill Prison* [2017] IEHC 23 [33].
[67] 'Release of man sought in Australia Refused', *Irish Times*, 3 Nov. 1984; *Breathnach v Manager Wheatfield Place of Detention*, Supreme Court [2020] IESC 68.
[68] *Gibney v Governor of Cork Prison* [2019] IEHC 510 [13].
[69] *O(O) (an Infant) v Minister for Justice & Law Reform* [2015] IESC 26.
[70] *O'Dwyer v Governor of Midlands Prison* [2010] IEHC 528 [6].
[71] *Burke v Governor of Cloverhill Prison* (n 57).
[72] [1985] IR 550; *S v HSE* [2009] IEHC 106.
[73] 'Women who Refused Quarantine' *The Irish Times* (n 43).
[74] 'The provision for the actual production in court of the body of the prosecutor is 'an enabling power': *The State (Woods) v Kelly* [1969] IR 269; *CI v Member in Charge of Dun Laoghaire Garda Station* (n 37) [11]. In cases where the court has decided against physically producing the prisoner, arrangements have sometimes been made for the participation of the detainee by video-link: *S v HSE* (n 71); *McGee & Dignam v Governor of Castlerea Prison* (n 50).
[75] *Bolger v Commissioner of Garda Síochána*, Supreme Court, 2 November 1998.

contents of the certificate can be challenged on the grounds that there is an error on the face of the detainer's certificate. By reference to what principles is the certificate reviewed in order to check for error on its face? Here there seem to be two main rules: (i) If there is a prescribed statutory form, the warrant must follow that statutory form. (ii) If there is no statutory form, the order must comply with the common law principles for showing jurisdiction on the face of the order.

The case of *Moore v Governor of Wheatfield Prison*,[76] was an example of an order which did not follow the statutory form. The applicants, four water charge activists, had been the subject of an injunction ordering them to stay outside a protection zone assigned for water meter installers. The applicants infringed the injunction and were committed, for their contempt, to Wheatfield Prison. Form 12 in Appendix F of the Rules of the Superior Courts 1986 prescribes the form of an order of committal for contempt. The order must 'specify the contempt'. This warrant did not 'specify' the exact act of contempt (ie, failing to remain outside a 20-metre zone while water meters were being installed); accordingly, the High Court held that the 'certificate' was defective for non-compliance with the 1986 Rules and directed the release of the four prisoners.

Where there is no standard form, the order to detain must follow the arcane common law principle of showing jurisdiction on its face.[77] The exercise of any power of official detention is predicated upon compliance with a series of procedural steps and substantive findings. The 'showing jurisdiction on the face' doctrine requires that compliance with each of those statutory steps, and statutory findings, must be set out on the face of the order. The commonly exercised power of detention under section 5(2) of the Immigration Act 2003 provides for the detention of a non-national who (a) has been refused leave to land in Ireland and (b) whom an immigration officer suspects has been unlawfully in the State for a continuous period of less than three months. The complainant in *Ejerenwa v Governor of Cloverhill Prison*[78] had been arrested under section 5(2). The warrant did not rehearse adherence to each of the procedural steps; it merely referred to the general statutory power, stating: 'in exercise of the powers conferred on me by section 5(2) of the Immigration Act, 2003, I direct that Gerard Ejerenwa be detained in Cloverhill Prison'. The Supreme Court, in a very interesting resurrection of the common law principles, held that the warrant did not show jurisdiction on its face; it should have stated (a) that the detainee had been refused leave to land *and* (b) that the officer believed that he had been in Ireland for a continuous period of less than three months.[79] It was not sufficient that these findings had, in fact, been made. They should have been expressly stated.

An alternative view – that it is sufficient that the warrant simply informs the governor of the ground and period of the detention without laboriously describing fulfilment of each of the steps to detention – seems to underlie a subsequent ruling of the Supreme Court. The Criminal Justice (Community Service) (Amendment) Act 2011 requires that a sentencing court must – when it considers that the appropriate sentence of imprisonment should be one of twelve months or less – consider whether to make a community service order. In *Brennan v Governor of Castlerea Prison*,[80] the Supreme Court rejected the prisoner's contention that the order must, at common law, in accordance with the jurisdiction on the face doctrine,

[76] *Moore* (n 31).
[77] *The State (Hughes) v Lennon* [1935] IR 128, 142-143.
[78] [2011] IESC 41.
[79] There was no model form for the warrant authorised by s 5 Immigration Act 1999. In the absence of a statutory form the common law rule applied.
[80] [2019] IESC 5.

expressly state that the court had considered the community service option. The Supreme Court (seemingly in tension with the version of the jurisdiction-on-the-face doctrine applied in *Ejerenwa*) said that 'it [was] *not* necessary for a warrant to set out *every* pre-condition [to] jurisdiction'.[81] It was enough, the Supreme Court stated, to state that 'the person concerned has been convicted, what they have been convicted of, and the length of the sentence imposed'.[82] If the-basis-and-period-of-detention test set out in *Brennan* had been applied to the order in *Ejerenwa* the outcome might have been different. The warrant in the *Ejerenwa* case – 'in exercise of the powers conferred on me by Section 5(2) of the Immigration Act, 2003 … direct that Gerard Ejerenwa be detained in Cloverhill Prison pending the making of arrangements for his/her removal from the State' – might have satisfied the *Brennan* test.

The arcane common law doctrine of jurisdiction on the face of the order only applies in that tiny residuum of powers of detention where there is no statutory form of warrant. The difficulties caused by the common law principles would be avoided if the sensible suggestion of Humphreys J in 2016 – that a fully comprehensive set of statutory committal forms be drafted and enacted[83]– was implemented. In the meantime, a series of remedial techniques may be employed in order to prevent a documentary blemish from invalidating the entire detention. (i) A mere slip may be disregarded.[84] (ii) An order of detention will usually be predicated upon a prior judicial or administrative order. An omission in the warrant can be corrected by reference to the underlying order which contains the information missing from the warrant, or which shows that a mis-recital in the warrant is a pure error of transcription.[85] (iii) Even where the warrant cannot be cured by reference to collateral documentation, the High Court has a discretion to amend a warrant where the defect is technical and release might be a disproportionate remedy.[86] The Supreme Court was not invited to consider using this technique in *Ejerenwa*; its use in that case might have been apt.

The character of Article 40.4.2° review of the underlying order to detention

The 'fundamental default' standard

Distinct from review of the certificate, is the question of the nature of the review of the underlying order of detention. The question of the grounds of review on Article 40.4.2°, and the nature of the illegality which will render a detention not 'in accordance with the law', is perhaps the most difficult area in the current law of Article 40.4.2°. The source of the difficulty appears to be uncertainty over whether the phrase 'in accordance with the law simply means unlawful or ultra vires in the ordinary sense, or whether it requires something further: that the detention be affected by some 'default of fundamental requirements'.[87]

The origins of the fundamental default standard can be traced to the 1930s. Article 6 of the Constitution like Article 40.4.2° of the Constitution required the High Court to order the

[81] ibid [54] (emphasis added).
[82] ibid [54]. A similar test was set out in *Mullen v Governor of Midlands Prison* [2014] IECA 26 and *Freeman v Governor of Wheatfield Place of Detention* [2016] IECA 177.
[83] *Donovan v Governor of Midlands Prison* [2016] IEHC 287 [37].
[84] *Maguire v Governor of Mountjoy Prison* [2017] IECA 142; *Brennan v Governor of Castlerea Prison* [2019] IESC 5 [60] & [61].
[85] *POI v Governor of Cloverhill Prison* [2017] IESC 78.
[86] *Sharma v Member in Charge Store Street Garda Station* [2016] IEHC 611 [52] & [54]; *JA (Cameroon) v Governor of Cloverhill Prison* [2017] IEHC 609.
[87] *The State (McDonagh) v Frawley* [1978] IR 131.

release of the detained person unless satisfied that 'he is being detained in accordance with the law'. In the case of persons convicted by trial on indictment, the phrase 'in accordance with the law' was narrowed so as to admit only extreme illegality. A few months before the coming into effect of the 1937 Constitution, in *The State (Canon) v Kavanagh,*[88] the detainee, who had been convicted on indictment in the Dublin Circuit Criminal Court, had identified a technical procedural infringement affecting the competence of the trial court. That, the High Court held, was not nearly sufficient. It would require the 'most exceptional circumstances' to justify such an extraordinary intervention. The appropriate remedy for those who had been convicted on indictment was by way of an application to the Court of Criminal Appeal. This exclusion from habeas corpus was sustained by policy reasons. By using habeas corpus, rather than an appeal to the Court of Criminal Appeal, the prisoner was trying to cheat the public interest protections built into the criminal appeal process – particularly the power of the Court of Appeal to order a re-trial[89] (as opposed to the order of immediate release under Article 40.4.2°).

Throughout the 1960s and 1970s, as the High Court was being flooded with informal applications submitted by convicted prisoners, the Supreme Court renewed the proposition that Article 40.4.2° was generally unavailable in the case of post-conviction-on-indictment-imprisonment.[90] However, it did concede, that if the defect was so outrageous as to make it unacceptable that the prisoner even must await a hearing before the Court of Appeal, then it might intervene. The standard was set far above ordinary jurisdictional error. In order to reach the threshold, there must be a 'default of fundamental requirements' so radical that the 'detention may be said to be wanting in due process of law'.[91] There is at least one instance of this theoretical standard actually being reached. [92]

Over the succeeding decades, there have been three significant developments. First, there has been an expansion in the range of application of the principle. The 'default of fundamental requirements' standard was originally confined to imprisonment 'on indictment'.[93] Over the last twenty years this 'default of fundamental requirements' standard has begun to be extended beyond its original context of post-conviction on indictment imprisonment. There are instances of the test being applied to imprisonment following a District Court conviction.[94] The 'fundamental default' formula has been applied to review of remands in custody in the criminal trial process.[95] The 'fundamental default' formula has been applied to public welfare detention, whether authorised judicially (as in the case of place of safety orders made under the Childcare Act 1991)[96] or by administrative agencies (as in the case of detention under the Mental Health Act 2001).[97] The standard has been applied to

[88] [1937] IR 428.
[89] Courts of Justice Act 1928, s 5(1)(b).
[90] *The State (McKeever) v The Governor of Mountjoy Prison* (Supreme Court, 19 Dec 1966); *The State (Charles Wilson) v The Governor of Portlaoise Prison* (Supreme Court, 11 July, 1968; *The State (Royle) v Kelly* [1974] IR 259.
[91] *Frawley* (n 87).
[92] *The State (O) v O'Brien* [1973] IR 50; in that case the 'fundamental default' standard was held to have been reached where the terms of the detainee's sentence was not a technically correct translation of the statutory language ('until the pleasure' rather than 'during the pleasure'). This seemed particularly indulgent: not merely was the defect technical, the detainee had been convicted on indictment of murder. In *The State (Royle) v Kelly* (n 90), where the High Court held that the prisoner's lack of legal representation justified post-conviction release. The Supreme Court, finding that the prisoner was responsible for his own non-representation, allowed an appeal against the High Court ruling.
[93] *Frawley* (n 87) 136.
[94] *McSorley v. Governor of Mountjoy Prison* [1997] 2 IR 258; *Bailey v Governor of Mountjoy Prison* [2012] IEHC 366.
[95] *Roche v Governor of Cloverhill Prison* [2014] IESC 53; *Grant v Governor of Cloverhill Prison* [2015] IEHC 768.
[96] *Child and Family Agency v S McG & JC* (n 1).
[97] *AB v Clinical Director St Loman's Hospital* [2018] IECA 123.

detention resulting from misconstruction of the enhanced remission regime under the Prison Rules 2007.[98] Second, associated with the 'fundamental default' standard is an ancillary principle that judicial review – and not Article 40.4.2° – is the appropriate remedy where the illegality does not reach the fundamental default standard.[99] Third, the exact content of the fundamental default standard has been filled out. The 'fundamental default' standard is now recognised as being made up of a number of strands: cases where there has been a 'complete absence of jurisdiction,'[100] cases where there has been a breach of 'fundamental [fair procedural] requirements,'[101] and cases where the order of detention shows invalidity on its face.[102]

Three understandings of the 'fundamental' defect test

At least three understandings of the 'complete absence of jurisdiction'/ fundamental denial of justice'[103] standards can be identified. (i) According to one version, the 'complete absence of jurisdiction' and the 'fundamental denial' of procedures formulae are not confined to Article 40.4.2° challenges to trials on indictment. They can apply to forms of administrative detention. These standards filter out all but the most exceptional illegalities: an indefensible assumption of a jurisdiction that does not belong to the court or a catastrophic disregard of fair procedures. (ii) According to a second line of authority, the standards apply generally. But by contrast with the first approach, those standards are met by illegality of the type that would make the order ultra vires at common law. No enhanced degree of illegality is necessary. The 'fundamental denial' or 'complete absence' formulae are read down. (iii) A third approach rejects the view that the 'fundamental denial' or 'complete absence' standards have a place outside of the context for which they were originally created: post-trial on indictment review and have no place in the context of administrative detention.

The 'fundamental default' standard is only reached where the defect is so grave that it would justify intervention in a post-conviction setting

The *ex tempore* decision in *Ryan v Governor of Midlands Prison*[104] can be placed in the first category. According to this position, only the sort of extreme abuse of the criminal process that would justify post-conviction release, will justify intervention by Article 40.4.2°. In *Ryan* the detainee had, the High Court found, been illegally denied enhanced remission under the Prison Rules 2007. The Minister's refusal had been affected by a series of classical administrative law defects: a failure to have regard to relevant considerations and a fettering of discretion by an inflexible policy.[105] Without these illegalities, it appears that remission would have been granted and the prisoner would have been discharged. The High Court, on an Article 40.4.2° enquiry, ordered the complainant's release.[106] The Supreme Court, however, allowed the Governor's appeal. The Supreme Court did not (though it might have

[98] *Ryan v Governor of Midlands Prison* [2014] IESC 54.
[99] *FX v Clinical Director of the Central Mental Hospital* [2014] IESC 1 [65]; *Ryan v Governor of Midlands Prison* (n 98) [23].
[100] *Ryan* (n 98) [18] (Denham CJ); *Roche (Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53 [24].
[101] *Frawley* (n 87).
[102] *FX* (n 99)[65]; *Ryan* (n 98)[13].
[103] *Ryan* (n 98) [18] (Denham CJ); *Roche v Governor of Cloverhill Prison* (n 95)[24]; *FX* (n 99) [66].
[104] *Ryan* (n 98).
[105] [2014] IEHC 338 (Barrett J).
[106] ibid

had good grounds for doing so)[107] contest the correctness of the High Court's legal conclusions. But, it considered that Ryan's 'complaint about the procedures leading to the Minister's decision' should 'be examined by judicial review, and not under Article 40.4.2°'.[108] The administrative law errors affecting the refusal of enhanced remission did not reach the Article 40.4.2° standards of a 'fundamental flaw'[109] or an 'absence of jurisdiction'.[110] 'In the case of an 'order in relation to post conviction detention' the 'route of the constitutional and immediate remedy of habeas corpus [was] not appropriate'.[111] The effect was to extend the standard previously applied to Article 40.4.2° review of imprisonment following trial on indictment to review of an administrative determination. While there is a compelling rationale for denying Article 40.4.2° to a post-conviction prisoner complaining of their trial, and attempting to cheat the criminal appeal process, that justification did not really apply in *Ryan's* case. Ryan was not cheating his duty to resort to the Court of Criminal Appeal. The objection did not relate to the trial. There was no criminal appeal available for him to cheat.

The 'fundamental default' standard is reached where the order is unlawful in the conventional sense

In *Ryan's* case the 'fundamental default' standard seems to have been understood as requiring an illegality graver than ordinary common law illegality; otherwise, Ryan would have been released. More often, however, the fundamental default standard is applied in the more moderate sense of the sort of illegality that would make the order ultra vires at common law. Jurisdictional error is treated as 'fundamental' per se. It is not necessary that the abuse of jurisdiction be of the more extreme character that would justify intervention by Article 40 in the post-conviction-on-indictment context.

One recognised category of 'fundamental default' arises where the detaining agency has acted with a 'complete absence of jurisdiction'.[112] The 'complete absence of jurisdiction'[113] standard was held to have been established in one case where a sentence of imprisonment had been imposed without considering the imposition of a community service order.[114] Like *Ryan*, there had been a failure to take into account a relevant consideration. Yet unlike *Ryan*, the High Court did not demand any further quality of illegality. The 'fundamental' standard was held to have been established where the prisoner had been convicted summarily for an indictable offence without compliance with the statutory requirement that the prisoner be informed of the right to be tried by a jury.[115] Again, unlike *Ryan*, there was no reference to any further element than the fact than the conviction was ultra vires.

A second strand to the 'fundamental default' captures cases where there has been a default of 'fundamental [fair procedural] requirements.'[116] The standard has been held to have been reached where a parents in a child protection case were not legally represented.[117] In another

[107] Subsequently, the Court of Appeal disagreed with the High Court's interpretation of Rule 59(2) of the Prison Rules 2007: *McKevitt v Minister for Justice* [2015] IECA 122.
[108] *Ryan* (n 98) [23].
[109] ibid [13].
[110] ibid [20-21].
[111] ibid [18].
[112] ibid [18] (Denham CJ); *Roche v Governor of Cloverhill Prison* (n 95) [24].
[113] ibid (Denham CJ); *Roche v Governor of Cloverhill* Prison (n 95) [24].
[114] *Ilie v Governor Castlerea Prison* [2016] IEHC 373 [17]; Criminal Justice (Community Service) Act 1983 (as amended), s 3.
[115] *Cirpaci* (n 2) [22] & [27]; Criminal Justice Act (Theft and Fraud Offences) Act 2001, s 53(1).
[116] *Frawley* (n 86).
[117] *Child and Family Agency v S McG and JC* (n 1) [17], [33- 34] (MacMenamin J).

instance, the threshold was established when the defendant had not been notified of an appeal date.[118] In *Connors v Governor of Limerick Prison,*[119] the detainee argued, and the Court of Appeal agreed, that the standard had been infringed when remand followed a refusal by the court to allow the detainee to exercise their constitutional right to plead guilty.[120] Again, in these cases, the court did not, for the defect to be classified as 'fundamental', demand anything further than the fact that there had been an infringement of fair procedures.

The 'fundamental default' is not appropriate outside post-conviction detention

A third position views the formulae devised to deal with post-conviction detention as simply not apt in the context of administrative detention. Once outside the area of post-conviction detention, review under Article 40.4.2° should be conducted according to the same standards as are applied when an order of detention is examined by judicial review. In *Sharma v Member in Charge of Store Street Garda Station*[121] the High Court (in the context of a detainee who was being held under the immigration code) cogently repudiated the proposition that the 'fundamental default' standard applied to administrative detention. The assertion that 'an applicant must prove breach of a fundamental requirement of the law in order to succeed in an Article 40 application in relation to administrative detention' was, the High Court stated, 'clearly wrong'.[122]

One of the corollaries of the high-end *Ryan* version of the 'fundamental default' standard is that the applicant must, in cases which do not reach that standard, use judicial review instead of Article 40.4.2°. A potential longer-term effect of imposing the standard is that judicial review would displace Article 40.4.2°. In *Cirpaci v Governor of Mountjoy Prison,*[123] Hogan J (in the context of a challenge to a District Court conviction) warned that

> to require … that the applicant proceed by way of judicial review rather than to avail of the remedy which the Constitution expressly provides for unlawful detention would amount to a repudiation of the text, tradition and history on which Article 40.4.2° rests.[124]

Ultimately, there may not be much difference in substance between the second position (fundamental default interpreted as equivalent to unlawfulness) and the third position (unlawfulness (not fundamental default) is the appropriate standard). There is, however, a significant difference between the second and third approaches, on the one hand, and the first approach, on the other hand. A potential problem with the first approach is that it over-applies the 'fundamental default' test and, thereby, denies Article 40.4.2° to a detainee whose detention is not 'in accordance with the law'. The decision in *Ryan* seems to be an isolated example of a misapplication of the standard originally designed for Article 40.4.2° review of detention following trial on indictment.

[118] *Bailey v Governor of Mountjoy Prison* (n 94) [22].
[119] [2017] IECA 218 [44] & [63].
[120] ibid.
[121] *Sharma* (n 86).
[122] ibid [21].
[123] *Cirpaci* (n 2).
[124] ibid 32].

Conditions of detention as a ground of review on Article 40.4.2°

The original common law view was that conditions of detention subsequent to the order of detention did not impair the legality of imprisonment.[125] It followed that the habeas corpus enquiry was purely concerned with the process leading to the detention; not with what happens thereafter.[126] This was probably established in English law by the early seventeenth century.[127] The year 1976 marked the beginning of a change of approach in Ireland. In *The State (C) v Frawley*,[128] an informal petition was received from a very distressed prisoner, Karl Crawley. Despite suffering from mental illness, Crawley had been placed in solitary confinement, was being handcuffed and sedated. The ill-treatment of Crawley had aroused sympathy amongst prisoners' rights activists and a campaign for the amelioration of his treatment had been established.[129] Applying traditional common law doctrine, the High Court ruled that it was powerless: the basis of the detainee's detention (a conviction and sentence by the Circuit Court) was valid; the legality of the root of the detention exhausted the High Court's jurisdiction on Article 40.4.2°. However, the Supreme Court took a different view and directed an enquiry under Article 40.4.2°. The legal reasons for the Supreme Court's more expanded view of the capacity of Article 40.4.2° were not recorded. It has been suggested that Henchy J who was, at that point, chairing a report into the treatment of the mentally ill in the criminal justice process, had taken a compassionate interest in Crawley's application and that he may have prevailed upon the rest of the Supreme Court to allow the appeal.[130] On reconsidering the complaint, the High Court held that the measures were proportionate attempts to prevent self-injury – but also endorsed the proposition that measures or restrictions which were punitive or malicious could be suitable for an enquiry, and even release, under Article 40.4.2°.

Crawley's case laid the seed of a new category of Article 40.4.2° review. Later in 1976, the Supreme Court, in the *Emergency Powers Bill 1976 Reference*,[131] warned that if during extended policy custody, a detainee's right to legal and medical assistance was infringed, the High Court might 'grant an order for release under the provisions for habeas corpus contained in the Constitution'.[132] The *C* and *Emergency Powers Bill* cases reconceptualized the whole nature of the legality of detention and marked a break with the common law. Under the traditional view there was one condition to legality: the initial order or conviction authorizing detention. Under the new conception of habeas corpus that emerged in the Irish High and Supreme Courts in the mid-1970s, there were two conditions to the legality of detention: the initial order and the subsequent conditions of detention.

In the case of short-term police or administrative detention, the *Emergency Powers Bill 1976 Reference* envisaged the possibility of an Article 40.4.2° order of release where conditions of detention were unlawful. In the case of longer-term detention, the remedy of release is at the

[125] *R v Deputy Governor Parkhurst Prison* [1992] 1 AC 58, 165.
[126] ibid.
[127] In 1636 the English judges determined that habeas corpus was an inappropriate remedy for the relief of prisoners detained during time of plague; *Politics and the Bench, The Judges and the Origins of the English Civil War,* ed G.R. Elton (London, 1971), pp. 182,183; *Anon* (1654) Style 432.
[128] [1976] IR 365.
[129] Brian Kenny, Máirín de Burca (Cork, 2023) 234-237.
[130] 'The Small Legend of Karl Crawley', *Magill*, 31 May 1982. *Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons. Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts* (1978) Prl. 8275.
[131] [1977] IR 159.
[132] *Re The Emergency Powers Bill* [1977] IR 159, 173.

remotest end of the remedial spectrum. In *JH v Clinical Director of Cavan General Hospital*[133] the High Court set the threshold at a 'complete failure' to provide 'appropriate conditions or appropriate treatment'.[134] A 'complete failure' may arise because of the detainer's actions prior to the complaint. It may also arise because of the detainer's conduct within, or subsequent to, the High Court enquiry. Prior to the complaint, there may have been a *complete* failure if the failure to provide 'appropriate conditions has been 'egregious, or exceptional or fundamental'.[135] The detainer's intentions may also be relevant. In the *C* case, the High Court distinguished measures which were justified by clinical or security grounds from, at the other end of the spectrum, measures which were malicious in intent.[136]

After the complaint has been enquired into, and after the detainer has been instructed by the court to remediate the prisoner's conditions, a 'complete failure' may arise where the detainer is still unwilling to take remedial action. The prisoner in *Kinsella v Governor of Mountjoy*[137] was being detained in solitary confinement in the basement section of Mountjoy Prison. In order to protect him from attacks from fellow prisoners, he was held in a padded cell three metres by three metres; there was no natural light; he was not allowed access to a radio, TV or books; and he was given a cardboard box for his human waste. The High Court held that the conditions of detention were an unconstitutional infringement of his right to physical integrity. However, that did not necessarily mean that he was entitled to the ultimate remedy of release. The proper remedy was to have the conditions remediated (by judicial review by mandamus) – not release. 'So far as sentenced prisoners are concerned, the Article 40.4.2° jurisdiction can only be used in quite exceptional cases'.[138] The prisoner could only be entitled to the ultimate remedy of release where there had been 'a complete failure to provide appropriate conditions' – a total failure by the State to respond.[139]

Release

'Unless satisfied that he is detained in accordance with the law'

Judicial review is, of course, a discretionary remedy[140] and relief may be refused, even if the order is unlawful, on grounds related to the conduct of the party; failure to exhaust alternative remedies; waiver; breach of the rule in *Henderson v Henderson*;[141] or breach of the duty of candour. By contrast with judicial review, the strict textual design of Article 40.4.2° does not permit denial of relief on extraneous grounds. The final phrase of Article 40.4.2° provides that the High Court must 'order the release of such person from such detention *unless* satisfied that he is being detained in accordance with the law'. The only contingency which will prevent release is the detention being 'in accordance with the law'. The conduct of the detainee is not a ground for disapplying the presumption of release; only the legality of the detention can stop release. In *Ryan v Governor of Mountjoy Prison*,[142] the Supreme Court confirmed that the text of Article 40.4.2° did not recognise anything other than the legality of the detention as a ground for refusing relief.

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133 [2007] 4 IR 242 [7.5].
134 ibid.
135 *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288; *SM v Governor of Cloverhill Prison* [2020] IEHC 639 [38]; *SM v Governor of Cloverhill Prison* [2021] IECA 102 [12].
136 *The State (C) v Frawley* (n 128) 374; *SM v Governor of Cloverhill Prison* [2020] IEHC 639 [39].
137 [2011] IEHC 235.
138 ibid [16].
139 The same test was applied in *RA v Governor of Cork Prison* [2016] IEHC 504.
140 Hogan Morgan and Daly *Administrative Law in Ireland* (5th edn, Round Hall 2019) ch 18, section D.
141 (1843) 1 Hare 100.
142 [2020] IESC 8.

If abuse of process is not a ground for denying release, abuse of process cannot be a ground for an enquiry; otherwise, the first principle could be evaded. The *Ryan* case might affect the suggestion made in *Joyce v Governor of the Dóchas Centre*,[143] eight years earlier that an application made to a second or third judge might, unless new grounds had come to light, be regarded as an abuse of process. The *Joyce* case was decided before *Ryan*. Following *Ryan*, abuse of process can no longer be regarded as a ground for denying an Article 40.4.2° enquiry.

'Shall order the release'

Article 40.4.2° requires that the High Court 'shall order the release of such person'. The release cannot either be delayed or stayed. Once news of the High Court's order of release has been conveyed, the detainer must act; once the information is conveyed by a proper source, the detainer is not entitled to ask for formal confirmation or for a court order.[144] Nor can the release be stayed. The phrase 'shall order the release' is interpreted as meaning that, a detainee who is not being detained in accordance with the law, is entitled to unconditional release.[145] A corollary is that release may not be suspended. In *The State (Trimbole) v Governor of Mountjoy Prison*,[146] the Supreme Court (after earlier having granted an overnight stay on the High Court order of release) implicitly acknowledged its misstep and ruled that 'it would be inconsistent with the Constitution for this Court to exercise any right to stay such an order'.[147]

Over the last twenty years, a welfare exception to the ordinary right of release has emerged. This exception captures cases where the detainee is a patient who may be a physical threat to themselves or others, or cases where the detainee is a child.[148] In *FX v Clinical Director CMH*,[149] the detainee was a very ill psychiatric patient (said to be one of the most disturbed prisoners in the Irish detention system). The High Court broke from the previous practice of immediate, unconditional release, and delayed release. Judgment was handed down on Sunday 8 July 2012; the High Court directed that release should not be implemented until Tuesday 10 July. This managed release was designed to enable the authorities to have in place an alternative warrant by Tuesday 10 July. The Supreme Court held that while there was 'no provision in the Constitution for a stay',[150] release could, in the case of a person 'incapable of protecting themselves', be 'controlled'.[151] The distinction between release being 'stayed' (which is not permitted) and release being 'controlled' (which is allowed) is very fine. A release which is 'controlled' is being delayed. If it is being delayed it is being stayed. Whether 'controlled release' is better regarded as a qualification upon the constitutional right of release, or whether it is better classified as merely a species of release, the overall effect corresponds to the position at common law. At common law, the idea of using habeas corpus to obtain the discharge of persons who were a danger to themselves or others was regarded as '[abusing] the name of liberty'.[152]

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[143] *Joyce* (n 20)[25].
[144] *Ejerenwa v Governor of Cloverhill Prison* [2011] IEHC 351 [15].
[145] *The State (Browne) v Feran* [1967] 1 IR 147; *The State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550, 568; *SC v Clinical Director of the Jonathan Swift Clinic, St James's Hospital*, 5 December, 2008 (ex tempore); *O'Farrell v Governor of Portlaoise Prison* [2016] IESC 37 [204].
[146] *The State (Trimbole) v The Governor of Mountjoy Prison* (n 145).
[147] ibid [550, 567 & 570].
[148] *N v Health Services Executive* [2006] 4 IR 374.
[149] [2012] IEHC 272.
[150] *FX* (n 99)[79].
[151] ibid.
[152] *Re Shuttleworth* (1846) 9 QB 651.

Release 'from such detention'

Article 40.4.2° merely directs the release of the person from 'such' detention as it is currently undergoing. The text is not irreconcilable with the co-existence of a power of immediate re-arrest under some cleansed process. The pronoun 'such' only prohibits perpetuation of the original, defective detention. Article 40.4.2° does not prohibit re-arrest under a new *non-defective* process. Dr Paul Singer,[153] the colourful stamp-dealer and socialite, whose fraudulent management of a Dun Laoghaire stamp auction business had ruined thousands of investors, had manged to obtain release on Article 40.4.2° from a remand in custody. As Singer stepped outside the doors of Mountjoy Prison, he was immediately re-arrested on a new charge. Singer then challenged this re-arrest, arguing, in effect, that 'release' for the purpose of Article 40.4.2° required some definite allocation of time and space. The Supreme Court argued that, once rearrest did not perpetuate the same – 'such' – defect as had impaired the original process, there was no contravention of the right of release. The *Singer* principle was applied in *Ejerenwa v Governor of Cloverhill Prison*[154] (described earlier).[155] The release of Ejerenwa had been ordered on the ground that the detention order did not show jurisdiction on its face. In the meantime, the immigration service, having taken legal advice, drafted a lawful order and waited for Ejerenwa to leave the prison estate, and rearrested him. The High Court held that the re-arrest was quite lawful: like Singer, Ejerenwa had not been re-arrested under 'such' detention as he had been released from. Article 40.4.2°'s remedy of release is sometimes viewed as reckless. However, the welfare and rearrest qualifications to release provide a means of counter-balancing the public interest against the detainee's remedy of release.

Article 40.4.2° and Judicial Review: A Comparative Survey

One element of the line of thought that would limit Article 40.4.2° to cases of 'fundamental default' derives from the perception that judicial review may provide a better balanced forum for determining questions relating to the legality of detention than Article 40.4.2°.[156] This preference for the alternative remedy of judicial review seemed, in part, to underlie the Supreme Court's conclusion that Article 40.4.2° was an inappropriate way of reviewing the complaint in *Ryan v Governor of Midlands Prison.*[157] The Supreme Court observed that 'Mr. Ryan's complaint about the procedures leading to the Minister's decision may be examined by judicial review, and not under Article 40.4.2°' with its 'special and extraordinary features'.[158]

There is, in some respects, an element of pointlessness to the policy of preferring judicial review to Article 40.4.2°. The detainee is being diverted away from the High Court acting under Article 40.4.2° back to the High Court acting under judicial review. The basic framework regulating the two remedies – the scope of review, the timeline and the remedy – are, in substance the same:

[153] *In Re Paul Singer (No 2)* (1960) 98 ILTR 112.
[154] [2011] IEHC 351.
[155] See text to (n 78).
[156] *McSorley v Governor of Mountjoy Prison* (n 94); *FX* (n 99)[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…or if it is a court of local jurisdiction, then an application for judicial review…the constitutional and immediate remedy of habeas corpus is not the appropriate approach').
[157] *Ryan* (n 98).
[158] ibid [23].

(a) The character of the review is the same. On judicial review the High Court assesses the legality of the underlying order on which the detention is predicated. Equally, when conducting review under Article 40.4.2°, the High Court may 'look through'[159] a formal order of detention in order to examine its internal validity.

(b) A complaint under Article 40.4.2° must be enquired into 'forthwith'. On the other hand, there are indications that, where personal liberty is at stake, judicial review, or an appeal, should also be administered at an accelerated pace.[160] Equally, on Article 40.4.2°, the High Court may adjourn the application; the High Court is not required to 'skimp its enquiry'.[161]

(c) The remedy consequent on a judicial review determination is, in substance, no different to the remedy consequent on Article 40.4.2°. On judicial review, the order authorizing the detention is set aside and, as a consequence, the prisoner released; under Article 40.4.2°, the prisoner is discharged. There is no real difference. An advantage of judicial review is that the quashing by an order of certiorari may be suspended in order to allow a replacement order to be drawn up in the interval.[162] However, equally, on Article 40.4.2° the Court has the equivalent option of directing 'controlled release'[163] in order to enable a new order to be drafted.

In other respects, there are genuine differences between the two remedies. A non-exhaustive list of some of these differences can be enumerated.

(a) Judicial review is a discretionary remedy; Article 40.4.2° is not.[164] An applicant for judicial review may be denied a remedy on grounds of abuse of process, such as a breach of duty of candour.[165] (Where important interests are at stake, not all courts administering judicial review will decline jurisdiction on misconduct grounds).[166] By contrast with the usual position on judicial review, an Article 40.4.2° detainee may not be denied release on grounds of abuse of process (such as lack of candour).[167]

(b) An applicant seeking judicial review will be bound by the strict time limits set out in Order 84, rule 21 (1) of the Rules of the Superior Courts. By contrast, there are no time limits on Article 40.4.2°.

(c) On judicial review, the burden of proof is on the applicant.[168] By contrast, on Article 40.4.2°, the ultimate burden of proof is considered to lie on the detainer.[169]

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[159] ibid [8].
[160] *McSorley v Governor of Mountjoy Prison* (n 95); *FX* (n 99)[65].
[161] *The State (Whelan) v Governor of Mountjoy Prison* (n 62); *O'Farrell v Governor of Portlaoise Prison* (n 144) [221]; *Knowles v Governor of Limerick Prison* (n 52) [31].
[162] *Balz v An Bord Pleanála* [2020] IESC 22.
[163] *FX* (n 99) [78].
[164] *Bailey v Governor of Mountjoy Prison* (n 94) [20]; *Ryan v Governor of Mountjoy Prison* (n 142)
[165] *Bebenek v Minister for Justice* [2018] IEHC 323.
[166] *Dimbo v Minister for Justice* [2006] IEHC 344 [12].
[167] The detainee who commits an abuse of process may be subject to other sanctions such as costs: *Ryan v Governor of Mountjoy Prison* (n 142) [53].
[168] *Meadows v Minister for Justice* [2010] IESC 3 [71] (Denham J).
[169] *The State (Trimbole) v Governor of Mountjoy Prison* [(n 145) 577; *Ryan v Governor of Midlands Prison* (n 105) [22]; *Lanigan v Governor of Cloverhill Prison* (n 66) [41]; *SS (Pakistan) v Governor of Midlands Prison* [2018] IEHC 442 [9]; *Burke v Governor of Cloverhill Prison* (n 50) [76]. An alternative view was taken in *McG & JC v The Child and Family Agency* (n 1) [32] (Charleton J).

(d) An unsuccessful applicant for judicial review will usually be liable, under section 169 of the Legal Services Regulation Act 2015, to pay the defendant's costs (unless one of a number of limited exceptions are applicable). The position under Article 40.4.2° is more pro-complainant. In the first place, it is doubtful whether the 2015 Act can constrain the superior Constitutional process of Article 40.4.2°.[170] Second, an unsuccessful complainant has a higher chance of being spared costs on Article 40.4.2° than on judicial review. On judicial review, an unsuccessful applicant will usually only be able to escape having to pay the other side's costs where the point of law is one of general public interest case,[171] or a test case.[172] On Article 40.4.2° the mere fact that it was reasonable to take proceedings may be sufficient to spare the complainant from covering the other side's costs.[173]

(e) Renewal of an application for leave on judicial review is normally regarded as abusive.[174] Under Article 40.4.2°, by contrast, there is a constitutional right to renew (an undetermined) complaint to another High Court judge.

(f) An application under Order 84 requires the preparation of statements and affidavits;[175] under Article 40.4.2° non-compliance with the paperwork can be excused.[176]

(g) Article 40.4.2° recognizes the right of one party -the detainer- to be given 'an opportunity of justifying the detention'. The defence right of the party who actually authorised the detention is omitted from the text of Article 40.4.2°. In the 1990s,[177] the Supreme Court suggested that judicial review should be preferred over Article 40.4.2° because, under Article 40.4.2°, the detention is justified, not directly by the judge or administrative officer who authorized the detention, but indirectly by the detainer. But such indirect presentation of the defence is not unique to Article 40.4.2°. It can occur on judicial review, as well. On judicial review the decisions of inferior courts or tribunals are defended, not directly by the judge who authorized the decision, but indirectly by the third party in whose favour the court's order was made.[178] Yet this indirect way of presenting the defence on judicial review has not been regarded as unsatisfactory. If it is unobjectionable on judicial review, why is it objectionable on Article 40.4.2°?

(h) On judicial review by certiorari the High Court may 'quash' the prior determination which authorized the original detention. As the Supreme Court has correctly pointed out, there is no power to 'quash' the underlying order on Article 40.4.2°.[179] The capacity to quash the order can be important where it is in the public interest that a second order of detention be made: there could be a concern that, so long as the first order remains unrescinded on the file, a second order cannot be made. Can an order be re-made even where the earlier order cannot be quashed?

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[170] *The State (Ahern) v Cotter* [1982] IR 188.
[171] *Dunne v Minister for the Environment* [2008] 2 IR 775.
[172] *Shackleton v Cork County Council* [2007] IEHC 334.
[173] *HB v Governor of Mountjoy Prison* [2022] IEHC 313 [29] & [30]; *McGee & Dignam v Governor of Castlerea Prison* [2023] IEHC 308 [10].
[174] *G v Child and Family Agency* [2018] IESC 28.
[175] RSC Ord 84, r 20 (2) & (3).
[176] See text to (n 34).
[177] *McSorley* (n 93).
[178] *McIlwraith v His Honour Judge Fawsitt* [1990] 1 IR 343; *O'Connor v Judge Carroll and Bankers Inns Limited (Notice Party)* [1999] 2 IR 160.
[179] *Child and Family Agency v S McG and JC* (n 1) [8].

> Two objections to having (an 'un-quashed') order re-determined are that the proceedings may, by that stage, be (i) functus officio and (ii) closed by the principle of cause of action estoppel. The principle of functus officio prevents a court or administrative tribunal which has made a final decision from re-visiting that decision.[180] But a decision which is a nullity is not a decision. If there has been no decision that null decision cannot be closed or functus officio.[181]
>
> The principle of cause of action estoppel prevents a final determination at the conclusion of a judicial process from being re-litigated; the principle might apply to detention which has followed a quasi-judicial process. Finality is a condition of cause of action estoppel.[182] But because the original tribunal is not yet closed, or functus officio, the process is incomplete. If the process is incomplete, it is, by definition, not 'final and conclusive'.[183] Accordingly, it is arguable that the proceedings are not barred by cause of action estoppel.[184] It is questionable, therefore, whether it really is necessary, in order to reactivate the process, that the original order have first been quashed (and whether Article 40.4.2°'s lack of capacity to quash is such a disadvantage).[185]

Some of these points of difference do provide a marginal advantage to the detainee who resorts to Article 40.4.2°. At the same time, these advantages – the right not to be denied release on Article 40.4.2° on conduct-related grounds, or the right to make an application later than three months from the date when grounds first arose, or the right to a process in which the ultimate burden lies upon the detainer – are derivates of Article 40.4.2°. They are constitutional rights. A constitutionally-sourced justification is required to limit these rights. It is not clear how the accomplishment of these small marginal gains could provide a compelling constitutional justification for degrading Article 40.4.2° in favour of the non-constitutional remedy of judicial review.

Conclusion

If it had not been for the decision of the drafters of the Constitution of the Irish Free State and of Bunreacht na hÉireann to incorporate habeas corpus into the Constitutions of 1922 and 1937, habeas corpus in Ireland might have gradually drifted to the margins in the same way that it has in English law, where judicial review has largely displaced habeas corpus.[186] But in Ireland the process remains widely used and dynamic. Over the last five years, aspects of the Article 40.4.2° process – the right to renew the application, the right not to be denied the remedy on discretionary grounds, the right of the complainant not to be deterred by costs

[180] *Noel Recruitment v Personal Injuries Assessment Board* [2015] IECA [23 & [24].
[181] *Chandler v Alberta Association of Architects* [1989] 2 SCR 848; Anna Wong, 'The Doctrine of Functus Officio. The Changing Face of Finality's Old Guard' (2020) 98 Canadian Bar Review 544, 553.
[182] *G v Child and Family Agency* (n 174) [59].
[183] ibid.
[184] *R (Coke-Wallis) v Institute of Chartered Accountants in England* [2011] UKSC 1 [34].
[185] The remedy of suspended invalidation (postponing quashing until a replacement order has been made), which was approved in *Balz v An Bord Pleanála* (n 162), assumes that a second order may be made without the original order first having been quashed; it is enough to allow the new order to be made that the first order has been judicially determined to be invalid.
[186] *R v Secretary of State for the Home Department ex p Muboyayi* [1992] QB 244; *Verde v Governor of HMP Wandsworth* [2020] EWHC 1219 (Admin).

– have been strengthened.[187] The only possible threat to the capacity of the remedy derives from the proposition that the general standard of review should be that of 'fundamental default' and that illegality short of the 'fundamental default' standard should be reviewed by judicial review rather than habeas corpus. The principle that judicial review should rank over habeas corpus has had a devastating effect on habeas corpus in English law.[188] While this line of thought has not captured the law on Article 40.4.2°, it does, occasionally, reappear. In *Ryan v Governor of Midlands Prison*[189] it was suggested that, in order to protect the unique character of Article 40.4.2° as a 'special and extraordinary' process, it was necessary to conserve Article 40.4.2° for exceptional cases. However, enquiries under Article 40.4.2° are usually not 'extraordinary' or 'special'. *Egan v Macready*s or *Burkes v Lennons* or *Trimboles* come only once every couple of generations. The fact that Article 40.4.2° can, sometimes, be 'special and extraordinary' does not necessitate taking away its capacity to be ordinary, while removing its ordinary presence may impair its availability to be, occasionally, extraordinary.

[187] *HB v Governor of Mountjoy Prison* (n 173); *McGee & Dignam v Governor of Castlerea Prison* (n 173); *Burke v Governor of Cloverhill Prison* (n 57); *Ryan v Governor of Mountjoy Prison* (n 142).
[188] See text to (n 186).
[189] *Ryan* (n 98).