APPROVED **[2023] IEHC 248**

THE HIGH COURT

2023 No. 642 SS

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

MICHAEL JOSEPH MCGEE
THOMAS MICHAEL DIGNAM

APPLICANTS

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 May 2023

INTRODUCTION

1. This judgment is delivered in respect of an inquiry pursuant to Article 40.4.2° of the Constitution of Ireland. The inquiry is in respect of the continuing detention of Mr. Dignam in Castlerea Prison. Mr. Dignam will be referred to in this judgment as "***the Prisoner***" to distinguish him from the first named applicant.

2. The Prisoner stands convicted of an offence of harassment pursuant to the Non-Fatal Offences against the Person Act 1997. This conviction was entered following a two day jury trial in October 2022 and the Prisoner was sentenced to three and a half years' imprisonment on 2 February 2023. As explained presently, the objections which the Prisoner seeks to make in respect of his conviction are ones that are more properly raised by way of an appeal to the Court of Appeal rather than by an application for *habeas corpus*.

3. This judgment also addresses, pursuant to Article 40.4.3°, the constitutional validity of the legislative provision pursuant to which the Prisoner is detained, namely Section 10 of the Non-fatal Offences against the Person Act 1997.

TRIAL AND CONVICTION

4. In order to understand the arguments advanced on behalf of the Prisoner, it is necessary first to briefly rehearse the circumstances of his conviction. The conviction is in respect of an offence of harassment against Mr. Aidan Devlin. The background to the offence is as follows. In December 2018, Mr. Devlin had acted as agent for KBC Bank in connection with the execution, by the Sheriff, of a High Court order of possession in respect of a property in Falsk, Strokestown, County Roscommon. Thereafter, the Prisoner published a number of posts on the social media platform "*Facebook*" referring to Mr. Devlin and his involvement in those events. These posts were published during the period 22 February 2019 to 2 November 2020. These posts ultimately came to the attention of Mr. Devlin, and he made a complaint to An Garda Síochána on 3 November 2020.

5. On 20 November 2020, the Prisoner was arrested pursuant to Section 4(3) of the Criminal Law Act 1997 for a suspected offence of endangerment under Section 13 of the Non-Fatal Offences against the Person Act 1997. The member in charge of Letterkenny Garda Station subsequently granted a request by the arresting garda to detain the Prisoner pursuant to Section 4 of the Criminal Justice Act 1984. The Prisoner was released from custody approximately three to four hours after he had been arrested.

6. While in custody, the Prisoner had been interviewed under caution. The Prisoner confirmed that he had been informed of his right to avail of the services of a solicitor but said that he did not require one.

7. During the course of the interview, the Prisoner confirmed that he had a Facebook account in the name of "*Tom Dignam*". The Prisoner was shown a printout of the profile page of that account and confirmed that it was his account and that he was the person in the profile photograph. The Prisoner confirmed that he had published the following four posts on Facebook. (The date upon which each of the respective posts was first published is indicated in parentheses).

> "Here's another scumbag Aidan Devlin who should be hounded at every opportunity, be it in the Supermarket, Pub, Church etc. This scum of the earth was in charge of the eviction in Strokestown last December."
> (22 February 2019)

> "Aidan Devlin the commander of the violent eviction of the McGann family last December 2018. This scumbag hired the loyalist thug Ian Gordon and his thugs with the blessing of KBC Bank. His career is over he knows it."
> (10 December 2019)

> "Aidan Devlin. Is this man out of his fucking mind attempting to evict the McGann family for a second time. No amount of money from KBC is worth it, ask Ian Gordon."
> (1 November 2020)

> "That fat bastard Devlin will soon know what KARMA really means."
> (2 November 2020)

8. In the case of the first three of these posts, a photograph of Mr. Devlin was included as part of the post.

9. The Prisoner was subsequently charged with an offence under Section 10 of the Non-Fatal Offences against the Person Act 1997. Given that the Prisoner now objects to the fact that the wording of the statement of charge differs from that of the indictment upon which he was ultimately arraigned on 27 October 2022, it is necessary to set out the relevant part of the charge sheet of 12 April 2021. It reads as follows:

> "On various Dates between the 10th of December 2019 and the 2nd of November 2020 both dates inclusive within the state harassed Aiden (*sic*) Devlin.
>
> Contrary to Section 10(1) and (6) of the Non-Fatal Offences Against the Person Act, 1997."

10. The criminal prosecution came on for hearing on 27 October 2022 before the Circuit Court (His Honour Judge Aylmer). Counsel for the Director of Public Prosecutions applied at the outset to amend the indictment. The Prisoner was arraigned on a fresh indictment as follows:

> "STATEMENT OF OFFENCE
>
> Harassment contrary to Section 10 of the Non Fatal Offences Against the Person Act, 1997.
>
> PARTICULARS OF OFFENCE
>
> Tom Dignam between the 10th December 2019 and the 2nd November 2020 (both dates inclusive) within the State without lawful authority or reasonable excuse harassed Aidan Devlin by persistently communicating with him by posting messages on Facebook."

11. At the trial, Mr. Devlin gave evidence to the effect that his daughters and various other people had drawn his attention to the nature of the material on Facebook. Mr. Devlin further stated in evidence that he had then looked at the material himself; printed off copies of the relevant Facebook pages; and brought them to the attention of An Garda Síochána.

12. As to the references in the posts to Mr. Ian Gordon, Mr. Devlin gave evidence that there had been an attack on the security staff who were *in situ* at a repossessed home in Strokestown, Co. Roscommon in December 2018 and that one of "*the more serious injuries*" was to Mr Gordon, who was the principal of the security company.

13. Mr. Devlin gave evidence to the effect that, as a result of the Prisoner's posts on Facebook, he became "*very concerned for the safety of*" his own person. Mr. Devlin also gave evidence that he interpreted the reference to "*Karma*" in the post of 2 November 2020 as meaning that there was going to be violence against him or his family at some point.

14. The Prisoner declined to have professional legal representation at his criminal trial. The Prisoner did not actively participate in his trial: he made no submissions; did not cross-examine any witnesses; and adduced no evidence. Prior to his arraignment, the Prisoner stated that the court did not have jurisdiction over him as he was a "*living man*".

15. It is apparent from the transcript that the trial judge was solicitous to ensure that all points which might reasonably have been raised on behalf of the Prisoner were raised. In particular, the trial judge carefully considered whether the prosecution had adduced sufficient evidence to allow the issue of guilt to go to the jury. The trial judge examined the elements of the offence under Section 10

of the Non-Fatal Offences against the Person Act 1997, including the concept of "*communicating with*" a person. The trial judge was ultimately satisfied, having regard to the judgment of the Supreme Court in *Director of Public Prosecutions v. Doherty* [2020] IESC 45, that there was sufficient evidence to go to the jury on the single count on the indictment.

16. The trial judge addressed the question of whether there might be a "*reasonable excuse*" within the meaning of Section 10(1) of the Non-fatal Offences against the Person Act 1997 in his charge to the jury as follows:

> "Mr Dignam is entitled, as I said to you, to put up his opinions and views about things on Facebook. In doing so he has to be careful, like everybody else, not to say anything incorrect and defamatory about them and if he does, he runs the risk of getting sued. He is not entitled to put up material which is so menacing and threatening to somebody as to give rise to a situation where they're going to be distressed or alarmed or put in fear in relation to their personal safety. That's what the section directs. And there can be no reasonable excuse I suggest to you in those circumstances for putting them up. But at the end of the day reasonable excuse is what you determine it to be. You are reasonable people, ladies and gentlemen of the jury, and you'll have to determine whether there was any reasonable excuse in those circumstances for putting up the publications."

17. The trial judge elaborated upon this at a later point of his charge as follows:

> "[The Accused] describes himself as a frequent user of Facebook and a keyboard warrior. He admits that he posted several times in relation to the attempted repossession at Roscommon and he says that he has nothing to hide in relation to that and that it is, he claims, within the law. He says that the general theme is basically exposing the fraud and corruption of wrongdoers like Mr Devlin and that in his opinion the wrongdoing by Mr Devlin is in relation to the McGann's and other eviction cases when he used people from the north who were operating without a licence and he is referring there to security men I think and that they have to be exposed and that's what I do and I will continue to do.
>
> So, while he doesn't claim any lawful authority, perhaps he is claiming that it is a reasonable excuse within the language of the section and I have just explained to you about

> reasonable excuse and I won't repeat what I've said there but that seems to be his view of things, that he has a reasonable excuse for all -- that ultimately, as I said, is a matter for you, ladies and gentlemen, whether or not there is a reasonable excuse for putting Mr Devlin in a state whereby he feels alarmed and distressed by those publications and afraid of what might happen when he leaves his home."

18. The trial judge's references to the Prisoner's explanation of his conduct are references to what he said at his cautioned interview rather than to testimony at trial. The Prisoner, as is his absolute right, had chosen not to give evidence at his criminal trial.

19. The jury returned a guilty verdict. The Prisoner was remanded, on continuing bail, for sentence on 2 February 2023. On that date, a sentence of three and a half years' imprisonment was imposed. The final twelve months of the sentence were suspended, conditional on the Prisoner entering into a bond to keep the peace and be of good behaviour. To date, the Prisoner has refused to enter into such a bond.

PROCEDURAL HISTORY OF ARTICLE 40.4.2° INQUIRY

20. The Prisoner first made an application for an inquiry into the legality of his detention by way of a paper-based application on 21 February 2023. This application bore the following title and record number: *Dignam v. Governor of Castlerea Prison*, High Court 2023 No. 3 SSP. The High Court (Naidoo J.) refused the application for leave to apply for an order pursuant to Article 40.4.2° of the Constitution of Ireland for the reasons set out in a written judgment dated 23 February 2023.

21. A second application for leave was made on behalf of the Prisoner on 19 April 2023. This application bore the following title and record number: *McGee and*

Dignam v. Governor of Castlerea Prison, High Court 2023 No. 571 SS. The application for leave was made on behalf of the Prisoner by a friend of his, Mr. Michael McGee. Mr. McGee is named in the proceedings as the first applicant, and the Prisoner is named as the second applicant. The High Court (Meenan J.) refused the application for leave on 20 April 2023.

22. A third application for leave was made on behalf of the Prisoner on 3 May 2023 by way of the present proceedings. Again, the Prisoner and Mr. McGee are joint applicants. Mr. McGee arranged to have himself named as an applicant in the proceedings out of an abundance of caution, lest there be any objection taken to his moving the initial *ex parte* application. This caution is misplaced. It is well established that the initial *ex parte* application may be moved by a third party on behalf of a detained person. It is not necessary that such a third party be named as an applicant in the proceedings.

23. The position is stated as follows by the Supreme Court in its judgment in *Application of Woods* [1970] I.R. 154 (at 157/158):

> "It should be clear that it is not questioned that under Article 40, s. 4, sub-s. 2, a person has the right to complain to the High Court on behalf of another person that that other person is being unlawfully detained. This right includes a right to state the grounds which are put forward for alleging that such other person is being unlawfully detained. The court, in the course of its inquiry under Article 40, may require such complainant to furnish further information or assistance as it thinks fit."

24. A recent example of this principle being applied in practice is provided by the judgment of the High Court (Barr J.) in *Burke v. Governor of Cloverhill Prison* [2023] IEHC 177 (at paragraph 13). In that case, the initial application was moved by the sister of the person in detention.

25. Returning to the facts of the present case, the High Court (Dignam J.) made an order on the afternoon of 3 May 2023 directing an inquiry. The matter was assigned to me on Friday 5 May 2023, and I made an order that morning directing that arrangements be made for the Prisoner to appear before the High Court by way of video link from Castlerea Prison at 2.30 o'clock that afternoon.

26. At that time, it was explained to the Prisoner that the hearing could either take place immediately by way of video link, or, alternatively, the hearing could be adjourned for a short time to allow the Prisoner to attend in person. The Prisoner chose the latter option and agreed that the matter could be adjourned for hearing to Monday 8 May 2023. The Prisoner indicated a preference that the matter be listed in the afternoon to allow Mr. McGee, who is to act as a McKenzie Friend, to travel up to Dublin from Donegal. The Governor was given liberty to file a replying affidavit.

27. I explained to the Prisoner that, if he wished, he could be assigned solicitor and counsel through the "*Legal Aid – Custody Issues Scheme*" administered by the Legal Aid Board. The Prisoner confirmed that he understood that this option was available to him but stated that he was content to represent himself with the assistance of Mr. McGee as a McKenzie Friend. I then made directions that the Prisoner be afforded an opportunity to discuss the case with Mr. McGee, initially by telephone call on the afternoon of 5 May 2023, and, thereafter, in person on 8 May 2023 prior to the hearing at 2.00 o'clock.

28. Over the course of the weekend, I had an opportunity to listen to much of the digital audio recording of the criminal trial before the Circuit Court on 27 October and 28 October 2022. As discussed presently, it is apparent from the recording that one of the principal objections raised by the Prisoner in his *habeas*

corpus application, namely that he had been prosecuted by reference to the incorrect version of the legislation, is misplaced.

29. At the outset of the hearing on Monday 8 May 2023, I informed the parties that I had listened to the recording of the criminal trial ("*the DAR*"). I explained that the content of that recording had a significance for the principal objection raised by the Prisoner and that it would be of benefit to the Prisoner to have an opportunity to consider a transcript of the hearing. I further explained that it would take a number of days to arrange for the transcript to be prepared. The Prisoner was then offered the choice of either going ahead with his Article 40.4.2° application that day, or, alternatively, agreeing to an adjournment for a number of days to allow the transcript to be prepared. The Prisoner elected to have the matter adjourned until Friday 12 May 2023. The Prisoner then made an application for bail which was refused: this is discussed at paragraphs 38 and 39 below.

30. An order was drawn up directing the preparation of a transcript. On the following day (9 May 2023), counsel for the Governor made an *ex parte* application to have the terms of the order modified so as to ensure that the transcript would not be used for purposes other than the purpose of these proceedings. Counsel submitted that it is standard practice that, in circumstances where a transcript is provided to the parties in criminal proceedings, it is subject to an implied undertaking as to its use. I made that modification but directed that the applicants have liberty to apply.

31. The hearing resumed on 12 May 2023. It was again explained to the Prisoner that he could be assigned solicitor and counsel through the "*Legal Aid – Custody Issues Scheme*" and the Prisoner, again, declined.

32. At the outset of the hearing, the Prisoner's McKenzie friend, Mr. McGee, raised an objection to the fact that the terms upon which the transcript had been provided had been modified. In particular, complaint was made that the absence of a soft copy version of the transcript meant that his side were unable to use software to "*search*" the documents for key words.

33. In response to a direct question from the court, the Prisoner confirmed that he was not seeking an adjournment to allow him more time to consider the transcript. Accordingly, the application proceeded but the Prisoner's McKenzie friend was given liberty to send an email to the registrar on or before the evening of Monday 15 May 2023 if the Prisoner's side wished to draw the court's attention to any specific passages of the transcript. The Prisoner's side was also provided with a soft copy version of the transcript. A written submission on the transcript was received by the High Court registrar from the Prisoner's side on the afternoon of 15 May 2023 and the content of same has been considered in preparing this judgment. The written submission raises a series of objections to the course of the criminal trial, by reference to the transcript. None of these objections discloses a fundamental denial of justice or a fundamental flaw such as would justify an order for release. Rather, the objections are matters for appeal to the Court of Appeal. See, further, paragraphs 66 to 73 below.

34. The Prisoner elected to have counsel for the Governor make his oral submission first, with the Prisoner replying to same. The Prisoner handed in a detailed written submission to the court and a copy was provided to the other side. The Prisoner, having been offered the option, agreed that I should rise briefly to read the submission myself rather than having him formally read it aloud. The hearing was thus adjourned briefly to allow me to read the submission. Upon

the resumption of the hearing, I explained to the Prisoner that one of the principal objections which had been made by counsel on behalf of the Governor had been that the points raised by the Prisoner were all points for appeal rather than for an application for *habeas corpus*. I further explained that this would be one of the principal issues which I would have to adjudicate upon. The hearing was adjourned to allow the Prisoner time to discuss this objection with his McKenzie friend and to formulate a response to same. The hearing resumed at 2.15 o'clock and the Prisoner made a submission on this point and handed in a speaking note to the court.

35. At the conclusion of the hearing, I indicated to the parties that I required a number of days to consider the detailed submissions which had been made and that I would deliver a reserved judgment.

36. As explained by the High Court (Barrington J.) in *State (Whelan) v. Governor of Mountjoy Prison* [1983] I.L.R.M. 52 (at page 55), the court must balance the need for urgency with the need to ensure a just result:

> "It appears to me also that, on an application for habeas corpus the duty of the High Court is forthwith to enquire into the legality of the prosecutor's detention, but that once the enquiry is entered on, and provided the urgency and importance of the proceedings are kept in mind, the court is entitled, after hearing the views of the prosecutor, the respondent and their legal representatives to conduct the enquiry in the manner which the court thinks best calculated to resolve the issues of law and fact raised in the proceedings, and to achieve the interest of justice. If the application raises difficult issues of law or fact the court may have to consider whether the prosecutor should be admitted to bail until these issues are resolved. The duty of the High Court 'forthwith' to enquire into the legality of the prosecutor's detention stresses the importance and the urgency of habeas corpus proceedings. But it does not mean that the High Court should skimp its enquiry or proceed on an inadequate understanding of the law or the facts. When, as in the present case, the enquiry proceeds upon a basis which appears to have been humane and sensible and which was in fact agreed to by

> counsel representing the prosecutor at the relevant time, it appears to me it will be extremely difficult to challenge the proceedings later."

37. In the present case, a period of some two weeks has elapsed between the initial opening of the inquiry and the delivery of this judgment. This occurred in circumstances where it was necessary to allow time for the preparation of the transcript (and time thereafter for the consideration of same by the parties) and where the legal issues advanced on behalf of the Prisoner are far-ranging and new points were raised for the first time at the hearing on Friday 12 May 2023. Having regard to the considerations outlined in *State (Whelan) v. Governor of Mountjoy Prison*, the inquiry has been conducted with all reasonable expedition.

APPLICATIONS FOR BAIL

38. The Prisoner applied, on two occasions, to be released on bail pending the completion of the inquiry. In each instance, I refused the application for the following reasons. The Prisoner comes before the High Court as a person who has been convicted by the Circuit Court following a jury trial. Accordingly, unless and until that conviction is quashed, the presumption of innocence does not apply.

39. Of course, the Prisoner submits that his detention is unlawful and the precise purpose of the application is to enquire into the legality of that detention. This court has not yet completed that inquiry. It seems to me that the appropriate approach to adopt on a bail application pending the completion of an inquiry is for the court to make some assessment of the strength of the *habeas corpus* application on a provisional basis. If, for example, the court were satisfied, on the basis of its initial consideration of the matter, that there were strong grounds

for contending that the detention is unlawful, then it might be appropriate to grant bail pending the more in-depth consideration of the matter necessitated to complete the inquiry. (This is subject to any countervailing factors, such as flight risk). In the present case, having listened to the digital audio recording of the criminal trial, I had not been satisfied, at that stage, that there were strong grounds for contending that the principal objection advanced by the Prisoner, i.e. that he was prosecuted pursuant to the amended legislation, was well founded. I emphasised that this represented my provisional view only.

SUCCESSIVE APPLICATIONS FOR LEAVE

40. For completeness, it is necessary to refer briefly to a preliminary objection advanced on behalf of the Governor but subsequently withdrawn. The objection had been to the effect that the proper remedy for the Prisoner would have been to bring an appeal to the Court of Appeal against the judgment of the High Court of 23 February 2023 rather than to make successive applications for leave to other judges of the High Court. The objection had been advanced on the basis that in circumstances where the High Court had already ruled on the merits of the application in a detailed written judgment it was inappropriate for the Prisoner to seek to reagitate the matter at the level of the High Court.

41. This objection had been advanced on the mistaken understanding that the judgment of 23 February 2023 had been delivered in respect of the second stage of the inquiry under Article 40.4.2°. To elaborate: the procedure prescribed by Article 40.4.2° is two-stage in nature. The first stage involves an *ex parte* application for an order to direct an inquiry. The second stage consists of the inquiry and is heard *inter partes*, with the person in whose custody the subject

of the inquiry is detained being required to certify in writing the grounds of his detention.

42. As explained by the Court of Appeal in *A.C. v. General Manager of St. Finbarr's Hospital* [2018] IECA 272, the remedy which is available to a party, who is dissatisfied with the decision of the High Court, differs depending on which stage is involved. In the case of the refusal to direct an inquiry at the *ex parte* stage, a detained person remains free in principle to apply for an inquiry to another judge of the High Court (subject, of course, to issues of possible abuse of process). By contrast, in the case of the refusal, *following an inquiry*, of an order directing the release of the detained person, the only remedy is to appeal against the decision in question. Unlike in the situation in the case of the original *ex parte* application for an inquiry, there is no question of possibly going from judge to judge to seek an order for release.

43. As to when successive applications might be abusive, see the judgment of the High Court (Hogan J.) in *Joyce v. Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 666 (at paragraphs 23 to 24 of the reported judgment).

44. On the facts of the present case, the decision of the High Court on 23 February 2023 had been a decision to refuse to direct an inquiry, i.e. a decision made at stage one of the process. This is apparent from both the opening and concluding paragraphs of the written judgment; from the terms of the formal order; and from the fact that the Governor was not required to certify in writing the grounds of detention. Accordingly, the Prisoner was entitled, in principle, to renew his application before another judge of the High Court.

45. Similarly, the order of the High Court (Meenan J.) of 20 April 2023 was a decision to refuse to direct an inquiry. It was only when the High Court

(Dignam J.) directed an inquiry on 3 May 2023 that the matter moved to the second stage of the process. The matter having subsequently been assigned to me, I am obliged to conduct and complete the inquiry.

PARAMETERS OF ARTICLE 40.4.2° INQUIRY

46. The parameters of the High Court's jurisdiction to conduct an inquiry pursuant to Article 40.4.2° of the Constitution of Ireland in circumstances where the applicant is being detained pursuant to a conviction order have been described as follows by O'Donnell J. in *S. McG. v. Child and Family Agency* [2017] IESC 9, [2017] 1 I.R. 1 (at paragraphs 9 to 11):

> "The remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty. It carries with it its history in the common law as the vindication of the rule of law against arbitrary exercises of power. It is and remains the classic remedy when a person's liberty is detained without any legal justification, or where the justification offered is plainly lacking. However the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case for the High Court to, as it were, "look through" an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so, and direct the release of the applicant. The Constitution itself recognises perhaps the most dramatic example of this where it specifically provides for the possibility of Article 40 being invoked in circumstances where it is contended that a person is being detained in accordance with law, but "that such law is invalid having regard to the provisions of this Constitution". However, the High Court is not itself given power under Article 40 to declare the law invalid even though it is for these purposes "satisfied" that it is invalid. Instead it is to refer the question of validity of law to the

Supreme Court, and refrain from making an order under Article 40 until such time as the Supreme Court has determined the question so referred.

When *habeas corpus* was established as the essential bulwark of personal liberty, the grounds for asserting the invalidity of an order, whether of detention or otherwise, were limited and rarely invoked. Similarly there was no provision for a right of appeal against conviction in criminal cases, something itself a relative novelty in 1937 when the Constitution was adopted. The writ of *habeas corpus* was an important method of ensuring legality of detention, in the absence of any other mechanism being provided by law.

The manner in which the constitutional remedy has been applied has taken account of these changes in the legal landscape. Thus, in *The State (Royle) v. Kelly* [1974] I.R. 259 Henchy J. stated at p. 269:-

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

In *Ryan v. Governor of Midlands Prison* [2014] IESC 54, (Unreported, Supreme Court, 22 August 2014) Denham C.J. quoted this passage and continued at p. 4:-

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

> The grounds for challenging the validity of orders made has expanded exponentially since the remarks in *The State (Royle) v. Kelly* [1974] I.R. 259 were made. But in most cases Article 40.4 cannot be invoked as an alternative speedier and sometimes more costly and disruptive route to a conclusion which may require the careful analysis by way of judicial review of the validity of an order. For my part I accept the observations of Henchy J. in *The State (Aherne) v. Cotter* [1982] I.R. 188 that the High Court hearing an application under Article 40.4 does not have jurisdiction to quash orders of inferior courts or administrative bodies. That goes back to the fundamental nature of the remedy: its strength lies in part in its limitation. However, the court in an exceptional case has the capacity to direct the release of the applicant notwithstanding the existence of the order, in the same way in which in an exceptional case, post-conviction, it may proceed to direct the release of an individual notwithstanding the existence of an order convicting him or her which has not been set aside on appeal in the circumstances considered by Henchy J. Any such case however is exceptional and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion."

47. In the present case, the Governor has certified that the Prisoner is being held pursuant to an order of the Circuit Court. The Prisoner has been convicted following a jury trial and sentenced to a term of imprisonment. In such circumstances, the normal procedure would have been for the Prisoner to bring an appeal against his conviction and sentence to the Court of Appeal. An application for an inquiry under Article 40.4.2° of the Constitution of Ireland would only be appropriate if there had been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw.

48. There are only two issues raised in these proceedings which might, in principle, have met this threshold. The first is the objection that the Prisoner had been convicted on the basis of a legislative amendment which had not been in force at the time the offence is said to have occurred. The second is that the Prisoner

is not the person the subject of the conviction order. As discussed under the next two headings below, neither of these objections is well founded.

ALLEGED RETROSPECTIVE OR RETROACTIVE PENAL EFFECT

49. Section 10(1) of the Non-fatal Offences against the Person Act 1997 has been amended by the Harassment, Harmful Communications and Related Offences Act 2020. The amendment consists of the substitution of the words "*communicating with or about him or her*" for "*communicating with him or her*". This amendment takes effect from 10 February 2021.

50. The amended provision reads as follows:

> "Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with **or about** him or her, shall be guilty of an offence."
>
> *Emphasis added

51. The principal objection raised in the affidavit grounding the application for an inquiry is to the effect that the Prisoner had been convicted of a criminal offence by reference to the *amended* version of Section 10 of the Non-fatal Offences against the Person Act 1997. It is said that there was no statutory basis for the conviction in circumstances where the amending legislation was not commenced until 10 February 2021, that is, at a date *subsequent* to the dates upon which the alleged offence is said to have occurred, i.e. between 10 December 2019 and 2 November 2020. It is further said that it amounts to a fundamental denial of justice for a charge, a trial, a conviction and a subsequent sentencing order to rely on a law which was not on the statute book for the dates in question.

52. If made out, this objection might well have justified the making of an order directing the release of the Prisoner. This is because there is a constitutional prohibition on retroactive penal legislation (Article 15.5.1°). For the reasons which follow, however, the objection is not made out on the facts.

53. The assumption underlying the objection is that the original, unamended version of the offence of harassment required that there be *direct* communication between the accused person and the victim of the harassment. On this analysis, a conviction could not lawfully be entered where the prosecution was relying on a form of *indirect* communication. Here, the prosecution's case relied on the fact that the Prisoner had published certain posts on a publicly accessible page on Facebook and that the subject of the harassment, Mr. Devlin, was subsequently informed of the existence of those posts by family and friends.

54. The assumption that there must be direct communication is incorrect as a matter of law. The meaning of the concept of "*communicating with*", in the context of the original, unamended version of Section 10 of the Non-Fatal Offences against the Person Act 1997, has been discussed in detail by the Supreme Court in *Director of Public Prosecutions v. Doherty* [2020] IESC 45. The Supreme Court held that "*communicating with*" someone means that some information is made common as between the person communicating and the person communicated with. This does not necessarily require the subject of the harassment to be directly addressed.

55. On the facts of *Doherty*, the accused had sent emails derogatory of the victim to third parties. The victim became aware of the existence of, and the content of, the emails from the recipients of same. The accused had also placed leaflets on cars and pillars in the neighbourhood where the victim resided and the content

of these too came to the attention of the victim. The Supreme Court held that these actions fitted into the category of a communication with the victim in circumstances where any rational person would realise that, although not directed at the victim, the leafletting in the neighbourhood of her home and the sending of emails were matters that were bound to come to her attention.

56. It is incorrect, therefore, to say that conduct consisting of the publishing of posts on a publicly accessible page on a social media platform is not capable, as a matter of law, of amounting to communication for the purposes of the statutory offence of harassment merely because the posts were not sent *directly* to the victim. It was not necessary for the amended version of the legislation to have been available before a prosecution could have been taken in such circumstances. Of course, it will be a question of fact, in any given case, as to whether such conduct satisfies the elements of the offence. It will, for example, be necessary for the prosecution to establish that the communication actually came to the attention of the victim. It will also be necessary for the prosecution to establish either that the accused intended that the communication would come to the attention of the victim or that it was reasonably foreseeable that it would come to the victim's attention and that the accused was reckless in this regard.

57. In summary, the objection that the prosecutor relied upon the amended version of the legislation is not made out. The criminal prosecution was pursued by reference to the original, unamended version of the legislation in reliance upon the principles in *Director of Public Prosecutions v. Doherty* [2020] IESC 45. If and insofar as it is now alleged that the principles were not properly applied to the facts, that is a matter for an appeal to the Court of Appeal.

IDENTITY OF THE CONVICTED PERSON

58. As explained by the High Court (Hogan J.) in *Bailey v. Governor of Mountjoy Prison* [2012] IEHC 366, [2012] 2 I.R. 391, one circumstance in which an order directing the release of a prisoner post-conviction will be justified is where the person detained is not, in fact, the person identified in the conviction order.

59. The present proceedings raise an objection as to the identity of the convicted person. Crucially, however, the nature of the objection is entirely different from that contemplated in *Bailey v. Governor of Mountjoy Prison* (above). There is no suggestion here that the Prisoner was not the person tried and convicted before the Circuit Court. Nor is it suggested that he was not the person who published the offending posts on Facebook. Rather, the objection is entirely predicated on the unmeritorious argument that the reference to the Prisoner in the documentation as "*Tom Dignam*" rather than "*Thomas Michael: Dignam*" invalidates his conviction and detention. The objection is that the Prisoner is not the "*entity*" which had been charged and convicted of the offence and that the Prisoner is not the "*statutory, quasi-artificial person 'Tom Dignam'* […]".

60. The Prisoner addresses this issue as follows in his affidavit of 2 May 2023:

> "I, say it is a conclusive fact that, I, Thomas Michael: Dignam, am still alive and breathing, having never been 'merely dead,' presumed dead, deceased, absent from my life's Estate, or intentionally abandoned by my natural/biological father and mother upon the day I emerged from my biological mother's womb. Since the day I emerged from my biological mother's womb, I have never intentionally or unintentionally, surrendered or abandoned any claims of the Creator-given life, Estate or claims to my given Christian name, recorded in the Lamb's Book of Life (Revelation 13:8; 20:15) and the principle being named by my biological father and mother with the entry of the date and time when I emerged from my biological mother's womb into my biological father and mother's private book of the Holy Scriptures and I hereby correct my status from that of Trustee to that of Beneficiary regarding any/all

> agreements/contracts which my biological father and mother may have entered into on my behalf with people acting as agent(s) of/for the Irish State and/or Irish state and/or IRISH STATE. For and on the public record I am the beneficiary of any/all agreements/contracts which my biological father and mother may have entered into on my behalf with people acting as agent(s) of/for the Irish State and/or Irish state and/or IRISH STATE. I, Thomas Michael: Dignam am the beneficiary of the THOMAS MICHAEL DlGNAM cestui que trust numbered 5980174.
>
> I say it is a conclusive fact that I, Thomas Michael: Dignam, am neither a member of the Irish Armed Forces, nor am I a rebel or belligerent publicly residing in an occupied territory under rule of a martial or military conqueror /Commander-in-Chief. I am in esse and sui juris a Private Irish national Denizen of the Republic of Ireland, I am neither an 'enemy' nor an individual, quasi-artificial 'person' as amended by the 'Emergency Banking Relief Act' of March 9, 1933. Therefore, I am not now, nor have I ever been the statutory, quasi-artificial person 'TOM DIGNAM' 'THOMAS MICHAEL DIGNAM, 'THOMAS M DIGNAM', 'DIGNAM THOMAS MICHAEL', 'THOMAS M DIGNAM', and/or 'Thomas Michael Dignam', 'Thomas M Dignam', 'Dignam Thomas Michael', Dignam Thomas M', or designated by any other derivation of said name of war/nom de guerre."

61. The gist of the objection is summarised as follows in the written submissions handed into court on 12 May 2023:

> "The State has a burden of proof to show they have legal identification papers for the prisoner TOM DIGNAM and they cannot show same. They have to have such a legal chain of title and they do not. Without such papers the purported warrant and Prosecution at a very minimum would have to have been titled against THOMAS (Otherwise 'TOM') MICHAEL DIGNAM if they were to have any hope to have a chain of title to the Irish National Thomas Michael Dignam, but again they are not so saved."

62. The Governor has certified that he is detaining the Prisoner pursuant to a committal warrant dated 2 February 2023. The committal warrant identifies the Prisoner as Tom Dignam, Woodlands, Dooish, Ballbofey, Co. Donegal. The Prisoner's date of birth is stated to be 6 April 1950.

63. The legal burden remains at all times with the State in an application under Article 40.4.2° to justify the detention. Here, the evidence establishes that the Prisoner's full name is Thomas Michael Dignam; that his date of birth is the same as that stated in the committal warrant; that during the course of his cautioned interview in November 2020 he gave the same home address as appears in the committal warrant; that he created and operated a profile on Facebook with the username "*Tom Dignam*"; and that he raised no objection before the Circuit Court to the effect that he was not the individual named in the indictment. None of this evidence has been challenged, still less rebutted by the Prisoner.

64. The use of the diminutive form of his name "*Tom*" rather than "*Thomas*" does not invalidate the committal warrant. As counsel for the Governor correctly points out, the Criminal Justice (Administration) Act 1924 provides that the description or designation in an indictment of the accused person shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation.

65. In summary, I am satisfied that the Prisoner is the person identified in the committal warrant and that this is not a potential case of mistaken identity.

APPEAL-TYPE OBJECTIONS

66. In addition to the two principal objections discussed above, the Prisoner has advanced a series of further objections. Many of these appear to be the product of a granular analysis by the Prisoner of the transcript of the two day criminal trial. It is said, in effect, that every step of the criminal prosecution was flawed,

from the initial arrest and search warrant, all the way through to the trial judge's charge to the jury and the subsequent sentencing hearing.

67. None of these objections reach the threshold which would allow the High Court, on an inquiry under Article 40.4.2°, to look through the conviction entered by the Circuit Court and to make an order directing the release of the Prisoner. These objections are, at best, of a type which might ground an appeal to the Court of Appeal.

68. The objections run from the absurd to the technical and all the way through to ones which might, in principle, form a ground of appeal. The absurd objections relate to matters such as the fact that the victim, Mr. Devlin, while giving evidence, had to borrow a pair of spectacles to read documentation and had not been able to state precisely what his glasses prescription is; or that he had "*suddenly*" become "*expert*" in the use of Facebook because he was able to print screenshots of the Facebook postings and of the Prisoner's profile page. The technical objections include ones based upon the misspelling of Mr. Devlin's first name in the charge sheet: "*Aiden*" rather than "*Aidan*". The provisions of Section 4M of the Criminal Procedure Act 1967 provide a complete answer to this objection. Criticism is made of the fact that the exhibited copy of the indictment is not signed. This criticism overlooks that the Prisoner had been formally arraigned before the jury on the (fresh) indictment on the first day of the trial and had not objected to this.

69. There are a small number of objections raised which might, in principle, represent arguable grounds of appeal before the Court of Appeal. This category includes objections relating to the concept of persistence in the phrase "*persistently … communicated with*" as employed in Section 10 of the Non-fatal

Offences against the Person Act 1997. These objections centre on the fact that one of the Facebook posts had been published at a date *earlier* than the range of dates specified in the indictment. As appears from the transcript of the second day of the criminal trial, this issue was expressly raised by the foreman of the jury. The trial judge, having heard submissions, directed the jury to consider whether the fact that the post remained online might make it persistent.

70. The question of the precise application of the concept of persistency to online communications, which can remain accessible long after their initial posting, is one which might form a ground of appeal to the Court of Appeal. Crucially, however, there is nothing in the approach taken to this issue at trial which could be said to have rendered the criminal trial fundamentally flawed. Rather, it is apparent that the trial judge had invited submissions on the question of persistency before making a decision to allow the issue go to the jury. The jury were given guidance as to how they might address the question of persistency as an issue of fact. Even if it were to subsequently transpire, on appeal, that the trial judge had erred in law in his approach this would not mean that the trial had been fundamentally flawed.

71. This brings us to a related objection, namely that the trial judge was in some way assisting the prosecution or displaying bias by raising these issues. This objection is entirely without merit. It is apparent from the transcript that the trial judge was at all times seeking to ensure fairness for the accused. It will be recalled that the Prisoner had chosen not to have professional legal representation. The trial judge was solicitous to ensure that all points which might reasonably have been raised on behalf of the Prisoner, as the accused, were raised. One example is that the trial judge ensured that a reference in the

memorandum of interview to the presence of a firearm at [details redacted] was not disclosed to the jury. This ensured that material which might have prejudiced the accused was not put before the jury. The Prisoner now perversely seeks to allege that this was done to "*clean up*" the interview for the benefit of the prosecution. This allegation is entirely without merit. The removal of the reference to a "*firearm*" was to the benefit of the accused alone.

72. The Prisoner's side contends that the arrest of the Prisoner for questioning had been unlawful. Even allowing that there might, in principle, be cases where a conviction has been secured on foot of evidence obtained following an unconstitutional arrest and the circumstances attending that arrest were so egregious that an order for release might be appropriate under Article 40.4.2°, there was nothing about the arrest of the Prisoner on 20 November 2020 which approaches this threshold or which would undermine the validity of his subsequent conviction. The objection made is that the Prisoner was arrested on suspicion of having committed an offence of endangerment under Section 13 of the Non-fatal Offences against the Person Act 1997 but was subsequently charged with the offence of harassment under Section 10. There is no merit in this objection. The fact that a person is ultimately charged with a less serious offence than that for which he had initially been arrested does not make the arrest unlawful. Here, both the arrest and the ultimate charge arose out of the complaint made to An Garda Síochána in respect of the Prisoner's activity on Facebook. There can be no suggestion that the initial arrest was a colourable device or that the Prisoner was charged with an offence arising out of an entirely different incident.

73. Finally, there is simply no basis for the objections made in respect of the search warrant in circumstances where no evidence obtained pursuant to that warrant was relied upon at the criminal trial.

CHALLENGE TO VALIDITY OF THE ACT

74. Article 40.4.3° provides that where the High Court is satisfied that a person is being detained in accordance with a law but that such law is invalid having regard to the provisions of the Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated. It follows that the High Court does not have jurisdiction itself to declare legislation invalid in the context of an inquiry. The form of the procedure thus imposes a constraint on the jurisdiction which the High Court otherwise enjoys, pursuant to Article 34.3.2°, to determine the question of the validity of any law having regard to the provisions of the Constitution. Where such a question arises in the context of an inquiry, same may only be determined by the Court of Appeal (and thereafter by the Supreme Court if leave to appeal is granted). The High Court's role in this regard is confined to deciding whether to refer a case stated to the Court of Appeal.

75. The wording of Article 40.4.3° suggests that the High Court should only refer a case stated where it is "*satisfied*" that the law in accordance with which the person is being detained is invalid. This threshold places the High Court in the anomalous position of having to make an assessment of the validity of the law, notwithstanding that it does not have jurisdiction to make a declaration of invalidity.

76. In the present case, it is submitted on behalf of the Prisoner that Section 10 of the Non-Fatal Offences against the Person Act 1997 may be invalid having regard to Article 40.6.1° of the Constitution. This Article provides for the right of the citizens to express freely their convictions and opinions subject to public order and morality.

77. On behalf of the Prisoner, it is submitted that there is a public interest in the events surrounding the eviction at Strokestown in December 2018, having regard, in particular, to the fact that unlicensed security personnel had been employed. It is further submitted that the Prisoner is entitled to communicate about these events. In his cautioned interview, the Prisoner had asserted that he is a "*keyboard warrior*" exposing "*fraud*" and "*corruption*".

78. The Supreme Court has held that the right under Article 40.6.1° extends to a right to communicate facts as well as a right to comment on them: *Irish Times Ltd v. Ireland* [1998] 1 I.R. 359 (at 405/406). This complements the unenumerated right to communicate under Article 40.3.

> "I would be prepared to accept that such a right exists as one of the unspecified rights of the citizen but, if such a right exists, it must include not only the right to communicate facts but also the right to communicate convictions opinions and even feelings. The question then arises of what is the relationship between this right and the right of freedom of expression guaranteed by Article 40.6 of the Constitution.
>
> In some respects the two rights may overlap and may be complimentary. But the right of freedom of expression is primarily concerned with the public statements of the citizen. When the Constitution guarantees the citizen liberty for the exercise of this right it is guaranteeing to him that he will not be punished by the criminal law or placed under any unconstitutional restriction for freely stating in public his convictions and opinions, be they right or wrong. *A fortiori* it guarantees him, but again subject to the same constitutional restrictions, the right to state the facts on which these convictions and opinions are based. The Constitution guarantees to the organs of public opinion

> liberty for the criticism of government policy. But it would be absurd to suggest that the press enjoys constitutional protection under Article 40.6.1 (i) when criticising government policy but not when reporting the facts on which its criticism is based."

79. The Supreme Court, in *Mahon v. Post Publications Ltd* [2007] IESC 15, [2007] 3 I.R. 338, reiterated that the Constitution unequivocally guarantees both the right to express convictions and opinions, and the right to communicate facts or information and that these rights are inseparable.

80. Section 10 of the Non-Fatal Offences against the Person Act 1997 makes it a criminal offence, in certain prescribed circumstances, to communicate with others. Relevantly, the offence can capture communications addressed to the public at large, provided that it is reasonably foreseeable that those communications come to the attention of a person who may be harassed thereby.

81. In principle, therefore, the section is capable of "*engaging*" the right to freedom of expression. The question which arises is whether the legislative restrictions pursue a legitimate aim and are proportionate. This requires consideration of the precise type of communications which are prohibited.

82. The concept of "*harassment*" bears a specific meaning for the purposes of the criminal offence. This is provided for under sub-section 10(2) as follows:

> "For the purposes of this section a person harasses another where—
>
> (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
>
> (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other."

83. The term "*harm*" is defined elsewhere under the Act as meaning harm to body or mind and includes pain and unconsciousness.

84. The definition of "*harassment*" ensures that the offence is only committed where there has been a serious interference with the rights of the victim. This is expressly provided for in the first limb: "*seriously interferes with the other's peace and privacy*"; and is implicit in the second limb: the words "*alarm*", "*distress*" and "*harm*" all connote a serious interference with the victim's rights. The legislative provisions thus pursue a legitimate aim: the constitutional right to freedom of expression is not absolute and may legitimately be restricted in the interests of public order and morality and in the protection of the constitutional rights of others, including their right to a good name and their right to bodily integrity.

85. The legislative provisions also satisfy the requirement for proportionality. As already noted, the offence is only committed where there has been a serious interference with the rights of the victim. The offence of harassment is defined in such a way that guilt does not depend on the *subjective* views of the victim. Whereas the prosecution must establish that the victim suffered one or more of the consequences prescribed under sub-section 10(2), it must go further. The prosecution must also establish, by reference to an objective standard ("*a reasonable person would realise*"), that an accused must have *intended* to harass the other person or to have been reckless in that regard. A person making public comments is not therefore at risk of an overly sensitive victim.

86. Moreover, it is a precondition to criminal liability that the harassment must have been carried out without "*reasonable excuse*". This is provided for as follows in sub-section 10(1) of the Act:

> "Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence."

87. The statutory concept of a "*reasonable excuse*" is broad enough to allow for a consideration, by the tribunal of fact, of the question of whether the communication might represent protected speech. The approach to be taken in this regard is analogous to that adopted by the European Court of Human Rights ("*ECtHR*") in connection with the balancing of the rights under Article 8 and Article 10 of the European Convention on Human Rights. This approach has been recently reiterated in *Pal v. United Kingdom* (App. No. 44261/19) as follows (at paragraph 54):

> "The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria in the context of balancing the competing rights under Articles 8 and 10 of the Convention. The relevant criteria thus defined include: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned and the content, form and consequences of the publication. Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers [citations omitted]".

88. These criteria were identified in the specific context of a publication by a journalist by way of a series of tweets. Similar criteria apply, in principle, under the domestic constitutional order where a citizen is exercising their (qualified) rights under Article 40.3 and/or Article 40.6.1°.

89. In summary, Section 10 of the Non-fatal Offences against the Person Act 1997 is capable of being interpreted in a manner which ensures proper respect for the constitutional right to communicate. Accordingly, there is no basis for the High

Court to refer the question of the validity of the legislation to the Court of Appeal by way of case stated.

90. The fact, if fact it be, that in a particular case a trial judge may have failed to properly direct a jury as to the ingredients of the offence and as to the concept of a "*reasonable excuse*" does not render the legislation unconstitutional. Rather, an accused has a right of appeal to the Court of Appeal.

CONCLUSION AND FORM OF ORDER

91. The application for the release of the Prisoner pursuant to Article 40.4.2° of the Constitution of Ireland is refused for the reasons set out herein. If either side wishes to apply for their legal costs, then they should file short written submissions (less than 3,000 words) within four weeks of today's date.

92. Finally, and in circumstances where the Prisoner has chosen not to avail of professional legal representation, it is appropriate to emphasise the following for his benefit. The objections which he seeks to make in respect of his conviction and sentence are matters for an appeal to the Court of Appeal rather than for an inquiry under Article 40.4.2°. Whereas the time-limit for an appeal to the Court of Appeal from the Circuit Court has expired, it is open to the Prisoner to make an application to the Court of Appeal to extend time for the lodging of an appeal against his conviction and sentence. The Prisoner would be entitled to apply for legal aid in this regard.

Appearances

The first and second named applicants appeared as litigants in person
James B Dwyer SC and Grainne O'Neill for the respondent instructed by the Chief State Solicitor

Approved Gerrett Simons