

THE HIGH COURT

[2023] IEHC 180

[2023 522 SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN

SIMEON BURKE

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Cregan delivered *ex tempore* on 14th April, 2023.

Introduction

1. The application before this Court is an application by Mr. Simeon Burke for:
 - (i) an inquiry pursuant to Article 40.4.2 of the Constitution;
 - (ii) an order directing the release of the Applicant; and
 - (iii) an order quashing District Court proceedings entitled *DPP v Simeon Burke*.
2. The application is grounded upon the affidavit of Mr. Burke.
3. The initial application for an inquiry into the legality of Mr. Burke's detention was brought by Ms. Ammi Burke, Mr. Burke's sister, to the High Court on Wednesday, 12th April 2023. The High Court (Mr. Justice Barr) directed that an Article 40 inquiry should be held into the legality of Mr. Burke's detention the following day, 13th April 2023. The inquiry was held before me on Thursday, 13th April and Friday 14th April 2023.
4. Counsel for the Respondent produced a certificate in writing, certifying the detention of the applicant.

5. Counsel for the Respondent also indicated that he wished to put replying affidavits before the Court, and these affidavits were received by the Court at 2.30 pm.

6. The inquiry commenced at 3 pm on Thursday and continued until 8 pm. Mr. Burke opened all the affidavits and made submissions on his own behalf on the evidence and on the law.

7. Ms. Ammi Burke also wished to make submissions on behalf of her brother. Counsel for the Governor of Cloverhill Prison objected that it was not clear whether Ms. Burke was doing so as a solicitor or as a McKenzie Friend. However I allowed Ms. Burke to make submissions on behalf of her brother for two reasons:

(i) first, because Article 40.4.2° provides that; “*A complaint that someone is being unlawfully detained can be made by or on behalf of a person who is being detained*”(emphasis added), and, in my view, this constitutional provision should be interpreted broadly in this respect; and

(ii) secondly, because I was concerned that Mr. Burke, having spent one month in prison, might not have had the resources at his disposal to properly prepare his application and in my view, the justice of the situation required that he be allowed the assistance of his sister, Ms. Burke, who is a qualified solicitor.

8. Later in the day, counsel for the Governor indicated that there were statements of a further 10 to 12 Gardaí in respect of this matter, which he wished to also put before the Court. A further affidavit exhibiting all these statements of evidence was sworn and furnished to the Court and admitted into evidence.

Article 40.4.2° of the Constitution

9. Article 40.4.2° of the Constitution provides as follows:

“Upon complaint being made by or on behalf of any person to the High Court or any judge thereof, alleging that such person has been unlawfully detained, the High

Court and any and every judge thereof to whom such complaint is made, shall forthwith inquire 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 a 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.”

The background to this application: the incident at the Court of Appeal

10. In order to understand the circumstances leading to Mr. Burke's detention, it is necessary to set out the somewhat unusual background to this application.
11. The Court of Appeal sat on Tuesday, 17th March 2023 at 2 pm, in order to deliver its judgment in the case of *The Board of Wilson's Hospital School v Burke* [2023] IECA 52. The Defendant in those proceedings was Mr. Enoch Burke, Mr. Simeon Burke's brother. Other members of the Burke family were also in court at the time, including his father Mr. Seán Burke, his wife, Mrs. Burke, Ms. Ammi Burke, Mr. Simeon Burke, Mr. Enoch Burke and others.
12. It appears from the affidavit of Garda Michael McGrath that, after about 40 minutes, as the members of the Court of Appeal were reading their judgments, Ms. Ammi Burke began to interrupt the Court by shouting at the Court. It appears that other members of the Burke family also began to shout. Ms. Burke takes exception to this description, and says they were not shouting, but that there were objections to what the Court was saying. It appears, however, that regardless of the characterisation, the members of the Court of Appeal could not be heard above the noise of the members of the Burke family and the members of the Court rose for a few moments to allow peace to be restored to the courtroom. When they

reappeared, they attempted to resume reading out their judgments again, only to be met with further interruptions by members of the Burke family. As they were interrupted in the giving of their judgments, members of the Court of Appeal rose again and left the courtroom, and their judgments were subsequently delivered electronically.

13. Of course, it should go without saying that it is absolutely disgraceful that any member of the Burke family should behave themselves in such a way that members of the Court of Appeal were unable to conduct the business of the Court and to give judgment in this case in open court. It was also the case that if Mr. Enoch Burke was unhappy with the decision, he could have sought to appeal the decision to the Supreme Court. However, it is even more astonishing that Ms. Ammi Burke, a qualified solicitor and officer of the court and the Applicant, Mr. Simeon Burke, a law graduate and a student of the King's Inns should behave in such a manner in any court, including the Court of Appeal.

14. Mr. Simeon Burke said in his affidavit that as the Court was delivering its judgment he was *"taking notes"*, and stated that *"In its judgment, the Court ruled that the case was not about transgenderism. After several objections during delivery of the judgment, the Court rose to deliver its judgment electronically."* This statement about what happened is brief to the point of being misleading – as some of the 12 Gardaí who were involved in the matter show in their statements of evidence or in their affidavits. In response to a question from the Court about whether he was also participating in these "objections", Mr. Simeon Burke, gave a very guarded and nuanced reply. He said he wasn't "leading" the objections as he was taking notes, that he made one or two interventions, but he was not shouting.

15. In any event, what happened next, according to Garda McGrath, was that the three judges rose because it was impossible for them to be heard above the noise, and when the judge were in chambers, the tipstaff of the President of the Court informed Garda McGrath that, on the instructions of the Court, he was to remove, or the Gardaí were to remove, the

two female members of the Burke Family, which he then proceeded to do. Subsequently, all members of the Burke family were removed from the court and shortly thereafter, the applicant was arrested and brought to the Bridewell Garda Station and then to the District Court.

Mr. Burke's arguments

16. In summary, Mr. Burke in his affidavit and in his submissions makes the following arguments:

- (i) first, that he was wrongfully and unlawfully arrested, that the Gardaí had no warrant or authority to remove him from the courtroom, that he was never, in fact, arrested, or if he was, that he was unlawfully arrested;
- (ii) secondly, that when he raised these matters before the District Court, his concerns were neither accepted nor rejected, and that this was a breach of his constitutional right to fair procedures;
- (iii) thirdly, that his detention was wanting in due process of law;
- (iv) fourthly, that the process leading to his arrest, imprisonment and being brought before the District Court was of such a nature as to outrage, insult or defy the legal or constitutional authority of the Court;
- (v) fifthly, that excessive force was used; and
- (vi) sixthly, that there was a flaw on the face of the warrant, in that the name of the arresting officer was not the Garda who arrested him.

The first issue: the issue of the lawfulness of the arrest

17. A central plank of Mr. Burke's case in this application is that he was never actually arrested and/or that his arrest and, therefore, subsequent detention were unlawful.

18. It is important to set out the evidence on this matter for the purposes of this judgment.

19. Mr. Burke's affidavit states as follows at paragraph 5: *“With regard to (2), I say that I was wrongfully arrested. The Gardaí had no warrant or authority to remove me from the courtroom. I was also unlawfully arrested. In an egregious and flagrant violation of my constitutional rights, none of the formalities of an arrest were complied with. I was not aware at any point that I was under arrest. No member of An Garda Síochána explained to me at any point that I was being arrested, the reason for my arrest or the power of arrest. I was simply seized, handcuffed and forced into a Garda vehicle. Excessive force was used by the Gardaí. Custody regulations 8(1) and 15(1) were not complied with.”*

20. At paragraph 10, he states: *“I attended the Court of Appeal at the Four Courts on Tuesday 7 March at 2 pm for delivery of the judgment in the case The Board of Wilson's Hospital v Burke [2023] IECA 52. I was taking notes. In its judgment, the court ruled that the case was not about transgenderism. After several objections during delivery of the judgment, the Court rose to deliver its judgment electronically. The Court did not direct that my family be removed from the courtroom nor did it ask or order my family to leave. Specifically, the Court did not direct that I be removed from the courtroom, nor did it ask or order me to leave. No one had been found in contempt of court. The court was no longer in session.”*

21. At paragraph 11 he says: *“Subsequently a large number of Gardaí entered the courtroom and began to forcibly remove members of my family. Garda Michael McGrath, who had been standing next to me in an aisle, reached towards me with his hand, grabbed my shirt and ripped it open so that the buttons were torn off. Several Gardaí, including Garda Conor O’Dwyer and Garda Lachlan McHugh went for my neck and dragged me out of the courtroom and out of the Court of Appeal building. As I was being dragged out, one of the Gardaí, whom I believe was Garda McHugh said, “f**k him out of the courtroom”. No*

member of An Garda Síochána asked or directed me to leave the courtroom. I say that the Gardaí had no warrant or authority to remove me from the courtroom.”

22. At paragraph 12 he says: *“The Gardaí violently dragged me through the Four Courts complex and out past the main gates on Inns Quay. Excessive force was used which should not have been used. At times, some of the Gardaí had their hands and arms around my neck. I was treated like an animal. My clothing was torn and I was left injured, bleeding and in shock. I say that the behaviour of the Gardaí was deliberate and conscious.”*

23. At paragraph 13 he says: *“I was dragged over to an unmarked Garda jeep. I was handcuffed by Garda McHugh and a plainclothes Garda, whom I believe was Garda Patrick Hynes. I was forced into the backseat of the jeep. This occurred at ca. 3:10 pm. I was not aware at any point that I was under arrest. No member of An Garda Síochána explained to me at any point that I was being arrested, the reason for my arrest, or the power of arrest. I did not acquiesce with my purported arrest. I objected and reasoned with the Gardaí, but received no response, save “you're an f**king attention-seeker” from Garda McHugh.”*

24. At paragraph 14 he says: *“I was driven to Bridewell Garda Station by Garda McHugh and Garda Deirdre McDonnell, who sat in the back seat of the jeep with me. During the brief journey to Bridewell, Garda McHugh who was driving the jeep repeatedly cursed me using the F-word.”*

25. At paragraph 15, he says: *“We arrived at Bridewell Garda Station at ca. 3:20pm. In the station, I heard one Garda, whom I believe was Garda McHugh, saying in a defensive tone of voice, “someone said I arrested him”.”*

26. At paragraph 16 he says: *“I was left in a cell. Approximately one hour later, at ca. 4:20pm I was taken out of the cell and charged by Sergeant David O'Leary with an offence contrary to Section 6 of the Public Order Act 1994. I was not given a copy of the charge*

sheet (contrary to custody regulation 15(1)).” Mr. Burke then goes on to talk about how he was brought before the District Court.

27. However, the evidence of the Guards involved in this matter tell a different story. The evidence of Garda Michael McGrath at paragraphs 1, 2 and 3 of his affidavit states as follows, at paragraph 1: *“Approximately 40 minutes into the case Ammi Burke started to interrupt the Court by shouting. The other members of the Burke Family started to shout. The three judges rose as it was impossible for them to be heard above the noise. When the judges were in chambers, the President’s tipstaff informed me that the instruction of the Court was to remove the two female members of the Burke family from the Court room.”*

28. At paragraph 2 he says: *“I requested two female members of an Garda Siochana attend the Court of Appeal. When the Court resumed Ammi Burke was on her feet shouting at the judges within seconds. Martina Burke started shouting. I stood by Garda Fisher and Garda Murtagh while they explained to Ammi Burke that she had to leave the Court. Ammi Burke became obstructive straightaway. She shouted and would not listen to instructions from Gardai. She was waving her hands around. She resisted when she was being moved. It was at this point the remaining members of the Burke family became involved in scuffling with Gardai. They were pushing gardai, holding onto furniture and gripping each other.”*

29. At paragraph 3 he says: *“I assisted colleagues in removing Simeon Burke. He was highly obstructive and resisted every attempt made by gardai in removing him. There were at least three members involved in extracting Simeon Burke from the Court. The bench where he and his parents were seated was knocked over during the struggle. Whilst restraining the applicant I fell backwards onto the table in front of this bench. When we got the applicant to the door of Court 1, he pushed the soles of his feet into the wall and the door frame to further impede our efforts. My colleagues and I got the Applicant to the bottom of the steps of the Court building. I had no further interaction with the Applicant”*

30. Garda Conor O'Dwyer also swore an affidavit in this matter, and at paragraph 2 of his affidavit he says as follows: *“I asked Simeon Burke to leave the Court. The applicant, Mr. Burke, held onto the bench refusing to leave. Garda McGrath, Garda McHugh and I had to remove Mr Burke. At this point he was very aggressive, kicking at Gardai. We escorted him from the Court to the road outside.”*

31. At paragraph 3, he states: *“At one stage, members of an Garda Síochána, including I, stopped and let Simeon Burke down to reason with him and calm him down. He continued being aggressive and unreasonable. Both Garda McHugh and I continued to reason with him, but he continued to be very aggressive and shouting.”*

32. At paragraph 4, he states: *“While outside the gates of the Four Courts on Inns Quay a public place, Simeon Burke was shouting in an aggressive manner using insulting, and abusive language including comments about transgenderism towards gardai, with several members of the public around, which may have provoked a breach of the peace.”*

33. At paragraph 5, he states: *“At 15.12pm I arrested Simeon Burke under section 24 of the Criminal Justice (Public Order) Act 1994 for an offence contrary to section 6 of the Public Order Act, 1994 and I explained to Mr Burke the reasons for his arrest. At this point Simeon Burke continued to be loud and abusive towards gardai. In my statement the time of arrest is listed at 15.23, this is an error. I beg to refer to a copy of my Garda Notebook[...].”* (which he has exhibited). He says at paragraph 6 that, *“Simeon Burke was conveyed to the Bridewell Garda Station and was cautioned and the caution was explained in ordinary language.”*

The oral evidence of Garda O'Dwyer and Garda McGrath

34. It is unusual in an Article 40 inquiry to hear oral evidence. However, in circumstances where there was a conflict of evidence on affidavit, and in circumstances where Mr. Simeon Burke and Ms. Ammi Burke made vitriolic allegations that the Gardaí

were telling “a pack of lies” and that the affidavit evidence from the Guards were “all lies”, and that Mr. Burke was never arrested, I was of the view that oral evidence should be called on this point.

35. Garda O’Dwyer gave oral evidence before the Court, and in his evidence, he confirmed that he arrested Mr. Burke at 15.12 pm under section 24 of the Criminal Justice (Public Order) Act 1994 for an offence contrary to section 6 of the Public Order Act 1994, and that he explained to the Plaintiff the reasons for the arrest.

36. Section 24 (1) of the Criminal Justice (Public Order) Act 1994 provides as follows: *“Where a member of the Garda Síochána finds any person committing an offence under a relevant provision, the member may arrest such person without warrant.”*

37. Section 6 of the Criminal Justice (Public Order) Act 1994 provides at sub-section (1) that, *“It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.”*

38. Garda O’Dwyer confirmed in his evidence that he arrested Mr. Burke pursuant to those two statutory sections.

39. The fact that Mr. Burke was arrested at this time, is also corroborated by his garda custody record, which clearly states that he was arrested at 15.12 by Garda O’Dwyer.

40. Garda McGrath also gave oral evidence on these matters, and he confirmed in all respects that what was in his affidavit and précis of evidence was true and accurate.

The CCTV evidence

41. I have also reviewed the CCTV evidence of the removal of Mr. Burke from the Court of Appeal building, and his removal from the precinct of the Four Courts. A number of points emerged from this review.

42. First, it pinpointed exactly where and at what time Mr Burke was arrested and which according to Garda O'Dwyer's evidence was on Inns Quay at about 3.15 pm.
43. Secondly, it showed no evidence of excessive or unreasonable force.
44. Thirdly, it corroborated in all respects Garda O'Dwyer's evidence.

Other witnesses

45. In addition to Garda McGrath and Garda O'Dwyer, there are, I think, some 10 other Gardaí who have also made statements in respect of what happened on that day.
46. The evidence of Sergeant Bryan Griffin in his statement is as follows. He says:

“Within minutes, I heard an assistance call from the Four Courts. I ran across the road, I went to the Appeals Court. As I was approaching the Appeals Court, I could see garda members struggling with someone outside the main gate on Inns Quay, a public place, where a crowd had gathered. I made my way to Inns Quay. There I found Garda members, Garda Conor O'Dwyer, Garda Lachlan McHugh, Garda Patrick Hynes, Garda Deirdre McDonnell and Detective Garda Gareth Cooke attempting to effect the arrest of a male I now know to be Simeon Burke. Mr. Burke was standing facing an unmarked Hyundai and was facing the Four Courts with the blue lights activated. Simeon Burke was screaming and wailing, he was screaming largely unintelligible insults at the Garda members. He made comments about 'transgenderism'. He told the Gardaí to go to Tallaght and do their jobs dealing with criminals. The garda members standing behind Mr Simeon Burke had managed to put his left hand in a rigid set of handcuffs. Simeon Burke was forcefully resisting their efforts to put on the second handcuff. He was pushing back against the car against the garda members, wilfully obstructing their efforts to arrest him. There were other members of the public

present. I was aware that some of these individuals were supporters of the Burkes. They were shouting comments also about transgenderism and about the gardaí furthering various agendas. Ammi Burke, Simeon's sister, being the chief protagonist, was circling behind Garda members, shouting and roaring, attempting to obstruct the arrest. From my experience, the situation had the potential to spill over causing a further breach of the peace. I took hold of Simeon's right wrist. He had his glasses clenched in his right hand. I spoke in Simeon Burke's right ear; I instructed him to stop resisting. I told him that his glasses were in his right hand and that he was breaking them. He did not listen to me. He was totally frantic, screaming and physically resisting my efforts to place the second handcuff on his right wrist. He told me that I should be ashamed of myself and that I was a disgrace. He made further comments about transgenderism. I managed to get the handcuffs on his right wrist. He forcefully, physically resisted my efforts, but I managed to get him into the patrol car. He refused to bring his legs into the car, he continued screaming and shouting. I manoeuvred him into the car. I asked the garda members to get him back to the Bridewell, to remove him from what had now become a volatile situation. Two of the Burke supporters, who were not known to me, were standing alongside the patrol car shouting abusive and insulting comments at Gardaí about 'transgenderism' and various conspiracies. I directed them to desist and leave the vicinity in an orderly manner under section 6 of the Criminal Justice (Public Order) Act, 1994. They complied with the direction and left the vicinity."

47. The evidence of Garda Martin Byrne is to a similar effect. He says in his statement:
- "Upon arrival at the court, I observed Garda members attempting to escort a group of protesters from the body of the court. My attention was drawn to one of*

the protestors, who was shouting loudly at the top of her voice. I now know this female to be Ammi Burke. I observed Garda Fisher engage verbally with Ammi Burke and request she desist from shouting and remove herself from the Court of Appeal in a peaceful manner [...]

A large number of members of the public had gathered around at this time. I returned to the Court of Appeal building and my attention was then drawn to a male protestor, who was shouting loudly at the top of his voice and aggressively resisting efforts by garda members to escort him from the court building. I now know this male to be Simeon Burke. I then assisted with escorting him out of the court building, but he threw himself to the ground and resisted. I then made an attempt to ask him to desist from his behaviour under section 8 of the Criminal Justice (Public Order) Act 1994, but he ignored me and continued to shout loudly. Simeon Burke was escorted from the Court of Appeal where he continued to aggressively resist and shout insults at Garda members. He shouted, ‘How dare you – go to Tallaght and do your job!’ I assisted both Garda Dwyer and Garda McHugh with escorting Simeon Burke to the gates of the Four Courts. Once he had brought to the gates, I had no further involvement.”

48. Then there is the evidence and statement of Garda Lachlan McHugh who said:

“Once outside and away from the courtroom, Garda O’Dwyer and I stopped and attempted to reason with Mr Burke, but he continued to be aggressive and roar abuse at us. Mr. Burke was then removed from the court grounds and once outside the gates of the Four Courts, became even more abusive while in the presence of a large crowd that had gathered. I was present when Garda O’Dwyer arrested Mr. Burke for an offence contrary to section 6 of the Criminal Justice (Public Order) Act 1994. I was also present when Mr. Burke was placed

in a Garda car. I then left the Four Courts and returned to the Bridewell Garda Station, where I took up as gaoler for the station. At 15.20, Simeon Burke arrived at the Bridewell Garda Station, I entered his details into the official custody record. I then went through the official custody report section, record section by section, completing the relevant tasks. In all my dealings with Mr Burke, I complied with the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987. Every entry I made in the occurrences of the custody record was marked with my initials and district number D157. At 16.22 hours, I was present when Mr. Burke was charged by Sergeant David O'Leary as per national charge sheet number [And he gives the number]. He was cautioned following the charge and handed a true copy of the charge sheet. Mr. Burke made no reply.” (emphasis added)

49. Finally, there is the evidence of Garda Patrick Hynes who says, *“On arrival to the Four Courts, I observed Garda Lachlan McHugh and Garda Connor O'Dwyer in the courtyard, carrying a male by his arms, as he appeared to be dragging his feet and not supporting his body weight. I now know this male to be Simeon Burke. I then assisted Garda O'Dwyer and Garda McHugh by grabbing Mr. Burke's left leg and carrying him from the Four Courts.”* He goes on in that vein.

50. There is another statement by Garda Deirdre McDonnell to a similar effect, and there are further statements by other Gardaí, which I don't need to set out in my judgment.

51. Counsel for the Governor also submitted that the garda custody record for Mr. Simeon Burke showed:

- (i) that he was arrested for an offence contrary to section 6 of the Public Order Act 1994;
- (ii) that the arresting officer was Conor O'Dwyer; and

(iii) that the timing of arrest was 15:12.

Calling the Gardaí liars

52. It is completely unacceptable, in my view, to make wild and unfounded allegations in open court that all the Gardaí who provided summaries of evidence in witness statements or affidavits were telling lies, or that their evidence was “a pack of lies”.

53. It is particularly unacceptable in circumstances where those Gardaí were then called to give evidence – at my direction – and Mr. Burke then refused to cross-examine these Gardaí, against whom he had made these allegations. He was given a full opportunity to prove his allegations by cross-examining the guards, and he simply refused to cross-examine them.

Mr. Burke's argument on unlawful arrest

54. It appears from this evidence and from Mr. Burke's submission, that he was of the view that because there was no request or order from the Court delivered in open court by the judges of the Court that he should leave the court, that this meant that the Gardaí could not ask him to leave the court or force him to leave the court when he refused to go.

55. However, as counsel for the Respondent put it, the Gardaí do not have to wait for a direction from the Court, even though here they received one. They could make an operational decision to remove persons from a court if those persons were interfering with the administration of justice, or engaging in disruptive behaviour, and preventing a Court from carrying out its lawful duties and functions. I agree with this submission.

56. It appears that Mr. Simeon Burke, and perhaps other members of his family, were surprised that the Gardaí were seeking to remove them from the court. If that be so, it is difficult to understand why they would be surprised, given that their behaviour, shouting and

interruptions had caused the judges to rise, and prevented them from delivering their judgments in open court.

57. On the basis of all of the above evidence, I am satisfied that the evidence indicates that Mr Burke was arrested, that his arrest was effected by Garda O'Dwyer on or about 15.12 pm on 7th March 2023, and that his arrest was lawful. There was a disturbance in the court, and the Gardaí could have cleared the court, with or without a direction from the Court. Therefore, Mr. Burke's argument that there was no direction from the Court to him or his family to leave the court is irrelevant.

58. I am also satisfied, given the commotion, that Mr. Burke knew, or ought to have known, that the manner in which he and other members of his family interrupted the court proceedings (and the manner in which this melee and these scuffles broke out, and the manner in which he behaved himself) might have had him arrested.

The second issue: the failure to be heard in the District Court

59. Mr. Burke's second major argument is that on the first occasion he was before the District Court, and on each and every occasion thereafter, he raised the issue of the lawfulness of his arrest and detention. He complained that on each occasion the District Court Judge said, "*I hear you*" or "*These are matters for the trial*". He complains that this issue was never investigated, nor was a decision made. He says that this amounts to a breach of his constitutional right to fair procedures.

60. However, in my view, these objections are without substance for a number of reasons.

61. First, if Mr. Burke wished to challenge the lawfulness of his arrest, he could have done so by judicial review proceedings. He has not done so. However, that path might remain open to him. Secondly, issues such as the lawfulness of his arrest are matters which he or his counsel can raise at the trial of the offence. Thirdly, the stages at which he raised these matters were only remand or bail hearings, or hearings to process the progress of the trial of

the offence. Therefore, I am of the view that Mr. Burke's arguments on this matter are also of no substance.

Miscellaneous issues

62. There are a number of other issues which remain to be dealt with.

The flaw on the warrant

63. Mr. Burke argued that there was a flaw on the face of the warrant, because the garda on the warrant was not the arresting Guard. It was clear, however, that this argument is manifestly wrong. The evidence is all one way. Garda O'Dwyer arrested Mr Burke and his name is on the warrant.

The Gardaí had no warrant or authority to remove Mr. Burke from the court

64. As a matter of fact, the Gardaí were requested by members of the Court to remove Ms. Ammi Burke and Mrs. Burke from the court. However, the Gardaí do not need the authority of the Court or a direction from the Court to remove protestors from the court if they are obstructing the work of the Court.

Allegation of excessive force

65. The allegation of excessive force is also unfounded. I am satisfied, based on the CCTV footage, that no unreasonable or excessive force was used. I am also mindful of the evidence of Garda McGrath, who said that proportionate force was used in response to the resistance of Mr. Burke.

Conscious or deliberate violation of the plaintiff's constitutional rights

66. I am also of the view, based on the evidence that there was no conscious or deliberate violation of the plaintiff's constitutional rights. (See *Whelton v O'Leary & DPP* [2010] IESC

63. *Killeen v DPP* [1997] 3 IR 218 and *Trimbole v Governor of Mountjoy Prison* [1985] IR

550. In relation to *Trimbole*, considerable reliance was placed by the Applicant on this decision. That, however, was an entirely exceptional case, and a long way removed from the facts of the instant case. *Trimbole* concerned a deliberate and conscious violation of a constitutional right. That is not the case here.

That the conduct of the Gardaí was of such a nature as to outrage, insult or defy the legal or constitutional authority or status of the Court.

67. I am also satisfied that the conduct of the Gardaí in this case was not of such a nature as to outrage, insult or defy the legal or constitutional authority or status of the Court. (See *Keating v Governor of Mountjoy Prison* [1991] 1 IR 61.)

68. I would also remark in passing that it is rank hypocrisy of Mr. Burke to make such an argument in circumstances where his behaviour was clearly an outrage, insult or defiance of the legal and constitutional authority of the Court of Appeal.

Breach of regulation 8 and 15 of SI 119, 1987 the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.

69. Regulation 8 of these regulations provides as follows: “*The member in charge shall without delay inform an arrested person or cause him to be informed (a) in ordinary language of the offence or other matter in respect of which he has been arrested, [...]*”

70. I am satisfied based on the evidence that this regulation was complied with.

71. The second regulation is regulation 15, on charge sheets which provides that: “*Where a person in custody is charged with an offence, a copy of the charge sheet containing particulars of the offence, shall be given to him as soon as practicable.*”

72. It appears to me on the evidence that this was done, but even if it were not, that would not make his detention unlawful.

The halting of the criminal trial

73. Mr. Burke also sought an order that his criminal trial be stopped, based on the arguments he outlined. As I am of the view that his arguments are without substance, that application also fails.

Interim ruling of the Court

74. At the start of day two of this inquiry, instead of moving onto the next stages of the inquiry and hearing the evidence, Ms. Ammi Burke made an objection to the manner in which the application was proceeding. Her submission was that in fact, under the Article 40 procedure, the respondent should have gone first. In reliance on this point, she relied on Article 40.4.2° of the Constitution and the decision of Mr. Justice Humphreys in *Lanigan v Governor of Cloverhill Prison* [2017] IEHC 23.

75. I rose to consider this submission and to read the case of *Lanigan*. I indicated on my return that, in my view, Ms. Burke's submissions were misconceived for a number of reasons. First, the Applicant in this case is Mr. Burke; it is his application. It is the invariable practice of this Court that the applicant goes first, opens the affidavits, and makes such submissions as they wish. In this case, in an abundance of procedural fairness, I also let Ms. Burke make submissions on his behalf. It was, therefore, entirely normal to allow Mr. Burke to go first.

76. Secondly, it is of course true that the respondent bears the burden of proof in justifying the lawfulness of this detention. I was aware of that burden from the very start of this application. However, the fact that the respondent bears the burden of proof does not, necessarily, mean that the respondent goes first. Mr Clarke SC for the Governor submitted that Ms. Burke was conflating the burden of proof with the procedural requirements of who opens the application. I agreed with that submission.

77. Thirdly, Ms. Burke also relied on the decision of *Lanigan*, a decision of Humphreys J where, he says(at paragraph 41) that normally, the respondent goes first in such applications. I noted, however, that firstly, this was *obiter*, and secondly that I respectfully disagreed with

Humphreys J. Mr. Clarke submitted that the normal practice in such applications is that the applicant goes first. I agree with that submission. That has also been my experience.

78. More substantively, I indicated that I was of the view that the Applicant had an advantage in going first, because he had a right of reply, but I also indicated that I would afford both parties an opportunity to make whatever submissions they wanted, and that no one would be shut out from being heard. I also indicated that if the Applicant believed that there were other grounds he would like to put forward as to why his detention was unlawful, he could, of course, put those arguments forward, later in the day. In other words, even if Ms. Burke was right (which in my view she was not), that Mr. Burke would not be allowed to suffer any procedural disadvantage by going first.

79. Despite my ruling on this matter, Ms. Burke continued to object and to harangue and barrack the Court, and refused to accept the ruling of the Court, repeating on umpteen occasions that the inquiry was now being conducted in an unlawful manner.

80. I have to say that I regard her conduct of this case to be completely unacceptable on every level. Ms. Burke knows (or should know) that if a ruling during the conduct of a case goes against either her or her client, (or in this case, her brother), then it should be accepted and the case moves on. If Mr. Burke has any difficulty with the ruling he can, at the end of the hearing, appeal the decision to the Court of Appeal and include his objection on this issue as a ground of appeal.

81. Unfortunately, however, Mr. Burke adopted a position in the afternoon where, in response to all questions, he simply repeated the mantra that the Court was conducting the inquiry in an unlawful manner.

82. Despite his refusal to engage with his own application, I was satisfied that as it was an inquisitorial process, the Court should continue the investigation into the legality of the detention.

The bail conditions

83. It is also worth emphasising that the bail conditions were very mild: a bail bond of €200, and an undertaking to stay away from the Four Courts. Mr. Burke could walk out of prison this evening if he agrees to these conditions. However, he will not do so, he says, because he is a man of principle. I find it difficult to see what principle he is standing on. He has no constitutional right to disrupt court proceedings to the detriment of the Court, and indeed, to the other party to that case, namely Wilson's Hospital School.

Conclusion

84. I am satisfied therefore, having carried out this inquiry into the legality of Mr. Burke's detention, that, based on the evidence and the legal submissions, Mr. Burke's concerns are unfounded. I was aware at all times that the burden of proof was on the State to prove the legality of the detention, and I approached the investigation in that frame of mind.

85. If there had been an infirmity in the State's case, I would have had no hesitation in releasing Mr. Burke from his imprisonment, which I am sure must be uncomfortable for him.

86. But I am quite satisfied, having heard all the evidence and considered all the submissions, that all of Mr. Burke's allegations and submissions are utterly without foundation. No doubt he was affronted at being manhandled, arrested and imprisoned, but actions have consequences, and his completely unacceptable actions in disrupting the Court of Appeal and in his interaction with the Gardaí, are solely responsible for landing him in the position in which he is.

87. I am of the view that Mr. Burke is being lawfully detained, and in the circumstances, I will refuse the application.
