THE HIGH COURT

[2023] IEHC 707

[Record No. 2023/4282P]

BETWEEN

JOE DOOCEY AND MELISSA KELLY

APPLICANTS

AND

FINTAN MURPHY, KBC BANK, AIDEN DEVLIN, IAN GORDON, GS AGENCIES LIMITED, TRINITY ASSETS MANAGEMENT, CENTRAL BANK OF IRELAND, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE GARDA COMMISSIONER, MARTINA BAXTER, MINISTER FOR JUSTICE AND EQUALITY AND GOVERNOR OF CASTLEREA PRISON

RESPONDENTS

EX TEMPORE JUDGEMENT of Mr Justice Mark Sanfey delivered on the 12th day of October 2023

1. The applicants in this case are Melissa Kelly and Joe Doocey. Their application is for an enquiry pursuant to Article 40.4.2 of the Constitution in respect of the continuing detention of Martin O'Toole – otherwise Martin Thomas – in Castlerea Prison.
2. The applicants have initiated plenary proceedings in which they seek a range of reliefs against a number of defendants including the Attorney General, the DPP,

the Garda Commissioner, Her Honour Judge Martina Baxter, the Minister for Justice and Equality and the Governor of Castlerea Prison.

3. In the plenary summons they seek a wide range of orders. I don't propose to set out all the orders, but some of the orders which will give a flavour of what is being sought are:

(1) A mandatory injunction for the immediate release of Martin Thomas (O'Toole) to afford him his EU and International Law and Protected Justice and Due Process Rights and his constitutional right of access to the High Court which has hitherto denied or failing this in the interim an Article 40 on his detention or release on bail.

…(6) A declaration that Martina Baxter operated *ultra vires* and denied equal access to justice enshrined in the ECHR the Aarhus Convention and Bunreacht na hÉireann.

(7) An order for disclosure of the execution order for the property in Falsk and any records held by the defendants relating to champerty and maintenance or conflict of interest issues relating to same.

(8) An order for disclosure of all garda files relating to the property in Falsk.

…(10) An order for disclosure of the books of evidence, the trial transcripts, the bodycam footage and the various possession and execution orders.

(11) A mandatory injunction on the gardaí to investigate and on the DPP to prosecute all instances of contradictory evidence misleading the court and perjury that arose in the trial.

(12) A declaration that the right to defend your indigenous territory against unlawful invasion is a right protected by Article 42 of Bunreacht na hÉireann.

4. Mr Doocey describes himself in the plenary summons as "an Irishman, a journalist/activist, a founding member of the anti-corruption taskforce and the Irish Environmental Defenders" and gives his address. He says his occupation is machine driver. Ms Kelly describes herself as "an Irishwoman, a Republican and a founding member of the NGO Irish Environmental Defenders and Concerned Parents Against Government Overreach and a farmer" and she gives her address.The matter came before me on Friday 06 October 2023 in the afternoon. Mr Doocey and Ms Kelly came into court and presented the court with the plenary summons, the *ex parte* docket and an affidavit, an affidavit which Ms Kelly had sworn.
5. It was intimated to me that all the reliefs being sought on the *ex parte* docket in the plenary summons were being sought. I indicated that any application under plenary proceedings should proceed in the normal way on notice to the defendants.
6. It was brought to my attention that Article 40 *habeas corpus* relief was sought and an affidavit of 25 September 2023 was handed in. I was then told that the matter had been before Mr Justice O'Higgins on 20 September 2023, and that he had heard an Article 40 application on that date and put it back to the following day 21 September 2023 for the State to be put on notice and on that date Mr Justice O'Higgins refused the application.
7. When I looked at the affidavit of 25 September 2023 sworn by Ms Kelly it was clear that it was a very lengthy affidavit directed towards the conduct by Mr

Justice O'Higgins of the hearing before him on 21 September 2023. I indicated that in those circumstances I would not entertain an application based on that affidavit as I could not act effectively as a Court of Appeal from the decision of Mr Justice O'Higgins, that the appropriate course if exception was taken to the decision of Mr Justice O'Higgins was to appeal that decision to the Court of Appeal.

8. After hearing submissions from Ms Kelly however, I said that I would entertain an application for an enquiry under Article 40 based on the application before Mr Justice O'Higgins and any new submissions which Ms Kelly or Mr Doocey wished to make. I indicated that that application should be on notice to the governor. Ms Kelly and Mr Doocey agreed that this was an appropriate way of proceeding and asked for and received permission to put in a further submission.
9. On the return date of Wednesday 11 October, counsel attended for the governor. Counsel instructed by the DPP also attended and submitted that that was appropriate in the circumstances, but the applicants indicated that they had no objection to the DPP being represented at the hearing.
10. I reminded the parties that the only issue before the court was whether or not an enquiry should be ordered into the detention of Mr O'Toole rather than the enquiry itself and that submissions should be restricted to whether or not an enquiry should be ordered.
11. I explained to the applicants that the threshold for seeking an enquiry was low. In the words of Mr Justice Barr in the case of *Simeon Burke v The Governor of Clover Hill Prison* [2023] IEHC 177 at para. 16, Mr Justice Barr said:

> "The court is satisfied that, given the importance of the right to liberty, the threshold for seeking an enquiry into the legality of a person's

> detention pursuant to Article 40.4.2 of the Constitution, should be a low bar. In other words, the court should err on the side of caution when considering the application and, if in any doubt as to the possible legality of a person's detention, the court should direct that an enquiry be held."

12. As we shall see, while I agree with that statement of law, it is subject to a significant qualification established in the case law as to the nature of the issue raised about the legality of the detention in question and I will come back to that. I also drew the attention of the parties to the dicta of Chief Justice Ó Dalaigh in the case of *ex parte Charles Wilson*, a decision delivered on 29 July 1969. At p.7 of the Chief Justice's judgment he said:

> "Habeas Corpus is not a mode of reviewing alleged procedural deficiencies unless they go to the jurisdictional basis of the trial or invalidate some essential step in the proceedings leading ultimately to the conviction".

13. The papers which I read in advance of the hearing are as follows:

- The plenary summons.
- The *ex parte* docket, which set out the same relief as the plenary summons.
- The affidavit of Melissa Kelly of 20 September 2023.
- A brief written submission by the applicants and what was called a statement of truth by Ms Kelly handed into court on the morning of the application. (This statement of truth I had given Ms Kelly liberty to lodge in advance of the hearing).

14. On reading those papers, one of the difficulties I had was in understanding the background to the application. It appeared that Mr O'Toole had been incarcerated

as a result of a conviction in the Circuit Court. However, the affidavit of Ms Kelly did not set out the background to the trial of Mr O'Toole, the charges against him, the date of duration of the trial, the details of the conviction, the sentence given to Mr O'Toole or the basis upon which the applicants purported to represent Mr O'Toole.

15. At the hearing, counsel for the governor presented the court with the warrant on foot of which Mr O'Toole was incarcerated. From this it became apparent that there had been four counts of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997 in respect of which sentences were imposed of five years. There were four counts in relation to the counts of false imprisonment contrary to s.15 of the Non-Fatal Offences Against the Person Act 1997. In respect of the first of those counts a sentence of fifteen years was granted and in respect of the second, third and fourth of those counts, a period of fourteen years was given. There was a further count of aggravated burglary contrary to s.13 of the Criminal Justice Theft and Fraud Offences Act 2001: a sentence of 13 years was given in respect of that. There were three counts of arson contrary to s.2(1)(4) and (5) of the Criminal Damage Act 1991 and a further charge of violent disorder contrary to s.15 of the Criminal Justice (Public Order) Act 1994. A sentence of eight years was imposed in respect of that. There was a charge of criminal damage contrary to s.2(1) and (5) of the Criminal Damage Act 1991: there was a sentence of five years in respect of that. There was a count in respect of animal cruelty contrary to s.12(1) and (2) and a sentence of five years was granted in respect of that.

16. The order of the court provided that all sentences were to run concurrently and to date from 28 July 2023 which was the date of sentence with credit being given for all the time spent in custody.
17. The warrant also made it clear that the date of conviction was 02 June 2023. It also said that Mr O'Toole's date of birth was 23 June 1964 which would make him 59 years of age now. The date of sentence as I have said was 28 July 2023. The matter was tried in the Criminal Courts of Justice before Her Honour Judge Martina Baxter. It being the Circuit Court, there was a jury in attendance as well.
18. None of those facts were alluded to in Ms Kelly's affidavit or in her oral submissions to the court. I was not apprised of any of those facts until I had the opportunity to look at the warrant which was presented by counsel for the governor.
19. The counsel for the governor also explained that the trial took over three months. It appeared that the circumstances related to Mr O'Toole's involvement in a protest against an eviction effected at a property in Strokestown, County Roscommon and an altercation that arose as a result. Even today, my understanding of what occurred leading up to the trial, and the circumstances which gave rise to Mr O'Toole's being charged with offences, is extremely hazy.
20. On Friday 06 October, I pointed out to Ms Kelly that her affidavit did not set out the background to the matter. She acknowledged this in her statement of truth which she handed into the court subsequently on 11 October 2023. The opening paragraph of that statement of truth is as follows:

> "On the previous hearing of this matter the judge in fairness quite reasonably said I had not properly outlined the backstory to this incarceration and that my previous affidavits were relying heavily on

> what I saw happen at trial and my personal experiences and that I have not given sufficient background information. This statement is an attempt to correct this error on my behalf. Part of the reason for this omission is that I was not present at the original eviction by the banks or the second eviction by the defenders and so much of the information I have is second hand. This is not to say that I do not honestly believe it to be credible because I am only relying on information from sources that I believe to be honest. Another key reason for this is that I was of the impression that Martin would be produced to give his account and that this would be more appropriate to hear certain information 'from the horses mouth' as it were to pre-empt any objections based on hearsay".

21. The statement did provide some further information but primarily consisted of a series of complaints about all of the various defendants and aspects of their conduct during the trial.

22. The grounding affidavit of Ms Kelly of 20 September 2023 is very lengthy. Once again a flavour of the affidavit may be seen in the following passages. At para. 3 she says:

> "In my capacity as lawful observer I witnessed first hand numerous disclosure failures, numerous examples of what can at best be described as contradictory evidence which I believe to be more honestly described as perjury but that is not for me to investigate, that went completely unchallenged by the judge and the legal representatives on both sides that should even taken individually have been enough to warrant a mistrial".

At para. 4 she avers:

> "In addition to this I witnessed both sides' legal teams on occasions too numerous to count engaged in misleading the court by referring to the mercenaries who are trespassing on the McGann property after manhandling and assaulting Irish people, including the elderly homeowners, one of whom has a disability, doing their best to defend against this invasion as 'security men'. These men were convicted by the PSA for operating without a licence and had no lawful authority to be there."

Ms Kelly goes on at para. 9 to aver:

> "I have become somewhat involved in this case after Martin discharged his legal team because they refused to take this instruction. I am a bit more familiar with the filing office etc and as Martin is dyslexic, he needs assistance with typing which I was happy to do. I was present as a witness to a meeting with the legal team who told him that the Bar Council had a meeting about his case and informed them that they would be reprimanded if they carried out his instruction".

At para. 11 Ms Kelly says:

> "I witnessed Martin refuse the jurisdiction of this Court for a number of reasons to the judge and asked for time to file paperwork in the High Court as she refused to refer the matter to the Superior Court on a point of law. I witnessed Martina Baxter refuse this request and direct Martin that if he did not turn up to court any morning there was trial his bail would be revoked, and he would be arrested on a bench warrant."

At para. 19 Ms Kelly avers:

> "The trial continued. I was unfortunately not present every day as my personal circumstances and finances did not allow me to do so. On some occasions I had friends who were able to attend and on other days I did not".

At para. 20 she avers:

> "On 16 May, Martin dictated a statement of truth to be given to the judge which was signed by six men and women which I was to read to the court as Martin was refusing to engage with the trial as he had refused jurisdiction and believed it better not to engage further in what he felt was an unlawful trial."

This is included as document 6.

> "This was handed to the clerk before the court started and she brought it to the judge. It was also given to the DPP. The DPP and Judge Baxter acknowledged receipt of the statement."

23. Much of the affidavit relates to Ms Kelly's own interactions with the court. It is clear that she was not present for much of the trial. It is fair to say that she is trenchantly critical of the way in which the trial was conducted and of the conduct of the judge, the lawyers, the Garda Síochána and almost everybody involved with the case. The affidavit is replete with hearsay, speculation and legal theories. In fairness it includes what are carefully researched observations on the case law regarding *habeas corpus*. It was not entirely clear on what basis the applicants purported to represent Mr O'Toole. They are clearly friends and supporters of Mr O'Toole and claimed to have a written authorisation to represent him. There is no reason to believe that they do not have Mr O'Toole's permission to conduct the application on his behalf although it was not clear as to why Mr O'Toole did not swear an affidavit himself if only to verify that he agreed with and accepted the basis of the applicants' application. Both Mr Doocey and Ms Kelly addressed the

court at length at the hearing in relation to what they consider to be the basis on which Mr O'Toole's incarceration should be deemed illegal. These grounds are stated at length in the various items of documentation handed in by Ms Kelly but a short and non-exclusive synopsis would be:

- the alleged failure of the court to facilitate plenary proceedings issued during the trial with a view to halting the trial, complaints in relation to the deficiencies in the evidence, bodycams, CCTV, discovery and so on.
- The question of representation and the suggestion as we have seen in the passage I have read out is that it was represented to Mr O'Toole that his instructions could not be followed.
- Complaints in relation to the arrest process. Numerous complaints regarding the involvement of what was referred somewhat controversially to in the trial as "licensed security men" which were characterised by Mr Doocey in particular as "loyalist thugs". Mr Doocey also referred to what he deemed to be an invasion of Irish territory by these persons from outside the jurisdiction.
- Complaint was made about the lack of forensics. It was alleged that parties had withheld evidence. The fact that certain parties were alleged to have been assaulted in an attempt to recover possession of a property was mentioned.

*** Judge stops here as there is suggestion that proceedings are being recorded ***

- Ms Kelly was making a complaint about what she saw to be the withholding of evidence. The fact that certain parties – an elderly couple – were assaulted in an attempt to recover possession of a property. Ms Kelly

made complaint about the fact that a statement made by her was not taken into account by the court and that she wasn't allowed make it.

- There were various procedural complaints about the execution order. It was reiterated on a couple of occasions that there was in fact no evidence against Mr O'Toole and that he was "completely innocent".
- Certain complaints were made as to what was said by counsel in open court. There were complaints about the quality of the defences put forward by the various co-defendants and there were also substantial complaints which are fleshed out in the affidavit and the submissions that certain defences should have succeeded but didn't.

24. Counsel for the governor accepted that a third party generally had a right to apply for *habeas corpus* on behalf of persons detained. In fact, Article 40 makes that clear. It states that an application can be made on behalf of a person detained and counsel in fact didn't raise any particular objection to Mr Doocey or Ms Kelly in representing Mr O'Toole save to comment upon the view that the court should take of the quality of the evidence presented in support of the Article 40 application.
25. Counsel for the governor said that the detention in the present case was on foot of an order of court which was valid on its face and that there was no suggestion to the contrary. In such circumstances the court could only order an enquiry in circumstances where there was a fundamental denial of justice.
26. Counsel referred to the decision in *Ryan v Governor of Midlands Prison* [2014] IESC 54. That was an *ex tempore* decision of the Supreme Court with the judgment given by Chief Justice Denham. At para. 11-13 she said as follows:

"11. As the respondent was a detained person, he is entitled to apply for an enquiry under Article 40. However, the High Court had received certification from the appellant exhibiting a valid warrant for detention and that order was sufficient to establish the validity of the detention.

12. The respondent collaterally attacked his continued detention by urging that the Minister's decision of the 16 April, 2014, was procedurally flawed. The question arises as to whether this attack is within Article 40.

13. The Court follows and applies the statement of law given in *FX v Clinical Director of the Central Mental Hospital* [2014] IESC 01, where it was stated at para. 65 and 66:

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

27. That passage was specifically relied upon by counsel for the governor. His point was that Mr O'Toole had not proceeded with an appeal. The applicants in this case had not given any reason as to why an appeal could not be pursued. That is not strictly correct to the extent that the applicant certainly did address the question of an appeal and I will come to that.

28. Counsel suggested however that all of the grounds put forward by the applicants were matters which would normally be the subject of an appeal. The decision that

Mr O'Toole was guilty of the charges against him was that of a jury and the onus, counsel submitted, is on the applicants to show that there is an exceptional reason why *habeas corpus* is more suitable than an appeal.

29. Counsel for the DPP adopted those submissions. The same application had been run before Mr Justice O'Higgins and been rejected. He submitted that to revisit the application on the same grounds was inappropriate. He said that the application was clearly a collateral attack on the conviction in circumstances where an appeal or judicial review is more appropriate. He said not only that, but the applicants wanted a broader enquiry which would interrogate a number of issues not directly relevant to the legality of the detention.

30. As regards standing, counsel said that the applicants appear to want Mr O'Toole to be freed to assist them in their own case. He made the point that Mr O'Toole could have participated in this application but had not. He didn't bring his own application. He didn't swear an affidavit in this application. He could have made a prisoner application in writing which is an application which prisoners are entitled to make in writing seeking orders of the court and which are routinely dealt with by a rota of judges but he did not do any of those.

31. Counsel submitted that in all the circumstances the applicants had not reached the threshold to warrant an enquiry being ordered.

32. The legal principles are very clear and are set out in various cases from the *Charles Wilson* decision onwards. In *Ryan*, subsequent to the portion of the judgment which I have already read out, the Chief Justice stated as follows:

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

> ‘21. There are many instances where, within jurisdiction, a court may fall into an error of interpretation or base its decision on a mistaken view of the law. This does not in consequence remove jurisdiction. There are legal structures in place to deal with such commonplace situations and these fall outside the obligation of the High Court to enquire into and to declare that a detained person is either lawfully detained or not’. [Emphasis added]

15. The proposition that not every defect or illegality attached to detention will invalidate that detention has long been established.

16. This is not a novel exposition of the law. In McDonagh v Frawley [1978] IR 131 at 136 it was stated:-

> ‘The stipulation in Article 40, s.4, sub.s.1, of the Constitution that a citizen may not be deprived of his liberty save ‘in accordance with law’ does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded.’

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

> ‘The mandatory provision in Article 40, s.4, sub-s.2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained ‘in

> accordance with the law' is but a version of the rule of *habeas corpus* which is to be found in many Constitutions. The expression 'in accordance with the law' in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if – but only if – the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.'

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

33. In a very helpful recent judgment *McGee v Governor of Castlerea Prison* [2023] IEHC 248, Simons J addressed the parameters of Article 40.4.2 enquiry. He stated as follows at para. 46:

> "46. The parameters of the High Court's jurisdiction to conduct an enquiry 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 enquiry 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 enquiry 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. 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'…
>
> '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."

34. Thus, while there is a low bar as the court commented in the *Simeon Burke* case, this does not mean that a doubt as to the legality of a conviction automatically entitles an applicant to an enquiry. As O'Donnell J (as he then was) stated in *S. McG*, the release of an individual notwithstanding an order convicting him is exceptional and will only occur where the breach is "so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion".

35. In the present case, the detainee Mr O'Toole was convicted after a trial before a jury lasting over three months for at least some of which Mr O'Toole was legally represented. He appears to have discharged his legal team at some point. This is referred to in Ms Kelly's affidavit at para. 72 where she averred as follows:

> "There is also the serious matter of Martin having to discharge his legal team because the Bar Council apparently told them that they would be penalised for doing so. This in itself is unbelievable to me and in my opinion repugnant to the essence of natural justice that a defence team would take the instruction of an external party rather than their own client facing serious criminal charges that eventually received a sentence of fifteen years imprisonment. Regardless of the content of the instructions, and I am not quite sure what these instructions were, is a man not entitled to conduct his own defence as he so chooses."

36. Ms Kelly, very fairly in that paragraph, acknowledges that she is not aware of what the instructions were. The difficulty that faces this Court is knowing what actually took place during the trial. In relation to this particular issue, this Court can't be expected to form a view in circumstances where Mr O'Toole, who is the only person who could say what instructions he gave, or what he was told by the Bar Council, has not sworn an affidavit.

37. In relation to the trial itself, one must assume in a trial which took over three months in the Circuit Court the admissibility of evidence was repeatedly tested during the course of the trial. In fact Ms Kelly in her submissions referred to "numerous applications in the absence of the jury that the jury were almost more outside the courtroom than in it". That suggests that what was happening was applications being made to the judge in the absence of the jury.

38. In such circumstances the onus is on the applicants to establish an exceptional circumstance which goes fundamentally to the jurisdiction of the trial court. I have already been through some of the complaints made by the applicants. They can be categorised generally in the following terms: complaints about the ability to progress a constitutional challenge by plenary summons which the applicants sought to file during the file in May 2023 seeking orders stopping the proceedings; complaints about various aspects of the conduct of the trial; complaints that the common law defence of necessity did not avail Mr O'Toole; that he was not afforded reasonable accommodation; complaints about the failure of the joint enterprise defence; and complaints about evidence such as bodycam evidence, CCTV, discovery, disclosure and so on.

39. In relation to the joint enterprise defence, at para. 75 of her affidavit Ms Kelly says:

> "I would also argue that the charge of joint enterprise is fundamentally flawed at its core on a criminal level because it is essentially holding an individual with freewill and agency responsible for the actions of another individual with his own freewill and agency by mere association and no evil action or intent and to be tried for the crime of another person if indeed crime it was, which I dispute, which would seem to me to be repugnant to natural justice and the constitutional right to freedom and association and the nature supposition that all people are capable of self-determination."

40. Essentially, I understand that to be an argument that despite there being no evidence of Mr O'Toole's culpability he was convicted on the basis of it being a joint enterprise with other people and that that is a basis upon which he should not

have been convicted. I should say that is developed at paras. 78, 79 and 80 of Ms Kelly's affidavit.

41. Any complaint about the conduct of the trial or issues of legal representation would normally be the subject of an appeal or possibly a judicial review. Courts make mistakes but that is why we have courts of appeal. Other complaints about other matters extraneous to the trial process do not go to the issue of whether or not the detention is legal. It is clear that Mr Doocey and Mr Kelly are very exercised by wider issues, many of which they canvassed during their submissions, such as the integrity generally of the justice system, the use by banks of operatives from outside the State, the alleged bias of the system (including the courts it must be said) in favour of banks and so called "vulture funds". While these may be matters about which Mr Doocey and Ms Kelly feel passionately, they have no relevance whatsoever to the sole and narrow issue of whether Mr O'Toole's detention is illegal in such a manner as to warrant an enquiry as to *habeas corpus*.

42. The applicants seem to me to be operating under a misapprehension. They disagree profoundly with the verdict and sentence against Mr O'Toole. They regard him as completely innocent, lacking both the *actus reus* and the *mens rea* to commit the offences of which he was convicted. Any decision by the court or jury or any part of the process which led to Mr O'Toole's conviction must of necessity be tainted by error, collusion or corruption. This is the prism through which they view the matters to which they refer.

43. However, an enquiry under Article 40 is predicated on the existence of a fundamental breach of the principles of justice so exceptional that an appeal is not sufficient to ensure that justice is done. This occurs in certain cases where a patent

defect of jurisdiction has occurred. There is no evidence before me which would suggest that there is any matter relevant to the question of legality of Mr O'Toole's incarceration which could not be dealt with on appeal.

44. In this regard, I would refer again to the state of the evidence on this application which makes it all but impossible for this Court to evaluate matters which took place before the Circuit Court. General allegations are thrown out without any substantiation. The affidavit is replete with hearsay. Ms Kelly's affidavit relates in large part to her own interaction with the court. She readily concedes that she was not present for significant periods of the trial.

45. The lack of involvement of Mr O'Toole in this application is unfortunate. He is the person best placed to say what occurred at trial: what his interaction with his lawyers was; what the circumstances which led to the arrest and sentence were and the trial were. He has chosen not to do so. I do not accept that his dyslexia is a sufficient explanation for his complete lack of involvement in this application.

46. The closest the applicants came to explaining why Mr O'Toole disdains the option of an appeal is in the submission furnished by Ms Kelly in the second paragraph of her submissions in which she says:

> "Judge O'Higgins helpfully pointed out that the respondents might take the view that the Court of Appeal would be a more appropriate remedy in this instance but this is not acceptable to us. Firstly, because Martina Baxter already refused the application from one of the defendants, Patrick PJ Sweeney for bail, until such time as the appeal was conducted, a man whose wife and very elderly mother are both seriously ill with cancer and probably dying. I do not know these people and I was not allowed into the court for the sentencing hearing. So this is second hand information but I was told it was

raised. Given the difficulties Martin faces being unable to secure appropriate assistance with regard to his disability dyslexia, which I can produce medical evidence of to the court if necessary, that the circumstances surrounding this incident and the inherent complexity of the case conducting an appeal with Martin in jail is not a just remedy. Furthermore, Martin has indicated that he does not favour this route as he does not believe that the original court had jurisdiction to hear the case in the first place for reasons that we would really need Martin to explain for himself in relation and his personal beliefs on individual sovereignty to the transfer of the case from Roscommon to Dublin."

47. At paras. 82 and 83 of her affidavit Ms Kelly said:

"82. The respondents may claim that this is not the appropriate method to gain remedy in this case but we have no access to Martin. He has no access to assistance as he is entitled to under due process and reasonable accommodation for his dyslexia grounds. We have exhausted several other methods such as making a complaint to the Judicial Council before sentencing was passed and making a similar report to the gardai about the possible criminal implications in what to me is clear evidence of collusion, clear breaches of the Perjury Act and a myriad of other complaints outlined above.

83. We did attempt to file the originating summons with Martin as a co-plaintiff, but the Central Office would not accept this despite myself and Joe having his written authority to act on his behalf to act as special trustees and Joe has been in contact with Martin by phone and discussed this with him. In order that Martin, and indeed myself and Joe to fully prepare and present our case, Martin needs to be free to work on it with us and given the massive disparity of resources between the plaintiffs and the State funded defendants, it

> would clearly seem that we are already at a disproportionate disadvantage and it would be in the interest of proportionality that this disadvantage to be removed as it would cost the other side and society in generally nothing and indeed shield them from potential liability based on the eventual outcome of the case."

48. It seems therefore that the applicants hope that Mr O'Toole will be released on foot of an enquiry so that he will be free to assist them with a case in which an agenda which goes far beyond the legality of Mr O'Toole's detention is being pursued. This is not an appropriate purpose for which to seek an enquiry under Article 40. It is difficult to avoid the conclusion that the applicants are indeed mounting a collateral attack on Mr O'Toole's conviction in the hope of securing his freedom.
49. In all the circumstances, I don't consider this an appropriate case in which to order an Article 40 enquiry and I refuse the application.