



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 304
Appeal Record No.: 2019/410

**Birmingham P
Edwards J.
Ní Raifeartaigh J.**

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

BETWEEN/

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA
SHANE HOGAN)**

PROSECUTOR

- AND-

VLADIMIR MALAI

DEFENDANT

**JUDGMENT of the Court delivered by Ms Justice Ní Raifeartaigh on the 11th day of
November, 2020**

1. This is a consultative case stated by Judge James O'Donoghue from the Circuit Court pursuant to s.16 of the Courts of Justice Act 1947 on a point of law. In general terms it relates to the duties of a member in charge with regard to the provision of language interpretation when an arrestee who is a foreign national is brought to a Garda station. The specific circumstances in which this arises are as follows.

2. At a sitting of Dublin Circuit Criminal Court hearing appeals against orders of the District Court, the accused Mr. Malai appeared to answer a criminal complaint on a charge sheet which alleged that he had driven a mechanically propelled vehicle while there was present in his body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 22 microgrammes of alcohol per 100 millilitres of breath contrary to ss.4(4)(a) and (5) of the Road Traffic Act 2010, an offence commonly and colloquially known as “*drink driving*”. He pleaded not guilty and the case proceeded to trial. The prosecutor called one witness, the prosecuting Garda.

3. The District Judge found the following facts proved or admitted or agreed:-

- (a) Garda Hogan gave evidence that on 13th December, 2013 at approximately 1:00am, he observed a red Skoda Octavia driving up Bath Avenue towards Grand Canal Upper. The vehicle was dragging a parking cone under the front bumper as it drove along. He activated his blue lights and siren and indicated for the driver to stop which it did. He approached the car and spoke to the driver and requested the driving licence. There were three other passengers in the car. Garda Hogan said that while speaking to the driver, Mr. Malai, he noticed a smell of alcohol from his breath, that his eyes were “*glassy*” and that his speech was “*slurred*”. He said that based on the manner of driving and “*indicative factors*”, he formed the opinion that the driver was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. He told him he had formed such an opinion and was arresting him for an offence contrary to s.4 of the Road Traffic Act 2010. He said that he explained to the driver in ordinary language that he was arresting him on suspicion of drink driving.

- (b) Garda Hogan stated that he cautioned him and then asked him if he had been drinking to which the accused responded that he had two drinks at a Christmas party. The accused was not handcuffed and was conveyed to Irishtown Garda Station.
- (c) Garda Hogan stated that he arrived at Irishtown Garda Station at 1:13am and he was introduced to the jailer, Garda Adrian Kelly, who made entries in the custody record and provided the defendant with notice of rights under the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987. The defendant signed the custody record in acknowledgment of having received his rights.
- (d) Garda Hogan said he commenced a period of observation of the defendant for twenty minutes during which time he observed the defendant consume nil by mouth. He explained to the defendant at the beginning of the period that he was commencing a period of observation and that he was fully trained in the use of the apparatus for determining the concentration of alcohol in the breath and explained the procedure that would be followed. Garda Hogan stated that the defendant indicated that he understood.
- (e) Garda Hogan stated that at 1:33am together with another garda he brought the defendant to a doctor's room for the purpose of providing a breath sample. Garda Hogan entered the details of the prisoner into the machine and selected the language English.
- (f) Garda Hogan stated that at 1:37am he made a requirement of the defendant pursuant to s.12(1)(a) of the Road Traffic Act 2010 saying that he was requiring him to provide two specimens of breath by exhaling into the apparatus for the purpose of determining the concentration of alcohol in his breath. He also informed the

defendant that the failure or refusal to comply with the requirement was an offence under s.12(2) of the Road Traffic Act 2010 for which there was a penalty on conviction of a fine not exceeding €5,000 or imprisonment for a term not exceeding six months or both. He also informed the defendant that failure or refusal to comply with the requirement could result in disqualification for a period of up to four years for the first offence and not less than six years for a second or subsequent offence.

- (g) Garda Hogan stated that at 1:42am the defendant provided two breath specimens and the machine produced two identical receipts which showed a concentration of 55 microgrammes of alcohol per 100 millilitres of breath. Garda Hogan separated the statements and handed them to the defendant who also signed both. The defendant retained one copy and handed the remaining copy back to Garda Hogan.
- (h) Garda Hogan returned the defendant to the custody area and he was later charged.
- (i) Under cross-examination, Garda Hogan stated that the manner of driving was not dangerous or careless but it was the fact of the traffic cone under the car which gave rise to a suspicion. He confirmed that the accused pulled over when requested and cooperated in answering questions. One of the matters put to Garda Hogan was that he was mistaking the defendant's poor English and/or accent with slurring his speech to which he replied that he did not accept this and said he was satisfied that the defendant could speak English.
- (j) Other matters were put to the Garda in cross-examination which are not relevant to this case stated.
- (k) Under cross-examination, Garda Hogan could not recall if he was advised by the member in charge of whether the latter was satisfied that an interpreter was not required or whether the member in charge informed the accused that an interpreter was not required. He stated that the accused did not request an interpreter. It was

put to the Garda in cross-examination that the custody record did not contain any information in the section concerning foreign nationals and that it was not indicated whether or not an interpreter was required. He could not comment on this but maintained that he himself was satisfied that the defendant did not require an interpreter. It was put to him that the defendant's level of English was not to a level as being made out by Garda Hogan and that it was clear that he required the assistance of an interpreter for the court hearing. Garda Hogan did not accept this and stated that the defendant spoke English well.

4. Defence counsel made an application for a direction of no case to answer on two grounds, the second of which only is relevant to this case stated. This was the submission that the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Siochána Stations) Regulations, 2013 had not been complied with and therefore the detention of the defendant was unlawful, and that any evidence which flowed therefrom was inadmissible. It was submitted that the Regulations had not been complied with insofar as there was no evidence that the member in charge had enquired or satisfied himself that an interpreter was or was not required. The prosecutor submitted that there was no evidence before the court to demonstrate that the Regulations had *not* been complied with, as Garda Hogan had given evidence that the accused spoke good English although he was from Romania, and that he had complied with all requirements and signed for receipt of his notice of rights in English in the Garda's presence.

5. The trial judge said:-

"I noted that it appeared that the defendant was reliant on the interpreter for the duration of the hearing. I did not accept the arguments of the prosecution and I held that there was a breach of 2013 Regulations in two respects:

- (a) That there was no evidence that the member in charge, had, *if he determined that an interpreter was not required as it was presumed he must have*, informed the defendant of this and of the reason for same, and
- (b) That no information was recorded in the relevant section of the custody record in respect of interpretation in the Courts of the 2013 Regulations.”

(Emphasis added)

6. For the purpose of answering this case stated, it is important to note the precise wording of the above. First, there was no finding as such by the trial judge that the accused did not understand English sufficiently to follow events during the investigative stage or at the trial; he confined himself to an observation that the accused appeared to be reliant on an interpreter throughout the trial without taking that to any further conclusion. Secondly, there was no finding that the member in charge had failed to carry out an assessment of whether or not the accused needed an interpreter at the Garda station. On the contrary, the Judge said that he was presuming that the member in charge had done so (as appears from the words italicised above). Thirdly, the breaches actually found were (1) that the member in charge did not inform the defendant of his (presumed) opinion that the accused did not need an interpreter; and (2) that the member in charged failed to make note of his (presumed) opinion in the custody record. Thus, the breaches found were premised upon an implicit finding that the member in charge had conducted an assessment and concluded that the detainee did *not* require an interpreter. The specific breaches were that he did not inform the detainee of that view nor did he note it in the custody record. These are the parameters within which the question posed must be answered by the Court.

7. Having determined that there was a breach of the 2013 Regulations in those terms, the trial judge invited the parties to deal with the consequences thereof. The prosecutor argued

that the evidence was admissible and the accused inadmissible, on the basis of authorities discussed below.

8. The trial judge stated the following question of law for determination by the Court of Appeal:-

“Having determined that there was a breach of the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013, is the detention of the defendant therefore rendered unlawful or any evidence which flowed therefrom inadmissible in the within proceedings?”

9. It may be noted that the question as posed refers to two distinct legal issues: (1) was the detention unlawful, and (2) was the evidence rendered inadmissible?

The Legal Framework

10. The European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013 (hereinafter referred to as *“the 2013 Regulations”*) give effect to Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. Article 2 para. 4 of the Directive states that Member States:-

“[...] shall ensure that a procedure or mechanism is in place to ascertain whether the suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter”.

11. Under Regulation 3 of the 2013 Regulations:-

“An arrested person, other than a person who is being dealt with through the medium of the Irish language, who does not speak or who does not understand the English language shall have the right while in custody to the assistance, at no cost, of an interpreter and to the translation, at no cost, of the documents specified in these Regulations.”

12. Regulation 4 of the 2013 Regulations provides:-

“(1) Where it appears to the member in charge, or the member in charge is made aware, that an arrested person may require interpretation while in custody, the member in charge shall take such steps as are reasonable in all the circumstances to verify if the person requires the assistance of an interpreter.

(2) In deciding whether the assistance of an interpreter is required, the member in charge shall consider whether interpretation is necessary to ensure that the arrested person knows the offence or other matter in respect of which he or she has been arrested, will be able to communicate effectively with his or her solicitor and will be able to appreciate the significance of questions put to him or her or of his or her answers during interview. In case of doubt it shall be presumed that interpretation is required

(3) Where the member in charge decides that the assistance of an interpreter is required, the member in charge shall arrange, without delay, for the attendance of an interpreter at the station and shall record this in the custody record.

(4) Where the member in charge decides that the assistance of an interpreter is not required, the member in charge shall inform the arrested person of this and the reasons for the decision. This information and any response made by the arrested person shall be recorded in the custody record.”

The submissions of the parties

The submissions on behalf of the accused

13. Counsel on behalf of the accused relies upon the wording of the 2013 Regulations as well as the Directive which gave rise to it. He references certain dicta of Donnelly J. in *DPP v. Savickis* [2019] IEHC 557, a case where the pre-trial interpretation service which was provided for an accused person had failed to meet the requisite level of skill or quality

required. Donnelly J. considered the relationship between the constitutional guarantee of a fair trial and the issue of interpretation and made it clear that the trial court could be concerned with the issue of what took place during the pre-trial investigative procedure under the rubric of the fair trial guarantee.

14. Counsel submits that in the present case it was an accepted fact that English was not the first language of the defendant and that the defendant was reliant on the assistance of an interpreter for the hearing before the trial judge. In those circumstances there was *prima facie* evidence that the defendant “*may*” require the assistance of an interpreter in accordance with Regulation 4(1) of the 2013 Regulations such as to put the member in charge on notice that he was obliged to verify whether the assistance of an interpreter was required. Once the member in charge had decided not to obtain an interpreter he was required to; (1) inform the arrested person of this and the reasons for the decision and (2) put that on the custody record. There was no evidence of compliance with this and therefore there had been a breach of the 2013 Regulations.

15. Counsel submits that the consequence of a breach of the Regulations is different as between the 2013 Regulations and the 1987 Regulations (i.e. the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987), because there no equivalent provision to s.7(3) of the Criminal Justice Act, 1984, which provides that a breach shall not of itself lead to the inadmissibility of evidence.¹ Counsel submits that therefore the decision *DPP v. Spratt* [1995] 1 I.R. 585 does not apply.

16. Counsel submits that where there had been a breach of the 2013 Regulations, the court could not rely on the evidence that a lawful demand for a breath sample was made where it

¹ Criminal Justice Act, 1984 s.7(3): “A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.”

could not be proved that the defendant understood the requirement made of him; it was for the prosecution to prove in the affirmative that such a requirement was made and understood.

17. Counsel for the accused submits that he accepts that the effect of decisions such as *Spratt and Walsh v. District Justice O’Buachalla* [1991] 1 I.R. 56 means that there needs to be a nexus between the breach and the evidence sought to be inadmissible. However, he submits that there is a nexus between the Garda making the legalistic demand that the detainee provide a breath sample, which is a form of self-incrimination, and the individual’s understanding of that requirement and his ability to defend himself. He submits that the suspect is disabled from defending himself because the only witness then as to the validity of the requirement made is the Garda himself and the accused himself cannot give evidence of it. He submits that it has to be clear that the precondition for the exercise of the power has been met and the precondition here is the making of a requirement under s.12 of the Road Traffic Act 2010; in the circumstances of this case, the accused is unable to defend himself as to whether s.12 was complied with. This is distinguishable from a situation, he says, like *Spratt and O’Buachalla* where someone is seeking to avail of a right that has nothing to do with the obligation on him to give a sample.

18. Counsel also submits that the problem in this case is that the member in charge simply failed to make any assessment of whether the accused needed an interpreter.

19. In answer to a question from the Court to the effect that the evidence of the Garda was that the accused did understand English, combined with the fact that he had a legal obligation to provide the breath sample, counsel submits that the trial judge did not appear to have accepted the Garda view that the accused understood English, given his comments about the interpreter in court having been availed of by the accused throughout the trial.

The submissions of the prosecutor

20. Part of the prosecutor's submission appeared to question the finding of the trial judge that there had been any breach of the Regulations, whereas the case stated had been formulated on the basis of there having been a breach and furthermore a breach of a particular kind. Accordingly, I will not deal further with this aspect of the prosecutor's submission.

21. On the issue of the consequences of the actual breach of Regulations found, counsel relies on a number of decisions concerning the taking of samples or specimens following a breach of certain rights. This line of authority is particularly associated with the decision in *O'Buachalla*, where the accused had provided a specimen of blood after he asked for a solicitor but before the solicitor was provided. The High Court (*per* Blayney J.) said that the evidence had been obtained after the violation but not as a result of the violation, emphasising the need for a causal connection between evidence obtained and the relevant breach of right. He said that the applicant was obliged by statute to give a specimen of blood or urine and no advice from a solicitor could have altered that. Accordingly, his being refused access to a solicitor did not in any way lead to the specimen of blood being obtained. Counsel submitted that the same principle applied in the instant case because the defendant was obliged by statute to give a specimen of his breath and that no access to an interpreter could have altered that reality.

22. Reference is also made *inter alia* to the decision in *Spratt* which also involves the taking of samples/specimens and attempted exclusion of evidence by reason of breach of rights, where the reasoning of *O'Buachalla* was applied. Counsel also relies on *DPP v. Cullen* [2001] IEHC 21, a case involving a urine sample, where the High Court (*per* Ó Caoimh J.) held that the District Court would have to be satisfied that the impact of the non-compliance with the Regulations was one which had a material effect on the case for the prosecution

23. Counsel also relies on certain comments by O'Malley J. in *DPP v. Avadenei* [2017] IESC 77 as to the appropriate approach of a trial judge, depending on the categorisation of the issue which arises.

24. Counsel submits that the height of the defendant's case is that the prosecution did not prove that he understood the requirement to provide a sample and therefore his detention was unlawful but that this submission does not get "*off the ground*" when one considers that a sample was in fact provided. It might be different if he had failed to provide a sample but having regard to the fact that he did provide a sample, any perceived prejudice is non-existent.

25. Counsel submits that there was evidence that this accused understood English and that he had co-operated with the Garda in answering questions when his vehicle was stopped. Therefore this was not a case where there was any real issue about whether the person understood the English language; instead, it is confined to the two breaches actually found by the trial judge which are premised on the view that he did *not* need an interpreter. Counsel suggests that the situation might be a different one if the prosecution were one for refusal to provide a sample, but this is not the situation here; the accused was required to provide the sample and did so, and therefore there was no causal link between the precise breaches found by the trial judge or any prejudice to the accused.

26. In relation to what should trigger a member in charge engaging in such an assessment, counsel for the prosecutor submits that what is important is the view of the Garda who interacts with the person at the side of the road; if this Garda does not report any difficulties, the member in charge need not engage with the issue. Counsel for the accused in reply to this point says that there must be a common-sense approach to this and that the fact that the arrestee had a Romanian name and was obviously a Romanian national should have triggered

the inquiry and required action on the part of the member in charge; furthermore, the actions required under the Regulations are not onerous and they should be carefully observed.

Decision of the Court

The precise parameters of this case

27. The Court must confine its decision to the question actually posed and the breaches actually found by the judge. A feature of the case is that the trial judge's comments were somewhat ambiguous on two matters; (1) whether the detainee had adequate English or instead needed an interpreter, and (2) whether the member in charge had addressed his mind to the issue of interpretation at all. Regarding the first of these, he made the observation that the accused appeared to be reliant on an interpreter during the trial, but he did not actually make a finding that the accused had need of an interpreter, and there was evidence from the Garda that he had interacted with the accused in English without difficulty. The Court will treat this as a case where there was no finding that the accused had inadequate English to understand what was happening during his pre-trial detention.

28. Secondly, the judge did not explicitly find that the member in charge had addressed his mind to the issue of whether the accused required interpretation; rather, with the use of the word "*presumed*" (in the passage set out earlier), he made an implicit rather than explicit finding that the member in charge *had* addressed his mind to it and concluded that the accused did *not* need interpretation. This finding is also implicit in the actual breaches found. Accordingly, the Court will proceed on this basis also i.e. that this is not a case of a member in charge failing to address the issue of whether an accused required an interpreter.

29. Further, the trial judge found two specific breaches of the 2013 Regulations; the failure of the member in charge to inform the detainee that he was of the opinion that the detainee did not need an interpreter, and a failure to note this in the custody record. It is important that the Court answer the question in light of these specific and positive findings.

30. Having regard to the above, it is perhaps important to record what the Court is *not* dealing with in this judgment. The Court is not being asked to deal with a situation where an accused person in fact needed an interpreter and was deprived of one at the pre-trial stage, which would be an extremely serious matter. Nor is the Court required to indicate what precisely would trigger the need for an assessment by a member in charge of whether a particular detainee needed an interpreter. Nor is the Court being asked to deal with a situation where the member in charge failed to address his mind to the issue of interpretation at all. The breaches found by the judge are the specific breaches set out above, and the question for the Court relates to the *consequences* of those breaches, not whether he should have reached those conclusions in the first place.

31. The question asked of the Court is whether, those particular breaches having been found, the detention was thereby rendered unlawful and/or the evidence (the sample evidence) rendered inadmissible.

The question posed

32. *Unlawful detention?* There is no basis for concluding that the detention was unlawful in the present case by reason of the two specific breaches of the Regulations identified by the trial judge. The accused was lawfully arrested and lawfully detained and this was not in issue in the case; in truth, the accused did not press the argument that the breaches found had rendered the detention unlawful. The submissions of counsel rightly focused on the admissibility of the evidence arising from the breath sample, having regard to the breaches of the Regulations found by the trial judge. The Court will therefore deal with the case as a question relating to the admissibility of evidence.

33. *Admissibility of evidence?* It is true, as the counsel for the accused points out, that there is no provision in the 2013 Regulations equivalent to s.7(3) of the Criminal Justice Act, 1984 making it clear that a breach of the Regulations does not automatically render evidence

obtained inadmissible. However, it does not follow from this absence that any breach of the 2013 Regulations in connection with a detention renders the evidence obtained during the detention automatically inadmissible. The default position, in the absence of any statutory guidance one way or another, is that the general Irish legal principles as to the admissibility of evidence come into play.

34. In this regard, the Court notes the observation of O'Malley J. in *Avadenei* that there is a tendency in the case of road traffic cases to cite authorities relating only to other road traffic cases and not to anchor the analysis in more general principles relating to the admissibility of evidence (see paragraph 78 of her judgment). With this in mind, the Court wishes to provide an answer to the question posed by the trial judge in a manner which remains within the four walls of ordinary Irish principles relating to the admissibility of evidence.

35. In accordance with the general principles relating to the admissibility of evidence, it seems to the Court that the first question to be asked is whether (1) the breaches of Regulations identified by the trial judge amount to a breach of a constitutional right, in which case the principles in *The People (Director of Public Prosecutions) v. J.C.* [2017] 1 I.R. 417 apply, or (2) alternatively, there has been a breach of a right or duty conferred by law (but which does not amount to a breach of constitutional right), in which case the principles relating to illegally obtained evidence applies; see *Attorney General v. O'Brien* [1965] I.R. 142.

36. *Was there a breach of a constitutional right in the present case?* As was discussed in *DPP (at the Suit of Detective Garda Patrick Fahy) v. Savickis* [2019] IEHC 557, the question of language interpretation is a matter which can be seen as a matter falling within the embrace of the constitutional right to a fair trial, whether it arises during a trial or during Garda detention. However, it does not follow that every breach of the 2013 Regulations necessarily amounts to a breach of a constitutional right. A breach of the Regulations and a

breach of a constitutional right *may* coincide in a particular case but this does not mean that every breach of the Regulations *necessarily* involves a breach of the constitutional right. Some aspects of the Regulations are administrative in nature and do not necessarily trench on the core issue of whether the person needs the assistance of an interpreter to understand what is going on.

37. In the present case, the Court's view is that the identified breaches of the Regulations (the failure to record, and inform the detainee of, the member in charge's opinion that he did *not* require interpretation) were essentially administrative in nature and did not amount to a breach of constitutional rights although they did indeed amount to breaches of the Regulations. The issue therefore falls to be considered under the principles relating to the obtaining of evidence where there has been illegality, i.e. the *People (AG) v. O'Brien* principles.

38. If the Court is correct in its view that what has taken place is a breach of rights/procedures under the Regulations rather than a matter of constitutional breach, the situation presenting is simply that governed by *People (AG) v. O'Brien* [1965] I.R. 142, where Kingsmill Moore J. said (at p. 160):-

"It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions, and that the answer to the question depends on a consideration of all the circumstances. On the one hand, the nature and extent of the illegality have to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it the result of an ad hoc decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial and technical nature or was it a serious invasion of important rights the

recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provide some excuse for the action?"

I do not understand this approach to “*illegally obtained evidence*” to have been affected by the decision in *The People (Director of Public Prosecutions) v. J.C.*.

39. A more recent formulation of the correct approach is that set forth in *Avadenei*. In this regard, O’Malley J said (at para. 90):-

“Having regard to the authorities, there should in my view be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible..

40. *Is the question of the causal link relevant?* It is interesting to consider the authorities relating to the need for a causal link between the breach of a right and the evidence sought to be rendered inadmissible, to which the Court was referred to, including *Walsh v. O’Buachalla* and *Spratt*. These authorities discussed the question of a causal link in the context of a breach of constitutional rights; and the Court has expressed its view above that there was no breach of constitutional rights in the present case. However, the logic of the causal link requirement appears to the Court to be of relevance in the case of any breach of right (whether one classifies the context as one of a breach of a constitutional right or not), at least as a relevant consideration in deciding whether or not evidence should be admitted in the exercise of the court’s discretion. The question of whether the breach caused the evidence to be obtained (or not) would be a factor to feed into the overall discretion as to whether to admit the evidence in question.

41. If that is so, the Court is of the view that in the present case there was no nexus between the breach of the Regulations and the evidence sought to be rendered inadmissible. A demand was made to provide a breath sample; a sample was provided. The situation might perhaps be different if the offence charged was a failure to provide a sample or specimen in circumstances where there was a doubt as to whether the demand had been understood by a non-Irish national who had no interpreter. That is not the situation arising here. The Court therefore finds, if it is necessary and appropriate to do so, that there was no causal link between the breaches found and the evidence obtained. Insofar as this is relevant to the exercise of discretion by the trial judge, it is a factor weighing in favour of the admissibility of the evidence.

42. It will be recalled that counsel on behalf of the accused argued that the effect of the breach in the present case is that the suspect is disabled from defending himself because he is the only witness as to the validity of the request for the sample (other than the Garda who made the request) and the accused himself cannot give evidence of it. He submits that the prosecution must prove that the precondition for the exercise of the power has been met and the precondition here is the making of a requirement under s.12 of the Road Traffic Act; but in the circumstances of this case, the accused is unable to defend himself as to whether s.12 was complied with. Counsel submits this is the prejudice in the present case. However, this is premised on the view that the accused did not understand what was happening, and this is not within the parameters of the case sent to the Court, as discussed earlier.

43. Accordingly, the case stated will be answered as follows:-

“Question: Having determined that there was a breach of the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Siochána Stations) Regulations 2013, is the detention of the defendant therefore rendered

unlawful or any evidence which flowed therefrom inadmissible in the within proceedings?

Answer: 1. The breaches of the Regulation found by the trial judge in the circumstances of the case do not render the detention of the accused unlawful. 2. As to the admissibility of the evidence obtained by means of the breath sample, the trial judge has a discretion to admit or exclude the evidence in light of the facts of the case in accordance with the ordinary principles relating to the admissibility of evidence relating to evidence obtained in a context where there has been an illegality but not a breach of a constitutional right. In this regard, it is relevant that there is no causal link between the breaches of the Regulations and the obtaining of the breath specimen. However, the trial judge should consider all of the relevant factors in light of the caselaw in exercising his discretion as to whether or not to admit the evidence in question.”