APPROVED **[2023] IEHC 625**

THE HIGH COURT

2022 1027 SS

IN THE MATTER OF A CONSULTATIVE CASE STATED PURSUANT TO SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

JONATHAN O FLAHERTY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 November 2023

INTRODUCTION

1. This matter comes before the High Court by way of a consultative case stated from the District Court. The case stated raises a net question of statutory interpretation in respect of the powers of An Garda Síochána under the Road Traffic Act 2010. More specifically, the issue is whether a member of An Garda

Síochána has an *implied* statutory power to require a driver, who has provided an oral fluid specimen, to remain at a roadside checkpoint until such time as the said specimen has been analysed for the presence of drugs.

2. On the facts, the defendant had been told by a member of An Garda Síochána that he was required to remain at the roadside for a period of up to one hour. The guard accepted, in cross-examination, that he had clearly communicated to the defendant that he was not free to leave the checkpoint until such time as the analysis was completed. The guard went on to state that if the defendant had tried to leave the checkpoint while the analysis of the oral fluid specimen was pending, he would have prevented the defendant from leaving. Under the provisions of Section 10 of the Road Traffic Act 2010, it is a criminal offence to fail to comply with a "*requirement*" made by a member of An Garda Síochána. It follows that, on the Director of Public Prosecution's interpretation, the defendant was required to remain at the roadside under pain of criminal prosecution if he failed to do so.

3. In the event, the lapse of time between the provision of the specimen and the result of the analysis was eighteen minutes. On the basis of the result, the guard formed the opinion that the defendant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle and that he had committed an offence under Section 4(1A) of the Road Traffic Act 2010. The guard then arrested the defendant under Section 4(8) of the Road Traffic Act 2010. The defendant was conveyed to a Garda Station and required to permit a designated doctor to take a blood specimen at the station.

NOMENCLATURE

4. For ease of exposition, this judgment will refer to the substantive offences created under Section 4(1) and Section 4(1A) of the Road Traffic Act 2010 by the shorthand "*driving under the influence of drugs*". It should be noted, however, that the statutory definition of the offences is more nuanced, and, in respect of the latter offence, is defined by reference to the concentration of a specified drug in a person's blood within three hours after driving or attempting to drive.

LEGISLATIVE SCHEME

5. The Road Traffic Act 2010 ("***RTA 2010***") has been amended, with effect from 13 April 2017, so as to allow for the imposition of a requirement upon a driver to provide a specimen of oral fluid in certain circumstances. Relevantly, Section 10(4) of the RTA 2010 now reads as follows:

> "(4) A member of the Garda Síochána, who is on duty at a checkpoint, may stop any vehicle at the checkpoint and, without prejudice to any other powers (including the functions under section 9) conferred on him or her by statute or at common law, may require a person in charge of the vehicle to do one or more of the following:
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> (a) to provide a specimen of his or her breath (by exhaling into an apparatus for indicating the presence of alcohol in the breath) in the manner indicated by the member;
>
> (b) to provide a specimen of his or her oral fluid (by collecting a specimen of oral fluid from his or her mouth using an apparatus for indicating the presence of drugs in oral fluid) in the manner indicated by the member;
>
> (c) to accompany him or her or another member of the Garda Síochána to a place (including a vehicle) at or in the vicinity of the checkpoint and there to provide a specimen of his or her breath, as specified in

paragraph (a), a specimen of his or her oral fluid, as specified in paragraph (b), or both, in the manner indicated by him or her or that other member;

(d) to—

(i) leave the vehicle at the place where it has been stopped, or

(ii) move it to a place in the vicinity of the checkpoint,

and to keep or leave it there until the person has complied with a requirement made of him or her under any of paragraphs (a), (b) and (c).”

6. Section 10(5) provides that a member of the Garda Síochána, for the purposes of making a requirement of a person under subsection (4), may indicate the manner in which the person must comply with the requirement.

7. Section 10(7) provides that a member of the Garda Síochána may arrest without warrant a person who, in the member’s opinion, is committing or has committed an offence under Section 10.

8. The following aspects of the statutory scheme are pertinent to the issues arising on the case stated.

9. First, the legislation does not appear to envisage that there would be any time lag between the “*provision*” of a specimen of oral fluid and the “*indication*” of whether drugs are present in the oral fluid or not. The legislation does not, for example, refer to an “*analysis*” of the specimen, still less to the awaiting of the result of any such analysis. Rather, the legislation seems to contemplate an instantaneous indication of the presence of drugs. Certainly, the legislation does not envisage the two-stage process employed in the present case, where the specimen of oral fluid was taken and then transferred into a separate machine for

analysis. The only express reference to the "*analysis*" of a specimen occurs in the context of a specimen of breath, blood or urine: see Section 3 and Section 17.

10. Secondly, the legislation does not expressly stipulate what is to happen in the event that the test is positive, i.e. the presence of drugs in the specimen of oral fluid is indicated. Indeed, the legislation does not expressly refer to the result of the test at all. Crucially, it does not say that a positive test result may be relied upon as giving reasonable cause to arrest that person on suspicion of having committed an offence. The only explicit reference to reliance upon a preliminary oral fluid test is to be found under Section 13B. That section allows for the taking of a specimen of blood from an *arrested person* in circumstances, *inter alia*, where a member of the Garda Síochána, having carried out a preliminary oral fluid test is of the opinion that the person has committed an offence of driving under the influence of drugs.

11. Thirdly, there is no express power conferred upon a member of An Garda Síochána to detain a person, at the place where he or she has been stopped, to await "*indication*" of whether drugs are present in the oral fluid or not. The only contingency in which a person may be required to remain at the place where he or she has been stopped is where the member of An Garda Síochána does not have "*apparatus*" with him or her. In such a contingency, the person may be required to remain in place until the apparatus becomes available. Importantly, this power of detention is subject to an outer time-limit of one hour. See Section 9(2A)(c) of the RTA 2010 as follows:

> "(2A) A member of the Garda Síochána may require a person referred to in subsection (1)—
> […]
>
> (c) where the member does not have such an apparatus with him or her, to remain at that place in his or her

> presence or in the presence of another member of the Garda Síochána (for a period that does not exceed one hour) until such an apparatus becomes available to him or her and then to provide a specimen of oral fluid from his or her mouth, using an apparatus for indicating the presence of drugs in oral fluid, in the manner indicated by him or her or that other member."

12. Fourthly, the statutory power to impose a requirement upon a person to provide a specimen of his or her oral fluid is not subject to a qualifying threshold. The requirement can be imposed even in the absence of there being any reasonable suspicion that that person may have been driving under the influence of drugs. This is to be contrasted with the exercise of the powers prescribed under Section 9 of the RTA 2010 which are subject to the following criteria:

> "(1) This section applies to a person in charge of a mechanically propelled vehicle in a public place who, in the opinion of a member of the Garda Síochána—
>
> (a) has consumed an intoxicant,
>
> (b) is committing or has committed an offence under the Road Traffic Acts 1961 to 2011,
>
> (c) is or has been, with the vehicle, involved in a collision, or
>
> (d) is or has been, with the vehicle, involved in an event in which death occurs or injury appears or is claimed to have been caused to a person of such nature as to require medical assistance for the person at the scene of the event or that the person be brought to a hospital for medical assistance."

13. Finally, no offence is committed where a person holds a "*medical exemption certificate*" as defined under the RTA 2010. Such a certificate indicates that a person has been lawfully prescribed cannabis for medicinal purposes. There is some suggestion in the written legal submissions filed on behalf of the DPP that a member of An Garda Síochána is only entitled to inquire whether a driver holds

such a certificate, and, if so, to request the production of same, in circumstances where a preliminary oral fluid test has yielded a positive result. This is incorrect. As appears from the wording of Section 10(8), there is no reference to the outcome of the test in this context.

PRINCIPLES OF STATUTORY INTERPRETATION

14. Notwithstanding that Section 10 of the RTA 2010 is a penal provision, the process of statutory interpretation must commence with a consideration of the ordinary and natural meaning of the statutory language. The approach to be adopted has been summarised by the Supreme Court as follows in *Director of Public Prosecutions v. T.N.* [2020] IESC 26 (at paragraph 119):

> "Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled [to] a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation."

15. The Supreme Court reaffirmed this statement in its judgment in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60. O'Donnell J., having cited the passage above, then stated as follows (at paragraph 56 of his judgment):

> "I would merely add that the principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. That approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision."

16. In *Director of Public Prosecutions v. McDonagh* [2008] IESC 57, [2009] 1 I.R. 767 (at paragraph 65), the Supreme Court held that the literal rule should not be applied in construing penal legislation if this would negate the intention of the Legislature:

> "In construing a penal statute, as any other statute, the literal rule should be applied but it should not be applied if this would lead to an absurd result which is pointless and which negates the intention of the legislature derived from the construction of the section within its context: where appropriate a purposive interpretation may be applied."

17. The Supreme Court has recently reiterated that the words of a statute are the best guide to the result the Oireachtas wanted to bring about. See *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed.

18. The test for the implication of statutory powers has recently been summarised as follows in *Habte v. Minister for Justice and Equality* [2020] IECA 22 (*per* Murray J., at paragraphs 75 and 76):

> "The test for the implication of powers is neither complex, nor in dispute. A statutory body will be found to enjoy such powers as are incidental to or consequential on the powers and duties expressly provided for by the Oireachtas. While this remains the core test applicable to the question (*McCarron v. Kearney* [2010] IESC 28 [2010] 3 IR 302 at para. 39) it falls to be applied having regard to whether the power thus implied is be justified by the statutory context as a whole, and to its not being inconsistent with any express provisions within the relevant statutory scheme. The implication of a power is thus but one component of the overall process of interpretation of a statute conferring public law functions and must be gauged according to standard principles of construction. The implication of powers should accordingly function so as to avoid absurdity, advance the effectiveness of the legislation and implement the intention of the Oireachtas as deduced from the language in the relevant provisions viewed in the light of the statutory scheme as a whole. At the same time, the Court in determining whether to imply a power must caution itself against legislating which, if the test is applied as formulated, it will not be doing.
>
> Ultimately, in determining whether such a power should be discerned from the Act, the Court is concerned to determine whether it can be said that the Oireachtas so clearly intended the statutory body to enjoy the power that it was reasonable to conclude it did not feel it necessary to express it. It is for this reason that it is sometimes said that if the power it is suggested should be implied is of a kind one would, in the ordinary course, expect to see expressed, it is not appropriate to impose that power by implication (see *Magee v. Murray and anor.* [2008] IEHC 371 at para. 29). However, this should not be overstated: the fact that a power is of a kind that appears expressed in other legislation is not a basis for refusing to imply one if it is otherwise appropriate to do so."

DISCUSSION

19. The principal issue for determination upon this case stated is whether Section 10(4) of the RTA 2010 confers an implied power of detention. More

specifically, the question is whether a driver can be detained on the roadside pending the carrying out of an analysis of a specimen of oral fluid which they have provided. Section 10(4) does not confer an express power of detention for such an exercise. Accordingly, the DPP is forced to argue for an *implied* power of detention. It is submitted that a member of An Garda Síochána is entitled to detain a driver on the roadside for a reasonable period of time, subject to an outer limit of three hours. This outer limit is said to derive from the definition of the offence under Section 4(1A) which describes the offence by reference to the concentration of a prohibited drug in a person's blood within three hours after driving or attempting to drive.

20. In essence, the DPP is constrained to contend for an implied power of arrest. The logic of the DPP's position is that a person may be detained at the place at which their car has been stopped under pain of criminal sanction. To elaborate: a person who refuses or fails to comply immediately with a "*requirement*" under subsection (4) commits an offence and is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding six months or to both. It follows, therefore, that if the DPP is correct in her contention that there is an implied power of detention, then a person who refuses to remain in place is liable to criminal sanction.

21. The DPP argues that the RTA 2010 should be given a "*purposive*" interpretation and that the implication of a power of detention is necessary to ensure that the legislation is not rendered "*unworkable*". The argument is summarised as follows in the written legal submissions:

> "Any interpretation of section 10(4) of the 2010 Act that does not entitle Gardai to require a person to remain at the scene until an oral fluid specimen had been analysed by the Drager Drug Test 5000 would

> undermine the purpose of the legislation. The intention of the legislature was to provide a process to facilitate the formation of a Garda's opinion in a reliable and scientific way. If the defence submission was accepted it would render the scheme of the 2010 Act unworkable. In the circumstances Section 10(4) of the 2010 Act must be interpreted in a purposive manner to include an entitlement on the part of the Garda to require a person to remain at the checkpoint after the oral fluid specimen had been given and until such time as the analysis of the oral fluid specimen is completed. It is only then, depending on the result, that other related Garda powers may fall to be exercised against the person."

22. The reference to the formation of an "*opinion*" is to the express power of arrest conferred by Section 4(8) of the RTA 2010. A member of the Garda Síochána may arrest, without warrant, a person who in the member's opinion is committing or has committed an offence of driving while under the influence of drugs.

23. As explained by the Court of Appeal in *Habte v. Minister for Justice and Equality* [2020] IECA 22, a statutory power may be implied so as to avoid absurdity, to advance the effectiveness of the legislation and to implement the intention of the Oireachtas as deduced from the language in the relevant provisions viewed in the light of the statutory scheme as a whole. These principles were stated in the context of civil, rather than criminal, legislation. It is not necessary, for the purpose of resolving the present case stated, to decide whether these principles might require modification in the context of criminal legislation. This is because, even allowing that the principles apply without modification, the threshold for the implication of a power to detain is not met for the following reasons.

24. The first reason is that it is not apparent from the scheme of the RTA 2010 as a whole that the intended purpose of the requirement to provide a specimen of oral

fluid is to assist in the formation of the requisite opinion for an arrest pursuant to Section 4(8). Rather, the only *express* reference in the legislation to a garda relying upon their having carried out a preliminary oral fluid test under Section 10(4) for a particular purpose is to be found under Section 13B. This section allows a garda to rely on the result of an earlier roadside oral fluid test to require a person, *who has already been arrested*, to permit the taking of a blood specimen. The legislation is open to the interpretation that this is the *only* purpose of the requirement to provide a specimen of oral fluid. This purpose is not undermined by the absence of an implied power to detain a person at the roadside pending the analysis of the specimen: Section 13B only applies where there has already been an arrest.

25. In essence, the DPP is contending for an implication upon an implication, i.e. the court should imply that the purpose of the taking of the specimen of oral fluid is to assist in the formation of the requisite opinion for an arrest, and then imply a power to detain a driver at the roadside so as not to undermine the first implication. With respect, this goes beyond permissible statutory interpretation and would involve the court legislating. It is not necessary to engage in this implication upon an implication in order to avoid an "*absurd*" interpretation of the RTA 2010. Having regard to the statutory language employed—which after all is the sole identifiable and legally admissible outward expression of the objectives of the Oireachtas—the RTA 2010 is open to the interpretation that the *only* purpose of the oral fluid specimen is that expressly identified under Section 13B.

26. The second reason that the threshold for an implied power is not met is that there is nothing in the RTA 2010 which suggests that the Legislature intended that

there would be any time lag between the "*provision*" of a specimen of oral fluid and the "*indication*" of whether drugs are present in the oral fluid or not. The legislation envisages the use of an "*apparatus for indicating the presence of drugs in oral fluid*". The legislation does not refer to an "*analysis*" of the specimen, still less to the awaiting of the result of any such analysis. Certainly, the legislation is open to the interpretation that the Legislature envisaged that the indication of the presence or otherwise of drugs would be instantaneous. The fact, if fact it be, that some of the instruments which An Garda Síochána use in practice may entail a time lag between the provision of the specimen and its analysis cannot affect the interpretation of the legislation. As explained by the Supreme Court in *Director of Public Prosecutions v. McDonagh* [2008] IESC 57, [2009] 1 I.R. 767, the machine must follow the Act and not the Act follow the machine. It would be inappropriate to allow the manner in which a particular apparatus operates in practice to regulate the proper interpretation of the section; rather, the apparatus, in its operation, should correspond with the requirements of the section.

27. The third reason that the threshold for an implied power is not met is that the RTA 2010 makes *express* provision for powers of arrest and a power of detention at various points throughout its structure. It is apparent, therefore, that where the Oireachtas intended that a power of arrest or detention be available to members of An Garda Síochána in certain circumstances, this was done by the use of express statutory language. Moreover, the Oireachtas imposed safeguards on the exercise of such powers. The example of most immediate relevance to the present proceedings is the power of detention under Section 9(2A)(c) of the RTA 2010. This provides that a person may be required to remain at the place,

where he or she has been stopped, in circumstances where the member of An Garda Síochána does not have "*apparatus*" with him or her. In such circumstances, the person may be required to remain in place until the apparatus becomes available. Importantly, this power of detention is subject to an outer time-limit of one hour.

28. It is apparent from the RTA 2010 that the Oireachtas had addressed its mind to the possible necessity of detaining a person at the roadside and confined this power to the contingency of the requisite "*apparatus*" not being immediately available. As explained by the Court of Appeal in *Habte v. Minister for Justice and Equality* [2020] IECA 22, if the power which it is suggested should be implied is of a kind one would, in the ordinary course, expect to see expressed, it might not be appropriate to impose that power by implication. Here, the fact that, within the very same Act, the Oireachtas has made express provision for a power to detain a person in place in a specific set of circumstances, subject to a one hour time-limit, militates against the *implication* of an additional, broader power to detain in other circumstances.

Director of Public Prosecutions v. McNiece

29. Counsel on behalf of the DPP cites the judgment of the Supreme Court in *Director of Public Prosecutions v. McNiece* [2003] IESC 41, [2003] 2 I.R. 614 in support of the proposition that a statutory power to take a specimen implicitly authorises the carrying out of such procedural steps as are reasonably necessary to fulfil that purpose. On the facts of *McNiece*, the accused had been arrested and brought to a Garda Station for the purpose of taking a breath sample using an intoxilyser. The taking of the sample had been deferred to allow an observation period of twenty minutes. The evidence before the Circuit Court

established that a twenty minute observation period (or alcohol deprivation period) was necessary to eliminate the possibility of mouth alcohol. More specifically, the evidence established that a breath specimen should not be taken earlier than twenty minutes *after* the subject has finished drinking. This time delay is necessary to allow for the dispersion of high concentrations of alcohol mixed with saliva and mucus secretions in the mouth. The practice of An Garda Síochána was to allow a twenty minute observation period, in the Garda Station, in order to ensure that an accused could not subsequently claim that the test results were unreliable because the breath specimen might have been taken within twenty minutes of the accused having consumed alcohol.

30. The Supreme Court held that this evidence—if accepted by the Circuit Court judge—would demonstrate objectively that the observation period of twenty minutes prior to the accused exhaling into the intoxilyser was reasonably necessary in order to take effective or reliable samples of his breath. This was the purpose for which he was lawfully arrested and brought to the Garda Station.

31. The distinguishing feature of *McNiece* is that the accused in that case had already been lawfully arrested pursuant to an *express statutory power of arrest*. The issue was whether the prolongation of the accused's custody for the purposes of such a period of observation was lawful because the necessity for such a detention period had not been objectively justified. Put otherwise, the accused's continued detention might be rendered unlawful notwithstanding that the initial arrest had been lawful.

32. The judgment in *McNiece* is concerned with the exercise of an express statutory power of arrest. It holds that an express power of arrest may lapse if the prescribed specimen is not taken within a reasonable period of time. Put

otherwise, *McNiece* is an example of an *implied limitation* on an express statutory power of detention. It does not follow as a corollary of the proposition that unreasonable delay may render a continued period of detention unlawful that the prompt taking and analysis of a specimen of oral fluid would justify the inference of an *implied* power of arrest.

PROPER SCOPE OF RESPONSE TO THE CASE STATED

33. The case stated presents a net question of law in respect of the interpretation of Section 10 of the Road Traffic Act 2010. Notwithstanding this, the DPP invites the High Court to go further and to consider the validity of events *subsequent to* the roadside detention of the defendant. The defendant had been formally arrested and conveyed to a Garda Station. The defendant was required to provide a blood specimen at the Garda Station. The DPP invites the High Court to comment upon the validity of this arrest and upon the admissibility of the certificate in respect of the blood specimen.

34. There is authority to the effect that having regard to the purpose and effect of a consultative case stated, i.e. to enable the lower court to obtain the advice and opinion of the High Court, it would be inappropriate for the High Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the District Court. See, generally, *Dublin Corporation v. Lowe* [1986] I.R. 781 and *Director of Public Prosecutions v. Buckley* [2007] IEHC 150, [2007] 3 I.R. 745.

35. In the present proceedings, however, the additional issues upon which the DPP invites the High Court to rule go well beyond the scope of the case stated. The High Court is, in effect, being invited to determine issues which have not yet

been decided by the District Court as the court of trial. It is apparent from the content of the case stated that the District Court is still at the stage of considering the lawfulness of the detention of the accused pending the analysis of the specimen of oral fluid. The District Court has not had to reach a determination on what the legal consequences of an unlawful detention would be for the subsequent arrest and for the admissibility of the certificate in respect of the blood specimen. The District Court has not sought the guidance of the High Court on these issues. It would be presumptuous of the High Court to address these issues in circumstances where the District Court has not yet had an opportunity to do so.

36. Put otherwise, the fact that a case stated has arisen at a particular point in the adjudication upon a criminal trial does not have the effect that all subsequent points in the decision-making process must be determined by the High Court. Here, the question raised on the case stated is self-contained and there is no risk that, by confining the response to that question, the District Court might be misled as to the appropriate law (to borrow the language of *Director of Public Prosecutions v. Buckley*).

37. In any event, there are not sufficient findings of fact contained in the case stated to allow the High Court to determine what the legal consequences of the unlawful roadside detention might be. There is, for example, no finding as to whether, absent the result of the analysis of the preliminary oral fluid specimen, there might still have been reasonable suspicion for arresting the defendant.

CONCLUSION AND PROPOSED FORM OF ORDER

38. The District Court has referred the following question of law to the High Court by way of a consultative case stated:

> "Does s. 10(4) of the Road Traffic Act 2010 provide a power for a member of An Garda Síochána, who is on duty at a checkpoint, to make a legal requirement for a person to remain at that checkpoint after that person has provided an oral fluid specimen for a period of up to one hour, until such time as that an oral fluid specimen has been analysed for the presence of drugs?"

39. For the reasons explained, the answer to this question is "*No*". In brief, there is no express power of roadside detention, and it is not necessary to imply such a power in order to avoid an "*absurd*" interpretation of the RTA 2010. Having regard to the statutory language employed—which after all is the sole identifiable and legally admissible outward expression of the objectives of the Oireachtas—the RTA 2010 is open to the interpretation that the *only* purpose of the oral fluid specimen is that expressly identified under Section 13B. This section allows a garda to rely on the result of an earlier roadside oral fluid test to require a person, *who has already been arrested*, to permit the taking of a blood specimen.

40. It should be emphasised that this judgment is only concerned with the taking of a specimen of oral fluid and does not address the taking of a specimen of breath using a roadside breathalyser.

41. As to costs, my *provisional* view is that the defendant, having been entirely successful, would be entitled to recover his costs against the Director of Public Prosecutions were the default position under Section 169 of the Legal Services Regulation Act 2015 to apply. Of course, it may be that the costs fall to be dealt with differently if, for example, the Applicant is availing of legal aid.

42. In the ordinary course, the matter would now return to the District Court for that court to conclude the criminal trial. However, having regard to the novelty of the legal issue raised, I propose to impose a stay on my order for twenty-eight days to allow for the contingency of an appeal; in the event that an appeal or an application for leave to appeal is filed within that period, the stay will continue until the appeal proceedings are determined.

43. I will hear submissions from counsel as to the precise form of order on Monday 20 November 2023 at 11.30 o'clock.

Appearances

Kieran Kelly for the Director of Public Prosecutions instructed by the Chief Prosecution Solicitor
Feichín McDonagh SC and David Perry for the defendant instructed by Michael J. Staines & Company

Approved