THE HIGH COURT

Record No. 2016/1198 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT,

1857, AS EXTENDED BY SECTION 51 OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA MARIUS STONES)

RESPONDENT

AND

GERARD MAHER

APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 22nd day of January, 2019

1. This is a judgment on an appeal by way of case stated by District Judge Seamus Hughes arising out of the prosecution and conviction of the appellant of an offence under ss. 4(4)(a) and (5) of the Road Traffic Act 2010 (the "Act of 2010") (the offence of driving a mechanically propelled vehicle while under the influence of an intoxicant or while there was present in his body, alcohol, in excess of the prescribed limits).

Background

2. Keen followers of the law in this area will recall that in the case of *Director of Public Prosecutions v. Avadenei* [2015] IEHC 580, this Court (Noonan J.) held that the regulations then applicable to the form of statement to be provided to persons after undergoing a breathalyser test (Road Traffic Act 2010 (Section 13) (Prescribed) Form and Manner of Statements Regulations 2011 (S.I. No. 541 of 2011)) (the "2011 Regulations") required that a person who had provided breath specimens should be given the prescribed statements in both the Irish and the English languages. Since the statements had been provided in English only, Noonan J. held that it was not admissible in evidence. On appeal to the Supreme Court, that Court agreed that it was a requirement of the 2011 Regulations that the statements should be provided in both languages, but did not agree as to the consequences of supplying it in one language only. I will come back to this decision later, but I mention it now in order to explain that immediately following the delivery of the decision of Noonan J. in Avadenei, the Oireachtas amended the 2011 Regulations so that instead of requiring that a person who had provided breath specimens should be provided with statements as to the results of the tests in both the Irish and the English languages, such persons could be provided with statements in either the Irish or the English language. The central issue in these proceedings is whether or not a person who is being required to provide breath specimens should first be informed of his or her right to have the statements required by s. 13(2) of the Act of 2010, and which are generated by the breathalyser apparatus (the "Statements"), provided in either language and afforded the opportunity asked to exercise a choice in this regard.

3. So far as is relevant to these proceedings, the statutory and regulatory framework applicable to the circumstances giving rise to the prosecution of the appellant in this case is contained in s. 13(2) of the Road Traffic Act 2010 and article 4 of the 2015 Regulations. Sections 13(2), (3) and (4) of the Act of 2010 provide as follows:-

> "Where the apparatus referred to in section 12 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 4 (4) or section 5 (4), he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the *prescribed form* (my emphasis) and duly completed by the member in the prescribed manner, stating the concentration of alcohol in that specimen determined by that apparatus.
>
> (3) On receipt of those statements, the person shall on being requested so to do by the member—
> (a) immediately acknowledge such receipt by placing his or her signature on each statement, and
>
> (b) thereupon return either of the statements to the member.
>
> (4) A person who refuses or fails to comply with subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both."

4. Articles 3 and 4 of the Road Traffic Act 2010 (Prescribed Form and Manner of Statements) Regulations 2015 (S.I. No. 398 of 2015) (the "2015 Regulations") provide:-

> "(3) the form set out in the Schedule is prescribed for the purposes of s. 13(2) of the Act of 2010 as the form of the statements to be automatically produced being either –
>
> (a) in the English language, form A, or
>
> (b) in the Irish language, form B,
>
> by an apparatus referred to in section 12(1)(a) of that Act.
>
> (4) For the purposes of completing the statements referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—
>
> (a) before the person provides a specimen of his or her breath in accordance with section 12(1)(a) of the Act of

2010, input into the apparatus referred to in that section—

(i) the member's name and number,

(ii) whether the statements are to be produced either—

(I) in the English language, or

(II) in the Irish language…"

5. The combined effect of s. 13(2) of the Act of 2010 and article 4 of the 2015 Regulations is that *before* a breath sample is provided the garda concerned must input certain information into the breathalyser apparatus, including a direction as to whether the Statements that are to be generated by the apparatus are to be produced in the English language or the Irish language. Following upon the provision of the breath specimen, if it appears that there has been a contravention of either s. 4(4) or s. 5(4) of the Act of 2010, the garda is obliged to provide to the person who has provided the sample with two identical Statements automatically produced by the apparatus in the prescribed form, the form of which is prescribed in the 2015 Regulations. That form is substantially the same as the 2011 Regulations, save that in the 2011 Regulations the form was in both the Irish and English languages, but in the 2015 Regulations it is to be generated in whichever language the garda has input into the apparatus.

Background facts of this case

6. On 25th October, 2015, at 1.10 a.m., the appellant was arrested by the respondent having been observed driving erratically by the respondent. The respondent formed the opinion that the appellant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place and arrested the appellant pursuant to s. 4(a) of the Act of 2010. The appellant was then brought to Mullingar garda station and the procedures required by the Act of 2010 were followed. After an observation period of 20 minutes or more to ensure that the appellant had nil by mouth prior to providing specimens of breath, the respondent then required the appellant to provide two specimens of breath by exhaling into a breathalyser apparatus. The penalties for failing or refusing to comply with the requirement to provide breath specimens were outlined to the appellant. The respondent stated in evidence that he explained this to the appellant in ordinary language and asked him if he understood this and the appellant confirmed that he did understand. The respondent gave evidence that all of this conversation took place in the English language.

7. The respondent then entered the details required to be entered in the apparatus pursuant to article 4 of the 2015 Regulations. The respondent provided the breath specimens and the apparatus then printed two identical Statements for the purposes of s. 13 of the Act of 2010, in English, the respondent having selected English as the language in which the Statements were to be produced. The respondent then signed both Statements and gave them to the appellant for signature, who signed both Statements and returned one to the respondent. The statements indicated that the concentration of alcohol in the breath of the appellant was 77mcg/100ml of breath.

8. Cross-examined by the solicitor for the appellant, the respondent gave evidence which confirmed that he had complied with the various steps set out in the 2015 Regulations. He confirmed specifically that he had given the appellant the usual warnings that he would be committing an offence should he fail or refuse to provide two specimens of breath. He was then asked if he had given the appellant the option as to whether the Statements were to be produced in the English language or the Irish language, and he confirmed that he had not done so.

9. The solicitor for the appellant, Mr. McDonnell, submitted to the District Judge that there had not been compliance with the 2015 Regulations because the respondent had failed to give the appellant any choice as to the language in which the Statements, should be produced. Mr. McDonnell submitted that it was implicit from the provisions of article 4(a)(ii) of the 2015 Regulations that it was for the person providing a breath specimen and not for the garda to choose in which language the Statements should be produced. It was submitted that it would be an absurdity if the garda administering the test had been vested with the right of election as to which language was to be used. Since the regulations are penal or related to a penal provision, they had to be strictly interpreted and any ambiguity regarding which party should choose the language should be resolved in favour of the appellant.

10. On behalf of the respondent, the superintendent attending court on the day, Superintendent Alan Murray, submitted that even though the appellant had not been afforded the opportunity of choosing the language in which the Statements were to be produced, nor had the appellant requested that the Statements should be produced in Irish. The superintendent further submitted that at all times in his interactions with the respondent, the appellant had spoken to the respondent in English. The District Judge inquired of the respondent whether the apparatus could print Statements in both languages, and the respondent confirmed that this was so, and that he had elected to use the English language option.

11. Having considered the evidence and the submissions of the parties, the District Judge found as a fact that the appellant had not been given an option or made aware that he had an option of choosing whether the Statements should be produced in English or in Irish. However, the District Judge refused an application for a direction to dismiss the prosecution and, since the appellant did not go into evidence, he proceeded to convict and fine the appellant and to impose the consequential disqualification from driving. He then said that he would consider an application to appeal by way of case stated should the appellant so desire, having regard to the importance of the issue raised.

12. The appellant confirmed that he wished to appeal by way of case stated, and requested that the District Judge should state a case to this court on the following questions of law:-

(I) on the facts as found by the District Judge, have the provisions of S.I. No. 398/2015, namely the Road Traffic Act 2010 (s. 13) (prescribed form and manner of statements) Regulations 2015 been complied with?;

(II) on the facts so found, is the certificate automatically produced by the apparatus under s. 13 of the Road Traffic Act 2010, indicating the concentration of alcohol in the breath of the appellant, admissible in evidence?

Submissions of Appellant

13. At the outset it should be observed that it was emphasised on behalf of the appellant that his case is based on the statutory interpretation of the relevant provisions and not on any claim with regard to language rights. This is not, as counsel for the appellant put it, "an Irish language case", instead it is the appellant's contention that, on a reasonable interpretation of the 2015 Regulations,

the appellant was entitled to choose the language in which the Statements were produced, and, that being the case, the respondent had a duty to inform the appellant of that right. Since a person providing breath specimens, such as the appellant, is required, under threat of penal sanction, to sign the Statements, there should be no doubt that he will receive the Statements in the language of his choice, and therefore there should be no doubt about who selects the language.

14. While making it clear that this is not "an Irish language case" counsel for the appellant nonetheless referred to me the decision of the Supreme Court (Hardiman J.) in *Ó Beoláin v. Fahy* [2001] 2 I.R. 279 in which he stated, *obiter*:-

> "In my view the Irish language which is the national language and, at the same time, the first official language of the State cannot (at least in the absence of a law of the sort envisaged by Article 8.3) be excluded from any part of the public discourse of the nation or the official business of the State or any of its emanations. Nor can it be treated less favourably in these contexts than the second official language. Nor can those who are competent and desirous of using it as a means of expression or communication be precluded from or disadvantaged in so doing in any national or official context."

15. The appellant drew to my attention that the above passage was later cited with approval in the case of *Ó'Maicín v. Éire* [2014] 4 I.R. 583 where O'Neill J. stated at paras. 342 and 343:-

> "342. It would seem to me beyond doubt but that in the fulfilment of its obligations in respect of the use of the Irish language, the State … is 'bound to do everything' within its range of competence to establish the use of Irish for all official purposes including in the sphere of the administration of justice.
>
> 343. Impediments which might justify the State in not providing for the use of Irish cannot be mere impracticalities. A choice by the State to withhold provision for the use of Irish on the grounds of administrative difficulty or impracticality would not suffice and would be in breach of the obligation of the State under Article 8 of the Constitution and would correspondingly risk breaching the rights of a citizen who chose to use the Irish language in his or her dealings with the State. I am of opinion that the standard or test to be applied where the State seeks to avoid provision for the use of Irish is one of non-feasibility or in other words that it is simply not possible in the given circumstances to make provision for the use of Irish as sought by a citizen."

16. These authorities appear to me to be more relevant in the context of proceedings in which an applicant or a plaintiff claims that he has been denied his constitutional entitlement to engage with the State through the Irish language. It has been emphasised to me in these proceedings that the appellant is making no such case and indeed that case could not arise in any event on the questions put forward by the District Judge. Moreover, it has not even been asserted by the appellant that he made any request to receive the statements in the Irish language. The issue in the case, as confirmed by counsel for the appellant, is about whether or not the respondent had a duty under the 2015 Regulations to afford the appellant the opportunity to choose the Irish language as the language in which the Statements were to be produced, and if so, what consequences flow from the fact that the respondent did not afford the appellant that choice.

17. It is submitted on behalf of the appellant that given the history of the 2015 Regulations, the inclusion of Irish as an option was a right to be afforded to a person who wishes to avail of it. It is submitted that unless a person is informed that he or she has the right to receive the document in either language, the person may not be aware of that right and therefore there must be an obligation on the garda operating the apparatus to inform the person of his/her right to choose the language. This obligation is required in order to ensure legal certainty in circumstances in which there is a separate criminal offence for failing or refusing to sign the Statements, which may well be produced in a language which a person does not want or even understand. Given that this is a penal statute, it must be strictly construed and applied.

18. The appellant also relies on the decisions of this court in the cases of *DPP v. Freeman* [2009] IEHC 179 (MacMenamin J.) and *McCarron v. Groarke*, a decision of Kelly J. (as he then was) (Unreported, High Court, Kelly J., 4th April, 2000). In *Freeman* the issue that came under consideration was the order in which the forms had been signed by the member of An Garda Síochána and the defendant. Section 17 of the Road Traffic Act 1994 required the garda, when the apparatus indicated that an offence had been committed, to supply forthwith to the driver two identical statements automatically produced by the apparatus, which forms were to be "duly completed" by the garda. The driver was then obliged to acknowledge receipt by signing both statements and returning one of the statements so signed to the garda. "Due completion" under the applicable regulations required the garda to sign the statements following their production by the apparatus. However, the garda instead handed the statements to the defendant who then signed the two copies before the garda did so. While considering that the point made by the defence was "wafer thin", and that no substantive injustice had been perpetrated, MacMenamin J. nonetheless concluded that in order to be "duly completed", a form signed by a driver had to have already been completed in accordance with the statute, and this meant that it should already have been signed by the garda when he delivered it to the defendant for his signature. The significant point, in the view of MacMenamin J. was that refusal on the part of a driver to sign the document would give rise to a penal liability on his part. He considered that all the steps involved were interlinked in their statutory context, and that it was not possible to divorce one from the other, noting that it could not be the case that failure to sign the document could be "penal" for an accused, but not "penal" for a member of An Garda Síochána who administers the test.

19. In *McCarron* the issue before the court concerned the failure on the part of the garda, having been provided with two blood specimens by Mr. McCarron, to offer to Mr. McCarron a statement in writing indicating that he could retain either of the containers, as required by s. 18 of the Road Traffic Act 1994. However, as a matter of fact it had been found by the Circuit Judge that the accused had been orally informed of this entitlement and had taken and retained one of the containers, notwithstanding that he had not been informed of his entitlement to do so in writing. Kelly J. considered the failure to follow the statutory requirements in the following terms:-

> "It is not a flaw of no significance or one which could not work an injustice. It is not in accordance with the purpose and objects of the legislation to fail to provide the statement in writing to the accused. In fact, it is in discord with the purpose and object of the legislation."

20. The appellant also relies on the decision of the Supreme Court in Director of *Public Prosecutions v. Avadenei* [2017] IESC 77. In the concluding part of her judgment, having reviewed many authorities in the area, O'Malley J. summarised the types of breaches of statutory procedures that might invalidate evidence produced under the statutory regime as follows at para. 87:-

> "… the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime if:

(i) A precondition of the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or

(ii) The power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or

(iii) The power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or

(iv) The power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove."

21. At paras. 90 and 91, in passages relied upon by the appellant in this case, O'Malley J. stated:-

> "90. The third category may be more complex. 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. My own view, therefore, would be that both *McCarron* and *Freeman* should be regarded as being at the far end of the spectrum of insistence upon the letter of the statute.
>
> 91. Had the defendant in *McCarron* not in fact been informed of his right to take and retain a sample, that would have been a clear breach of the statutory protection of his fair trial rights. If he had not actually taken the sample, the failure to give him the printed information might have left a court in doubt as to whether he had been properly informed. Given, however, that he accepted that he had been informed; that he took the sample and that he gave it to his legal representative, it is difficult to see that any unfairness arose."

22. On the basis of these passages, and the opening lines of para. 91 in particular, the appellant in this case submits that a failure on the part of the respondent to comply with what he claims is a mandatory requirement of a provision which vests an option in the accused *i.e.* to receive the Statements in the Irish language, is a clear breach of the appellant's rights which invalidates the entire procedure. It is submitted that the fact that the accused may understand the English language and was given the Statements in that language does not cure the flaw. If, as is submitted, it was the intention of the Oireachtas to give the person providing breath specimens the option to choose the language in which the Statements are produced, it is for that person alone and not the garda to select the language, since it is impossible to say what option would have been exercised if the appellant himself had been afforded the opportunity to make the choice.

23. As to whether or not the respondent was obliged to afford the appellant the choice of taking the Statements in the Irish language, it is submitted that the fact there is a penal sanction imposed by s. 13(4) of the Act of 2010 in respect of any failure on the part of a driver to sign the Statements, and the fact that the 2015 Regulations are "related" to a penal provision, requires the courts to interpret the provisions strictly, in the way that MacMenamin J. did in interpreting of requirements of s. 17(3) of the Road Traffic Act 1994.

24. Counsel for the appellant also referred me to certain applicable principles of statutory interpretation, and in particular the decision of Blayney J. in the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 in which he referred with approval to the following passage from *Craies on Statute Law* (1971) (7th ed.) at p. 65:-

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view.' [*per* Lord Blackburn in *Direct United States Cable Co v Anglo American Telegraph Co* (1877) 2 App. Cas.394]."

25. Later, in the same judgment, Blayney J. quoted (also with approval) from Maxwell on *The Interpretation of Statutes* (12th ed., 1976) at p. 29 as follows:-

> "Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands and to 'leave the remedy' (if one be resolved upon) to others".

26. The appellant relies in particular on the last sentence of the first passage: the Court is entitled to look at "the object in view" in interpreting the words of the statute. It is submitted that having regard to the history of amendments and enactments in this area since 1994, there appears to have been a very clear intention on the part of the legislature, following upon the decision of this court in *Ó Gríofáin v Éire & Ors* [2009] IEHC 188 (to which I refer in more detail below), to incorporate the Irish language into the procedure for the production of the Statements. Furthermore, the 2015 Regulations were introduced immediately following upon the decision of Noonan J. in *Avadenei*, to address the issue arising out of his decision. It is submitted that it was surely never the intention of the legislature to accommodate gardaí who wished to have the Statements produced in Irish, and that such a proposition would constitute an absurdity. Clearly, the inclusion of Irish as an option was a right to be afforded to a person who wishes to avail of it, and therefore there must be an obligation on the garda operating the breathalyser apparatus, pursuant to the 2015 Regulations, to inform the person of that right. In the absence of such a duty to inform the person, there may be a serious issue regarding legal certainty given that a person can be convicted of a separate criminal offence for failing or refusing to sign the Statements, which may well be produced in a language which they do not want or understand. If the option is left to the garda at the scene, he or she may deliberately elect to choose a language that the person providing the specimens does not understand, but that person may still be required – under threat of penal sanction – to sign the Statements.

27. In summary, it is the appellant's contention that the respondent was under an implied statutory duty to inform the appellant that

he was entitled to receive the Statements in the Irish language, and that having failed to so inform the appellant, the respondent has failed to comply with an essential proof. Since the statutory regime is penal, it must be strictly construed, and the court should answer both questions posed by the District Judge in a case stated in the negative.

Submissions of the Respondent

28. The respondent submits firstly that there is no common law right to receive the Statements in Irish. The respondent relies upon the decisions of the Supreme Court in *Attorney General v. Coyne & Wallace* [1967] 101 I.L.T.R. 17, and *Ó Gríofáin* (to which I made reference earlier). In *Ó Gríofáin*, the applicant, a native Irish speaker, refused to sign a statement produced following an evidential breath test as it was only produced in English. Under the then applicable regulations, there was no reference to such statements being produced in Irish. Charleton J. refused to hold that there was an entitlement to have the statements produced in Irish or that there was any risk of an unfair trial stating at para. 12:-

> "The State is not required to produce any particular class of documents that concern a criminal process in either Irish or English. The State can choose one language or the other. This is not an abuse of anyone's rights. An illiterate person can get a document read, an English–speaking person can get someone to explain an Irish document to him and so can an Irish–speaking person an English document; see Ó Dálaigh Brmh. at p. 8. This is somewhat beside the point as the applicant is fluent in both languages. The fundamental requirement under the Constitution is to have reasonable notice of what is alleged in a prosecution. That entitlement exists so that a person may prepare a defence. In the presentation of that case one may use Irish or English. The entitlement to use one language or the other has been clearly declared by *Ó hAnluain Brmh. in An Stát (MacFhearraigh) v. MacGamhnia.* Those rights are in no way undermined by any particular document coming from the State being in either English or Irish."

29. Insofar as the appellant relies on *Ó Beoláin v. Fahy*, it is submitted that while Hardiman J. referred to the fact that the Irish language cannot be treated less favourably than English, this does not create an unlimited entitlement. As regards to the decision of O'Neill J. in *Ó Maicín v. Éire*, in this case, it is submitted that there is no administrative impediment to the form being used in the Irish language. There is no suggestion that the appellant sought or would understand the form had it been produced in Irish.

30. As regards whether the appellant has the right to select the language in which the Statements are produced, the respondent points out that the 2015 Regulations are silent on the process by which the language is decided, but submits that there are a number of hints in the legislation which together might imply that it is the garda who exercises the option:-

> (i) Section 13(2) of the Act of 2010 requires that the Statements be "duly completed by the member in the prescribed manner";
>
> (ii) Article 4 of the 2015 Regulations provides that: "…*the member*…supplying the statements shall…before the person provides a specimen…input into the apparatus referred to in that section…. whether the statements are to be produced either…(I) in the English language, or (II) in the Irish language". This implies that the election is made by the garda;
>
> (iii) Section 12(1)(a) of the Act of 2010, empowers the garda to require a person to give a breath sample "and may indicate the manner in which he is or she is to comply with the requirement". This implies the garda enjoys a discretion in how the process is to be conducted.

31. Moreover, s. 20 of the Act of 2010 contains a presumption of compliance with the regulations made for the purposes of the Act of 2010 "until the contrary is shown":-

> "(1) A duly completed statement purporting to have been supplied under section 13 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2010 of the facts stated in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him or her by or under Chapter 4 prior to and in connection with the supply by him or her under section 13 of such statement."

32. The respondent submits that there is no authority for the proposition that an accused person ever enjoys the power of election contended for by the appellant in any part of the process of interaction with a garda investigation. This is clear from the decision of Charleton J. in *Ó Gríofáin*. Furthermore, it is clear that the appellant understood the process at all stages when it was explained to him in English, and there is no lack of certainty as asserted by the appellant. The respondent further submits that it is clear that if there was a failure to explain to a person the applicable procedures, in a language that a person can understand. Such a person could not be convicted for a failure to comply with such procedures.

33. While not accepting that there has been any failure to follow the requirements of the 2015 Regulations, the respondent contends that if there was such a failure, it does not follow that the Statements are inadmissible. The respondent relies on *DPP (O'Reilly) v. Barnes* [2005] 4 I.R. 176 as well as the decision of the Supreme Court in *Avadenei*. In *Barnes*, the accused was charged with an offence under s. 50(4)(vi)(a) of the Road Traffic Act 1961, which was the offence of being in charge of a mechanically propelled vehicle in a public place with intent to drive, while there was present in his body a concentration of alcohol in excess of the then prescribed limits. However, when inputting the accused's details into the apparatus, the garda in error referred to s. 49 of the Road Traffic Act 1961. The District Judge stated a case to this Court posing the question as to whether this type of typographical error was fatal to the successful prosecution. O'Neill J. answered the question in the negative, stating at para. 15:-

> "…where objection has been taken to the statement on the basis of an error in it, if the error is of such an obvious or trivial or inconsequential nature so that it could not be said that it gave rise to any confusion or misleading of the accused or imposed any prejudice on him or in any way exposed him to any injustice then the court should conclude that the error in question did not detract from the due completion of the statement in question and it should be admitted and permitted the force and effect provided for by, as in this case s. 21(1) of the Road Traffic Act 1961."

34. The respondent also relies upon the decision of the Supreme Court in *Avadenei*. The respondent refers to the third category of flaws in the implementation of statutory procedures identified by O'Malley J. and referred to at para. 20 above, *i.e.* where "the power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights" and the respondent also relies upon the subsequent passage of O'Malley J. cited at para. 21 above. It is submitted that applying the rationale of the latter passage to the instant case, the evidence suggests that the appellant understood all that was said to him in English. There is no unfairness, prejudice or detriment to the appellant, so that even if there was a failure to follow the statutory procedure, it was inconsequential and the statement was admissible.

35. Accordingly, the respondent submits that both questions posed by the District Judge should be answered in the positive.

Conclusion

36. The cases of *Freeman* and *McCarron* involved clear breaches of express statutory obligations. They may have been technical, but the breaches were clear. The cases were also referred to by O'Malley J. in *Avadenei* as being "at the far end of the spectrum". In contrast, there is no clear breach of the 2015 Regulations. This Court is being invited to conclude, by inference, that article 4 of the 2015 Regulations is subject to a requirement that is not expressly set out therein *i.e.* to require a garda to ask a person providing breath specimens in which language that person would like to receive the Statements, Irish or English?

37. The 2015 Regulations were amended to take into account the decision of the High Court in *Avadenei*. The Oireachtas was addressing the decision of Noonan J. to the intent that the Statements required by the 2015 Regulations could be produced in either language, rather than in both. It is not difficult to see the logic in the argument of the appellant that the choice of language should be afforded to the person providing the breath specimens. The availability of the Statements in both the Irish and English languages is clearly there for the benefit of the person providing the breath specimens, and not the garda, and it is certain that if a person were to express a choice of language, then the garda would be obliged to provide the Statements in whatever language has been directed. However, the 2015 Regulations do not oblige the garda to offer that choice to the person providing the breath specimens. While this may be an omission (deliberate or not), it does not render the the 2015 Regulations unclear or ambiguous in any way. The garda is required by the 2015 Regulations to input into the apparatus the language in which the Statements are to be produced, with or without asking the person concerned. The appellant is inviting the court to infer that the garda must have a statutory obligation to afford the choice to the person concerned, in order to give effect to the purpose of this part of the 2015 Regulations. But that is to invite the Court to engage in judicial law making. It is entirely possible that the Oireachtas deliberately chose not to impose this obligation on the garda, and to allow the matter to his discretion depending upon the language in which the person engaged with him at the scene. The law in this area is already replete with mandatory steps, failure to comply with any one of which may result in the dismissal of an otherwise valid prosecution. The Oireachtas may have been reluctant to impose yet another such step, taking the view that is is suffcient that a choice of language in which the Statements are to be produced is available. Alternatively, it may well be an error or omission in the drafting of the 2015 Regulations. All of this is speculation, but if there is an oversight or omission, it is something that must be corrected by the Oireachtas, and not by this Court.

38. In case, however, I am wrong about this, it is appropriate to consider the consequences, if any, of failing to afford the appellant the choice of language of the Statements. In the concluding part of her judgment in *Avadenei*, O'Malley J. said that if a breach of a statutory procedure is established, but it has 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. Similar sentiments were expressed by O'Neill J. in *Barnes*. Even if therefore the respondent had a duty to afford the appellant a choice, on the appellant's own case the fact that he did not do so has had no consequences at all for the appellant, because there has been no unfairness, prejudice or detriment to the appellant, who is clearly an English speaker.

39. Either way therefore, the appellant's arguments must fail, firstly because in my view there was no obligation on the respondent to inquire of the appellant as to the language in which he required the Statements to be produced, and secondly, even if I am wrong about that it is clear that the failure on the part of the respondent to do so did not result in any unfairness, prejudice or detriment. Each of the questions posed by the District Judge in the case stated should accordingly be answered in the affirmative *i.e*. there has been compliance with the 2015 Regulations, and the Statements produced by the apparatus pursuant to s. 13 of the Act of 2010 is admissable in evidence.