THE HIGH COURT

[RECORD NO. 2018/36JR]

BETWEEN

DIARMAID Ó CADHLA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL, AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 20th day of June, 2019

Nature of the Case

1. This case concerns the interaction between Irish language rights and the conduct of a summary criminal trial in the District Court. The net question raised is this: Does the State have a duty of any kind under Article 8 of the Constitution to provide a bilingual District Judge in circumstances where an accused person has chosen to exercise his (now well-established) constitutional right to present his side of the case in the Irish language? If so, what is the extent or scope of that duty; is it, for example, a duty to make "reasonable efforts" to provide a bilingual judge? Or a duty to provide a bilingual District Judge "as far as is reasonably practicable"? Or a more absolute duty? One could also pose the question in terms of the rights of the accused person: has he or she a right of any kind to have a bilingual District Judge assigned, or at least to have the State make reasonable efforts in that regard? Or do the relevant duties and rights arising under Article 8 of the Constitution amount to no more than a duty on the State to provide and pay for an interpreter to translate the Irish parts of the case into English?

2. The present judicial review is the latest in a long line of cases in which a person accused of a criminal offence seeks to assert rights in connection with the Irish language. The issue raised must be addressed in the context of a weighty body of authority, including pronouncements of the Supreme Court in cases such as *Ó Monacháin v. An Taoiseach* [1980-1998] TÉTS 1, [1986] ILRM 660; *MacCárthaigh v. Éire* [1999] 1 IR 186; *Ó Beoláin v. Fahy* [2001] 2 IR 279; and *Ó Maicín v. Éire* [2014] 4 IR 477, which jurisprudence emphatically upholds the need for a practical implementation of the status of the Irish language as the first official language. The net issue raised in the present case arises with regard only to the particular case of an accused facing a criminal trial in the District Court and the decision is not intended to be of any wider application than in that specific context.

3. My conclusion, having regard to the authorities discussed below, is that the State does have a duty either to make reasonable efforts to assign a bilingual District Judge or to assign such a Judge as far as is reasonably practicable. The reasons for this conclusion are set out at some length in the judgment. Although the identification of a constitutional basis for this duty is novel, the practical effects of this conclusion seem likely to be very limited, as the practice of the State to date has in any event been to assign a bilingual judge in most of the very small number of cases in which the issue has arisen over the years. This decision merely reaches the conclusion that this practice is underpinned by a constitutional duty on the part of the State. It does not imply any further rights or duties in relation to other types of criminal trial, or legal proceedings, or non-legal proceeding of any kind, nor does it propose in any fundamental way to impact upon the selection or assignment of judges.

Some general comments about the relationship between the constitutional status of the Irish language and the lived reality of the language

4. Ireland today has a peculiar and complex relationship with the Irish language. Attitudes among Irish people towards the language range across a wide spectrum from passionate support through indifference to outright contempt and hostility. Fluency levels are similarly spread across a wide spectrum. There are small geographic pockets in the country where Irish is the native language of the people and where children continue to be raised in the Irish language; these are the Gaeltacht areas. There is also a small but significant proportion of people who, while not strictly speaking 'native speakers', are fluent in the language, deeply committed to it, and wish to use it as much as possible in their daily lives and in their interactions with State authorities. There is a vibrant and expanding sector within the education system consisting of schooling through the Irish language (the Gaelscoileanna). On the other hand, there are substantial numbers of people within the population who, while favourably disposed towards the language in a general sort of a way, have little fluency and no commitment to speaking it in their daily lives. There are also many people who are either indifferent to whether or not the language survives or, in some instances, (whether due to its compulsory educational status or, more likely, for other more complex reasons) are actually hostile to the language. The Irish-speaking minority in society sometimes faces surprising intolerance towards its rights from quarters usually more respectful of minority rights.

5. So much for the practical reality on the ground – the legal theory is utterly different. Floating at an abstract level above the complex sociological reality mentioned above is Ireland's constitutional commitment to the Irish language. The Constitution of Ireland designates the Irish language as *the first* official language; not merely one of two official languages, but the first official language. Further, one cannot simply view this official position of the language as a quaint and aspirational relic of the thinking and culture of 1937; more recently, Ireland took active steps to elevate the status of the Irish language within the European Union. Final agreement by the EU Council of Ministers to Ireland's application for a grant of full official working status to Irish occurred on 13th June, 2005 and Council Regulation (EC) 920/2005 amended Council Regulation 1/1958 to include Irish as an official working language of the EU. Interestingly, the recitals to the Regulation include the fact that Ireland in its application had "stressed" that Irish was the first official language of Ireland. It is also noteworthy that Article 8.3 of the Constitution itself expressly allows legislation which would designate either English or Irish as the official language for one or more purposes. This could of course include the administration of justice; the Oireachtas could have chosen at any time to designate English as the official working language of the courts. No such legislation has ever been enacted.

6. This lofty ideological commitment to the Irish language in the Constitution sits uneasily not only with the mixed feelings of Irish people towards the language in society at large, but also with the practical reality of the Irish language within the legal system. There has been a historically lukewarm State commitment to the giving of practical support and resources to support the language in the administration of justice. Thus, for example, it has proved necessary for Irish-speaking court users to resort to litigation to compel the translation of key sources of law, including Acts of the Oireachtas and statutory instruments (see *Delap v. Minister for Justice* [1980-1998] TÉTS 46, *Ó Beoláin v. Fahy* [2001] 2 IR 279, *Ó Murchú v. An Taoiseach & Eile* [2010] IESC 26 and *Ó Cuinn v. An Taoiseach & Chuid Eile* [2018] IEHC 816). It is fair to say, however, that when the State does engage in the process of translating legal sources, it employs people of the highest level of commitment and expertise with regard to the language. Regarding judges and the Irish

language, insofar as there have been judges available to deal with cases in the Irish language since the foundation of the State, this appears to have been because individual judges happened to have an education or upbringing in the language and were willing and able to hear cases in Irish because of their own personal background. The number of such judges appears to be steadily decreasing. However, there is an unofficial stream of goodwill within at least part of the judiciary which ensures that cases, including cases in the superior courts, are heard in Irish and by Irish-speaking judges on a reasonably frequent basis. Another current of opinion worth noting is that litigants who wish to have their cases heard in Irish are often viewed as being obstructive or insincere, with many people automatically assuming that litigants who wish to have their cases part-heard in Irish are simply attempting to delay the process or to make life difficult for State authorities such as the prosecution services. The comment is often made with some irritation that the litigant speaks English and therefore does not really "need" the case to be heard or part-heard in Irish. I therefore think it is fair to say that the status and lived reality of the Irish language within the legal system is as full of contradictions as the attitudes towards the language in society at large.

7. The present case is simply the latest in a line of cases in which a person accused of a criminal offence seeks to assert certain rights with regard to his trial in connection with the Irish language. While many issues have been previously raised and ruled upon by the courts, this particular case raises one particular and slightly novel issue. It is the issue identified at the outset of this judgment. To repeat, the question is: To what extent, if any, has the State a constitutional obligation under Article 8 to provide a bilingual District Judge when an accused person has chosen to exercise his (now well-established) constitutional right to present his side of legal proceedings in the Irish language?

A language right argument, not a due process argument

8. It is important to note from the outset that the applicant's case before me was squarely presented on the basis of whether any such duty or right arose from Article 8 of the Constitution; thus, the issue raised was one of a language right, not of a due process right under Article 38. This clarity has been helpful because the two issues of language right and due process are sometimes conflated. The issue of due process in a criminal trial can indeed arise in relation to language where there is a concern that an accused person does not understand the trial language sufficiently to be able to participate meaningfully in the trial. In this situation, there may be such prejudice to the accused that it could lead to an unsafe conviction and a miscarriage of justice. A notorious case in Irish history of such a situation was the case of Myles Joyce, who was convicted of the Maamtrasna murders in 1882 at a trial in Green Street Courthouse which was conducted entirely in the English language although he was himself a native Irish speaker. Mr. Joyce was hanged for the murders. Shortly afterwards, some of the witnesses recanted their evidence against him. One of the many injustices in the case related to the language issue. As Margaret Kelleher has recently said in her book on the subject: "For the accused and the witnesses, whether one spoke only Irish or had knowledge of English would prove to be of critical importance in interactions with police and with the legal and judicial systems, and for a number of men this would prove an issue of life or death. That Myles Joyce was a monoglot Irish speaker who failed to receive the services of an interpreter and translator is one notorious feature of this legal case with reverberations that extend to the present day" (preface to The Maamtrasna Murders: Language, Life and Death in Nineteenth Century Ireland, Margaret Kelleher, University College Dublin Press, 2018). The injustice of the case continued to resound down through the years and the President of Ireland granted a pardon to Myles Joyce in 2018. This is an extreme example of how a language issue can become a due process issue in a criminal trial. In modern Irish criminal trials, a due process issue is more likely to arise in relation to a person who was not raised in Ireland and who speaks neither Irish nor English; this is because there are in practice no – or, at least, almost no – Irish monoglots left.

9. In contrast, the issue of language right in its purest form has a different focus altogether; it is concerned with the right to use one's language of choice, irrespective of whether or not one also understands English. This language right stems from Article 8 of our Constitution, not Article 38. Not only does making Article 8 the bedrock of the constitutional argument in the present case shift the analysis away from a due process type of argument; it also distinguishes the situation from one involving other non-English languages, such as languages or dialects from Eastern Europe, Asia or Africa which are commonly heard in modern Irish courtrooms. One sometimes hears people drawing analogies between the position of an Irish speaker and, for example, that of a Polish speaker in the Irish courts. However, the legal analysis of issues relating to the use of other non-English languages in trials is not identical to the analysis which must be conducted in an Irish language case. This is, quite simply, by virtue of Article 8 of the Constitution. Polish, Lithuanian, Romanian or Mandarin are not official languages of the State, let alone languages carrying the designation of "first official language".

10. The distinction between language as an aspect of due process and language right in its pure form has been discussed in other jurisdictions where bilingualism is a feature both in society and in the administration of justice. The following excerpts from two Canadian cases are helpful in illuminating the distinction, and they shed light on the particular values underlying a language right:

> "Language rights are not subsumed by the right to a fair trial. If the right of the accused to use his or her official language in court proceedings was limited because of language proficiency in the other official language, there would in effect be no language right… there is a natural relationship between the ability to express oneself and taking full advantage of the possibility of convincing the court of the merits of one's case; […] language rights are not meant to enforce minimum conditions under which a trial will be considered fair, or even to ensure the greatest efficiency of the defence. Language rights no doubt enhance the quality of the legal proceedings, but their source lies elsewhere". (para 47, *Beaulac v The Queen* [1999] 1 S.C.R. 768).

> "Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality." (*Ford v Quebec (Attorney General)*, [1988] 2 S.C.R. 712)

Terminology

11. In this judgment where I use the term "Irish-speaking", I use it to describe a person who both understands and speaks the language fluently. Communication of course involves both speaking and understanding, but the phrase "Irish-speaking" is generally used to cover the whole package containing all the essential elements of communication.

12. Also, while there can be many degrees of fluency in a language, a point which was much discussed in *Ó Maicin v Éire* [2014] 4 IR 477, for present purposes I am concerned only with a judge who has a sufficient degree of Irish language expertise to be able to conduct a trial (or parts of a trial) in the language and I will use the term "Irish-speaking" in that sense only.

13. In the Ireland of today, there is no judge who is Irish-speaking who is not also English-speaking. In reality, any Irish-speaking judge will be bilingual in Irish and English. Therefore, I will refer mostly to such judges as "bilingual" rather than "Irish-speaking" because it serves as a reminder that the English-speakers in the trial are not in any way disadvantaged by the judge being proficient in the Irish language because the judge will invariably also speak English.

14. Where I use the term "English-speaking" in this judgment, I mean a person who speaks and understands English but not Irish.

It has been common practice to assign a bilingual District Judge in cases to be wholly or partly heard in Irish
15. The evidence before me, as will be seen below, makes it clear that where a person has chosen to exercise the right to present his or her side of the case in Irish, it has been common (although not exclusive) practice for the State to assign a bilingual District Judge to hear the case. The State maintains that this is no more than a practice and submits that there is no constitutional right or duty underlying the practice. The State maintains that the high point of the accused's constitutional rights is a right to have an interpreter paid for by the State, who will interpret the parts of the case which the accused conducts through the Irish language.

16. The applicant submits that Article 8 of the Constitution generates a right to have a bilingual judge appointed in order that an accused who exercises his right to give evidence and make submissions in Irish will be treated equally with the English-speaking opponent in the proceedings. He submits that it is a disadvantage for him to have his evidence and submissions heard by a judge who does not understand them in their original form and hears them solely through the prism of a translation, and that this disadvantage amounts to unequal treatment which is in conflict with the guarantees contained in Article 8 of the Constitution. In a nutshell, the case concerns whether or not there is any right to *be heard and understood in Irish* by the District Judge trying the case, as distinct from the right *to speak and present one's case* in Irish (which is already well established). The applicant submits that to have the latter right without the former is akin to what one Canadian judge once described as "the sound of one hand clapping". The full quotation is as follows: "If litigants are entitled to use either English or French in oral representations before the courts yet are not entitled to be understood except through an interpreter, their language rights are hollow indeed. Such a narrow interpretation of the right to use either English or French is illogical, akin to the sound of one hand clapping, and has been emphatically overruled by *Beaulac* [*R. v. Beaulac* (1999) 1 R.S.C. 768]" (Judgment of Brown B. in *R. v. Pooran* (2011) A.B.P.C. 77).

The Reliefs Sought by the Applicant
17. The applicant sought the following reliefs:

> i. A declaration that there is a constitutional duty and/or a duty pursuant to section 8 of the Official Languages Act 2003 on each of the respondents to nominate a judge with Irish for the purposes of the applicant's hearing in the District Court;
>
> ii. A declaration that the learned Judge Olann Kelleher of the District Court acted *ultra vires* in refusing to assign the summary criminal proceedings for hearing to a judge with Irish;
>
> iii. An order of *mandamus* directing the respondents to nominate a judge with Irish for the purposes of the applicant's hearing in the District Court;
>
> iv. A prohibition order preventing the fourth named respondent, its servants and agents, from taking any steps in the summary criminal proceedings in the District Court until a judge with Irish has be nominated to hear the proceedings against the applicant;
>
> v. A prohibition order preventing the fourth named respondent, its servants and agents, from taking any steps in the summary criminal proceedings in the District Court until the applicant has entered a plea of guilty or not guilty;
>
> vi. An order of *certiorari* quashing the decision of the learned Judge Olann Kelleher of 18th December, 2017 in which he refused the applicant's request to have a judge with Irish made available so that he may defend against the summary criminal proceedings in the District Court, completely through Irish, his native language, the national language and the first official language of the State, without disadvantage and on equal footing with the person who is happy to always use English;
>
> vii. A ban preventing the fourth named respondent, its servants and agents, from taking any steps in the summary criminal proceedings in the District Court until these judicial review proceedings have been heard and judgment has been delivered;
>
> viii. Any other such order as necessary;
>
> ix. The costs of these proceedings.

The evidence before me
The Affidavits sworn on behalf of the applicant

18. The applicant averred that he was born and raised in Ring, a parish within the Irish-speaking Gaeltacht area of *na Déise*, in County Waterford. He stated that Irish is his native language and that he conducts his business as much as possible through Irish. In 2017, he was questioned by Gardaí in Cork in connection with allegations of criminal damage and subsequently received five summonses containing charges of criminal damage. The applicant wrote to the court clerk of the District Court in Cork, seeking disclosure of documents and requesting that his trial be conducted in Irish. This letter was passed on for the attention of the judge.

19. The applicant appeared before District Judge Kelleher on 20th November, 2017. He was not legally represented and spoke to the court in Irish. He informed the court that he wished to have his hearing in Irish. According to the applicant's affidavit, the judge responded by saying that he knew the applicant from a previous occasion and knew that he could speak and understand English. He said that he intended to conduct the hearing in English. The proceedings were adjourned until 4th December, 2017.

20. On 4th December, 2017 the applicant appeared again before District Judge Kelleher. An interpreter was provided for him. The applicant spoke in Irish and again informed the court that he wished to conduct the hearing in Irish and requested to have a judge who understood Irish in order to facilitate this. This application was rejected. The applicant then asked for his case to be appealed by way of case stated to the High Court regarding his right to a hearing in Irish. This application was also rejected. The judge said that

while the applicant had a right to present his own evidence through Irish and to cross-examine witnesses through Irish, he did not have right to a hearing in Irish with a judge who had Irish. The judge adjourned proceedings until 18th December, 2017, to give the applicant a further opportunity to consider how he wished to plead. He also advised the applicant to obtain legal advice.

21. On 18th December, 2017, when the matter came up again before District Judge Kelleher, the applicant was represented by a legal team. An interpreter was again provided on that date. The applicant's counsel made his submissions to the judge in Irish. The applicant averred that as the interpreter was unable to interpret for both the applicant and the judge simultaneously, the applicant's counsel switched to English during the proceedings and made his submissions in English. The interpreter who was present on the date in question also swore an affidavit, as will be seen below.

22. Counsel for the applicant continued to make the same submissions as before. The judge once again referred to how he had heard the applicant speaking English on a previous occasion and could therefore understand English. He then entered a plea of 'not guilty' on the applicant's behalf and adjourned the proceedings to 19th January, 2018.

23. Two co-defendants had also been charged in connection with the same events. Both had entered pleas of not guilty and were content to have their trials in English. As their trials were set down for the same date as that of the applicant, he assumed that the intention of the judge was that all three would be heard together.

24. Mr. Eoin Seoighe, solicitor acting for the applicant, swore an affidavit in which he confirmed the above sequence of events insofar as he was involved in them. A number of other solicitors also swore affidavits on behalf of the applicant as follows.

25. Mr. Mac Aodháin, a solicitor from the Donegal Gaeltacht with over 30 years' experience of practice, averred that many of his clients wish to use Irish and that when parties elect to use Irish, it has been the practice of the courts to run cases before a judge with Irish. He said that none of his clients has ever been forced to go before a judge without Irish in the District Court, the High Court or the Supreme Court. When necessary, a judge with Irish would travel to hear a case; Mr. Mac Aodháin gave examples of judges who came to Dublin to hear cases in Irish, including (now retired) Judge Uinseann Mac Gruairc, the late Judge Seán Delap, the late Judge Máire de Róiste, and the late Judge Liam Mac Meanamin. Mr. Mac Aodháin also said that in his experience, interpretation in court could be defective.

26. Mr. Sean Ó Ceanainn averred that he had practiced as a solicitor for 30 years in the Donegal Gaeltacht and was also the county coroner. He said that those of his clients who wish to conduct their cases in Irish are facilitated in that regard by Judge Paul Kelly who has sufficient expertise in the language. In his experience, interpreters in court could be faulty from time to time and he considered it important that the presiding judge would have Irish in order to ensure that such errors are corrected. He also referred to one of his cases currently listed before the Circuit Court in which his client will be giving evidence in Irish and counsel will be making submissions to the court in Irish. The Circuit Court judge who has been assigned has Irish.

27. Mr. Tomás Brabazon averred that he was a solicitor with over 20 years of experience based in Dublin. Although he had many clients who wish to use the Irish language in court, he had never had to go before a judge in the Supreme Court, the High Court or the District Court who did not have Irish. He said that it was the practice of the District Court in Dublin to have an Irish-speaking judge assigned as necessary. He also was of the opinion that court interpreters could be faulty, and there was a need for a judge with Irish to keep matters on the right track.

28. Mr. Seán Ó Cearbhaill averred that he had over 30 years' experience as a solicitor. He has a large criminal practice in Galway, which also deals with aspects of civil law. Many of his clients wish to conduct their business through Irish, particularly any matters of court. This was facilitated by District Judge Mary Fahy, who had fluency in the language. In his experience within the criminal courts, interpretation from Irish to English could be flawed but the presence of an Irish-speaking judge was helpful in such situations.

The Affidavits sworn on behalf of the respondents

29. Ms. Dolores Gordon, a member of staff at the court's office in the Loughrea Courthouse, Co. Galway, swore an affidavit in which she said that sometimes Irish language interpreters are used for cases conducted in Irish. She gave the example of a case heard on the 3rd March, 2016, in which an Irish interpreter was used because the judge did not understand Irish.

30. An affidavit was sworn by Mr. Seán Ó Luasa, the interpreter employed when the applicant was before the District Court on the 18th December, 2017. He has a Bachelor of Arts in Irish and Italian and a Masters in Translations Studies. He is a member of *Gael-Taca*, an organization in Cork that promotes the Irish language in the city. Mr. Ó Luasa explained how he was working with Access Translation Cork on the day in question. He had prepared in advance of the hearing on 18th December, 2017, including advance translation of each charge and particular legal terminology. He says that before entering the courtroom, the applicant, the applicant's counsel, and Mr. Ó Luasa all agreed that the counsel would make his submissions in Irish and that Mr. Ó Luasa would provide an interpretation. In court, he started by standing next to the applicant's counsel in order to provide the interpretation, but the applicant (who was perhaps 5 metres away) complained that there was no translation for himself. Mr. Ó Luasa then made the decision that he would be unable to do both at the same time, and went over to the applicant to begin translating. That was when counsel, for the sake of simplicity, decided to make his submissions in English. Mr. O'Luasa pointed out that if the applicant remained silent, he himself could have stood in the middle of the room and translated out loud.

31. A substantial affidavit was sworn by Mr. Micheál Ó Cearúil. Mr. Ó Cearúil is responsible for translating court rules into Irish on behalf of the Department for Justice and Equality. He is the author of *Bunreacht na hÉireann: A study of the Irish text* (Coiste Uile-Pháirtí an Oireachtais ar an mBunreacht, 1999/The All-Party Oireachtas Committee on the Constitution, 1999). He has a doctorate in Irish and is co-secretary of the advisory committee on Irish legal terminology. He was a translator in the translation division of the Houses of Oireachtas between 1992-2003, until he transferred to the Department of Justice and Equality. His duties in the Oireachtas included consecutive interpretation, that is to say, interpretations from Irish to English of speeches and debates of ministers, TDs and senators who spoke in Irish, while the speeches were being given or when the debate was ongoing.

32. He referred to some of the affidavits sworn on behalf of the applicant in which mention was made of the custom of judges having to come to Dublin when there were no local District Court judges available to hear cases in Irish. He said that this is no longer necessary as Judge Victor Blake has heard cases in Irish in Dublin for many years and is indeed a member of the advisory committee on Irish legal terminology.

33. Mr. Ó Cearúil described the difference between simultaneous and consecutive translation. Consecutive Interpretation is described as "*the process of interpreting after the speaker […] has completed one or more ideas in the source language and then pauses while the interpreter transmits that information*", in the entry under "*Consecutive Interpretation" of The Routledge Handbook for*

Interpreting (H. Mikkelson & R. Jourdenais, London and New York, 2015, page 96). This type of interpretation is compared to Simultaneous Interpretation, which is described in the same handbook at page 80: "*in simultaneous mode, the interpreter sits in a booth with a clear view of the meeting and the speaker and listens to and simultaneously interprets the speech into a target language*". Mr. Ó Cearúil said that since the judgment of Finnegan J. in 2002, consecutive translation was the method of translation used in the courts. He explained that because everyone in the court is able to hear what consecutive interpreters are saying, if they make a mistake, this can be corrected immediately.

34. Mr. Ó Cearuil described how interpreters prepare in advance for particular situations, including court hearings.

35. Regarding interpretation in general, Mr. Ó Cearúil observed that although the Courts Service of Ireland Report 2016 showed that there were over 8,000 applicants for interpretation services generally, in the case of Irish specifically, there were 13 bookings in 2013, 5 in 2016, and 2 in 2018.

36. With regard to the particular difficulty encountered on the 18th December, 2017 in the present case, where the interpreter was trying to cover two parties at the same time, he said this could be addressed by having more than one interpreter.

The logistics of interpreting in a bilingual trial

37. Before examining the legal issues, I wish to address a practical matter. One of the things which struck me when examining the authorities, and when considering the evidence above, is that people have different ideas as to how the process of translating evidence and submissions operates at a practical level in the course of a trial. Any discussion of the legal issues should be anchored in the practical realities of how interpretation would or does work on the ground. Indeed, this issue is specifically mentioned in the recent case of *DPP v. Billings* [2019] IECA 149, where the Court of Appeal described its own initial assumption as to how translation had taken place at the trial and then said that it turned out to be quite different from what had actually had taken place. Accordingly, I think I should set out my own understanding of how matters would proceed in a practical sense if and when a bilingual trial is conducted in front of a bilingual District Court judge.

38. The first stage of the trial would be the opening of the case by the prosecution and the calling of prosecution witnesses. Let us assume that all the witnesses give their evidence in English – I assume that no translation/interpretation would be necessary while evidence in chief is being given because the accused and his legal team understand English and therefore understand both the English questions to the witness and English answers from the witness. Perhaps I am wrong and that the practice is to have the English questions and answers translated into Irish. Perhaps it can vary from case to case, depending on what the accused person wants.

39. Regarding the cross-examination of the prosecution witnesses on behalf of the accused, each question asked in Irish by the counsel for the accused would have to be translated into English for the witness, who would then answer in English. Again, I do not think the witness' answer in English needs to be translated into Irish as the accused and his legal team understand English, but I may be wrong about this.

40. Moving on to the defence evidence (if any), it would proceed as follows. If the accused gives evidence, he would do so in Irish. Both the questions and answers of his evidence in chief would need to be translated into English. The cross-examination would consist of questions posed in English and translated into Irish for the witness; while the answers given in Irish would be translated in English.

41. Each side would conduct their closing submissions in English and Irish respectively, with the Irish language part being translated into English.

42. I do not see any reason why all the above-described translation from Irish into English cannot be done out loud for the benefit of anyone in the courtroom who does not speak Irish. This would obviously require the physical positioning of the interpreter so that he or she can be heard by everyone. I am somewhat puzzled by how matters proceeded in the present case when it was in the District Court, as described by the interpreter Mr. O'Luasa. He averred that the applicant requested a translation of his own counsel's submissions as they were being made. Why would the accused require a translation of his own counsel's submissions, when the accused is the very person who has requested that some of the case be heard in Irish and therefore presumably speaks the language? When one talks about the accused having the 'right to an interpreter', I would have considered this phrase a short-hand for his being entitled to the appointment of an interpreter who will interpret the Irish language part of the case *for those in the courtroom who only speak English*. This is to facilitate his conducting the case in Irish; but surely it cannot mean that the interpreter should be physically proximate or providing the translation service to the accused. Rather, the service is *to the benefit of the accused* in the wider sense that it enables him to conduct his part of the case in Irish while allowing the others in the courtroom to understand what he is saying.

43. Further, there is no practical reason of which I am aware which would prevent the translation from being done *out loud* for the benefit of anyone in the courtroom who does not understand Irish. This would create a transparency in the process so that any errors or missed nuances can be picked up upon by the Irish speakers in the courtroom, including the judge, if the judge is bilingual.

44. In a trial where there is both translation as described above and a bilingual judge, there would be no question of unequal treatment of the prosecution (whether one is talking about prosecution witnesses or lawyers). In the first place, they would have the benefit of translation to understand what the defence (lawyers and accused) are saying. Secondly, because the judge would be bilingual, he or she would directly understand the prosecution evidence and submissions in English. This "equality" point is particularly important when one comes to consider the Supreme Court decision in *Ó Monacháin v. An Taoiseah* (1982) TÉTS 1; [1986] ILRM 660, discussed in detail below, in which concern was expressed about equality of treatment as between the parties. Importantly, if one pauses to consider the (language) relationship *between the parties and the judge*, one can readily see that there is greater (language) equality in the trial as a whole where there is a bilingual judge as well as an interpreter, because the judge can understand each party's evidence and submissions directly (in Irish and English respectively) without translation. In contrast, where the judge speaks only English, the judge hears one side of the case (the English side) directly in a language he or she understands, and the other side (the Irish side) through translation.

45. I make one final comment regarding the logistics of the process. This concerns the situation where there are English-speaking co-accused, as arises in the present case. I do not see how their position is prejudiced by any of the above. They would have no difficulty regarding the prosecution case because it would be conducted in English; they would understand the Irish language evidence and submissions of the accused because it would be translated; and their own evidence (if any) and submissions in English would be directly understood by the judge.

Lost in Translation; the linguistic effects of translating from one language to another

46. The logistics of interpretation are one thing; the linguistic aspects are another. Anyone who speaks more than one language will be alive to the difference between understanding a language directly and receiving a version of what the person has said through a translation. Indeed, the word 'interpretation' itself recognises that the process is not the linguistic equivalent of a photocopy. This is even more true when one is dealing with oral evidence, where non-verbal communications such as body language, emotion, pace and intonation of the witness are all crucial in shaping the decision-maker's response to the words spoken by the witness. The interposing of a neutral, detached, professional interpreter between what comes out of the lips of the witness and what goes in the ears of the decision-maker is a significant event in the communication process. A number of distortions take place, and not only in relation to the words themselves. Having experienced and observed this in the courtroom first-hand, this seems to me so obvious that it hardly needs expert evidence to prove it, but as it happens, a number of Supreme Court judges have referred to a particular passage in a 1993 journal article in which an expert helpfully summarised what can be lost in the process of translating from one language to another. In *MacCárthaigh v Éire* [1999] 1 IR 186, Hamilton C.J. said:

> "Certainly, there are difficulties regarding interpretation - difficulties which Michael Shulman referred to in Vanderbilt Law Review (1993) vol. 46, p. 175 at 177 as follows:-
>
> > "When a defendant testifies in a criminal case, his testimony is critically important to the jury's determination of his guilt or innocence. The first noticeable difficulty in the present system of Court interpretation is that non-English speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, syntax or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. While juries should not attribute to the defendant the exact wording of the interpretation and the emotion expressed by the interpreter, they typically do just that . . . Given that juries often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?"

47. It is of course necessary to point out that in *MacCárthaigh v. Éire* [1999] 1 IR 186, the Court nonetheless went on to find that the accused did not have the right to an Irish-speaking jury despite the above-mentioned features of the translation process; this conclusion was reached because of the competing constitutional imperative of a representative jury. As Hamilton C.J. commented on the points made by Shulman: "That is true enough, but it must be said in today's Ireland there is no better solution available."

48. In *Ó Maicin v. Éire* [2014] 4 IR 477, Hardiman J., in the course of his dissenting judgment, referred to the same passage from the Shulman article and said:-

> "That article concerned persons who spoke foreign languages. Its insights must surely apply *a fortiori* to a defendant who wishes to use a State's own National and first official language."

In the same case, Clarke J. (as he then was) referred to the passage from the Shulman article but pointed to the ultimate result in *MacCárthaigh v. Éire* [1999] 1 IR 186, and then added:

> "Criticism of the quality of translation may well, on occasion, be justified. The risk of mistranslation cannot be ruled out. But likewise, the risk of misunderstanding by many of those who have a reasonable competence in Irish but who do not speak Irish as their mother tongue, seems to me to be equally significant. It is likely that there may be many who would feel competent to conduct an ordinary conversation in Irish and would, for example, have little difficulty in following the news in Irish but who would, nonetheless, not feel entirely confident in being able to avoid the risk of misunderstanding evidence or submissions."

Ultimately, Clarke J. reached the conclusion that the constitutional necessity for a representative jury outweighed the disadvantage for an accused of having his evidence translated for the jury. These judges therefore accepted that something can be lost in translation; but, the bigger question was whether there was any constitutionally acceptable alternative to this deficit in light of the imperative to have a representative jury. There was not - but that is a legal issue, not the linguistic one upon which I am currently focussing.

49. I note also the evidence in the present proceedings from several very experienced solicitors who averred that their experience of translation from Irish in court over the years was that the translation was sometimes quite flawed. This evidence was set out earlier in the judgment. Each of them said that they found it very helpful to have a presiding judge who spoke the language and was able to act as a corrective. This point was also alluded to, in the jury trial context, by McMenamin J. in *Ó Maicin v. Éire* [2014] 4 IR 477 when he said:

> "The judge, of course, has a central role in any trial before a jury; must be responsible for the proper administration of the trial; and rule on all controversial matters which arise during the trial itself. If the judge in the case is bilingual, or at least competent enough in Irish to work without the assistance of an interpreter, this must significantly diminish any concern the appellant has regarding the quality of translation or interpretation. The fact that the judge will be able to understand the evidence in both official languages may help to ensure any difficulties in translation are addressed immediately, so that the jury are not under any misapprehension as to nuance or meaning in evidence. In this aspect, therefore, the extent to which the appellant's language rights have been vindicated and protected in fact go further than in *MacCárthaigh*. In addition, the order may be said to bolster the appellant's right to a fair trial under Article 38 of the Constitution."

50. Counsel in the proceedings before me engaged in argument as whether it is a disadvantage, and/or a disadvantage which can be remedied, to have one's words translated in the course of a trial. I think it may be useful to distinguish between the linguistic and legal issues. As I have said, it seems to me entirely obvious that, from a linguistic point of view, to have one's words understood directly and without the medium of an interpreter is the best possible situation, and that translation is always a second-best option. However, the legal question before me is not whether one approach, from a linguistic point of view, is better than the other (because it is so obvious that no-translation is better than translation); the legal question is whether the second-best option is good enough to satisfy such constitutional rights and duties as may arise under Article 8. This is where the issue moves out of the realm of linguistics and into the realm of constitutional analysis. Is Article 8 of the Constitution adequately observed by the provision of a translation when the Irish language is deployed by an accused in a criminal trial? Or is there an obligation on the State to go further and strive to put a bilingual District Judge in place for the trial if possible? I turn now to the relevant legal sources of information to search for the answers to those questions.

Status of the Irish Language under the Constitution
51. Article 8 of Bunreacht na hÉireann provides as follows:

> 1 The Irish language as the national language is the first official language.
>
> 2 The English language is recognised as a second official language.
>
> 3 Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

It may be noted that no provision has been made by law for the exclusive use of either language for any particular official purposes in any part of the State despite the enabling provisions of Article 8.3; for example, there has never been any legislation providing that English is the official language for the administration of justice. At the highest level of Irish law, therefore, the Irish language is the first official language in the administration of justice.

52. The 1922 Constitution had also contained a similar provision albeit that it was phrased somewhat differently from the present Article 8. Article 4 of the Constitution of the Irish Free State (Saorstát Éireann) provided as follows:

> "The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the "Oireachtas") for districts or areas in which only one language is in general use."

53. In *O'Foghludha v. McClean* [1934] IR 469, Kennedy C.J., speaking of the above provision in the Constitution of the Irish Free State (Saorstát Éireann), expressed in strong terms the position of the Irish language in the constitutional scheme (at page 483):

> "The declaration by the Constitution that the National language of the Saorstát is the Irish language does not mean that the Irish language is, or was at that historical moment, universally spoken by the people of the Saorstát, which would be untrue in fact, but it did mean that it is the historic distinctive speech of the Irish people, that it is to rank as such in the nation, and, by implication*, that the State is bound to do everything within its sphere of action (as for instance in State-provided education) to establish and maintain it in its status as the National language and to recognise it for all official purposes as the National language*. There is no doubt in my mind but that the term "National" in the Article is wider than, but includes, "official," in which respect only the English language is accorded constitutional equality. None of the organs of the State, legislative, executive or judicial, may derogate from *the pre-eminent status of the Irish language as the National language of the State* without offending against the constitutional provisions of Art. 4." (emphasis added)

54. I note in particular his comment that the State is "bound to do everything within its sphere of action" to establish and maintain Irish in its status as the national language and to recognise it for all purposes as the national language. This suggests that Article 8 encompasses duties of an active, practical nature and that it is more than mere rhetoric or homage to the historical position of the language.

55. Moving on to some post-1937 case-law, Hardiman J. said in *Ó Beoláin v. Fahy* [2001] 2 IR 279:

> "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."

56. In *Ó Maicin v. Ireland* [2014] 4 IR 477, discussed in further detail below, O'Neill J. said:

> "There has been much judicial consideration of the extent of the duty or obligation imposed upon the State in respect of the Irish language and the corresponding rights of the citizen who wish to use the Irish language. The leading judicial statements in this regard are those of Kennedy C.J. in *O'Foghludha v. McClean* [1934] I.R. 469; and Hardiman J. in *Ó Beoláin v. Fahy* [2001] 2 I.R. 279. In the former of these cases, the following passage from the judgment of Kennedy C.J. describes in surprisingly strong language, the extent of the obligation and duty resting on the State… [He quoted the passage set out above and commented:] It is to be noted that the primary position of the Irish language is, if anything, enhanced in the language used in Article 8 of Bunreacht na hÉireann where the Irish language is not only described as the "national" language but as the "first" official language of the State, whereas in Article 4 of the Constitution of Saorstát Éireann, it is not given that additional designation as the "first" official language. Thus, it can be said that the imperative force of the obligation of the State described by Kennedy C.J. as emanating from Article 4 of the Constitution of Saorstát Éireann is repeated with added emphasis in the language used in Bunreacht na hÉireann."

57. Such judicial statements on the position of the Irish language in the Constitution emphasise the importance of treating the language with respect and of ensuring that those who wish to use the language in official dealings with the State are not placed at a disadvantage. They also suggest that Article 8 envisages an active rather than a passive role for the State in relation to the language. Of course, the precise contours of the active role are not delineated, and the present case raises the question of what precise activity (if any) is required of the State in the particular context of a District Court summary criminal trial.

The Official Languages Act 2003
58. Section 8 of the Official Languages Act 2003 provides:

> S.8 (1) A person may use either of the official languages in, or in any pleading in or document issuing from, any court.
>
> (2) Every court has, in any proceedings before it, the duty to ensure that any person appearing in or giving evidence before it may be heard in the official language of his or her choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.
>
> (3) For the purposes of ensuring that no person is placed at a disadvantage as aforesaid, the court may cause such facilities to be made available, as it considers appropriate, for the simultaneous or consecutive interpretation of

proceedings from one official language into the other.

(4) Where the State or a public body is a party to civil proceedings before a court—

(a) the State or the public body shall use in the proceedings, the official language chosen by the other party, and

(b) if two or more persons (other than the State or a public body) are party to the proceedings and they fail to choose or agree on the official language to be used in the proceedings, the State or, as appropriate, the public body shall use in the proceedings such official language as appears to it to be reasonable, having regard to the circumstances.

(5) Notwithstanding any other provision of this section, a person shall not be compelled to give evidence in a particular official language in any proceedings.

(6) In choosing to use a particular official language in any proceedings before a court, a person shall not be put by the court or a public body to any inconvenience or expense over and above that which would have been incurred had he or she chosen to use the other official language.

59. Counsel on behalf of the State in the proceedings before me submitted that the Act of 2003 captured in legislation all of the constitutional obligations and rights arising from Article 8. In particular, it was submitted that it was obvious that the Oireachtas considered that any 'disadvantage' caused to a person who wished to conduct their side of a court case in Irish could be 'cured' by the process of interpretation/ translation. It is certainly true that the legislation appears to consider translation to be an adequate way of safeguarding a person's right to conduct his or her part of the case in Irish. However, while legislation must be interpreted in accordance with the Constitution, the reverse is not true; it does not seem to me appropriate to interpret the Constitution (the higher law) by reference to legislation. It may be that the fruits of an analysis of the authorities concerning Article 8 will lead me to the same conclusion as the Oireachtas, but I do not think that the exercise can be short-circuited by simply assuming that the Oireachtas was correct and that the extent of the constitutional obligations and rights are co-extensive with what has been set out in the legislation. Indeed, as counsel on behalf of the applicant pointed out, section 8 of the Act of 2003 does not go as far as the Constitution in at least one respect; in *Stát (MacFhearraigh) v. MacGamhnia* [1980-1998] TÉTS 29, it was held that the rights identified applied in proceedings before the Employment Appeal Tribunal, whereas s. 8 of the Act of 2003 is limited to court proceedings. This shows the danger of assuming that the legislation necessarily captures all of the obligations and rights arising under Article 8.

60. For clarity, however, I should state that, in my view, the Act of 2003 does not confer any legislative right regarding the assignment of a bilingual judge and therefore the issue before me arises firmly in terms of constitutional right or duty.

Legal principles concerning the use of the Irish language previously placed beyond doubt by decisions of the courts

61. I turn now to an examination of the authorities concerning the constitutional rights and duties arising from Article 8 of Bunreacht na hÉireann in relation to the Irish language in court cases. Certain principles have been clearly established. They include the following:

(i) A person is entitled to put forward his or her part of a court case in Irish, whether it be his or her own evidence, or cross-examination of witnesses by his or her lawyer, or submissions on his or her behalf by a lawyer. This was set out in clear terms by the High Court (O'Hanlon J.) in *Stát (MacFhearraigh) v. Gamhnia* [1980-1998] TÉTS 29 and has never been doubted since that time.

(ii) It is irrelevant whether or not the person speaks and understands English. This is because the right is a language right deriving from Article 8 of the Constitution and not a due process right deriving from Article 38. This was also made clear by O'Hanlon J. in *Stát (MacFhearraigh) v. Gamhnia* [1980-1998] TÉTS 29; (Unreported, High Court, O'Hanlon J., 1st June 1983). It is perhaps surprising to see the extent to which the District Judge in the present proceedings focused on the fact that the applicant spoke English, having regard to the length of time it has been established in law that an accused person's fluency in the English language is irrelevant. The principle was also approved by the Supreme Court in *Ó Beoláin v. Fahy* [2001] 2 IR 279.

(iii) A person is entitled to have certain documents relevant to the prosecution against him translated into Irish (*Ó Beoláin v. Fahy* [2001] 2 IR 279). In *Ó Beoláin* itself, for example, the Supreme Court held that the applicant was entitled to have certain Road Traffic Acts and the Rules of the District Court 1997 translated in circumstances where he was facing trial for road traffic offences in the District Court.

(iv) A person is not (at least currently) entitled to a jury which understands Irish in a criminal case which is to be tried with a jury. This is because there is a competing constitutional imperative that the jury be representative. This representativeness cannot be assured in light of current information about the number of Irish speakers in the population, from whom the jury would be drawn. This was decided in *MacCárthaigh v. Éire* [1999] 1 IR 186, and confirmed (in respect of a trial which had much closer connections to a Gaeltacht area) in *Ó Maicin v. Éire* [2014] 4 IR 477.

(v) In a jury trial, where there is to be interpretation/translation, it is sufficient if such interpretation is consecutive rather than simultaneous (*MacCárthaigh v. Minister for Justice* [2002] 4 IR 8). However, as we have seen, the Act of 2003 gives a court flexibility on this particular issue (section 8(3) of the Official Languages Act, 2003).

The Supreme Court decision in *Ó Monacháin v. An Taoiseach*: has it already decided the issue in the present case?

62. None of the cases referred to in the previous section dealt directly with the question which arises in the case before me. However, there is one case which arguably does and therefore requires close examination. This is *Ó Monacháin v. An Taoiseach* [1980-1998] TÉTS 1; [1986] ILRM 660, 16th July 1982. On one view of the case, it has already decided the issue raised in the present case in a manner adverse to the applicant. On another view, it has left the question open. It is necessary, therefore, to engage in a careful study of the judgments in *Ó Monacháin* to see what precisely was or was not decided by the Supreme Court in that case. I am devoting considerable attention to the case because I would, of course, be entirely bound by the views of the Supreme Court if the case had already decided the point arising before me in the present proceedings.

63. Central to the case of *Ó Monacháin* was section 71 of the Courts of Justice Act, 1924 which provides as follows:

> "71.—So far as may be practicable having regard to all relevant circumstances the Justice of the District Court assigned to a District which includes an area where the Irish language is in general use shall possess such a knowledge of the Irish language as would enable him to dispense with the assistance of an interpreter when evidence is given in that language."

It is apparent from the words on their face that this duty is not absolute; it is a duty to assign an Irish-speaking judge to a Gaeltacht area only "so far as may be practicable". Incidentally, it may also be noted that it concerns the assignment of a District Judge to such an area on an ongoing basis and says nothing about the assignment of a judge to the hearing of a particular case in any other area, which is the issue in the case before me.

64. The plaintiff had been charged with two different sets of offences contrary to planning legislation. He was brought before the District Court of Bunbeg, an area within the Donegal Gaeltacht. The prosecutor was the County Council and wished to conduct its part of the case in the English language, while Mr. Ó Monacháin wished to conduct his part of the case in Irish. The first set of criminal proceedings came before District Judge Patrick Keenan Johnson, who had been temporarily assigned to the District. Mr. Ó Monacháin indicated that he wished to have a judge who could understand his evidence without the assistance of an interpreter. While the Irish language was in general use in the area of Bunbeg, it was alleged that District Judge Johnson did not have sufficient knowledge of the language as would enable him to dispense with the assistance of an interpreter when evidence was being given. His application was refused, and the judge also refused to state a case to the High Court on whether the State had failed in its duty pursuant to s. 71 of the Courts of Justice Act 1924. The plaintiff refused to participate further and was convicted, and subsequently imprisoned for non-payment of the fine.

65. Events repeated themselves much in the same way when the second set of criminal proceedings were prosecuted before District Judge Michael Larkin, the judge who was assigned to the District, and again the plaintiff was convicted and sentenced. The plaintiff then brought plenary proceedings seeking various reliefs grounded upon a claim that the relevant proceedings violated his legal and constitutional rights in that he was not tried in accordance with law. He was released on bail pending the outcome of the proceedings. A major component of his case was that the State had failed in its obligations pursuant to s. 71 of the Courts of Justice Act 1924. He was unsuccessful in both the High Court and Supreme Court.

What was the basis for the decision?

66. The headnote records the conclusion of the Supreme Court in the following terms: that while the plaintiff was entitled to put forward his own part of the case in Irish, this did not extend to a right under s. 71 *or any other source of law* to compel a District Judge to hear *the whole of the case in Irish* (emphasis added) if there is a witness or anyone else in the case who does not understand Irish, as to do so would be contrary to natural justice. In my view, this is a fair summary of what was decided, but immediately one can see that there are a number of puzzling aspects to it. The first point is that the conclusion seems to be slightly disconnected from what the plaintiff was seeking. As noted above, the plaintiff was not seeking to have the whole case heard in Irish; merely (a) to put forward his own evidence and submissions in Irish, and (b) to have a judge who would understand this Irish-language part of the case without the need for an interpreter. In other words, he was looking for a bilingual judge (as there is no question of there being an Irish-speaking judge who does not also speak English). The plaintiff was not asking for the other side to conduct their side of the case in Irish, nor that the case would be conducted without an interpreter. All that plaintiff wanted was a bilingual judge who would understand his part of the case, conducted through Irish, directly and without need of an interpreter; yet the Supreme Court refused the relief sought on the basis that he could not compel the Court to hold *the whole of the trial in Irish*. Another point of note was that the case was brought on the basis of the statutory obligation in s. 71 of the Act of 1924, whereas the conclusion of the Court was couched in much broader terms. It is therefore necessary to look more closely at the individual judgments handed down in the case to see how the conclusion was arrived at and what the implications are for the case before me.

67. Henchy J. emphasised that the statutory duty contained in s. 71 of the Act of 1924 was not absolute and then went on to say:

> "It is a fundamental principle of law – an aspect of natural justice which is not permissible to be put aside – that it is neither right nor lawful to hear a case in any language (even in the Irish language, the national language) without affording an opportunity to people who do not have the language and who have a close connection – as parties, as witnesses, as lawyers – with the case, to understand the entirety of the case. In a case of that type, even though any witness has permission to give his own evidence in his native language, it is not possible to find authority in s.71 or any other legal provision to compel a judge to hear a case without the assistance of an interpreter to provide an understanding of that evidence to the people who require to have that understanding."

This passage appears to proceed on the assumption that the plaintiff was seeking to have the whole of the case heard in Irish, which would be unfair to the English-speaking opposition.

68. Henchy J. continued:

> "Look at what happened in this case. After the solicitor for the county council opened the case in English, the first witness gave his evidence in Irish and the interpreter translated into English. But the second witness gave his evidence in English because he did not have Irish. From that point on, notwithstanding s.71 and even if the judge had sufficient Irish as to enable him to understand the witnesses in Irish with accuracy without the assistance of an interpreter, he would be obliged to commence the case from the beginning with an interpreter. Were he not to do so, the county council could obtain an order in the High Court quashing his judgement if it happened that that judgement was not in favour of the complainant…"

Again, I find this slightly puzzling because if there were an interpreter for the prosecution witnesses and counsel, and the judge speaks both languages, it is difficult to see where the problem lies. It can only make sense if Henchy J. thought that the plaintiff was seeking to force the hearing to be conducted entirely through the Irish language without any interpretation being provided at all.

69. He went on to say that this was "no new law" and referred to *O'Foghludha v. McClean* [1934] IR 469, and in particular to a passage in the judgment of Kennedy C.J. where he said that the language should not be used as "an instrument of oppression". It may be noted that *O'Foghludha* concerned the service of documents in the Irish language (without translation) on a party which did not understand Irish. He said: " No party or witness can rely on the provisions of s.71 to quash proceedings or a decision unless it can be shown that *no injustice will be done to the other side through the hearing being entirely in the Irish language and without the use of an interpreter* to provide an English language version of the evidence for those participating in the case and to have no knowledge of the Irish language." This makes it entirely clear that the problem perceived by Henchy J. was that of an all-Irish trial without any interpreter; such a situation would of course disadvantage the English-speaking prosecution.

70. Henchy J. continued:

> "Counsel for the plaintiff states that only required was that he would obtain a hearing in the District Court under s.71 from a judge who would have a thorough grasp of the Irish language spoken in Bunbeg and the surrounding district so that there would be no need for an interpreter. There are cases in which the plaintiff would have that right, but this case cannot be included in their number. Any plaintiff or witness has the right at all times to give his own evidence in the Irish language, but plaintiff has no permission under s.71 or any other provision of law, to compel the judge to hear the entire of the case in the Irish language [something missing here] witness or any other person participating in the case who does not understand Irish. Where the judge to act in that fashion, it would be a hearing inconsistent with the Constitution because it would be contrary to natural justice not to mention that it would arise from misunderstanding the correct meaning of section 71".

Again, the assumption that there would be no interpretation at all in the courtroom is evident. However, this is not a logical necessity; one can have both a bilingual judge *and* an interpreter who will translate the Irish evidence and submissions into English for the English-speaking prosecution.

71. Griffin J. agreed with Henchy J. and, again, commenced the discussion by emphasising that the duty imposed by s. 71 of the Act of 1924 was not absolute. He said:

> "It appears to me that it was one of the purposes of this section and it so restricted, that in any particular case regard would be had to all the circumstances of the matter when considering whether it is practical or impractical for a District Judge to do without the assistance of an interpreter when hearing a case and it appears to me that a judge may do without the assistance of an interpreter only in a case where *all* the evidence is given in the Irish language and when the case is conducted entirely in the Irish language. There can be no question but that it is the primary duty of any judge, when hearing a case, to afford the parties equal treatment. He cannot do that unless the case is conducted in a manner and in a language enabling him to understand the parties and their witnesses. At the hearing of the prosecution of the plaintiff before District Judge Keenan Johnson, the plaintiff stated that he wished that the county council would conduct the case in Irish. The solicitor for the county council wished to open and conduct the case in the English language. He was entitled to do that and the judge said he would listen to the case with an interpreter.... Because of the desire of the solicitor to open and conduct the case in English and because the second witness did not have Irish, the judge would not be right in hearing the case in the absence of assistance from an interpreter. It was the right of the plaintiff to give his evidence in Irish but he had neither license nor right to demand that the entire case be conducted in Irish when it was the desire of the solicitor to conduct the case in English and when one of the witnesses did not have Irish."

Thus, it appears that Griffin J. also proceeded on the assumption that the plaintiff was seeking to force a trial entirely through Irish language, without any interpreter being present for the assistance of the prosecution.

72. The judgment of Walsh J. is to be distinguished from those of Henchy and Griffin JJ. insofar as he concluded that there had been a breach of the Act of 1924. He said that there had been "fifteen years in which to find a suitable person" and that there was "no evidence to demonstrate that it was not possible to appoint a suitable Judge to the district in question". However, he then went on to pose the question: "But does that affect the jurisdiction of Judge Larkin?" and answered this question in the negative. He said that the validity of the judge's appointment was not in doubt even though "he was not the most satisfactory person to be there on [the trial date] because he had not a sufficient knowledge of Irish to fulfil the terms of s. 71 of the Act of 1924. The validity of the appointment does not rely on linguistic knowledge....". He went to say: "...there would be a breach of natural justice in any case where the evidence was not understood *by the Judge or by the parties* insofar as language entered into the matter. But when an effective interpreter is present to translate their evidence to everyone there is no lack of natural justice" (emphasis added). The reference to natural justice and to the evidence not being understood by the parties (as well as by the judge) may be noted. He concluded: "It is my opinion that the plaintiff failed to found any lack of jurisdiction and that he has no entitlement to an order of certiorari or mandamus, as he seeks, against the Judges in question or any other person". Regarding the Government, "though they failed to fulfil their statutory duties on [the trial date], as I have already said, I do not think it right to make any order of that nature. There would be no benefit to it as the case is over and matters relating to the case are at an end".

73. For present purposes, I make the following observations about the *Ó Monacháin* case:

> (i) The case was primarily focused on whether there had been a breach of s. 71 of the Act of 1924, not Article 8 of the Constitution.
>
> (ii) Although the question posed by the plaintiff for the court was indeed very similar to that arising in the present case (that question being – "Am I entitled to have a bilingual judge who will understand my Irish-language part of the case without the need for an interpreter?"), the Supreme Court appears to have provided the answer to a rather different question (that question being – "Am I entitled to force a hearing, entirely through the Irish language, in which there is an Irish-speaking judge and no interpreter and in which the prosecution would not understand any of the Irish parts?")
>
> (iii) Having re-framed the plaintiff's request as one for a hearing entirely through the Irish language (with the added feature of no interpreter), the case then appears to have been decided on the basis of a 'natural justice' issue rather than a language rights issue i.e., that it would be unfair to the prosecution to have to deal with a case in Irish (without an interpreter).
>
> (iv) The equality argument appears to have been considered only in the context of an assumption that the trial would have to be all-Irish or all-English. The conclusion is then reached that only an all-English trial will be fair, presumably on the unstated assumption that everybody understands English.

74. In contrast, the argument of the plaintiff in the present case presents the following features: (i) it is firmly anchored on Article 8 of the Constitution and upon language rights rather than due process issues; (ii) it has nothing to do with s. 71 of the Act of 1924; (iii) the applicant is not seeking to force an all-Irish trial upon the other side but rather to have a bilingual judge preside over a bilingual trial; (iv) there is no reason there could not be translation of the Irish part of the case for the English-only speaking counsel and prosecution witnesses; and (v) the applicant presses an equality argument, namely, that if the judge directly understands only the English-speaking part of the case but needs an interpreter for the Irish part, he (the accused) is placed at a disadvantage when compared with the English-speaking prosecution. The equality argument is focused upon the (language) relationship between the accused and the judge.

75. I am reluctant to reach conclusions contrary to views expressed by the eminent members of the Supreme Court and, of course, I am not entitled to do so at all if the case is binding upon me. However, I am of the view that the decision in *Ó Monacháin* does not

determine the issues raised in the present case for the specific reasons I have already endeavoured to set out. I have mentioned certain distinguishing features above; further, the case must also be placed into the analysis along with more recent pronouncements of the Supreme Court on the relationship between Article 8 and criminal trials. In this regard, I place considerable emphasis on the judgments in *Ó Maicín*, to which I now turn.

Ó Maicín v Éire

76. In *Ó Maicín v Éire* [2014] 4 IR 477, the applicant – who was facing criminal charges – sought to assert a constitutional right to an Irish-speaking jury in circumstances where the case had considerable connections to the Galway Gaeltacht. His application was refused, but only after a lengthy consideration of the issues by the Supreme Court, generating three separate judgments by members of the majority (Clarke, McMenamin and O'Neill JJ.) and a dissenting judgment from Hardiman J. O'Donnell J. agreed with Clarke J. The basis for the majority's decision was that any right the applicant might have under Article 8 to an Irish-speaking decision-maker had to be balanced against the constitutional imperative of a representative jury, and it concluded that this representative aspect could not be achieved, at this point in time, in view of the statistics before the Court outlining the numbers of Irish speakers in the relevant geographical area.

77. For present purposes, it seems to me important to note the fundamental point that the Court considered that there was a balancing exercise to be engaged in. If the Supreme Court in *Ó Monacháin* (referred to several times in the judgments in *Ó Maicín*) had already decided that there was no right of any kind to an Irish-speaking decision maker, it is difficult to see why it would have been necessary for the Supreme Court to 'balance' anything against the constitutional imperative that a jury must be representative. There simply would have been no right or duty to weigh against the constitutional imperative of jury trial. But, on the contrary, the Supreme Court clearly considered that there was something emanating from Article 8, concerning the linguistic competences of the decision-maker, to be put in the balance on behalf of the applicant, albeit that this "something" was outweighed by the competing representative-jury imperative. Because there is no such competing imperative in the present case, it becomes necessary to study the judgments in *Ó Maicín* to see if this 'something' can be more precisely identified and defined.

78. In his judgment, Clarke J. (as he then was) said it was necessary to conduct "an analysis of the rights of those who wish to conduct their affairs through Irish but also the language rights of those wishing to use English and, where appropriate, any competing interests or constitutional obligation that may arise". Of the three judgments in the majority, he seemed to put the State's constitutional obligation under Article 8 at its lowest, being some form of duty of *'encouragement'* on the part of the State for the Irish language. McMenamin J. placed it somewhat higher, saying:

> "I think the duty of the State goes further than merely to seek to encourage the status of the first national language. Subject to harmonious interpretation with any other relevant provisions of the Constitution, it is *to encourage in every practicable way*; not to place any obstacle, in the way of a person wishing to conduct his interactions with the State through Irish…"

79. O'Neill J. seems to have put it at its highest, supporting a standard of 'feasibility'. He stated:

> "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."*

80. Interestingly, Clarke J. left open the question as to what extent the State, in a scenario other than that involving jury trial, might invoke resources or necessity as a justification for a particular course of action, saying:

> "It is important to note that this case does not involve the consideration of an argument put forward on behalf of the State that a particular level of commitment to Irish would involve a disproportionate demand on the State's resources. In such a case it would be necessary to decide, with some precision, the precise standard against which any such argument would need to be measured. I would, therefore, leave to a case in which the issue specifically arose, the question of whether a conflict between Irish language rights, on the one hand, and the State's allocation of scarce national resources, on the other, ought to be judged by a standard of reasonableness, practicability, or, as O'Neill J. suggests in his judgment in this case, one of feasibility."

81. It is also interesting to recall that MacMenamin J. appeared to assume that the trial judge conducting a trial with a jury would himself or herself understand Irish. The relevant quotation in this regard has already been set out (paragraph 75).

82. The observations of Hardiman J., who dissented in the Ó Maicín case, obviously go even further than the views of the majority, and the logic of his position would undoubtedly lend support to the applicant's case in the present proceedings as his comments have even greater force where there is no competing constitutional imperative presenting an obstacle to the provision of an Irish-speaking decision-maker.

83. It seems to me that the overall import of the majority judgments in the *Ó Maicín* case is that the only reason the applicant was not entitled to have an Irish-speaking jury was because it was impossible to achieve that result while simultaneously honouring the constitutional requirement that a jury be representative. This suggests that, had it not been for that obstacle, the applicant would have been found to be entitled to a decision-making body which understood his evidence without the need for a translation. Therefore, there appears to be an unstated assumption in the majority judgments that Article 8 supports some kind of a right to an Irish-speaking decision-maker, albeit that it was outweighed in that particular scenario by the need for a representative jury. In the present case, where the context is that of a single professional decision-maker, i.e. a District Judge, the obstacle presented by the competing constitutional imperative is entirely absent. The case, therefore, seems to me to lend powerful implicit support to the applicant's submission in the present case.

DPP v. Billings

84. Before moving to my conclusions, I pause to mention the recent decision in *DPP v. Billings* [2019] IECA 149 which arose by way of appeal from a conviction by the Special Criminal Court. The specific points raised on appeal (whether the Explosive Substances Act 1883 should have been translated into Irish, and whether the appellant had the right to a transcript in the Irish language) are not directly relevant to the specific issue before me. The precise point raised in the present proceedings does not appear to have been raised and, indeed, the Court of Appeal records an exchange at the outset of Mr. Billings' trial from which it appears that the

appellant's counsel accepted, without challenge, that the Irish parts of the case would be translated. The Court of Appeal did, however, make some *obiter* comments about the conduct of the trial which might be considered to run contrary to the applicant's arguments in the present case insofar as they appeared to suggest that providing for an Irish-speaking decision-maker is something the State may try to do as a matter of courtesy or practice only, and that interpretation or translation is a satisfactory method of dealing with the Irish language part of the case. Reference was also made to the practical aspects of finding Irish-speaking judges for different types of cases. However, I do not think that there is anything in the judgment which binds me to a particular interpretation of Article 8 on these issues and the comments appear to have been made without there having been any argument directed to the issue which is before me, nor any detailed consideration of the judgments in *Ó Maicín*.

Conclusions

85. For the reasons set out above, it is my view that the issue arising in the present case has not previously been definitively decided and is effectively *res integra*. To recapitulate, the issue is whether Article 8 of the Constitution, which gives the Irish language the status of the first official language of the State, generates any duty on the part of the State to provide a bilingual District Judge to try a case where the accused wishes to present his part of the case through the Irish language; and if so, the extent or scope of the duty. It seems to have been assumed in many cases that if the State appoints an interpreter, this satisfies or exhausts any constitutional obligations placed upon the State by Article 8. However, it seems to me that the Supreme Court in *Ó Maicín* envisaged Article 8 as requiring something more than that. The Court viewed the question of having an Irish-speaking decision-maker in a criminal case as something which should only be displaced *if necessary.* This necessity and displacement did arise in *Ó Maicín* because of the constitutional imperative of having a representative jury, twinned with the (current) practical impossibility of having a jury which was both Irish-speaking and sufficiently representative. In the present case, there is no competing constitutional imperative. Therefore, there must be some duty on the part of the State to make at least some effort to assign a bilingual judge.

86. In my view, the State's position before me supported an excessively absolutist interpretation of Article 8 insofar as it was submitted that Article 8 generates no obligation or duty whatsoever on the part of the State, even to explore – at the most minimal level – the possibility of assigning a bilingual judge in such a case. Such a suggestion seems to me to be at odds with the seminal pronouncement of Kennedy C.J. in *O'Foghludha v. McClean* [1934] IR 469 when, speaking about the equivalent position in the Saorstát Constitution, he said that the State was "bound to do everything within its sphere of action" to support the Irish language. The context here is the administration of justice; the sphere of action in question is the assignation of District Judges. The State's position also seems to be at odds with the approach of the Supreme Court in *Ó Maicín*, where the Court took very seriously the applicant's desire to have an Irish jury and refused the application only because it *could not* be done. To refuse the application for a bilingual District Judge simply because the applicant spoke English, as happened in the present case, appears to me to run contrary to the whole spirit of Article 8 together with the jurisprudence on it. This conclusion is sufficient to lead to me to grant the relief of *certiorari* sought by the applicant in the present case.

87. The question of the appropriate declaration to be granted is slightly different. If I am correct in concluding that Article 8 does place some level of obligation on the State, the next question must be the extent or scope of that obligation. It could be articulated in various ways, representing different levels of obligation; such as an absolute duty (although I think this is unlikely), or a duty to make "reasonable efforts" to provide a bilingual judge, or a duty to provide a bilingual judge unless it is "impossible" or "lacking feasibility" to do so. The latter test echoes the one articulated by O'Neill J. in *Ó Maicín v. An Taoiseach* [2014] 4 IR 477 and seems to also chime well with the interpretation of the guarantee enunciated by Kennedy C.J. in *O'Foghludha v. McClean* [1934] IR 469. However, some of the other judges in *Ó Maicín* seemed to envisage a lower test involving a lesser duty. It does not seem to me to be necessary to decide on the precise standard but it can be said that it is no lower than a duty to assign a bilingual judge so far as is practicable or to make reasonable efforts to assign a bilingual judge where requested by an accused who wishes to conduct his side of the case in Irish. Accordingly, while I am open to hearing further argument on the precise declaration to be granted, my inclination would be to grant a declaration that the first respondent has a duty to make reasonable efforts to assign a bilingual (Irish-English) District Judge for the forthcoming criminal trial of the applicant in the District Court.

The practical consequences

88. What are the practical consequences of interpreting Article 8 to find a right of the kind described here? It is important to note that the State in the proceedings before me did not adduce any evidence about resources or practical obstacles or difficulties. The State simply argued that the applicant had no constitutional right of the kind suggested and so, the question of putting it in the balance against any resource or practicality argument did not arise. Given the tiny number of cases in which Irish-language interpreters were requested in court cases in recent years (set out earlier in this judgment), and given that it has been the usual practice to find a bilingual judge in said cases to date, it is hard to see that there would be any significant practical problems – but this type of argument was simply not raised before me, although it could be in another case.

Final comment: the Irish people and Article 8 of the Constitution

89. I would like to emphasise that the conclusion I have reached is based on the text of Article 8 of the Constitution itself and its construction by the courts in previous decisions. The Irish people have chosen not only to designate the Irish language as the first official language of the State, but to maintain this status since 1937 even though there is express constitutional provision for altering the position in Article 8.3 which would, for example, allow the Oireachtas to designate English as the language of the courts. In those circumstances, it seems to me a modest conclusion to find that a person who wishes to take Article 8 at its word and exercise his constitutional right to conduct his part of the case in Irish must also have, as a component of that right, at least some kind of right to have the State seriously consider the assignation of a bilingual District Judge to hear his case. This simply means doing what has frequently been done in the past, namely, that someone picks up the phone or sends an email to see if a bilingual judge can take the case. I do not see this as an onerous duty because it would simply require the taking of reasonable or practicable steps. But if the Irish people think that it is impractical or undesirable that even this limited right be recognised because of the practical realities of language fluency within the judiciary, Article 8.3 allows for an appropriate legislative intervention. A general consideration of the practical and political issues concerning the use of the Irish language in the legal system are better suited to the functions of the Executive and Legislative branches of Government. In the meantime, and for as long as Article 8 continues to maintain the Irish language in its position as the first official language of the State (including in the administration of justice), it seems to me that the courts should construe it in a manner which gives positive and practical effect to a litigant's right to use the Irish language in his District Court case rather than in a minimalistic, stinting manner.