

THE HIGH COURT

2015 667SS

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 (AS AMENDED)

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA TERESA JUDITH HEGARTY)

PROSECUTOR

– AND –
JAMES GREGORY

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 13th November, 2015

Part 1: Overview

1. This case comes before the court by way of case stated pursuant to the provisions of s.52 of the Courts (Supplemental Provisions) Act 1961 by Judge David Kennedy, sitting at the District Court of Bray. The issues he raises are concerned with the lawful operation by the Gardaí of 'drunk driving' check-points.

Part 2: The case as stated by Judge Kennedy

2. At a sitting of the District Court held at Bray on 24th July, 2014, Mr Gregory was presented before Judge Kennedy to answer the charges set out on charge sheet number 14625769 which alleged the following offence:

"On the 27/03/2014 at Putland Road Bray Wicklow a public place in the said District Court Area of Bray, while being a specified person as defined in section 3 of the Road Traffic Act 2010 as amended by section 9 of the Road Traffic (No. 2) Act 2011, did drive a mechanically propelled vehicle registration number []...while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in your breath did exceed a concentration of 9 microgrammes of alcohol per 100 millilitres of breath*

Contrary to section 4(4)(b) & (5) of the Road Traffic Act 2010."

3. The matter proceeded to hearing on the 24th July, 2014, 6th and 13th October, 2014. At hearing, the following facts were admitted or agreed, and so found by Judge Kennedy:

"(a) Garda Teresa Hegarty is a member of An Garda Síochána and on the 27th March 2014 conducted an authorised mandatory checkpoint at Putland Road, Bray, County Wicklow on foot of an authorisation issued by Inspector Thomas Finnerty on the 23rd February 2014 pursuant to section 10 of the Road Traffic Act, 2010, as amended by section 9 of the Road Traffic Act (No. 2) Act, 2011.

(b) The Authorisation (hereinafter referred to as 'M.A.T.') was adduced before me in evidence and was entitled 'Mandatory Alcohol Testing – section 10 of the Road Traffic Act, 2010 as amended by section 9 of the Road Traffic Act (No. 2) Act, 2011 (Authorisation to establish a Checkpoint or Checkpoints)' and purports to authorise checkpoints from Monday 24th March 2014 to Sunday 30th March 2014 at 14 different locations at specified 45 minute intervals through that 7 day period specified in the M.A.T. Amongst these locations purportedly authorised is Putland Road, Bray, County Wicklow on the 27th March 2014 between 10.45pm and 11.30pm....

(c) Putland Road, Bray, County Wicklow is a public place.

(d) On that date and at that location at 11.05pm Garda Hegarty stopped a motor vehicle registration number []... driven by the defendant. Garda Hegarty informed the defendant that she was conducting an authorised mandatory alcohol checkpoint and made a demand to the defendant requiring the production of his driving licence. The defendant did not have his driving licence and as a result Garda Hegarty informed the defendant that she was requiring him to provide a specimen of his breath into the Drager Alcometer, which is designed to test for the presence of alcohol in breath. Garda Hegarty further informed the defendant of the penalties upon failure to provide such a specimen.*

(e) The defendant provided a specimen and the Drager Alcometer registered as 'fail'. As a result of this Garda Hegarty formed an opinion that the defendant had consumed an intoxicant which rendered him incapable of driving a mechanically propelled vehicle in a public place.

(f) Garda Hegarty informed the defendant of her opinion and subsequently arrested the defendant at 11.10pm on Putland Road, Bray, County Wicklow pursuant to section 4(8) of the Road Traffic Act, 2010. Garda Hegarty explained to the defendant in simple language the reason for his arrest and cautioned him.

(g) The defendant was conveyed to Bray Garda Station arriving at 11.20pm, whereupon the defendant was introduced to the member in charge, Garda McLoughlin. Following a 20 minute observation of the defendant to ensure he had consumed nil by mouth, the defendant provided two specimens of breath to Garda Gleeson indicating a concentration of 52 micrograms of alcohol per 100 millilitres of breath.

(h) Following evidence Mr O'Hara [the defendant's solicitor] made an application before me for the dismissal of the prosecution on the basis that the M.A.T. issued by Inspector Thomas Finnerty on the 23rd February 2014 pursuant to section 10 of the Road Traffic Act, 2010 as amended by section 9 of the Road Traffic Act (No.2) Act, 2011 purported to establish multiple authorisations over a period of 7 days at multiple locations and times and as such amounted to an impermissible delegation insofar as it contained multiple locations and times, covered a period of 7 days and listed roads that do not amount to a specific public place.

(i) Section 10(2) - (3) of the Road Traffic Act, 2010 as amended by section 9 of the Road Traffic Act (No.2) Act, 2011 provides as follows:

"...(2) A member of the Garda Síochána, not below the rank of inspector, may, for the purposes of section 4 authorise the establishment of a checkpoint or checkpoints in a public place or places at which members of the Garda Síochána may exercise the powers under subsection (4).

(3) An authorisation shall be in writing and shall specify –

(a) the date on which, and the public place in which, the checkpoint is to be established, and

(b) the hours at any time between which it may be operated.”

Part 3: Questions of Law Raised by Judge Kennedy

4. Having regard to the above facts, Judge Kennedy raises the following issues by way of case stated:

"i) Does a written authorisation purportedly issued under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint but which purportedly establishes multiple authorisations over a 7 day period at multiple locations in a particular area constitute a valid authorisation for the purposes of Section 10 of the Road Traffic Act 2010 as amended?

ii) When an authorisation issues under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint, is it a requirement for the said authorisation to specify a location pursuant to Section 10(3) with more specificity than by reference to 'the Putland Road', which this court has judicial knowledge is over one kilometre in length?"

Part 4: A Consideration of Question i)

5. Question i) asks as follows: *"Does a written authorisation purportedly issued under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint but which purportedly establishes multiple authorisations over a 7 day period at multiple locations in a particular area constitute a valid authorisation for the purposes of Section 10 of the Road Traffic Act 2010 as amended?"*

a. A matter of statutory interpretation

6. By way of initial remark, the court notes that it is necessary to answer the questions posed by reference to the facts as stated by the learned District Justice. Thus, notwithstanding the general way in which Question i) is posed, it is clear that what is not in issue is some sort of free-wheeling authority allowing wholesale establishment of checkpoints in some undefined manner over a 7-day period. Such an authorisation would undoubtedly represent an unwarranted interference with that right to liberty touched upon by O'Neill J. in *Weir v. DPP* [2008] IEHC 268. Rather, what is in issue is something much more constrained, viz. an authorisation that *"purports to authorise checkpoints from Monday 24th March 2014 to Sunday 30th March 2014 at 14 different locations at specified 45 minute intervals through that 7 day period specified in the M.A.T."*

7. The question posed by the learned District Judge is best answered, and in the court's opinion cannot properly be answered, without having regard to the proper statutory construction of s.10(2) and (3). The only difficulty that appears to arise between s.10(2) and 10(3) is that s.10(2) contemplates the establishment of one or more checkpoints whereas s.10(3) appears to contemplate that an authorisation may refer to only one checkpoint. 'Appears to' because one has to bear in mind s.18(a) of the Interpretation Act 2005 which provides that among the rules that apply to the construction of an enactment are that:

"A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular".

8. Having regard to s.18(a) of the Act of 2005, there is no doubt in the court's mind that s.10(3), properly read, requires any authorisation/s to be in writing and to specify (a) the date/s on which, and the public place/s in which, the checkpoint/s referred to in the authorisation is or are to be established, and (b) the hours at any time between which it/they may be operated.

9. The court is conscious that the end-result of the establishment of a checkpoint may be criminal sanction for one or more individuals. However, the rule that penal statutes be construed strictly does not require that the courts depart from their senses, ascribe statute the most restricted meaning possible no matter how absurd that meaning may be, and justify any such absurdity by reference to a canon of construction which, if applied with unmerited abandon, could, in the context of road traffic legislation, see the personal rights of drunk drivers elevated above the personal rights of their potential victims, a state of affairs that the court is entirely confident the Oireachtas did not intend to achieve via s.10 of the Road Traffic Act 2010, as amended.

10. The court does not find anything in *Byrne v. Grey* [1988] I.R. 31, *DPP v. Dunne* [1994] 2 I.R. 537, *DPP v. Freeman* [2009] IEHC 179, or *DPP v. Avadenei* [2015] IEHC 580, all cases to which it was referred to by counsel for Mr Gregory, that would cause or require it to reach an alternative conclusion in this regard. The court would also note in passing that unelected courts must ever be careful in their laudable, proper and required vigilance for individual freedoms, to tread carefully when it comes to the legitimate freedoms and statutorily expressed intentions of a democratically elected, and constitutionally constrained, sovereign legislature, not least, though not solely because of that comity which ought typically to pertain between the great organs of state.

b. Impermissible delegation?

11. As to whether the form of the authorisation that issued involved an impermissible delegation, the court does not see that it involved any delegation at all. The authorisation relating to the within matter provides that a M.A.T. shall be established on *"Thursday the 27th of March 2014 between 10.45pm and 11.30pm at Putland Road, Bray, Co. Wicklow"*. There is no delegation in that. Moreover, while it is true that (as is entirely permissible, for the reasons stated above) other locations are mentioned in the authorisation, in relation to each location (again as is entirely permissible, for the reasons stated above) a specific time is stated. Again, there is no delegation arising in this. Absent delegation, there can be no impermissible delegation.

Part 5: A Consideration of Question (ii)

12. Question ii), it will be recalled, asks as follows: *"When an authorisation issues under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint, is it a requirement for the said authorisation to specify a location pursuant to Section 10(3) with more specificity than by reference to 'the Putland Road', which this court has judicial knowledge is over one kilometre in length?"*

13. The learned District Judge has found that Putland Road is a public place. The consultative case stated does not specify the particular argument made by the defendant as to why Putland Road would not be a public place, albeit that there is some suggestion

that this may have been by reference to the length of that road. The court accepts that there must come a point where to name a road would not be to name a place, e.g., no sensible reading of the word "*place*" would justify treating the entire length, say, of the M50 as a "*place*". Subject to the foregoing, one must, and the court does, trust to the good sense and learning of District Judges who are eminently capable in any one instance, and given their particular knowledge of the respective District/s in which they operate, of determining whether, to borrow the definition of a "*place*" from the Oxford Online Dictionary, the "*place*" named in an authorisation meets the standard of being "a particular position, point, or area in space; a location" or whether it strays beyond that into naming somewhere so wide-reaching in ambit that to describe it as a "*place*" flies in the face of common-sense.

14. If there is suggestion that in addition to naming e.g. Putland Road, the authorisation ought also to name a specific point along that road, the court considers there to be no justification for reading this into the Act of 2010. As a matter of logistics and sense, a check-point must be set up having regard to the flow of traffic, safety issues, lighting, footfall, obstacles on the road or footpath and any other logistical issues which may be considered relevant by the member/s of An Garda Síochána setting it up. Thus necessary latitude must be, and in the court's view is, given by statute to members of An Garda Síochána to whom a proper check-point authorisation has issued, e.g. in this case, to pick a point on Putland Road that seems to them, by reference to their professional competence and experience as law enforcement officers, to be a suitable point at which to set up the authorised check-point.

Part 6: The Court's Answers to the Questions Raised

15. For the reasons stated above, the court's answers to the questions posed by the learned District Judge are as follows:

16. *"i) Does a written authorisation purportedly issued under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint but which purportedly establishes multiple authorisations over a 7 day period at multiple locations in a particular area constitute a valid authorisation for the purposes of Section 10 of the Road Traffic Act 2010 as amended?"*

17. The court notes that it is necessary to answer the questions posed by reference to the facts as stated by the learned District Justice. Thus, notwithstanding the general way in which Question i) is posed, it is clear that what is not in issue is some sort of free-wheeling authority allowing wholesale establishment of checkpoints in some undefined manner over a 7-day period. Such an authorisation would undoubtedly represent an unwarranted interference with that right to liberty touched upon by O'Neill J. in *Weir v. DPP* [2008] IEHC 268. Rather, what is in issue is something much more constrained, viz. an authorisation that "*purports to authorise checkpoints from Monday 24th March 2014 to Sunday 30th March 2014 at 14 different locations at specified 45 minute intervals through that 7 day period specified in the M.A.T.*" When it comes to a date-limited, time-constrained form of authorisation that refers to a particular number of different locations, the court's answer is 'yes', such a form of authorisation is a valid authorisation for the purposes of Section 10 of the Road Traffic Act 2010, as amended.

18. *ii) When an authorisation issues under Section 10 of the Road Traffic Act 2010 as amended by Section 9 of the Road Traffic (No.2) Act, 2011 to establish a checkpoint, is it a requirement for the said authorisation to specify a location pursuant to Section 10(3) with more specificity than by reference to 'the Putland Road', which this court has judicial knowledge is over one kilometre in length?"*

19. This question is not properly capable of being met by a 'yes' or 'no' answer. The court accepts that there must come a point where the sheer length of a road is such that the entire road cannot sensibly be described as a "*place*". However, it is a matter for a District Judge in any one instance, given her or his particular knowledge of the District in which s/he operates, to determine whether, to borrow the definition of a "*place*" from the Oxford Online Dictionary, the "*place*" named in an authorisation meets the standard of being "*a particular position, point, or area in space; a location*", or whether it strays beyond that into naming somewhere so wide-reaching in ambit that to describe it as a "*place*" flies in the face of common-sense. The fact that a particular road within a particular town is more than 1km in length need not necessarily lead to the conclusion that such road cannot properly be described as a "*place*".