

THE HIGH COURT

IN THE MATTER OF S. 52 OF THE COURTS SUPPLEMENTARY ACT 1961

[2018 No. 1194 SS]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF DETECTIVE GARDA PATRICK FAHY)

PROSECUTOR

AND

DARIUS SAVICKIS

ACCUSED

JUDGMENT of Ms. Justice Donnelly delivered on the 16th day of July, 2019

1. This consultative case raises issues about the role of the trial judge in assessing allegations of inadequate translation services provided to an accused person at the investigative stage and the effect on the fairness of the subsequent trial if the services are found to be inadequate. These issues arose in a District Court trial of the accused for the alleged offence of failing to notify An Garda Síochána of his name and his home address as required by the relevant provisions of the Sex Offenders Act 2001 as amended by the Criminal Law (Human Trafficking) Act 2008 ("the 2001 Act").

2. Under the provisions of s.10(1) of the 2001 Act, a person who is subject to the requirements of the Act must notify the Gardaí in respect of this personal information within seven days. Under s.12(1)(a) and (3) of the 2001 Act, a person who "fails, without reasonable excuse" to comply with s.10(1) of the 2001 Act shall be guilty of an offence which may be tried either on indictment or summarily in the District Court.

3. The case stated by the District Judge outlined that the solicitor for the accused made submissions to the effect that the proceedings were tainted by an inherent unfairness with the result that the District Judge ought to exercise her jurisdiction to dismiss the charge. This was based upon his submission concerning the interpretation facilities provided at an interview conducted with the accused and recorded at Galway Garda Station on the 19th January, 2017, ("the interview"). The solicitor submitted: -

- (i) The interpretation facilities were completely inadequate to the point of unfairness;
- (ii) the memorandum of interview disclosed by the prosecution was incomplete and did not reflect what was said at the interview;
- (iii) the prosecution had subsequently procured a second independent translation of the interview ("the translation review") which demonstrated the inadequacy of the interpretation facilities and the incomplete nature of the memorandum of interview;
- (iv) the individual responsible for conducting the translation review was neither preferred as a witness on behalf of the prosecution nor tendered for cross-examination on behalf of the accused;
- (v) the identity and location of the individual responsible for conducting the translation review was not being disclosed to the accused (other than by way of an indication that the individual was ordinarily resident in Lithuania).

4. At the trial, the District Judge considered that in order to rule properly on the issue she had first to hear the evidence led by the prosecution. A number of witnesses were called on behalf of the prosecution. This included a detective sergeant who gave evidence that the accused had not registered as a sex offender pursuant to s. 10 of the 2001 Act. The relevant facts disclosed in the case stated are as follows: -

- (a) The accused pleaded guilty to a charge of rape and was sentenced on 27th July, 2009 to a term of six years' imprisonment.
- (b) His initial intended release date was 19th August, 2014.
- (c) In or around July, 2013, while in custody at Arbour Hill Prison, the accused met Niall Kennedy, a prison officer working there. Mr. Kennedy was familiar with the accused during his custody for a period of approximately two and a half years. Mr. Kennedy frequently conversed with the accused in the English language during that time. He met the accused and provided him with a leaflet (printed in English) concerning his obligation to register as a sex offender upon release from prison pursuant to s. 10 of the 2001 Act. Mr. Kennedy considered the accused fully understood those terms at the time. The accused signed a document (printed in English) acknowledging receipt of this information. A copy of the document typically provided to such persons was tendered in evidence.
- (d) There was no Lithuanian interpreter present for that meeting. The accused indicated his intention upon release was to return to Galway to live with his partner and their child, but this document recorded the accused as indicating he would be homeless upon release. The latter reference was a standard inclusion on the form which should have been deleted, it had not been indicated by the accused.
- (e) In point of fact the accused was not released from prison in August, 2014. He was detained in custody on foot of a European Arrest Warrant which had issued from the Lithuanian authorities for a surrender to Lithuania. Following legal proceedings, the accused was surrendered to Lithuania pursuant to an order of the High Court made on 31st July, 2014.
- (f) After a brief time in custody in Lithuania, the accused was released and lawfully returned to reside in the State to his partner and their child, in or around November, 2015.
- (g) On 18th January, 2017, the accused made a housing application to a local authority, Galway County Council, on behalf

of himself, his partner and now two children. The local authority passed the matter to An Garda Síochána for Garda vetting, as is customary with housing applications.

(h) On 19th January, 2017, D/Gda. Pat Fahy became aware that the accused was residing at a specific address in Galway. D/Gda. Fahy consulted with D/Sgt. O'Neill, who was familiar with the operating systems used by An Garda Síochána for recording information provided by persons subject to the provisions of s. 10 of the 2001 Act. D/Sgt. O'Neill informed D/Gda. Fahy that, according to Garda systems, the accused had not complied with his registration obligations under s.10 of the 2001 Act. D/Gda. Fahy met the accused at his home the same day, and the accused informed him that he had been residing there since November, 2015. The accused was arrested pursuant to s.4(3) of the Criminal Law Act, 1997 and conveyed to Galway Garda Station where the member in charge, Gda. Joseph Hearst, detained the accused under s. 4 of the Criminal Justice Act 1984 ("the 1984 Act").

(i) The accused was interviewed at Galway Garda Station by D/Gda. Fahy and Gda. Mary Moran. D/Gda. Fahy requested that the member in charge contact the translation service known as "translation.ie" to procure a Lithuanian interpreter for the interview, and this was done.

(j) The interview commenced after Ms. Aura Navickite, the Lithuanian interpreter, had arrived. Ms. Navickite had no training or qualifications in the provision of interpretation or translation services, either generally or in the context of the criminal justice process. She was educated in ordinary level English at secondary school in Lithuania. At the material time, Ms. Navickite was 23 years old and worked part time as a Lithuanian interpreter for translation.ie. The interview represented the second occasion on which she had attended a Garda station to interpret at an interview of an accused in custody.

(k) Following the interview, the accused was subsequently charged with the offence. He then met with his solicitor.

(l) Disclosure was made by An Garda Síochána of the memorandum of interview, and disclosure of the audio-visual recording of the interview was made pursuant to s.56 of the Criminal Justice Act, 2007. Based on instructions from the accused that he had been unable to participate fully in the interview as a result of the poor quality of the interpretation, and based on a review of the audio-visual recording of the interview, the solicitor took the view that the memorandum of interview was seriously deficient and did not reflect what was said by the accused or what was attempted to be conveyed by the accused at the interview.

(m) Accordingly, the solicitor corresponded with An Garda Síochána, setting forth his client's position that the interview had been conducted unlawfully by reason of the inadequate interpretation of same. He sought confirmation as to whether An Garda Síochána proposed to introduce into evidence the memorandum of interview at the trial.

(n) Arising from this exchange of correspondence, An Garda Síochána arranged for translation.ie to conduct the translation review. This review was conducted by unidentified experts in Lithuania working for translation.ie.

(o) A copy of the translation review was subsequently furnished by way of disclosure.

(p) At the District Court hearing, the memorandum of interview was proved by D/Gda. Fahy and a copy of it was admitted into evidence on behalf of the prosecution.

(q) A copy of the translation review was also admitted into evidence, without formal proof thereof.

(r) On a comparison of the translation review with the memorandum of interview, it is clear that the latter is significantly abbreviated and in parts, mistranslated.

(s) It is also clear that the person responsible for conducting the translation review did not consider the accused had good English, and they had been required to make accommodations for the very poor English of the speaker (being the accused) necessitating this to be done. At the outset of the translation review is a note stating that: -

"For the purposes of clarity, the incomprehensible speech due to the poor knowledge of English of the speaker was presented using correct grammar and structure, wherever it was possible to understand exactly what the speaker was trying to say. In cases, where the speech was confusing and difficult to understand, the transcript represents the exact words uttered by the speaker".

(t) The prosecution relied at trial on the fact that during the course of the interview and according to the translation review, the accused replied to questions in English on 81 occasions without Ms. Navickite interpreting, as compared with replying on 51 occasions in Lithuanian (which answers were required to be interpreted).

(u) The translation review further confirms that the caution administered to the accused prior to the commencement of the interview did not appear to have been translated into Lithuanian.

5. At the close of the prosecution case, the solicitor for the accused emphasised that the accused should not be obliged to go into evidence to make the case that he had been unable to participate in the interview properly due to inadequate interpretation, in circumstances where there were two alternative sources of evidence the court could consider, namely:

(i) The witness asked by the prosecution to review the adequacy of interpretation service provided at the interview; and/or

(ii) the audio-visual recording of the interview.

6. The solicitor submitted that the prosecution had an obligation to tender the witness responsible for producing the translation review for cross-examination, but it failed to do so. This witness, it was argued, was essential as he/she had, at the request of the prosecution, provided an independent, professional view that the accused had poor English and had been unable to engage properly with the interview process. Having tendered the translation review in evidence, the prosecution was not thereafter entitled to fail to provide the witness responsible for having produced the review, and the prosecution should be dismissed or stayed pending provision of that witness.

7. In the alternative, it was submitted that in the absence of the expert who produced the translation review at trial, the District Judge was required to view the audio-visual recording to get a sufficient sense of whether the accused was able to participate properly in the same, and to form her own view as to whether the interview was lawful or not. The submission was made that the judge was not, as a matter of fair procedures, entitled to prefer the evidence of prosecution witnesses as to the accused's proficiency in English without viewing the recording of the interview which, it was contended, constituted objective evidence which would counter that alleged proficiency.

8. The District Judge gave her preliminary view that she was not inclined to agree with those submissions. In her view, the prosecution was not obliged to tender the witness responsible for the translation review, and she was not obliged to listen to the audio-visual recording. Her reason was that she had the benefit of both the memorandum of interview and the translation review. While there were admittedly inaccuracies and omissions in the memorandum of interview as compared with the translation review, additional circumstances existed where the District Court was relying on the evidence of Mr. Kennedy who interacted with the accused at Arbour Hill for about two and a half years to the effect that the accused had sufficient facility in English for everyday language and the fact that an interpreter was provided at the interview, even if she was not formally trained or qualified in the provision of interpretation services, and the fact that it was accepted the accused answers questions during the interview in English on 81 occasions without those questions being translated into Lithuanian. The trial judge decided there was insufficient evidence of prejudice to the accused and that the matter should proceed to evidence on behalf of the defence and/or legal submission. She agreed to state a case to the High Court.

The Questions

9. The following were the questions of law upon which the determination of the High Court was sought: -

(a) In light of the circumstances as described above, is the prosecution obliged to tender for cross-examination the witness responsible for the translation review, where that document was procured by the prosecution and admitted into evidence on behalf of the prosecution?

(b) If the answer to (a) is yes, am I obliged to dismiss the prosecution or otherwise what is the effect of the failure of the prosecution to tender the said witness for cross-examination?

(c) If the answer to either (a) or (b) is no, having heard evidence on behalf of the prosecution and cross-examination thereupon as to the proficiency in English of the accused and his ability to participate in the interview, and having allowed into evidence the memorandum of interview tendered on behalf of the prosecution, am I obliged as a matter of fair procedures, to consider the audio-visual recording of the interview pursuant to s. 57 Criminal Justice Act 2007 with a view to assessing:

(i) Whether the accused was unable to participate properly in the interview; and/or

(ii) Whether there has been a breach of the 2013 Regulations (and in particular, Regulations 3 and/or 5 thereof), and/or the 2010 Directive (and in particular, Articles 2 (1), and/or 2(8) thereof)?

(d) If the answer to either (c) (i) or (c) (ii) is yes, am I obliged to dismiss the prosecution or otherwise what is the effect on the prosecution of either the inability of the accused to participate properly in the interview and/or the breach identified at (c) (ii)?

Legal Provisions

10. The European Communities Act, 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013 (SI 564/2013) ("the 2013 Regulations") provide at Regulation 3 that: -

"An arrested person . . . who does not speak or who does not understand the English language shall have the right while in custody to the assistance, at no cost, of an interpreter . . ."

11. The 2013 Regulations were specifically designed "for the purpose of giving effect to Directive 2010/64/EU of the European Parliament and the Council of 20th October 2010 on the right to interpretation and translation in criminal proceedings" ("the 2010 Directive"). Article 2 of the 2010 Directive provides: -

"1 Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

...

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence . . ."

Article 5 of the 2010 Directive provides as follows: -

"1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified"

Submissions

On behalf of the Accused

12. Counsel on behalf of the accused submitted that his position was that the interpretation facilities were hopelessly inadequate. The interpreter sourced by An Garda Síochána was untrained and completely unqualified. The inadequacy of the interpretation facilities was demonstrated by the independent translation of the interview which was procured by An Garda Síochána themselves in a direct response to the accused solicitor's complaints about the adequacy of interpretation facilities. Although it was not contained within the case stated, both parties agreed that the memorandum of interview and the translation review should be placed before the High Court.

13. I am conscious however, that in line with what was stated in *DPP v. Parker* [2015] I.E.C.A. 296, the High Court is confined to the facts contained in the case-stated, although it may be possible for the Court by agreement to take into account certain facts. In my view, the role of the High Court in this case-stated does not extend to making determinations as to the adequacy of the translation. That was and is a matter for the trial judge. The decision this Court has to make concerns the legal issues raised, in so far as it is possible to do so on the facts as set out and/or as agreed and the process adopted by the District Court.

14. Counsel for the accused relied upon fair procedures as well as case law to submit that the prosecution was required to tender the witness who had created evidence upon which they were relying, and that the District Judge could not prefer evidence of an opinion as to proficiency in English over the best evidence available, namely the audio-visual recording. Counsel's primary submission however, was to the effect that Article 6 of the European Convention on Human Rights ("ECHR") and Article 47 of the EU Charter on Fundamental Rights ("the Charter") required the provision of adequate interpretation facilities in the course of the investigative process.

15. Counsel submitted that an inadequate provision of interpretation in the investigative process had an effect on the fairness of the accused's trial. An important aspect of the accused's defence to the charge was whether his failure to notify the Gardaí occurred in circumstances where there was a reasonable excuse. In counsel's submission, pointing towards aspects of the translation review, it was apparent that the full answer and context for his failure to notify the Gardaí had not been given.

16. Counsel relied upon the 2010 Directive and pointed to the recitals therein which refer to the concepts of fair trial and the relevance of ECHR case law. Counsel referred to the line of authority beginning with *Salduz v. Turkey* [2008] E.C.H.R. 1542, which established the importance of the investigative stage and the provision of rights during that stage, for the overall fairness of the trial. The *Salduz* case concerned the provision of a lawyer at the investigative stage, but counsel submitted that the provision of adequate translation was as fundamental as a lawyer so as to ensure that a person could adequately participate in his or her trial.

17. Counsel referred to *Hacioglu v. Romania* [2011] E.C.H.R. 24 and other cases, in which the European Court of Human Rights ("ECtHR") confirmed that Article 6(3) of the ECHR which provides for the right to the free assistance of an interpreter for an accused who cannot understand or speak the language used in court, extended to pre-trial questioning. In that context, counsel submitted that adequate provision of interpretation facilities was required at the investigative stage which involved questioning. That was effectively part of the pre-trial investigations. Furthermore, counsel submitted that the District Court was required to oversee the adequacy of the interpretation that had been provided. Counsel also relied upon the cases of *Vizgirda v. Slovenia* [2018] E.C.H.R. 674 and *Knox v. Italy* [2019] E.C.H.R. 79 (unfortunately that judgment is only available in French).

18. Counsel also relied on the decision of the Supreme Court in the *State (Healy) v. Donoghue* [1976] I.R. 325. Counsel submitted that the references in the Supreme Court judgments to the right to legal assistance were principles that applied just as strongly to the right to interpretation. Both were, counsel submitted, issues about the right to participate adequately in a trial. The trial included the investigative procedures and therefore necessitated the provision of appropriate translation.

19. Counsel submitted that the obligation was on the courts of the member states to ensure retroactive control of the quality of interpretation. This meant that the court had to ensure and make appropriate investigation into the quality of translation provided. Counsel for the accused was not suggesting that there was an obligation to record all interviews. That was not an obligation that the ECtHR had already imposed. Counsel submitted however, that where a recording existed and an issue was fairly raised in relation to the adequacy of the interpretation, the trial court was at least obliged to consider it.

20. In one case, *Khat Chadourian v. Belgium* (Decision) App No. 22738/08 (12th January 2010), where the accused complained of poor quality translation of the public prosecutor's submission against him, the ECtHR relied on the findings contained in an expert report that the applicant had understood the "gist" of the submissions even if the translation was somewhat inaccurate. Counsel submitted that the accused in this case should be able to examine the expert retained by the prosecutor for a purpose similar to that in *Khat Chadourian* but had been unable to do so.

On behalf of the Prosecution

21. Counsel for the prosecution submitted that the provisions of the 2001 Act, by operation of law, meant that the accused had become subject to the requirements of that Act to give certain notifications for an indefinite period. The prosecution submitted that the failure to do so without a reasonable excuse rendered him, *prima facie*, guilty of an offence under s.12 of the 2001 Act. The prosecution submitted that the interview had no bearing whatsoever on that state of affairs. It was unclear how any issues or concerns of the accused's solicitors about the quality of the interview would have a bearing on that. The issue of reasonable excuse was no more than an evidential burden on an accused person and it remained open to the accused to give evidence or not as he sees fit in that respect. It was submitted that the accused had borne that evidential burden.

22. Counsel for the prosecution relied upon the fact that the accused, at no time during the course of his interview, had made known that there was any difficulty with interpretation. When his solicitor raised the issues, an independent translation review was procured and the transcript was furnished consistent with the terms of the 2010 Directive. The accused is now before the District Court and knows the nature of the charge against him and there are no fair trial rights issues.

23. It was submitted by the prosecution that the 2013 Regulations, which implemented the 2010 Directive, were designed to ensure that a person who was charged with an offence before a court and who does not speak or understand the English language sufficiently to enable them participate fully in the proceedings so as to effectively exercise his or her right to a fair trial, is entitled to an interpreter and to a translation of any relevant documents. The prosecution submitted that the accused had been accorded those rights. He submitted that the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, did not require the interview to be recorded *verbatim*; the record had to be "as complete as practical". This was only a memorandum of an interview; it was never intended to be a full transcript. Now, however, the accused possessed a full transcript.

24. Counsel referred to the case of *DPP v. Lacey* [2005] I.E.C.C.A . 70, which concerned the duty to call a witness on the book of evidence in the course of the prosecution case in a trial on indictment. He submitted that there was no requirement to call the author of the translation in this case; he was not a witness in the case.

25. Counsel for the prosecution referred to the transcript and the memorandum and submitted that ultimately it would be a matter for the trial judge as to the importance of the accused's answers and the importance of any differences between the memorandum and the reviewer's transcript. In short, the submission was that there was no requirement to tender the witness for cross-examination. It was submitted that s. 57 of the Criminal Justice Act, 2007 was permissive in that it permitted the admissibility of the audio recording. It did not require or oblige the admission of recordings and therefore that question had to be answered in the negative. Where the judge was satisfied that she had sufficient material before her, it would not be appropriate for the judge to review an audio-visual so as to establish proficiency in English. If the accused had wanted, he could have asked the District Judge in the course of his evidence in his defence to look at the audio-visual recording.

The Proceedings in the District Court

26. In the course of the hearing before me, it became apparent that the parties were not entirely *ad idem* as to what had occurred in relation to the admissibility of the memorandum of interview and the translation review in the District Court. The procedure that had been adopted was not entirely clear from the consultative case-stated.

27. Counsel for both parties submitted that proceedings in the District Court were of necessity somewhat more informal than those that take place in a trial on indictment. For example, a *voir dire* takes place in a patently obvious way in an indictable trial because the jury are sent out of court at the point of challenge. This enables the trial judge sitting alone to decide on the admissibility of the evidence. If the evidence is ruled admissible, the evidence is given in front of the jury. The distinction between the admissibility application and the trial itself is clear and distinct. In circumstances where a trial judge is sitting without a jury, it may be unnecessary to repeat the evidence that has been given in the *voir dire* if it has been ruled admissible.

28. I consider the foregoing perfectly acceptable and understandable. It would be a pointless waste of court time to insist, for example, that evidence be repeated before the trial judge in a trial without a jury. It can be noted of course, that a trial court must be careful about distinguishing between evidence that is only admissible for the purposes of the admissibility ruling and evidence which forms part of the prosecution case. For example, in the case of *People (DPP) v. Murphy* [2005] 2 I.R. 125, the Special Criminal Court incorrectly referred to evidence of previous convictions in reaching their verdict, when that evidence had only been given for the purposes of establishing the admissibility of certain evidence. It is important to stress that in the present case, there is no question of lack of propriety on the part of the trial judge or indeed on behalf of the solicitor for the accused or the Gardaí presenting the case. This matter only arises because, from the perspective of this Court dealing with the case-stated, it has been difficult within the context of the case-stated to discern how and when decisions as to admissibility were actually taken.

29. That difficulty is important because the question I have been asked to resolve is whether there is a requirement to provide the author of the translation review as a witness who will be subject to cross-examination by the accused. The case-stated recorded that the translation review was admitted without formal proof. This appears to have occurred in the context where the initial request of the solicitor for the accused was to have the case dismissed on the basis of the inadequate translation at the investigative stage. The translation review was "put in evidence" during the course of the prosecution case. This, it seems to me, appears to have taken place in an informal way without conscious regard to who was actually putting the translation review into evidence. Therefore, I am satisfied that the manner in which the first question was phrased which recorded the translation review and was admitted into evidence on behalf of the prosecution, does not reflect what was earlier said in the case-stated. The case stated said that it was admitted "without formal proof". That had occurred in circumstances where it was raised as an issue by the solicitor for the accused.

30. As regards the memorandum of interview, it is also important to identify how and why it was being admitted. If the memorandum of interview was being introduced as evidence by the prosecution, it would have to be proved in the usual manner (it appears it was proved by a member of the Gardaí and admitted into evidence). If there was an objection to that memorandum of interview being admitted, then a *voir dire* could have taken place that centred on the inadequacy of such a memorandum of interview. At that point, one would have expected the defence to object on the basis that it did not adequately reflect what had taken place during the interview.

31. It is noted that in the course of these proceedings the original interpreter, Ms. Navickite, was available and did in fact give evidence. She could have been cross-examined as to the accuracy of the memorandum by reference to the contents of the translation review. Given that the translation review was a piece of evidence obtained by the prosecution, the prosecution could hardly have objected to its contents being used in cross-examination. Furthermore, in the ordinary course of events where a memorandum of interview is being challenged as being inaccurate or incomplete, and in the absence of agreement as to where it is either inaccurate or incomplete, a court would seem bound as a matter of fairness to permit at least part of the content of the audio-visual recording to be played to it for the purpose of establishing the truth of those issues. This would usually be done during the cross-examination of the person who authored the memorandum of interview.

32. If no issue as to accuracy of interpretation arises, it is usually relatively easy for the defence and prosecution to agree between themselves a complete and accurate version of the interview. That can be done by way of the lawyers inserting additions as appropriate or, where there are lengthy passages to be transcribed, by a stenographer making a full transcript. The use of a stenographer is certainly not required in every case of inaccuracies or lack of completeness. It would only be where there is a marked distinction between the memorandum and the full contents that it may be necessary to take that step. Indeed, even where a memorandum may be said to be incomplete, there may be no necessity to amend or change the memorandum in any way. If the additions are entirely irrelevant to the central issues in the case, the parties may agree that the memorandum should be admitted as it stands and it would then form part of the evidence.

33. It should almost never be necessary to call a stenographer to prove the transcript in the case of an interview carried out in English. This is because the parties should be able to reach an agreement on the contents of the transcript and have settled on one to put before the court. It must also be recognised that the playing of audio-visual recordings in evidence remains at the discretion of the trial court. Section 57 of the Criminal Justice Act, 2007 states that "a court may admit in evidence" a recording by electronic or similar means or a transcript of such recording or both of an investigative interview with an accused. The admission into evidence of the audio-visual recording itself is therefore at the discretion of the trial court and of course is subject to the more general rules of admissibility of evidence.

34. There may be good reason why it is unnecessary and irrelevant to play a recording of an interview during the course of a trial. A full recording may contain irrelevant and otherwise inadmissible material that both parties agree should not be placed before the trial court. Reading a transcript will undoubtedly be shorter than playing the full audio recording. The playing of the recording is therefore

neither essential nor always desirable.

35. If, however, a recording is being admitted into evidence, it must be played in open court during the currency of the trial. That is required by Article 34 of the Constitution as justice must be administered in public, save in special and limited cases prescribed by law. A right to a public hearing is also a requirement under the European Convention on Human Rights. That is not to say that the recording cannot be played subsequently by a trial judge in her own chambers while she is considering the evidence before her or indeed in the jury room if the trial is with a jury. Once the contents of the recording are being admitted into evidence, the requirements of a public trial under the Constitution and the ECHR require that the evidence is played in court during the currency of the trial.

36. In the present case, the translation review cannot be read or understood as the equivalent of a stenographer making a transcript of the audio recording. The author of the translation review was undertaking an entirely different function from that of stenographer. The function of the translator was to review the audio recording, not for the purpose of writing down what had been said in English, but most importantly for the purpose of translating from the Lithuanian into English. That function of the interpreter requires a degree of expertise to enable the parties to the proceedings understand what was actually being said in the course of the interview. Furthermore, insofar as the reviewer was making a comment about the standard of English of the person being interviewed, or indeed about the standard of translation at issue, that was an expression of an opinion.

37. Neither party was able to point to any legal provision, either under statute or in the common law rules of evidence, that would permit evidence of this kind to be admitted as of right by way of a report, or as titled here, a "translation review". In the absence of an agreement between the prosecution and defence, it seems that there was no lawful basis for the admissibility of such evidence without it being proved, that is by the author of the report giving evidence. In those circumstances, the translator would be available for cross-examination.

38. To return to the position outlined earlier, in the present proceedings use of the translation review was made by the defence for the purpose of impugning the entire prosecution. It was in those circumstances that the question of the provision of the translator for cross-examination was raised. In my view, therefore, it is difficult to find a legal basis upon which a District Judge, in the unique and particular circumstances of this case, could insist that the prosecution ensure that the translator be available for cross-examination by the defence. It was not in truth evidence that was admitted by the prosecution, rather it was evidence put forward by the defence in the course of the prosecution's case. In those circumstances, making the translator available for cross-examination simply did not arise.

39. If the defence wanted the translator to give evidence, they should have taken all steps to have them called. In advance of the trial, the defence could have made known that the translator was required as a witness and that if the prosecution were not calling this person as a witness that they sought to have the person summoned to give evidence. In a summary trial, there is no requirement on the prosecution to call each and every person who may have something relevant to say (*Geaney v DPP* [2000] 1 I.R. 412). There is however, a duty on the prosecution not to mislead the court or to suppress material which might be of assistance to the defence. There is also an obligation to give an accused person information in the possession of the prosecution as to the whereabouts of a witness. The defence must have a reasonable opportunity to arrange for the attendance of that witness. In my view, where, as here, the translation review was carried out as part of contractual services provided to the state, the state must be in a position to be able to obtain the identity of that translator and to have them available to give evidence if required by either party.

40. Having made those initial observations, I will therefore address the remaining issues in this case-stated. It is necessary to turn to the law on the provision of interpreters at the investigative stage and the impact, if any, of that on the fairness of the trial.

The legal right to an interpreter

41. There is no doubt that the right to the free assistance of an interpreter, if a person cannot understand or speak the language used in court, is an integral part of the right to a fair trial. Although that statement reflects the language of the ECHR, which contains an express statement in that regard, it was not doubted in the course of these proceedings that the fair trial provisions under the Constitution (Article 38.1) and under the Charter (Article 47) have similar requirements. This case has revolved around the extent of those requirements and the role of the courts in ensuring the rights are protected.

42. The applicable law in this jurisdiction can only be understood after consideration of the interplay between the relevant Regulation, the 2010 Directive, the case law of the ECtHR on Article 6(1) and (3) and the case law on Article 38 of the Constitution. As the provisions of the 2010 Directive are themselves derived from the requirements of the ECHR, it is appropriate to commence with the developing principles established by that court.

43. Under the ECHR, *"the fact that the defendant has a basic command of the language of the proceedings . . . should not by itself bar that individual from benefitting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence"* (*Vizgirda v. Slovenia* [2018] ECHR 674, para 83). In *Vizgirda*, the ECtHR proceeded to state that the standard of the interpretation that was required is that which allows him to *"actively participate in the trial against him"*. If an accused cannot actively participate in the trial, then the trial then must be regarded as a wholly unfair.

44. The interplay between the ECHR understanding of the right, and the 2010 Directive is demonstrated by the fact that the ECtHR in *Vizgirda* expressly referred to Recital 22 of the 2010 Directive which provides that the purpose of interpretation is *"to allow (the accused) fully to exercise the right of defence, and in order to safeguard the fairness of the proceedings"*.

45. In *Hacioglu*, the ECtHR stated at para. 88: -

"The Court reiterates that paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings . . . The fact remains . . . that the interpretation assistance provided should be such as to enable the defendant . . . to put before the court his version of the events . . . In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided".

From *Hacioglu*, it is established that the provision of the interpreter is not merely for the convenience of the police in gathering evidence but is also designed to allow *"the defendant to put before the court his version of events"*.

46. In *Salduz*, the ECtHR stated at para. 54 that *"the investigation stage is crucial importance for the preparation of the criminal*

proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered". In the case of *Diallo v. Sweden* [2010] E.C.H.R. 84, the ECtHR drew a parallel between the right to adequate interpretation during police questioning and the right to a lawyer.

47. Those requirements are also apparent from the 2010 Directive. Article 2(1) requires that member states ensure that suspected persons or accused persons who do not speak or understand the language of the criminal proceedings are provided, without delay, with interpretation during criminal proceedings, including during police questioning. Article 2(8) requires that the interpretation provided should be:-

"of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence."

48. From an early stage, the ECtHR recognised that if the right to interpretation as guaranteed under Article 6 of the ECHR was to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter. If the authorities are put on notice and in particular circumstances, the obligation may also extend to a degree of subsequent control over the adequacy of the interpretation provided. (*Kamasinski v. Austria* (1991) 13 E.H.R.R. 26). In *Diallo*, the ECtHR confirmed at para 29 that in order to exercise "a sufficient degree of control of the adequacy of . . . interpretation skills" the trial court may properly be asked to retroactively consider, and provide a remedy against, an inadequate interpretation at the police station.

49. The 2010 Directive does not provide explicitly for the requirements on a trial court in relation to issues surrounding inadequacy of interpretation during the pre-trial stage. Consideration must be given to Article 2(5) which states that: -

"Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings".

The right of the trial court to consider retrospectively the quality of the interpretation is necessarily implied because the right under the 2010 Directive to adequate interpretation is for the purpose of safeguarding the fairness of the proceedings. In order to ensure the fairness of a trial, a trial court must be in a position to provide an adequate remedy where such a breach has occurred.

50. The 2013 Regulations provide for the position where an arrested person may require interpretation while in custody. There is an onus placed on the member in charge where it appears to him or her, or he or she is made aware, that such interpretation may be necessary to take such steps as are reasonable in all of the circumstances to verify if the person requires the assistance of an interpreter. Where it has been decided that such assistance is required, the member in charge must arrange without delay for the attendance of an interpreter at the station and must record it in the custody record. Where an interpreter is provided, the arrested person is entitled to the assistance of the interpreter during any meeting or communication with their solicitor and during any interview.

51. Article 7 of the 2013 Regulations addresses issues relating to the quality of interpretation. The arrested person is entitled to make a complaint about the interpretation. That must be investigated by the member in charge who must take whatever steps are necessary. Apart from making a note in the custody record of such a complaint and any actions taken the 2013 Regulations are silent as to what is required.

52. As I understand the submissions of the DPP in this case, she accepted that the fairness of the proceedings are the focus of the 2010 Directive, but does not expressly concede that the trial court has any role to play in assessing the quality of the interpretation. That was not a primary submission of the DPP, who submitted that if the Court has a role to play, it was exercised sufficiently in this case by the District Judge. The focus of the DPP's submissions was primarily upon the fact that there was no complaint by the applicant at the time of the interview which would have allowed a remedy to take place there and then. Moreover, in the context of the material available to the District Judge in the courtroom, she had in any event made an assessment that it was fair.

53. In the view of this Court, any understanding of the law in this jurisdiction must begin with a consideration of Article 38.1 of the Constitution which grants an accused person the right to a fair trial. Ultimately, it is the state's responsibility to provide a fair trial to an accused. The state complies with this constitutional obligation in a variety of ways such as: the provision of courts comprised of judges who are independent and impartial in the carrying out of their duties, the provision of legal assistance to those who are accused of crimes, and by a myriad of legal provisions which guarantee fair procedures during the course of the investigation and subsequent trial. An example of these legal provisions are the Criminal Justice Act, 1984 and the regulations made thereunder, which protect the rights of those under arrest or otherwise detained in garda stations. The rules on admissibility of evidence are also designed to ensure that illegality at the investigation stage will not affect the fairness of the trial proceedings. Moreover, the provision of criminal and/or disciplinary sanctions for Gardaí who violate legal rights ensure that the protections of the 1984 Act are not illusory. The 2013 Regulations form part of that matrix of protection of fair trial rights and place a requirement on members in charge to protect the right of interpretation.

54. The ultimate determination of whether an accused can have a fair trial rests with the judiciary. It is during the course of the trial that the judge may be called upon to make rulings as to the admissibility of evidence where a violation of rights is alleged. It is unnecessary in this judgment to expand upon the circumstances or manner in which a court will exercise its jurisdiction to ensure the fairness of the trial. Suffice to say that it may often take the form of the court refusing to admit evidence because it has been taken in violation of an accused person's rights. Another form of protection may be the court staying the proceedings where for example the delay in the prosecution has in the specific circumstances rendered it impossible for an accused person to have a fair trial. Similarly, the absence and impossibility of obtaining relevant evidence may result in a trial being unfair. The important point is that at all times the judge, in accordance with the provisions of Article 38 of the Constitution and the right to a trial in due course of law, is the adjudicator of when and in what circumstances that it can be said that a fair trial is not possible.

55. In the authoritative decision on the meaning of trial in due course of law, O'Higgins CJ in the *State (Healy) v. Donoghue* held that:

"It is clear that the words 'due course of law' in Article 38 make it mandatory that every criminal trial should be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights. What then does justice require in relation to the trial of a person on a criminal charge? A person charged must be accorded certain rights".

56. Having referred to various natural rights outlined by the High Court in its judgment in that case, O'Higgins C.J. proceeded to state that: -

"The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances, his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does".

57. Even though the ECHR had been ratified by Ireland at the time of the judgment in *State (Healy) v Donoghue*, it was not part of domestic law by virtue of our dualist approach to the incorporation of international treaties. The Supreme Court nonetheless referred to its provisions in the course of the judgments. O'Higgins CJ stated that the Convention provisions regarding legal assistance demonstrated that it was then generally recognised throughout Europe that, as one of his minimum rights, a poor person charged with a criminal offence had the right to have legal assistance provided without charge. It was only through the provision of legal aid that justice could be done and to hold otherwise "would be to tolerate a situation in which the nature and extent of a man's ability to defend himself, when accused, could depend on the nature and extent of his means".

58. I agree with the submission of counsel for the accused in this case, that *State (Healy) v. Donoghue* can be adopted as a statement of principle insofar as the provision of interpretation is referred. Insofar as fair trial issues are concerned, where legal assistance is mentioned, assistance of an interpreter could replace it. It would be to tolerate injustice if a person who could not fully understand English was nonetheless required to defend themselves without the assistance of such an interpreter.

59. The *State (Healy) v. Donoghue* formed the basis for the expansion of the concept of provision of legal aid into the investigative process. Ultimately, in *People (DPP) v. Gormley* [2014] 2 I.R. 591, the Supreme Court having referenced the decision of the ECHR in *Salduz v. Turkey*, held that the constitutional right to legal assistance extended to the right of access to a lawyer during the questioning by the police. An issue arose in *People (DPP) v. Doyle* [1994] 2 I.R. 286 on the facts as to whether it extended to the presence of a lawyer during the interviewing process. Although in *Doyle*, the Supreme Court did not find the constitutional right extended that far, the decision establishes that the primary concern of the trial court must be with the overall fairness of the criminal proceedings including the pre-trial investigative stage.

60. The provision of the assistance of an interpreter to those who cannot understand the language in which their interrogation and trial is being held, is undoubtedly essential in the interest of justice. The effective implementation of a right which is essential in the interest of justice is a matter for the trial judge. Henchy J. in his judgment in *State (Healy) v. Donoghue*, concentrated upon the effective implementation of that right, which had been recognised statutorily in the Criminal Justice Legal Aid Act, 1962. Henchy J. stated at pg. 354: -

"As is the case with all statutes, save those held to be unconstitutional, it is the duty of the District Court to give full effect to the provisions of the Act of 1962. But as this Act is designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled. The guarantee of protection from unjust attack is declared by the Constitution to be given by the State; and the judiciary, no less than the legislature, is an organ of the State. The legislative requirement of s. 2 of the Act is literally complied with when a legal-aid certificate is granted in the District Court: but it is clear that the judicial function does not begin and end there. Having regard to the scope and purpose of the Act of 1962 and the solemnly declared duty of each judge to uphold the Constitution and the laws, it is implicit that it is the duty of each District Justice not simply to grant a legal-aid certificate when an application is made for one on satisfactory statutory grounds but also to see that an accused who appears, from the circumstances disclosed by a due hearing of the case, to be qualified for one is informed of his right to apply for it; and, when a legal-aid certificate has been granted to an accused, the duty extends to ensuring that the accused will not be tried against his will without the benefit of that legal aid. The Act would be but a hollow and specious expression of the constitutional guarantee if it is not given at least that degree of judicial implementation. An accused person who has been convicted and deprived of his liberty without the benefit of legal aid in such circumstances may be heard to say that his constitutionally-guaranteed rights have been violated or ignored. On the joint charges on which the prosecutors Healy and Foran were sentenced on the 29th January, 1975, they were denied the benefit of the free legal aid to which they had already been judicially adjudged entitled on the ground that it was "essential in the interests of justice." The District Justice who sentenced them on that date seems to have been actuated by a desire to put an end to the unfortunate situation where, because of administrative difficulties in the operation of the legal-aid scheme, the accused were having to endure a protracted period of custody before sentence. But the genuineness of the motive cannot excuse the fact that, in sentencing them without the legal aid to which they were entitled, he deprived them of a guaranteed constitutional right. This was not simply a case of departure from a statutory requirement. The accused here wished to avail themselves of the free aid for their defence which the District Justice had already adjudged to be essential in the interests of justice. In those circumstances it was beyond his competence to force a trial on them without that legal aid. Legal aid had become of the essence of the legality of the trial, so that a trial without it could not be said to be a trial "in due course of law." The basic fairness postulated by the guarantees in Article 40, s. 3, of the Constitution required that the legal aid that had been judicially found to be essential in the interests of justice should not be arbitrarily removed from the accused by forcing a trial on them against their will without that legal aid. In the particular circumstances, the onus fell on the District Justice to see that the accused would not be subjected to the risk of injustice which he had already impliedly held to be inherent in a trial without legal aid. I agree with the conclusion of Mr. Justice Gannon that the convictions and sentences of the 29th January, 1975, should be quashed."

61. As the right to the assistance of an interpreter, even at the investigative stage, is one of the essentials of justice, it follows that the trial judge who is under a constitutional duty to ensure the administration of justice, must ensure that there is no unfairness of the trial arising from lack of, or inadequate, translation. This is not a mere formal requirement placed on a trial judge: it is a requirement to ensure at a substantive level that the trial is fair. Therefore, the trial judge must, where the circumstances demand, enquire into the adequacy of interpretation facilities that are in the course of the trial being provided or were in the course of the investigative stage provided. Apart from a constitutional duty, this type of inquiry would be one aspect of the concrete measures that member states must take to ensure the interpretation and translation provided meets the quality required under the 2010 Directive.

62. It is for the executive and legislative branches of the state to provide the formal structures designed to ensure the appropriate quality of interpretation. The qualifications, skill level, and experience required to be permitted to act as an interpreter are matters within the domain of the legislative and executive branches. In the course of a trial, the focus of the trial judge is not on the formal qualifications of the translator, although that may be a relevant consideration in the assessment as to whether the translation was in fact adequate. The fundamental issue is whether adequate translation was provided that permitted the accused to exercise fully their right of defence so that the fairness of the trial proceedings has been safeguarded.

63. Insofar as the investigative stage is concerned, there may be a number of ways in which the court may ensure the fairness of proceedings. A low threshold must be reached before the court may be put on inquiry. It is not every case that requires enquiry. Where the low threshold for inquiry has been reached, the trial court must make such inquiries as are appropriate in the circumstances. Furthermore, the remedies available to the court will depend upon the nature and extent of the breach, the circumstances in which it occurred, its effect on any evidence having regard to the complexities of the case and an overall assessment of the effect of any lack of quality interpretation on the ability of a defendant to defend themselves.

64. If, for example, the prosecution seeks to admit in evidence an inculpatory statement made by an accused person while in Garda custody but a real concern arises as to whether any appropriate interpretation assistance had been provided, the trial court has a duty to inquire into the effect of any alleged inadequacy on the admissibility of the statement. An example of where such an issue of admissibility concerning interpretation might arise is where a person who did not understand English did not have their right to silence explained to them in a language they understood. If that occurs, plainly that person has not been "cautioned" or advised in respect of their right to silence. This would be a violation of the privilege against self-incrimination and would have an impact on the fairness of the trial if any subsequent admissions were tendered into evidence.

65. As the focus in the District Court in the present case was not on the admissibility of the memorandum of interview or the translation review itself, these proceedings raise slightly different issues. The first is a matter of process as to how such an inquiry should be carried out. The second is more substantive and the argument is that because there has been an alleged breach of the opportunity to present a defence fully at the investigative stage, the consequence must be dismissal of the entire case.

66. As for the process issue, it is not possible to lay down principles that would cover each case. The nature and the extent of the inquiry will depend on the facts of the case and the issues at stake. If admissibility of the interview is at stake, the onus will remain on the prosecution to insure that the translation was adequate and that the trial court can be satisfied, beyond reasonable doubt, that the rights of the accused were accorded to him or her. The evidence as to the extent of the accused's knowledge of English may be provided by the prosecution in a number of ways. If a case arises where the prosecution state that the person did not require an interpreter at all, then it is entirely appropriate that evidence could be given by somebody who has knowledge and experience of dealing with the person in English over a period of time or perhaps at the relevant time. If an interpreter has been provided, the fact that this translator gives evidence and is available for cross-examination may also assist in clarifying the position. It is also true to say that it is particularly helpful where interviews have been audio recorded. That provides the defence the opportunity to assess the translation or as the case may be, the lack of translation.

67. The fact that a person answered the majority of questions in an interview in English without the assistance of translation may not of itself indicate sufficient proficiency in the English language to understand the nuances of what was being asked. It is important to assess the complexity of the questions asked and also the content of the replies so that one can be sure that the questions were understood correctly and that the person had the ability to answer them fully. For example, many people may understand basic questions of name, date of birth, address, family and occupation in the language of the place they reside. They may even understand simple questions (or instructions) given to them in that language. Such basic fluency would not necessarily mean that they can conduct an interview in that second language which requires either complex or nuanced legal and factual considerations. These must all be assessed by the trial judge.

68. It will not be in every case that a judge can be required to listen to the audio recording of an interview. However, where a real issue has arisen about the extent of the understanding of a person in respect of the English language and where such an audio recording is available, it would require very good reason not to listen to that audio recording for the purpose of assessing whether the translation in that particular interview for that particular accused can be said to be sufficient. It is a truism to say that a transcript does not record every nuance in a trial. Similarly, a translation review may not record every nuance of that interview.

69. In the present case, a translation review had been carried out and the reviewer stated that the grammar and structure of the replies had been changed for clarity purposes because of the incomprehensible speech due to the poor knowledge of English of the accused. In those circumstances, and especially in the absence of that interpreter being available for cross-examination, an examination by the trial judge of the English language speech of the accused that was available first hand to the court in the audio recordings, is warranted in the exercise of the judge's duty to ensure the fairness of the trial. Each case is fact specific and it must be repeated that it will not be in every case that the court is obliged to listen to the audio recording.

70. The second matter is one of substance; what is the impact on the trial of the lack of quality interpretation? In the District Court proceedings in the present case, the solicitor for the accused opened his submissions on the basis that the lack of interpretation required dismissal of the charge. Whether a fair trial can occur is ultimately a matter for a trial judge in the exercise of his or her duty to ensure that the constitutional rights of an accused are upheld. In certain cases, even where there is evidence that could satisfy a court beyond reasonable doubt of the guilt of the accused, the requirements of fair trial might require a court to refuse to permit the trial to proceed. The most obvious example of that could be where there is missing evidence. There may be *prima facie* evidence of proof, but the absence of evidence due to prosecutorial delay or a failure by the prosecution to obtain all relevant evidence may lead to a situation where an accused person is no longer in a position effectively to defend themselves.

71. In the proceedings before me, the issue is whether a trial court is required to dismiss a case when an accused person, because of inadequate translation, is unable to present their "defence" or reasonable excuse at the investigative stage. In my view, it is neither appropriate nor necessary at this stage to decide whether the fairness of proceedings would make such a requirement. In the first place, on the facts set out in the case stated, the argument in the District Court did not extend to a detailed discussion as to the legal implications of the phrase "without reasonable excuse" in the context of the relevant section of the 2001 Act. Moreover, it may never arise in the present case, as the District Judge has not examined the audio recording of the interview with a view to assessing that fact.

72. Most importantly, this is not an issue that should or could be dealt with in the abstract. It is noted from the memorandum of interview and the translation review that at various stages explanations were in fact put forward by the accused. In the context of seeking to establish an unfair situation, an applicant would at the very least have to engage with how it is argued that the quality of the interpretation interfered with the possibility of him putting forward a particular reasonable excuse. This is not to put a legal

burden on an accused person. Indeed, the onus remains on the prosecution to establish that the translation was adequate and that no unfairness will result from any inadequacy. Where, however, the interview reveals an attempt to put forward a number of excuses for not signing on, an examination of precisely why it is being asserted that the trial would no longer be fair because of the quality of the translation requires careful assessment.

73. The impact of inadequate translation on the fairness of the trial is fact specific. It can only be addressed by careful examination of all relevant circumstances, taking into account the evidence as available, including where appropriate the recordings of the interview. There are a range of remedies available to a trial judge to ensure that an accused person will have a fair trial. There is a duty on a trial judge to ensure that the right to a fair trial is not compromised by the lack of adequate translation. Whether, as a matter of law or the circumstances in which, the requirements of a fair trial require dismissal of a charge where inadequate translation did not permit the defence to be put forward at the investigative stage, remains to be decided in an appropriate case.

The Answers to the Questions

Question (a):

In light of the circumstances as described above, is the prosecution obliged to tender for cross-examination the witness responsible for the translation review, where that document was procured by the prosecution and admitted into evidence on behalf of the prosecution?

No. That negative answer is based upon the specific circumstances set out in the case-stated. The question is premised on the prosecution having admitted the document into evidence on its behalf. That may not be the correct position. The document was put into evidence without formal proof. Its contents were being relied upon by the accused. If there had been an admissibility issue, the translation review could only have been admitted through agreement between the parties or in the absence of agreement, the calling of the witness to prove the contents of the translation review. In those circumstances, the witness would have had to have been available for cross-examination.

Question (b)

If the answer to (a) is yes, am I obliged to dismiss the prosecution or otherwise what is the effect of the failure of the prosecution to tender the said witness for cross-examination?

Question B does not arise.

Question (c)

If the answer to either (a) or (b) is no, having heard evidence on behalf of the prosecution and cross-examination thereupon as to the proficiency in English of the accused and his ability to participate in the interview, and having allowed into evidence the memorandum of interview tendered on behalf of the prosecution, am I obliged as a matter of fair procedures, to consider the audio-visual recording of the interview pursuant to s.57 Criminal Justice Act 2007 with a view to assessing:

(i) Whether the accused was unable to participate properly in the interview; and/or

(iii) Whether there has been a breach of the 2013 Regulations (and in particular, Regulations 3 and/or 5 thereof), and/or the 2010 Directive (and in particular, Articles 2 (1), and/or 2(8) thereof)?

Yes. In the particular circumstances of the present case where the memorandum of interview is agreed to be incomplete and inaccurate, and in the context of a statement by the translator obtained by the prosecution that the interview contained incomprehensible speech due to the lack of proficiency of the accused, it was incumbent upon the District Judge in the present case to listen to the audio recording.

Question (d)

If the answer to either (c) (i) or (c) (ii) is yes, am I obliged to dismiss the prosecution or otherwise what is the effect on the prosecution of either the inability of the accused to participate properly in the interview and/or the breach identified at (c) (ii)?

No. The duty on the trial judge is to ensure the fairness of the trial. The appropriate remedy for a breach of the right to participate properly in an interview or, a breach of the 2013 Regulations or, a breach of the 2010 Directive is a matter to be assessed in the context of the trial.