Neutral Citation Number: [2011] IEHC 118

THE HIGH COURT

JUDICIAL REVIEW

2009 1067 JR

BETWEEN:

DENISE O'CONNOR

APPLICANT

AND

JUDGE JOHN O'NEILL, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Michael Hanna of delivered the 18th day of February, 2011

This is an application for Judicial Review of a conviction of the applicant at the Dublin Metropolitan District Court for an offence of refusal to provide a breath specimen pursuant to section 13 of the Road Traffic Act, 1994, (hereinafter referred to as "the Act") on the 10th day of September, 2009. The first-named respondent was the trial judge. The applicant claims that the first-named respondent erred in law and/or acted *ultra vires* his powers in so convicting her. It was determined by the trial judge that a special and substantial reason existed for the failure or refusal to provide a specimen of breath. I will set out the material legislation hereunder. He found that the Garda Siochána did not, subsequent to the applicant's failure or refusal to provide a sample of her breath, make a requirement of her to provide a sample of her blood or urine and that no onus existed on the Garda Siochána to inform the applicant of her obligation, as soon as was practicable after the failure or refusal, to offer a sample of her blood or urine.

The applicant claims that section 23(1) of the Act places an onus on the Garda Siochána to inform the applicant of the requirement to provide a sample of her blood or urine. In the alternative, the applicant claims that section 23(1) of the Act is unconstitutional or repugnant to the provisions of Bunreacht na hÉireann, and in particular the guarantees to trial in due course of law contained in Article 38.1 and the right to fair procedures in Article 40.3.1. Further, or in the alternative, the applicant seeks a Declaration pursuant to section 5 of the European Human Rights Act, 2003 that s. 23(1) of the Act is incompatible with the State's obligations pursuant to the ECHR.

Background Facts

On the 29th day of July, 2008, the applicant was arrested by Garda Culhane pursuant to section 49(8) of the Road Traffic Act 1961 on suspicion of drink driving. The applicant was conveyed to Terenure Garda Station, where a requirement was made of her pursuant to s. 13(1)(a) of the Act to provide two specimens of breath. The applicant failed to provide the required samples and was charged with refusing or failing to comply with a requirement to provide a breath sample contrary to s. 13(2) of the Act.

The applicant was not informed, and was not aware, that s. 13(2) of the Act provides a defence to a prosecution for a refusal or failure to give a sample of breath where the defendant has offered to provide a sample of blood or urine. The applicant was not asked by the Garda Siochána to comply with a requirement in relation to the taking of a sample of blood or urine, nor did the applicant offer to comply with such requirement.

The applicant appeared before the first-named respondent in the District Court on the 10th day of September, 2009. The applicant's General Practitioner, Dr. Kenny, gave evidence on the applicant's behalf at the hearing and stated that the applicant suffered from mild ongoing asthma and experienced panic attacks. Dr Kenny gave evidence of the typical symptoms of a panic attack; shortness of breath; palpitations; confusion and; disorientation. The applicant gave evidence that she had suffered from a panic attack at the Garda Station and it was as a result of this panic attack that she was unable, despite repeated efforts, to provide a sample of breath.

Garda Culhane gave evidence that, on the relevant date, he had observed a car, registration 06-D-50677, take a corner very wide and, as a result, the driver of the patrol car in which he was travelling, Garda McKinney, was forced to take measures to avoid a collision between the two vehicles. The applicant was the driver of the errant vehicle. Garda Culhane and Garda McKinney stopped the motor car. Garda Culhane stated that he formed the opinion that the applicant had consumed an intoxicant to such an extent as to render her incapable of having proper control of a mechanically propelled vehicle in a public place and gave evidence of arrest and caution. He gave evidence that he observed the applicant for 20 minutes, during which time she consumed nil by mouth. He stated that the applicant was then brought to the Doctor's room where she was processed through the Intoxilyser by Garda Leonard.

Garda Leonard gave evidence that while in the Garda Station he had formed the opinion that the applicant was under the influence of an intoxicant and that he had stated to Garda Culhane that he would conduct a breath test on the applicant. He subsequently made a demand of the applicant under s 13(1) of the Act to provide two specimens of breath for determining the level of alcohol in her breath. He instructed her that failure or refusal to comply with the requirement constitutes an offence under s. 13(2) of the Act and informed her of the potential punishment. Garda Leonard stated that the applicant attempted to blow into the machine but stopped blowing before a specimen registered and that the applicant repeated this several times contrary to the Garda's instruction. The Garda deemed the test a failure to comply with s. 13 of the Act. It is not disputed that the applicant was made fully aware of her legal rights.

The first-named respondent held that there was a 'special and substantial reason' for the applicant's failure or refusal to provide a sample of breath as envisaged by s. 23(1) of the Act. However, the first-named respondent held that his hands were tied and that the law required the applicant, even in the absence of her knowledge, to offer to provide a specimen of blood or sample of urine. He held that there was no onus on the Garda Siochána to inform the applicant of the provisions of s. 23(1) of the Act and therefore that he was obliged to convict her. The first-named respondent sentenced her to the mandatory four-year disqualification and a fine of €250.

I turn, momentarily, to one aspect of the applicant's case. Both Gardai have sworn affidavits. Both say that no reference was made to panic attacks in the station. The hearing in the District Court was the first they heard about this. Garda Culhane deposes that the applicant's doctor gave evidence to the effect that she accepted that most people suffering from asthma faced with the

circumstances confronting the applicant would inform the gardai of their ailment. Very late in the day, literally days before the hearing of this matter, an affidavit was filed sworn by the applicant's sister, Elizabeth O'Connor. She had, apparently, given evidence in the District Court. Her terse affidavit described her sister becoming agitated and of the deponent sitting in the front of the patrol car informing Garda Culhane of the applicant's tendency to suffer panic attacks.

The foregoing spawned an almost immediate replying affidavit from Garda Culhane set in terms that amounted to flat contradiction of everything Ms. O'Connor said with the exception of confirming her presence in the applicant's motor vehicle. This caused me, not to mention Mr. Paul Anthony McDermott for the second to fourth-named respondents, to wonder what the purpose was of this "chimes at midnight" incursion on the applicant's behalf. It seemed to dissipate to a degree the asserted reliance by Mr. Ross Maguire S.C. on the extant finding of special and substantial reason by the District Judge. What could its relevance be if not to attempt to undermine the credibility of the affidavits of the Gardai? And yet, no steps were taken by the applicant (and, for that matter, the respondents) to instigate cross-examination. I refer, without further comment, to para. 5-86 of *Civil Proceedings and the State* (Collins and O'Reilly):-

> *"The (cross-examination) procedure is of assistance where the affidavits, on their face, disclose conflicts of fact that are incapable of resolution. The court cannot resolve such conflicts in favour of the party on whom the burden of proof lies, usually the applicant."*

Applicant's Complaints
The applicant claims that Article 38.1 of the Constitution has been interpreted by the Courts as embracing a range of both procedural and substantive rights and that, where a statute breaches such constitutional guarantee of fair procedures, then the court should declare the statute unconstitutional without balancing rights.

The applicant claims that the absence of knowledge on the part of the applicant in relation to the defence open to her under s. 23 of the Act negates the *mens rea*. The applicant further claims that, by providing a defence to an offence contrary to s. 13 of the Act, the legislature has not applied strict liability.

The applicant submits that a person cannot be convicted for failing or refusing to comply with the requirement to give a specimen unless the person is informed of his legal obligation to do so subject to penal sanction. Furthermore, the applicant claims that it would be both substantively and procedurally unfair to regard a person as having committed an offence, or failing or refusing to comply with a requirement, when he had not been informed that he had an obligation to comply with such requirement subject to penal sanction.

Submissions of the Second-, Third- and Fourth-Named Respondents
The second-, third- and fourth-named respondents (hereafter "the respondents") submit that that it is the applicant who bears the burden of proof in proceedings for judicial review.

The respondents submit that the Gardaí were not on notice that there was any special and substantial reason for not providing a breath sample and that the date of the criminal prosecution was the first occasion when the Gardaí became aware that the applicant was raising a special and substantial reason defence.

The respondents also submit that it is not clear that there was a good and substantial reason for the refusal in this case and so it is not evident that the defence should have been in issue. Garda Culhane states in his affidavit that he noticed nothing in the station to suggest that the applicant suffered a panic attack. It is further submitted that the factual basis for the judgment is dubious, and that this should be taken into account because of the discretionary nature of judicial review.

The respondents submit that the courts are reluctant to review the merits of a conviction by means of judicial review, and that relief by way of judicial review is confined to cases where reliance could be placed on excess or want of jurisdiction, on clear departure from fair and constitutional procedures, on bias, on fraud and perjury or an error on the face of the record and is not available where the sufficiency of the evidence before the trial judge is being challenged.

The respondents seek to rely on the presumption of constitutionality and, if necessary, the double construction rule.

The respondents submit that, on the plain and ordinary construction of s. 23(1) of the Road Traffic Act, the Gardaí are not required to make a requirement of the applicant to provide a specimen of blood or urine and that the first-named respondent correctly interpreted the legislation in this regard. The respondents claim that, pursuant to the doctrine of *stare decisis*, the court should follow the decision in *Cabot v. DPP* [2002] 68 SS 41/2004, in which Ó Caoimh J. held that there existed no duty on the Gardaí to inform an arrested person that a special and substantial reason for failing or refusing to give a breath sample would not of itself provide a defence to a prosecution under s. 13 of the Act.

The respondents argue that, in the circumstances at hand, the Act is not repugnant to the provisions of Bunreacht na hÉireann and that the Gardaí are under no obligation to provide a list of all possible defences.

The respondents submit that the applicant has not properly pleaded a case in relation to the European Convention on Human Rights. Further, and in the alternative, the respondents argue that s. 23(1) of the Act is not incompatible with the State's obligations pursuant to the ECHR.

The respondents claim that the public interest is strongly in favour of upholding the conviction in circumstances where there is no reason to think that the conviction was unsafe.

Relevant Provisions of the Road Traffic Act 1994
Section 13 of the RTA 1994 provides as follows:-

> *"(1) Where a person is arrested under section 49(8) … of the Principal Act … and a member of the Garda Síochána is of the opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, do either or both of the following-*
>
> > *(a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his breath and may indicate the manner in which he is to comply with the requirement*
> >
> > *(b) require the person either-*

(i) to permit a designated doctor to take from the person a specimen of his blood, or

(ii) at the option of the person, to provide for the designated doctor a specimen of his urine,

and if the doctor states in writing that he is unwilling, on medical grounds, to take from the person or be provided by him with the specimen to which the requirement in either of the foregoing subparagraphs related, the member may make a requirement of the person under this paragraph in relation to the specimen other than to which the first requirement related.

(2) Subject to section 23, a person who refuses or fails to comply forthwith with a requirement under subsection (1)(a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both."

Section 23(1) of the RTA 1994 provides as follows:-

"In a prosecution of a person for an offence under section 13 for refusing or failing to comply with a requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the provision of a specimen of urine."

Relevant Articles of Constitution
Article 38.1 of the Constitution provides:-

"No person shall be tried on any criminal conviction save in due course of law."

Article 40.3 provides:-

"1° The State guarantees in its laws to respect and, as far as is practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it can from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

Mens Rea
The Applicant submits that there is a presumption that *mens rea* is an essential element in every offence. The Applicant claims that the absence of knowledge on the part of the applicant in relation to the defence open to her under s. 23(1) in circumstances where she could not comply with the requirement negates the *mens rea*. The Applicant relies on *CC v. Ireland* [2006] IESC 33 in this regard, in which case the applicant was charged with offences of unlawful carnal knowledge of a female person under the age of 15 years contrary to s. 1(1) of the Criminal Law (Amendment) act 1935. In that case the Supreme Court held the impugned provision to be inconsistent with the Constitution as, in failing to provide a defence of reasonable mistake, it permitted conviction in circumstances where there was no mental guilt. The Applicant further submits that, by providing a defence to an offence contrary to section 13(1), the legislature has not applied strict liability and has introduced an element of *mens rea*, which is required to ground a conviction.

While it is presumed that *mens rea* is an essential element of a criminal offence, this presumption may be rebutted by the wording of legislation creating the offence. In *Sherras v. De Rutzen* [1895] 1 QB 918, Wright J. stated:

"There is a presumption that mens rea, an evil intention or a knowledge of the wrongness of an act, is an essential ingredient in every offence, but that presumption is liable to be displaced by the words of a statute creating the offence, or the subject matter with which it deals, and both must be considered." (at p. 921)

Further, there are several examples where the severe effects of statutory strict liability are offset by statutory defences, e.g. s. 29 of the Misuse of Drugs Act 1977. In *DPP v. Behan* [2003] WJSC-HC, Ó Caoimh J. held that s.13 of the Act creates a strict liability offence, albeit with a limited defence provided by s. 23(1) of the Act.

Interpretation of the Legislation
In order to determine whether the First-Named Respondent correctly interpreted the legislation, the provisions must be examined closely.

Section 13 of the Act grants a discretion to members of the Garda Siochána, where a person is arrested under the relevant section and the member is of the opinion that the person has consumed an intoxicant, to require the person either to provide two specimens of breath, or, in the alternative, require the person to permit the taking of a specimen of blood or, at the option of the person, to provide a sample of urine. Therefore, it is a matter of the Garda's discretion whether he require a sample of breath or a specimen of blood. The only point at which the accused is offered a choice is when he is required by the Garda to provide a specimen of blood, at which point the accused may elect to provide a urine sample instead.

Section 23(1) of the Act provides for a defence to a charge under s. 13 of failing or refusing to provide a breath sample where the accused satisfies the court that there was a special and substantial reason for the refusal or failure and that the accused complied, or offered but was not called upon to comply, with a requirement in relation to the provision of a sample of blood or urine. The burden of proof in relation to raising the s. 23(1) defence lies on the accused, who must satisfy the Court that he meets the relevant criteria. The use of the word "offer" in the Statute shows a clear legislative intent that in order for an accused to rely on the defence, in addition to the existence of a special and substantial reason, there is also an obligation on the accused to offer a sample of blood or urine. The RTA does not expressly provide that the member of the Garda Siochána must inform the arrested person of the requirement to provide a blood or urine sample.

In *Cabot v. DPP* [2002] 68 SS 41/2004 the accused had declined to comply with a requirement to provide two samples of breath pursuant to s. 13. The accused in that case claimed that where a refusal to provide a breath sample has occurred, it is incumbent on a member of the Garda Siochána to inform the arrested person that a special or substantial reason for refusal or failure to provide a

sample would not in itself afford a defence to a prosecution for refusing or failing to provide a breath specimen unless the person (a) complies with a requirement in relation to the taking of a specimen of blood or urine or (b) the person offers to comply but was not required to do so. In relation to the alleged duty on Gardaí to inform the arrested person, Ó Caoimh J. stated as follows:-

> *"There remains the question whether there is an obligation on the member of the Garda Siochána concerned to inform the arrested person that a special and substantial reason for such refusal or failure will not of itself afford a defence to a prosecution for refusing or failing to provide such breath specimens, in light of the further provisions of s. 23(1) of the Act of 1994. I am not satisfied that there is any such requirement as the requirement to date has been for a member of An Garda Siochána to advise someone that failure to comply with the requirement under subsections (1)(a) or (1)(b) may constitute an offence punishable at law. I do not consider that there is any obligation on the member concerned to advise an arrested person as to what defence or defences may be open to the arrested person in the event of a subsequent prosecution. I am not satisfied that any requirement of constitutional fairness imposes any such obligation as contended for by counsel on behalf of the accused in this case."* (at p. 18)

If there is no duty on the Gardaí to inform the arrested person of the existence of the s. 23(1) defence, it follows logically that there is no obligation on the Gardaí to go a step further and lay the groundwork for the defence by positively requesting a blood or urine sample.

In *DPP v. Finnegan* [2008] IEHC 347, although Cabot was not expressly endorsed, Harding Clarke J decided along similar lines, stating as follows:-

> *"The language of the statute could not be plainer: a special and substantial reason for being unable to provide specimens of breath can only be a defence when the arrested person has offered to provide blood or urine. This section imposes an obligation to provide or offer to provide an alternative method of assessing the quantity of alcohol consumed. The intent of the statute and section 13 was to oblige any person lawfully arrested on suspicion of driving while intoxicated by alcohol or drugs to provide a specimen of breath, blood or alcohol [**sic**] when requested. A good and substantial reason for refusing does not include impugning the reasonable suspicion for the arrest."* (at para. 24)

It is clear that on its plain and ordinary construction of section 23(1) of the 1994 Act does not oblige the Gardaí to make a requirement of the applicant to provide a specimen of blood or urine. The first-named respondent correctly interpreted the legislation in this regard.

Constitutionality of the Legislation
Having interpreted the legislation, it is necessary at this juncture to decide whether the legislation as interpreted is repugnant to the Constitution.

The courts have been slow to provide an exhaustive definition of the concept of "due course of law" in relation to Article 38.1 of Bunreacht na hÉireann, but the phrase has been interpreted to embrace a wide range of substantive and procedural rights. In The State (Healy) v. Donoghue [1976] I.R. 325 Gannon J. described the expression as:-

> *"a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function." (at p. 335)*

In *Heaney v. Ireland* [1994] 3 I.R. 593, Costello J. held that Article 38.1:-

> *"implies a great deal more than a simple assertion that trials are to be held in accordance with laws enacted by parliament. It is an Article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, or charged a second time with the same offence, the principle that an accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at his trial, are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article."* (at p. 605-606)

Article 40.3 of Bunreacht na hÉireann guarantees protection for the right to justice and fair procedures in relation inter alia to criminal proceedings.

The question is whether the legislation, in not placing an onus on the Gardaí to inform the Applicant of the potential defence under s. 23 of the Act, is in breach of Articles 38.1 and 40.3.1°.

In my opinion the requirements of fair procedures do not necessitate that the Gardaí make a requirement of an arrested person to provide an alternative blood or urine sample where he or she has refused or failed to provide a breath sample pursuant to s. 13.

In the case at hand, according to the Gardaí in their sworn and undisturbed affidavits, there was no indication in the Garda Station that the Applicant had a special and substantial reason for not providing a breath sample. I am not satisfied that at any stage did the applicant inform or attempt to inform the Gardaí that she suffered from asthma and/or panic attacks and in the circumstances, the Gardaí were not on notice that there was any special and substantial reason. The fact that, more than one year later, a District Judge came to the conclusion that such special and substantial reason did exist does not bear on the situation. That conclusion was reached, inter alia, upon evidence that was not and could not have been available to the Gardaí involved, namely the evidence of Dr. Kenny. It would place an inappropriate and wholly unreal burden on Gardaí exercising their duties to compel them to anticipate every defence strategy which might be employed by a person facing charges when that person, as was the case here, was fully informed of her rights, including seeking the services of her solicitor.

Although there is an obligation on the Gardaí to inform an arrested person of the criminal sanctions of refusal, as identified by the Supreme Court in DPP v. McGarrigle [1996] 1 ILRM 271, the duty which the Applicant seeks to have imposed is of a different nature. The Gardaí are not under an obligation to inform an arrested person of any available defences to a charge. There is nothing in the wording of the Act to suggest this intention and to impose such an onerous burden would be unmanageable in practice. Advice

regarding a potential defence is the province of the solicitor, and had the Applicant availed of her right to a solicitor she would have been made aware of the availability of the s. 23(1) defence. The Gardaí cannot be expected to provide information in relation to defences to a charge where an arrested person has declined his right to legal advice.

It is clear from the wording of s. 23 of the Act that the provision is conjunctive. In order to avail of the defence therein, it is not sufficient that an accused meet the first stage of the test - that there existed a special and substantial reason for the refusal or failure to provide a breath sample - but also that the accused satisfy the second criterion: that, as soon as practicable after the refusal or failure, he or she complied, or offered but was not called upon to comply, with a requirement regarding the taking of blood or the provision of a sample of urine. The applicant contends that she was deprived of the defence available to her under section 23(1) and/ or deprived of the opportunity to provide a sample of her blood or urine. However, the principle of ignorantia legis neminem excusat applies; the applicant cannot rely on her own ignorance of the law as a defence.

The European Convention on Human Rights
The applicant seeks a Declaration pursuant to section 5 of the Human Rights Act, 2003, that section 23 of the 1994 Act is incompatible with the State's obligations pursuant to the European Convention on Human Rights and Fundamental Freedoms (hereafter 'the ECHR'). Although the applicant is vague on the provisions of the ECHR on which she relies in this regard, the relevant articles appear to be Art. 5(2) and 6(3) (a) and (b).

Article 5.2 of the ECHR provides as follows:-

> *"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."*

In relation to the extent of the right protected by Article 5(2), the European Court of Human Rights held in Kerr v. United Kingdom (App. 40451/98), ***admissibility decision of 7 December 1999***:

> *"[Article 5(2)] contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed 'promptly' (in French 'dans le plus court délai'), it need not be related [**sic**] in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features."*

For the purposes of Article 5(2), it is sufficient if detainees were informed in general terms of the reasons for the arrest and any charge against them. The provision does not impose an obligation on members of the Garda Síochána to prompt a detainee as to the existence of a possible defence.

Article 6(3) of the ECHR provides inter alia:-

> *"Everyone charged with a criminal offence has the following minimum rights:*
>
> > *(a) to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him;*
> >
> > *(b) to have adequate time and facilities for the preparation of his defence"*

The duty on the State under Article 6(3)(a) is more extensive than the requirement of notification of the reason for detention in Article 5(2), but it is clear from the plain and ordinary construction of the provision that the protection guaranteed does not extend to the provision of details of any possible defences to a charge. Such details do not constitute information "of the nature and cause of the accusation".

Article 6(3)(b) protects inter alia the right to adequate facilities for the preparation of a defence, which entails that the accused should have the opportunity to organise his defence appropriately. In the case at hand, the applicant was informed of her right to a legal representative. If she had availed of this right, she would have been informed of the defence available to her under section 23(1) of the RTA 1994. I believe that adequate facilities for the preparation of a defence were afforded to the applicant, and it is not open to her, in a situation where she has waived her right to legal representation, to claim that the Gardaí should have informed her of the existence of a possible defence.

Conclusion
As regards the applicant's arguments in relation to *mens rea*, I am not convinced that mental guilt comprises an essential element of an offence under s. 13(1). I agree with the decision of Ó Caoimh J. in Behan that the offence is one of strict liability.

A question arises as to whether the legislation places an obligation on a member of the Garda Siochána to make a requirement of an arrested person, or alternatively to inform the person of the obligation, subsequent to his or her failure or refusal to provide a breath sample, to provide a sample of blood or urine. I do not believe that the constitutional guarantees of trial in due course of law and of fair procedures necessitate such an obligation. I am not satisfied that there is any duty on a member of the Garda Siochána to advise an arrested person on how to successfully avail of any defence or defences that may be available to him or her, much less to lay the foundations for such defence by positively making a requirement to provide an alternative sample. I agree fully with the judgment of Ó Caoimh J. in Cabot and that of Harding Clarke J. in Finnegan.

In light of these conclusions I am satisfied that the relief sought should be refused.