THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 196

Appeal No. 2019/56

The President
Edwards J.
Baker J.

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA MARIUS STONES)

RESPONDENT

- AND -

GERARD MAHER

APPELLANT

JUDGMENT of Ms Justice Baker delivered on the 17th day of July, 2019

1. This is an appeal from the judgment delivered by Binchy J. on 22 January 2019, *Maher v. The Director of Public Prosecutions* [2019] IEHC 58, regarding the form of statements to be provided to persons who have provided a breath sample through a breathalyser apparatus. The judgment of Binchy J. was given in an appeal by way of case stated by Judge Hughes of the District Court, arising out of the prosecution and conviction of the appellant for an offence under ss. 4(4)(a) and 4(5) of the Road Traffic Act 2010 ("the 2010 Act"), and concerns the proper interpretation of the Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2015 (S.I. No. 398/2015) ("the 2015 Regulations"), which provide that the prescribed statements may be produced in either the English or Irish language. The question for determination is by whom the choice of language is to be made.

2. The appeal is the latest in a series of challenges and appeals from the provisions of road traffic legislation generally regarding drunk driving and it would be best to describe the argument of the appellant as technical in nature. Counsel for both parties in the appeal did recognise that, in general, the "culture", or society's approach to the drunk driving offence, no longer shows any tolerance of drunk driving because of the risk of death or injury to an innocent person injured by a driver under the influence of alcohol or drugs.

3. The legal argument may be technical, but it should not be forgotten that the consequence of a conviction for driving while intoxicated is the suspension of the right to drive and that this may have significant practical restrictions on the day-to-day life of the convicted person. It is to be noted too, that some of the more recent judgments of the Superior Courts in regard to the interpretation of the law regarding drunk driving has reflected a recognition that many of the arguments made on appeal by convicted persons have the appearance of being cynical or, as MacMenamin J. said in *The Director of Public Prosecutions v. Freeman* [2009] IEHC 179, at para. 22, have a legal character that is "wafer thin".

Background

4. On 25 October 2015, at 1.10 A.M., the appellant, having been observed driving erratically, was arrested by Garda Stones, who formed the opinion that the appellant was under the influence of an intoxicant to such an extent as being incapable of having proper control of a mechanically propelled vehicle in a public place. The appellant was arrested pursuant to s. 4(a) of the 2010 Act, and brought to Mullingar Garda Station. After an observation period of twenty minutes or more, and in compliance with the procedures required by the 2010 Act, Garda Stones required the appellant to provide two specimens of breath by exhaling into a breathalyser apparatus.

5. Garda Stones then entered the details required by the 2015 Regulations to be entered into the breathalyser apparatus. Two identical statements in the English language were printed from the apparatus which were handed to the appellant for signature, and Garda Stones duly warned the appellant that failure or refusal to return one of the two signed statements could result in a summary conviction. The appellant did sign and return one of the said statements, and retained the other as he was entitled to do.

6. All of the exchanges between Garda Stones and the appellant took place in the English language and the two identical statements were printed in English only.

7. The appellant was prosecuted in the District Court and the signed statement was adduced as evidence of the concentration of alcohol. At the conclusion of the evidence, Garda Stones having accepted in cross-examination that he had not offered the appellant a choice of having the statements produced in the English or Irish language, it was submitted in defence that the provisions of the 2015 Regulations had not been observed and that the statements were not admissible in evidence as the appellant had not been offered the choice of the language in which the statements were printed.

8. The District Court Judge having heard the evidence and submissions found as a fact that the appellant had not been given an option of choosing whether the statements should be produced in the English or Irish language, nor had he been made aware of the

possibility that the apparatus could publish the statements in either language. The District Court Judge refused the application for a direction to dismiss the prosecution and proceeded to convict and fine the appellant, and imposed the consequential disqualification from driving.

9. The District Court Judge then acceded to the request by the appellant that a case should be stated to the High Court on the following questions of law:

> (i) on the facts so found, have the provisions of the 2015 Regulations been complied with?
>
> (ii) on the facts so found, is the certificate automatically produced by the apparatus under s. 13 of the 2010 Act, indicating the concentration of alcohol in the breath of the appellant, admissible in evidence?

Judgment of the High Court

10. In a reasoned and considered judgment, Binchy J. reviewed the law leading to the enactment of the 2015 Regulations and answered both of the questions posed by the District Court Judge in the case stated in the affirmative. He considered that whilst the availability of the statements in either the Irish and English language was for the "benefit of the person providing the breath specimens, and not the garda" (at para. 37), absent an expression of choice by that person, the Garda member is under no obligation to offer a choice to the person providing the breath sample as to the language in which the statements will be printed. He went on to say as follows:

> "However, the 2015 Regulations do not oblige the garda to offer that choice to the person providing the breath specimens. While this may be an omission (deliberate or not), it does not render the 2015 Regulations unclear or ambiguous in any way. The garda is required by the 2015 Regulations to input into the apparatus the language in which the Statements are to be produced, with or without asking the person concerned. The appellant is inviting the court to infer that the garda must have a statutory obligation to afford the choice to the person concerned, in order to give effect to the purpose of this part of the 2015 Regulations. But that is to invite the Court to engage in judicial law making. It is entirely possible that the Oireachtas deliberately chose not to impose this obligation on the garda, and to allow the matter to his discretion depending upon the language in which the person engaged with him at the scene."

11. Binchy J. also considered that the failure to afford a person providing a breath sample with the choice of language had, as he put it at para. 38, "no consequence at all" for the appellant and that there had been no "unfairness, prejudice, or detriment to the appellant, who was clearly an English speaker".

12. In conclusion, the trial judge considered that there is no obligation on the Garda member to inquire of a person providing a sample as to that person's choice of language and that, were such obligation to exist, there did not result on the facts found by the District Court Judge, any unfairness, prejudice, or detriment to the appellant.

13. The appellant appealed the judgment and order of Binchy J., and the grounds of appeal may be stated in one proposition advanced in written and oral submissions, *viz*. that on the correct interpretation of the 2015 Regulations a Garda member is required to invite the person providing the breathalyser sample to make a selection as to the language in which the statements are to be printed. The argument is, essentially, that as the 2015 Regulations provide a choice as to the language in which the statements are to be printed, the choice must be one to be exercised by the person providing the sample. It is argued that a failure to invite or permit an accused person to make a selection renders the signed statement returned to the Garda member inadmissible in evidence.

14. It is important to note at this juncture that no argument was made by the appellant that there has been a denial of his right to transact his business in the Irish language. The appeal is centred on the single question of the manner in which, and the person by whom, the choice of the language of the statements is made.

The Statutory Scheme

15. Section 4 of the 2010 Act creates the offence of driving a mechanically propelled vehicle while under the influence of an intoxicant or of exceeding specified alcohol limits. The means of establishing the offence is set out in the statutory scheme and has been the subject of a large number of interpretative challenges and decisions of the Superior Courts.

16. Section 9 of the 2010 Act requires a person to provide two specimens of his or her breath to indicate the presence of alcohol. The means by which the presence of alcohol is tested is set out in its material part in s. 12 of the 2010 Act:

> "(1) Where a person is arrested under section 4(8), 5(10), 6(4), 9(4), 10(7) or 11(5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act, a member of the Garda Síochána may, at a Garda Síochána station F19 [or hospital], 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 or her breath and may indicate the manner in which he or she is to comply with the requirement,
>
> (b) […]
>
> (2) Subject to section 22, a person who refuses or fails to comply immediately with a requirement under subsection (1)(a) commits an offence.
>
> (3) […].
>
> (4) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both.
>
> (5) In a prosecution for an offence under this Part it shall be presumed, until the contrary is shown, that an apparatus provided by a member of the Garda Síochána for the purpose of enabling a person to provide 2 specimens of breath under this section is an apparatus for determining the concentration of alcohol in the breath.

(6) […]."

17. The appellant does not argue that Garda Stones failed in any respect to comply with the statutory obligations contained in s. 12 of the 2010 Act, and it is the provisions of s. 13 of the 2010 Act that give rise to the legal argument advanced in the appeal. That section sets out the procedure to be followed upon the provision by a person of two specimens of his or her breath by means of the breathalyser apparatus. Section 13(2) of the 2010 Act provides that, in respect of any specimen of breath, where the breathalyser apparatus determines that the person may have contravened the alcohol limits in s. 4 of the 2010 Act, he or she is to be provided with a document described as follows:

> "Where the apparatus referred to in section 12(1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 4(4) or section 5(4) , he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in that specimen determined by that apparatus."

18. The statements are then handed to the person who has provided the breath sample and that person is to acknowledge receipt of the statement as provided in s. 13(3) of the 2010 Act:

> "(3) On receipt of those statements, the person shall on being requested so to do by the member—
>
> (a) immediately acknowledge such receipt by placing his or her signature on each statement, and
>
> (b) thereupon return either of the statements to the member."

19. Failure to acknowledge, by signature, receipt of each of the statements and return one of these to the Garda member is an offence.

20. Section 20(1) of the 2010 Act deals with the evidential value of the statement produced by the breathalyser apparatus as follows:

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

21. The relevant prescribed forms for the purpose of the present appeal are contained in a schedule to the 2015 Regulations, Form (A) thereof, in the English language, and Form B in the Irish language. The Form sets out the details of the serial number of the apparatus, the relevant Garda Station in which the test was administered, the number of the test and the date of the start of the test. It provides details of the name, address and other identifying features of the person who provided the sample and the alcohol level found on an analysis of the two separately identified breath specimens. The Form in the English language provides as follows:

> "The specimen to be taken into account for the purposes of section _____ of the Road Traffic Act, 2010 is specimen _____ above. The concentration of alcohol in the breath for the purposes of that section is _____microgrammes of alcohol per 100 millilitres of breath."

22. The acknowledgment of receipt of the statements is done by affixation of the signature of the person who provided the specimens of breath to the two printed statements.

The 2015 Regulations provide for either language

23. In *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* [2015] IEHC 580, Noonan J. determined that for the purposes of the then operative Regulations, the prescribed form of the statements to be provided to a person who has provided two specimens of his or her breath by exhaling into an apparatus for determining the concentration of alcohol in the breath had to be produced in both the English and Irish languages and that the failure to reproduce the Irish part of the prescribed form had the effect that the statements could not be considered to have been duly completed within the meaning of the 2010 Act.

24. Immediately after the delivery of the judgment of Noonan J. on 21 September 2015, the Minister for Transport, Tourism and Sport, in exercise of his statutory powers, made the 2015 Regulations on 22 September 2015, which, in r. 3, contained the following provisions:

> "The form set out in the Schedule is prescribed for the purposes of section 13(2) of the Act of 2010 as the form of the statements to be automatically produced, being either—
>
> (a) in the English language, Form A, or
>
> (b) in the Irish language, Form B,
>
> by an apparatus referred to in section 12(1)(a) of that Act."

25. Regulation 4 of the 2015 Regulations reads as follows:

"For the purposes of completing the statements referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—

> (a) before the person provides a specimen of his or her breath in accordance with section 12(1)(a) of the Act of 2010, input into the apparatus referred to in that section—
>
> (i) the member's name and number,

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

(I) in the English language, or

(II) in the Irish language,

(iii) the provision that it is alleged the person providing the specimens has contravened, namely, section 4(4) or 5(4) of the Act of 2010, and

(iv) the name, address, date of birth and gender of the person providing the specimens,

and

(b) following the automatic production of the statements referred to in section 13(2) of the Act of 2010, sign the statements."

26. The statutory form of the statements must be used and Noonan J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei*, held that, as the complete statutory form contained both an Irish and a unified English language version, both were to be printed. The 2015 Regulations made a simple amendment to that requirement, the effect of which is that the statutory form no longer contains an Irish and an English version of the statements and the forms in the schedule may be either in Form A or Form B, Form A being in the English language and Form B in the Irish language.

27. The appellant makes no argument regarding the use of the conjunctive in r. 3 of the 2015 Regulations and does not assert that any ambiguity arises therefrom, but argues that the conjunction creates an option or requires a choice of language and that that choice must be one for the person giving the sample, or one which he must at least be offered the opportunity to exercise.

A choice of language?

28. Regulation 3 of the 2015 Regulations provides that the statements may be produced by the apparatus in either the English or Irish language. For the purposes of s. 20 of the 2010 Act, a statement purporting to have been supplied under s. 13 of the 2010 Act shall be sufficient evidence in proceedings under the 2010 Act of the facts stated in it and of compliance with the statutory requirements of the Garda member concerned. Regulation 4 of the 2015 Regulations provides that the Garda member supplying the statement shall, before the specimen of breath is provided by the person requested to do so, input certain matters into the breathalyser apparatus.

29. The Garda member therefore inputs certain variable details, and it is at that point that it is decided that the statement is to be produced in either the English or the Irish language. On a practical level, it seems evident that a choice is made at an early stage as to the language in which the statements are to be produced as the statements contain certain details including the relevant statutory provisions alleged to be contravened and the name, address, date of birth, and gender of the person providing the breath specimen. I accept the proposition advanced by the appellant that the words of the 2015 Regulations mean that there exists an option or choice as to the language in which the statements are to be produced, and that proposition is consistent with the statement of para. 15 of the judgment of O'Malley J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* [2017] IESC 77, at para. 15, that:

"The regulations have been amended since the High Court judgment in this matter, and it is now a matter of choice as to whether the form is in English or Irish."

30. It is argued by the respondents that it is clear that the choice of language is to be made by the Garda member concerned. On a plain reading of the r. 4 of the 2015 Regulations, that interpretation seems to be correct as the regulation provides that the Garda member supplying the statements shall input a direction to the apparatus to produce the statement in the Irish or English language.

31. The respondent argues that the 2015 Regulations do not impose a duty on a Garda member when making a requirement under s. 13(2) of the 2010 Act to give the arrested person a right of election regarding the language in which the statements are to be printed. It is argued separately that, as a result of the judgment of the Supreme Court in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei*, the absence of a consequent unfairness, prejudice, or detriment to an accused person means that any failure to offer an election to an arrested person does not render the statement inadmissible.

Analysis of statutory provisions

32. The appeal concerns a question of statutory interpretation and, in particular, of the evidential status of the statement in the prescribed form produced by the breathalyser apparatus. Two separate questions arise for consideration. The first question is that answered by Noonan J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* and on appeal to the Court of Appeal, *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* [2016] IECA 136 and, later, the Supreme Court, regarding the question of whether the statement was defective. The second question concerns the evidential status of the statement and whether it is admissible in evidence.

33. There is no argument that any ambiguity arises such as that that formed the basis of the three decisions in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei*. The three judgments of the Superior Courts came to the conclusion that the form used did not comply with the then applicable Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2011 (S.I. 541/2011) (the "2011 Regulations"), as the Irish version of the form was to be considered to be part of the statutory form prescribed by those Regulations. The primary focus of the judgment of O'Malley J. in the Supreme Court in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* was the consequence of non-compliance with the requirement to produce the form in both languages.

34. The question is therefore somewhat different from that considered by the High Court, the Court of Appeal, and the Supreme Court in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* which concerned the question of whether the statements were duly completed in a form required by the then applicable Regulations. The present question concerns the import in the process of the fact that the 2015 Regulations permit the production of a statement in either the Irish or English language and does not make explicit provision for the means by which the choice of language is to be made.

Statutory right to select the language

35. It is argued by the appellant that it is the accused person, and not the Garda member, who has the choice of language and that it could not have been the intention of the legislature to accommodate the Garda member. This is argued on the grounds that the legislation has been amended from time to time and that, up to the Road Traffic Act 1994 (Section 17) Regulations 1999 (S.I.

326/1999), there was no provision for the production by the apparatus of a statement in the Irish language. Those Regulations were considered by Charleton J. in *Ó Griofáin v. Éire* [2009] IEHC 188, who held that in the absence of any provision for an Irish language statement, the accused person did not have an entitlement to the production of the statements in Irish. The 2011 Regulations prescribed for the first time for the production of the statement in both Irish and English.

36. It is asserted, in the circumstances, that the Oireachtas has shown an intention following *Ó Griofáin v. Éire* to incorporate an Irish language form into the statutory regulations and that once the possibility exists that the form may be produced in either language, it would be an absurdity if the choice of language was left to the Garda member, as a language right is a right of an accused person and not of a garda.

37. The appellant argues by analogy from the decision of the Supreme Court in *The Director of Public Prosecutions (Garda Keoghan) v. Cagney* [2013] IESC 13, [2013] 1 IR 493, that the Garda member is obliged to inform the person providing the breath sample that he or she could avail of an option to have the form produced in the Irish language. The decision of the Supreme Court in that case was that a Garda member was obliged to tell an accused person that he or she could avail of an option to provide a blood or a urine sample following the failure to provide two specimens of breath. The legislation provided that it was for the accused to offer to the Gardaí the possibility of providing such alternative specimen, but at para. 6.9, Clarke J. said that, in his view:

> "there is an obligation on a member of An Gárda Síochána, […] to alert that person to the fact that, in order to rely on a defence of special and substantial reason for their failure or refusal, the person concerned must offer to provide blood or urine."

38. The judgment of the Supreme Court in *The Director of Public Prosecutions (Garda Keoghan) v. Cagney* does not support the proposition advanced by the appellant in the present case because no express option is contained in the statutory instrument by which the person providing the breath sample may choose the language in which the statements are produced. There is, in other words, no express right or option of which the Garda member must inform the person in question, and an argument by analogy from *The Director of Public Prosecutions (Garda Keoghan) v. Cagney* is not helpful.

39. The appellant argues that the right to be informed is to be implied from the existence of a right which itself is not express. It is not argued that the statutory instrument creates a right to have the form in any language of one's choice, but rather that once the form may validly be produced in either language, a choice of language must be made, and that any choice must be one for the accused person.

40. I do not accept the argument that there is to be inferred from the fact that the form may be admissible in evidence in either the English or Irish language, and produced for the purposes of the 2015 Regulations in either language, that the person providing the sample has an option to choose the language. There is no such express provision in the 2015 Regulations and it was the express option available to an accused person which led the Supreme Court in *The Director of Public Prosecutions (Garda Keoghan) v. Cagney* to take the view that the accused person could not properly be said to have the real benefit of an option if he or she was not aware of the existence of the right to choose the means by a specimen would be provided.

41. The respondent argues that, while the 2015 Regulations are silent as to the basis on which the Garda member is to choose or decide in which language the statements are to be printed, there are a number of "hints" in the legislation which suggest that the Oireachtas intended a choice or decision to be made by the Garda member. As a preliminary comment, I would refer to the language of r. 4 of the 2015 Regulations, which mandates a Garda member supplying the statement to input certain information into the apparatus and to input whether the statements are to be produced either in the English or Irish language. On a plain reading of r. 4 of the 2015 Regulations, the Garda member inputs the language choice. That interpretation does not, of course, preclude the fact that the Garda member could input a language choice after he or she has offered a choice of language to the person providing the breath sample, but at a plain reading of the regulation, the administration of the apparatus and the selection of language is done by the Garda member.

42. Reference is made to s. 13(2) of the 2010 Act, which requires that the statements be "duly completed by the member in the prescribed manner". I accept the proposition advanced by counsel for the respondent that no express provision for any participation by the appellant was provided in this sub-section, and on the clear words of the Statute, the administrative function is vested in the Garda member alone.

43. Reliance is also placed on s. 12(1)(a) of the 2010 Act by which the Garda member is empowered to require the person to give a breath sample "and may indicate the manner in which he or she is to comply with the requirement". That is a broader statement of the general power of the Garda member to administer the process of obtaining a breath sample. But, again, I accept the argument of the respondent that the administrative function is that of the Garda member, and no express provision is made for participation by the person providing the breath sample in that process.

44. Reliance is also placed on s. 20 of the 2010 Act which provides that the duly completed statement be "sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him or her by or under Chapter 4 prior to and in connection with the supply by him or her under section 13 of such statement."

45. This is the clearest statement in the legislation that it is the Garda member who performs the statutory procedures prior to and in connection with the completion of the statements and the supply of the statement to the person providing the breath sample. It supports the general proposition that the statutory procedures are to be performed by the Garda member alone. It further supports the proposition that no reading of the 2015 Regulations can be said to import a role for the person providing the breath sample.

46. It is also worthwhile to note that the provisions of s. 20 of the 2010 Act refer to the "requirement imposed on" the Garda member, and not the power or obligation. The point may be more obtuse than is necessary, and the asserted right to be involved in the choice of language does not find a correlative obligation in the 2015 Regulations and on that analysis, the right of participation in the choice of language is not one derived from any statutory obligation imposed on the Garda member. The legislation envisages in other words that the Garda member is performing a statutory requirement or statutory function, and not engaged in the performance of a statutory obligation.

47. On a plain reading of r. 4 of the 2015 Regulations, it seems to me that the Garda member is thereby vested with the administrative function of, or power to, input the language choice. There may be, in the broad sense, obligations implicit in the proper exercise of that function such as, at a level of principle, an obligation not to perform the function in a manner that is other than *bona fide*. The example given in the course of argument was a choice made by the relevant Garda member to choose an Irish language form where the person required to sign the form was a foreign national who had shown no knowledge of the Irish language. The appellant

argues for a different implication, not one derived from language rights or from a general proposition that an administrative function not be performed in a manner that its arbitrary or capricious. Essentially, the argument is that the person providing the breath sample is by implication to play a role or part in the administrative function as of right and not as ancillary to any asserted language or other right. The plain language of the 2015 Regulations does not give any such role to the person providing the breath sample. There is express provision for that person to sign the statement as an acknowledgment of the receipt of the statement, but no further positive or express function is given in the administrative role. Regulation 4 of the 2015 Regulations provides the mechanism or procedure for the production of the statements and I am not satisfied that any rights may be derived from the operation of that mechanism other than the broad rights mentioned above on which the appellant does not rely.

48. Binchy J. expressed the view that were a person to express a choice of the language in which the statements were to be printed, the Garda member would be obliged to provide the statements in the language so chosen, but that statement was clearly *obiter*, as the facts of the case did not bear out any proposition that the accused person had made an express choice. Binchy J. considered that the 2015 Regulations did not oblige the Garda member to offer the choice and noted that the 2015 Regulations did not contain any express provision by which an accused was to be afforded the choice. Binchy J. noted that that omission might be deliberate or not, but that no ambiguity or lack of clarity was to be noted, and I agree.

49. I reject, however, the argument of the respondent that the statements are to be treated as no more than a receipt. On a plain reading of the 2015 Regulations and of the part that the statement plays in the road traffic legislation concerning drunk driving, the statement is *prima facie* evidence of the alcohol level in the person providing the breath sample, and the statement is much more than a receipt or mere acknowledgement. The signature of the person on the statements is expressly identified as a signifier or acknowledgment of receipt of the documents, but that does not make the statements itself a receipt. In that context, I note the proposition stated at para. 93 of the judgment of O'Malley J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* as follows:

> "However, it is important to note that the signature is simply for the purpose of confirming receipt. It can not be held to amount to approbation of the contents – the defendant is neither accepting nor warranting the accuracy of the content of the statement. The fact that there is a legal compulsion to sign does not, in my view, necessarily relate to or justify a conclusion that a flaw in the form means that it should be excluded."

50. Insofar as counsel for the respondent argues that that statement by O'Malley J. is to be read as expressing a view that the statutory statements are themselves a receipt, I consider that counsel is incorrect in his reading and that O'Malley J. was referring to the function of the signature on the statements and not to the function of the statements themselves.

Strict construction?

51. Counsel for the appellant argues that the 2015 Regulations are to be given a strict construction and while that proposition might be generally correct in that the legislation is penal or, as MacMenamin J. said in *The Director of Public Prosecutions v.Freeman*, at para. 38, "related to a penal provision", the requirement of a strict construction does not assist the argument advanced by the appellant in that the 2015 Regulations do not produce an ambiguity or lack of clarity in their plain meaning and, as Blayney J. in the Supreme Court, in his dissenting judgment in *Howard v. Commissioners of Public Works* [1994] 1 IR 101, quoted from S. G. G. Edgar, *Craies on Statute Law* (7th ed., Sweet & Maxwell, 1971), at p. 65:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

52. The appellant argues for a strict construction in reliance of the judgment of MacMenamin J. in *The Director of Public Prosecutions v.Freeman*. There, MacMenamin J. was considering the sequencing in the statutory provisions for the signing of the statements following provision of a breath sample and he considered the statements did not have the benefit of the evidential presumption as it was not "duly completed" within the meaning of the legislation. MacMenamin J. considered at para. 22 that, as he put it, the argument was "wafer thin" and that the accused had no "merits" as such and that the point was technical in the extreme sense as there was no evidence that the accused was confused or misled or that any substantive injustice had been perpetrated. MacMenamin J. felt constrained by the language of the then relevant Regulations and the fact that the statute was penal, to regard the sequencing of the signature procedure as:

> "an essential aspect of a statutory intent, or a fundamental requirement for the protection of the rights of the citizen as evinced by the intent of the Oireachtas in the text of the Act."

53. *The Director of Public Prosecutions v. Freeman* involved the construction of the mandatory sequencing procedures. O'Malley J., giving the judgment for the Supreme Court in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei*, at para. 90, expressed a view that the judgment of MacMenamin J. in *The Director of Public Prosecutions v. Freeman* was to be regarded as "being at the far end of the spectrum of insistence upon the letter of the statute", although, as counsel argues, the Supreme Court did not reject the analysis of MacMenamin J.

54. It seems to me that the judgment of MacMenamin J. in *The Director of Public Prosecutions v. Freeman*, with which the Supreme Court, in an ex tempore judgment, agreed, may be distinguished.

55. Binchy J., at para. 36, came to the same conclusion and, in my view, he was correct. He expressed the matter thus:

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

56. There being no ambiguity, in my view, in the words of rr. 3 and 4 of the 2015 Regulations, or in the statutory forms provided in the schedule thereto, the argument that the 2015 Regulations are to be strictly construed does not offer any assistance on the appeal.

No full compliance with statutory safeguards?

57. The appellant also argues that the circumstances in the present case fall somewhere within the two more difficult categories of breaches identified by O'Malley J. *in The Director of Public Prosecutions (Garda Mahon) v. Avadenei*, at para. 87, in which she identified the types of breaches which might invalidate evidence produced under the statutory regime including the following:

> "(iii) The power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or
>
> (iv) The power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove."

58. The appellant argues that the present case falls somewhere within these third and fourth categories described by O'Malley J. and, in particular, that the present circumstances are analogous to those identified in the third category which she described as possibly "more complex". O'Malley J. noted the circumstances that had arisen in the decision of *McCarron v. Judge Groarke* (Unreported, High Court, Kelly J., 4 April 2000), and she went on to say as follows, at para. 91:

> "Had the defendant in *McCarron* not in fact been informed of his right to take and retain a sample, that would have been a clear breach of the statutory protection of his fair trial rights. If he had not actually taken the sample, the failure to give him the printed information might have left a court in doubt as to whether he had been properly informed. Given, however, that he accepted that he had been informed; that he took the sample and that he gave it to his legal representative, it is difficult to see that any unfairness arose."

59. The Director of Public Prosecutions v. Freeman and the proposition from *McCarron v. Judge Groarke* explained by O'Malley J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* deal, in both cases, with a failure on the part of the Gardaí to inform an accused person of a statutory right, in the case of *McCarron v. Judge Groarke*, the right to take and retain a sample, and in the case of T*he Director of Public Prosecutions v. Freeman*, the right to have the statutory form completed in the sequence for which statutory provisions provide. Neither case, it seems to me, offers assistance to the present circumstances where no express right or express procedure is identified from which fair process rights are to be derived.

Is there a common law right to have the form in the Irish language?

60. The appellant argues that, even if there cannot be implied into the 2015 Regulations a statutory right that the person providing the breath sample choose the language in which the statements are produced, a common law right exists to have a choice of language. That question was considered by Charleton J. in *Ó Griofáin v. Éire*, where the applicant was a native Irish speaker and had refused to sign a statement produced by an evidential breath testing apparatus as it was produced in the English language. That case was heard before the 2011 Regulations provided for the production of the statement in both English and Irish. Charleton J. held that there was no entitlement to have the statement produced in Irish. I quote from the available English translation of his judgment, which was delivered in Irish, at para. 12:

> "*In Attorney General v. Coyne and Wallace*, (1967) 101 I.L.T.R. 17 a notice of intention to prosecute under the Road Traffic Act was served on an English speaking person living in a Gaeltacht region. The summons was entirely in Irish. The Garda, in serving the notice, explained the nature of that summons. The defendants spoke only English. The Supreme Court held that this was a sufficient vindication of any right the defendant had to using English as an official language. Of course, it might be expected that the District Court would ultimately try their case in English. In the noise of argument concerning language rights, the principles set out in this case appear to have been obscured. They are, however, binding on me. The State is not required to produce any particular class of documents that concern a criminal process in either Irish or English. The State can choose one language or the other. This is not an abuse of anyone's rights. An illiterate person can get a document read, an English–speaking person can get someone to explain an Irish document to him and so can an Irish–speaking person an English document; see Ó Dálaigh Brmh. at p. 8. This is somewhat beside the point as the applicant is fluent in both languages. The fundamental requirement under the Constitution is to have reasonable notice of what is alleged in a prosecution. That entitlement exists so that a person may prepare a defence. In the presentation of that case one may use Irish or English. The entitlement to use one language or the other has been clearly declared by Ó hAnluain Brmh. in *An Stát (MacFhearraigh) v. MacGamhnia*. Those rights are in no way undermined by any particular document coming from the State being in either English or Irish."

61. The appellant relies also on the judgment of the Supreme Court in *O Beoláin v. Fahy* [2001] 2 IR 279 and, in particular, on the *dicta* of Hardiman J. that the Irish language is to be afforded treatment at least equal to that afforded to the English language in the conduct of State business. This argument of the appellant might have been considered in the context of an asserted right by the appellant of what are generally called "language rights", but the case stated was expressly not advanced on that basis. Apart from this, there is no suggestion that the appellant, in fact, speaks the Irish language, or has any interest or competence in the language. Language rights are not part of the argument in the present case.

62. I must admit to have difficulty in understanding the distinction made by counsel for the appellant, as absent in argument derived from a broad constitutional right to conduct one's business in Irish, there is nothing in a reading of the 2015 Regulations that mandates or suggests that the choice of language is for the accused person. That is not to say, nor am I to be taken as saying, that the accused does not have an entitlement to choose the language in which he or she conducts his business, including the business of dealing with the Gardaí for the purposes of the road traffic legislation in the Irish language, but I do not accept the argument of counsel for the appellant that the proper and effective functioning of the 2015 Regulations in the light of the requirement that there be legal certainty means that an accused person must know that he or she has a choice of language in which evidence is to be produced and if so the choice must lie with that accused person.

63. Reliance was also placed on the decision of O'Neill J. in *Ó Maicín v. Éire* [2014] IESC 12, [2014] 4 IR 477 where the appellant was a native speaker of the Irish language and wished to conduct his defence in the Circuit Court in the Irish language. He sought an order that the trial be held before a bi-lingual jury. The Supreme Court dismissed the appeal from the decision of Murphy J., *inter alia*, on the grounds that the appellant had failed to establish that it would be possible to empanel a jury sufficiently competent in Irish to conduct a trial without the assistance of an interpreter without excluding a significant number of persons otherwise qualified from the entitlement to sit on the jury in question, and would render a jury thus empanelled in breach of the Constitutional requirement of representativeness. Clarke J. did, however, state that the State was "obliged to do everything within its sphere of influence to maintain Irish in its status as the national language […]", at para. 3.2. In the present case, there is no administrative impediment to the use of the statement in the Irish language, and indeed the 2015 Regulations expressly provide for the production of the statement in the Irish language. Thus, it seems to me that *Ó Maicín v. Éire* is not on point.

64. The trial judge dealt with the arguments from *Ó Maicín v. Éire* and *Ó Griofáin v. Éire* at para. 16 of his judgment where, in my view, he correctly expressed the principles to be derived from the authorities on the use of the Irish language:

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

65. In my view, the trial judge was correct in this conclusion, and also in coming to the conclusion that no right at common law can be said to exist that the appellant was entitled to choose the language in which the statements were produced and that the Garda member had a corresponding right to inform the appellant of that right.

Omission in the 2015 Regulations?
66. Binchy J. summarised his conclusions at para. 37:

> "The 2015 Regulations were amended to take into account the decision of the High Court in *Avadenei*. The Oireachtas was addressing the decision of Noonan J. to the intent that the Statements required by the 2015 Regulations could be produced in either language, rather than in both. It is not difficult to see the logic in the argument of the appellant that the choice of language should be afforded to the person providing the breath specimens. The availability of the Statements in both the Irish and English languages is clearly there for the benefit of the person providing the breath specimens, and not the garda, and it is certain that if a person were to express a choice of language, then the garda would be obliged to provide the Statements in whatever language has been directed. However, the 2015 Regulations do not oblige the garda to offer that choice to the person providing the breath specimens. While this may be an omission (deliberate or not), it does not render the 2015 Regulations unclear or ambiguous in any way. […]."

67. I am not convinced that the trial judge was entirely correct in his view that the Oireachtas may have been "reluctant to impose yet another step" in the already complex processes surrounding the obtaining of evidence of drunk driving, or that there may well be an error or omission in the drafting of the 2015 Regulations. I do not think it is necessary to go that far as the 2015 Regulations in their plain meaning do no more, in my view, than providing a statutory administrative process by which the Garda member performs what s. 20(1) of the 2010 Act describes as "the requirements imposed on him or her" by chapter 4 of the 2010 Act. That requirement is the performance of the administrative function and not the engagement by the Garda member of the exercise of respecting fair trial rights or other constitutional or common law rights such as language rights of an accused person.

Conclusion on the making of the language choice
68. I conclude, in the light of the above analysis, that the 2015 Regulations do not support the argument that there exists in the person providing a breath sample a right to be informed of the fact that the statements may to be produced by the breathalyser apparatus in either the Irish or English language. No right exists in the person providing the breath sample to participate in the administrative process for which provision was made in the 2015 Regulations and none can be implied from the statutory scheme or be derived from common law. No obligation therefore exists on the Garda member to offer a choice of language to the person providing the breath sample. This case is not about language rights or any asserted right to the fair or non-arbitrary exercise of an administrative function.

69. There is not to be implied a right of participation in the language choice from the 2015 Regulations themselves, and not as an ancillary or subsidiary right derived from other principles, rights, or obligations.

70. In my view, this point of appeal must fail and the trial judge was correct in his view that the 2015 Regulations do not contain any obligation on the part of the Garda member to offer a choice to the person providing the sample before he or she inputs a language choice into the breathalyser apparatus.

Admissibility of evidence
71. There is a large body of case law relating to the failure to comply with statutory requirements in drunk driving legislation. The most recent authoritative judgment is that of O'Malley J. in *The Director of Public Prosecutions (Garda Mahon) v. Avadenei* and she considered the correct approach for a court to the evidential status of a statement which has not been produced in compliance with the statutory requirements. She expressed the proposition at para. 90 of her judgment as follows:

> "Having regard to the authorities, there should in my view be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible."

72. In the present case, there is no argument that the appellant suffered any prejudice, unfairness, or detriment by the production of the statements in the English language. The production of the statements in English, therefore, does not provide a "consequence", to use the language of O'Malley J., to which any standard other than the normal standard of criminal trials should apply.

73. The trial judge, at para. 38, came to the view that:

> "Even if therefore the respondent had a duty to afford the appellant a choice, on the appellant's own case the fact that he did not do so has had no consequences at all for the appellant, because there has been no unfairness, prejudice or detriment to the appellant, who is clearly an English speaker."

74. I consider that the trial judge was correct in this view and that statutory provisions that make the statement admissible in evidence have not been displaced by any failure or unfairness.

Conclusion
75. On a plain reading of the 2015 Regulations, the statutory instrument contains two separately identified forms in the schedule which expressly and in their literal meaning may be used in the alternative and do not require to be printed together. The schedule contains a Form A and a separate Form B.

76. The 2015 Regulations do not contain an express requirement that directs the Garda member to print the forms in Irish or English in any identified circumstances. The 2015 Regulations are enabling in that they permit the automatic production by the breathalyser

apparatus in either language and, provided the necessary statutory requirements are met, give evidential value to the statements so produced and signed.

77. There is no express statutory requirement that the Garda member should offer a choice of language to the person providing the breath sample, and the relevant Garda member has no duty implicit in the fact that either language version of the statement may be produced to offer a choice. Such a duty, if it exists, may derive from an assertion of a constitutional entitlement of a person to conduct business in the Irish language, and in certain circumstances it may also derive from an argument that the relevant Garda member may be precluded from seeking to adduce in evidence a statement printed in either the English or Irish language when he or she knew that the person receiving it had or would have chosen that the statements be produced in the other language. As I noted above, no language right is asserted in the present appeal, nor was the accused person arrested in a Gaeltacht area or in circumstances where it might have been expected that he might wish to conduct his business in Irish. I am not to be taken as saying that a duty might exist in these circumstances, but if it does, it can derive only from those principles and not from the literal or strict reading of the 2015 Regulations themselves which do not present any ambiguity and do not impose any obligation on the Garda member to offer a choice.

78. I would in the circumstances dismiss the appeal.