



THE COURT OF APPEAL

**Birmingham P.
Edwards J.
Kennedy J.**

Record No: 25CJA/20 & 18/20

Bill No: DUDP 147 / 2018

Between/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/RESPONDENT

-V-

H. M.

APPLICANT/APELLANT

And Between/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/RESPONDENT

-V-

B. O.

APPLICANT/APELLANT

JUDGMENT of the Court delivered on the 18th day of November, 2021 by Mr Justice Edwards

Introduction

1. The applicants/appellants in these two related cases are husband and wife. They were tried together on indictment at the Dublin Circuit Criminal Court, and on the 28th of November 2019 were each convicted, (i) of an offence of female genital mutilation ("FGM") contrary to s.2 of the Criminal Justice (Female Genital Mutilation) Act, 2012; and (ii) of an offence of child cruelty contrary to s.246(1) of the Children Act 2001. The alleged injured party in both cases was their infant daughter "S". They each received custodial sentences. They have each now appealed to this Court against both their convictions and sentences.
2. The applicants/appellants are also the applicants in motions that they have each respectively filed before the Court seeking leave to adduce fresh evidence at the hearing of their substantive appeals against their convictions which are pending, and are indeed part heard, before the Court.
3. For simplicity, and for the avoidance of confusion, the applicants/appellants will hereinafter be referred to simply as "the appellants", or where necessary individually as "the appellant HM" and "the appellant BO".
4. The Director of Public Prosecutions is the respondent to the said motions and is also the respondent in the substantive appeals. Accordingly, she will be referred to in all contexts simply as "the respondent".

The Background to the Appeal

5. The background to this matter arises from the presentation of "S", aged almost two, at the Accident & Emergency Department of Our Lady's Children's Hospital in Crumlin on the 16th of September 2016 with active bleeding from her perineal region following an injury. The bleeding was described as "*brisk*", a term clarified by Mr Sri Paran, Paediatric Accident and Emergency Surgeon, as meaning a type of bleeding in which "*a child would be expected to lose blood volume very rapidly and succumb to exsanguination and shock within 6-10 hours.*" The child was taken to the operating theatre to be operated on by Mr Sri Paran where she was found to have "*injury above her urethral opening with part of the clitoris missing and bleeding mostly from the clitoral base and underneath the labia minora.*" Mr. Paran reported that, "*[i]ncidentally, no external bruising or injury to either the labia majora, minora, or vagina was noted.*" The bleeding was controlled with cauterization, a urinary catheter was inserted, and "S" was admitted as an in-patient. The examination of "S" on the 16th of September 2016, and the surgical procedures performed on her by Mr. Paran on that date to stem the bleeding, were recorded in the operating theatre using a Colposcope, a procedure known as colposcopy.

6. In the days after "S"'s admission two further specialists became involved in her care. The first was a Mr. Fergus Quinn, a Consultant Paediatric Urologist; and the second was a Dr Sinead Harty, a Consultant Paediatrician, who is also a qualified forensic medical examiner and the lead for child protection at Our Lady's Children's Hospital. On the 19th of September 2016 "S" was re-examined under sedation jointly by Mr. Paran, Mr. Quinn and Dr Harty. During this joint examination Dr Harty manipulated the urinary catheter which was still in place and physically explored the area. She was unable to see the clitoral head. Once again, this procedure was recorded by means of colposcopy.
7. The evidence was that prior to the commencement of the re-examination on the 19th September 2016 the appellant HM was asked by Dr Harty as to how the injury had occurred. The history provided to Dr Harty by HM was that "S" had had a dirty nappy on the previous Friday and that her mother had brought her into the bathroom of the family home to change her. He said that after "S" had been cleaned up, and while her mother was washing her hands, "S" left the bathroom without her nappy on. HM had said that (upon encountering "S" outside the bathroom) he had showed her a toy that had frightened her and that this had caused her to run backwards. He stated that as she did so she fell on to a(nother) toy thereby injuring herself.
8. On the 20th of September 2016 the toy on to which "S" had allegedly fallen, which was described at the trial as being *"a little round activity center"* that had had a steering wheel, clutch, and a little wing mirror on it, was brought into the hospital by the parents. The medical team that had re-examined "S" on the previous day, having viewed the toy, were of the view that the history did not fit the findings. They suspected that there was a non-accidental cause for "S's" injury and the case was referred to the medical social work department in the hospital.
9. Dr Harty, who later gave evidence for the prosecution at the appellants' trial, considered that "S's" injury was consistent with female genital mutilation ("FGM"), type 1 ("FGM1"). FGM1 is where there is partial or total removal of the clitoris.
10. Following "S's" discharge from hospital Dr Harty carried out a two-month follow-up review of "S" on an outpatient basis on the 6th of December 2016, in the course of which "S" was again physically re-examined. Once again this was recorded by colposcopy. Dr Harty's conclusions remained the same following this review.
11. In circumstances where she was concerned from an early stage that "S" had possibly been subjected to FGM1, Dr Harty had sought a second opinion from another consultant paediatrician, with expertise in FGM, namely Dr Deborah Hodes, who is based at University College London Hospital. This was prior to the review on the 6th of December 2016.
12. While Dr Hodes did not examine "S" personally, she reviewed the relevant notes and records including such colposcopy recordings as were available at the time that she was consulted, i.e., those relating to the examinations on the 16th of September 2016, and the 19th of September 2016 (and a further colposcopy recording of the 26th of

September 2016 which, it is accepted by all, was of no significance in that it fails to adequately capture the area of interest), and a Garda photograph of the controversial toy on to which it was claimed that "S" had fallen. In reporting her views, Dr Hodes agreed with Dr Harty. She reported, and later testified for the prosecution at the appellant's trial to the same effect, that the clinical examination findings as recorded were consistent with FGM1 involving partial or total removal of the clitoris. Further, in her view the injury suffered by "S" could not have been sustained by her running backwards and falling on to a plastic toy.

13. Following notification by the hospital of child protection concerns in respect of "S" to Tusla and An Garda Síochána, and the conducting of an investigation, a file was referred to the DPP who directed that the appellants be charged and tried on indictment with the offences of which they were ultimately convicted. The appellants were duly charged, and were served with a Book of Evidence, and later a Notice of Additional Evidence, which material contained, *inter alia*, statements of intended evidence/reports from Mr Paran, Dr Harty and Dr Hodes. Moreover, relevant medical records including the colposcopy recordings of the examinations of "S" on the 16th of September 2016, the 19th of September 2016 and the 6th of December 2016, were disclosed to the defence.
14. The trial commenced on the 11th of November 2019 and concluded on the 28th of November 2019. Mr Paran, Dr Harty and Dr Hodes all gave evidence for the prosecution at the appellants' trial in accordance with their statements of intended evidence and were cross-examined by counsel for the appellants.
15. The manner in which the case was defended at trial was not to dispute that "S" had sustained a perineal injury which had led to profuse bleeding which had in turn required urgent surgical intervention. The fact of injury was accepted, but what was disputed was how that injury was caused. The defence was that it had been caused accidentally in circumstances where "S" had fallen on to the previously mentioned toy. The appellant HM testified in that regard on behalf of both himself and his wife.

The Grounds of Appeal

16. The appellants each claim that their respective convictions are unsafe and unsatisfactory, and do so on the basis of two main complaints which, although formally pleaded in more extensive terms, may be summarised as follows:

1. That the appellants did not receive a trial in due course of law in that they did not have available to them appropriate expert evidence that would have allowed them to challenge the evidence proposed by the respondent concerning injury to their daughter.
2. That the appellants did not receive a trial in due course of law where the translation of the appellant HM's testimony before the jury, both during his evidence in chief and during his cross-examination, which it is accepted by all concerned was relied upon by both appellants, was so inaccurate as to have in effect deprived the

appellants of their ability to be heard in evidence in their own defence and of having the jury consider their said evidence.

17. From here on in this judgment the first main complaint will be referred to by way of convenient shorthand as “the expert evidence issue”, and the second main complaint will be referred to as “the interpretation issue”.
18. To provide an evidential basis for their intended arguments in support of the expert evidence issue, the appellants seek the leave of this Court to adduce as fresh evidence, testimony from, *inter alia*, a new expert who was not called at the trial. The background to the expert evidence issue is set out in this Court’s earlier judgment delivered on the 30th of August 2021, the neutral citation for which is [2021] IECA 240, in response to earlier motions brought by the appellants seeking directions. It is not necessary to repeat it in the context of today’s judgment.

The Current Status of the Substantive Appeal Proceedings, and of the Motions.

19. The current overall status of the substantive appeals is that they are part heard. The Court has concluded its hearing with respect to the interpretation issue but has not yet concluded its hearing with respect to the expert evidence issue. If that is required, it will be necessary for us to rule in due course on the appellants’ motions to adduce fresh evidence, and how the substantive appeals with respect to the expert evidence issue may proceed thereafter will depend on those rulings.

The Expert Evidence Issue

20. The motions to adduce fresh evidence, which are also part heard, seek leave to adduce the expert testimony of a Professor Birgitta Essén, a Consultant Obstetrician and Gynaecologist with expertise in FGM who is based in Sweden, and some evidence from the appellants’ respective solicitors, in support of the expert evidence issue. Although the motions to adduce fresh evidence have been part heard, and indeed we have received oral testimony from Professor Essén, and in response to her evidence have also received further oral testimony from the aforementioned Mr Sri Paran, Dr Sinead Harty, and Dr Deborah Hodes, for the limited purpose only of assisting this Court in determining where the interests of justice may lie should it ultimately be necessary for us to have to rule on the said motions, we have not yet heard counsel’s final oral submissions on the motions, nor have we ruled on those motions. Thus, we have as yet have made no determination as to whether or not we would be prepared to permit the appellants to adduce the fresh evidence that they seek leave to adduce so that they might rely on it in support of their arguments on the expert evidence issue in their substantive appeals.

The Interpretation issue

21. In so far as the interpretation issue is concerned, we are of the view that the appellants have raised an issue of serious concern which is potentially capable of being dispositive of these appeals. If the appellants were to succeed in having their complaints with respect to the interpretation issue upheld, the substantive appeals would have to be allowed in our

view leading to the quashing of the appellants' convictions, albeit that the possibility of re-trials would then have to be considered.

22. We consider that if we were of the view that the appeals required to be allowed on the basis of the interpretation issue, it would be unnecessary for us to proceed to further consider the expert evidence issue, or to rule on the motions for leave to adduce fresh evidence. Indeed, it would be undesirable that we should do so as it would involve deciding a moot. The expert evidence issue would be moot in the event of a re-trial being ordered since the appellants would be at liberty to call Professor Essén at the re-trial, and it would then be a matter for a new jury in the retrial to assess all of the expert evidence adduced before it. It goes without saying that the point would also be moot if the original convictions were to be quashed simpliciter with no re-trial.
23. In those circumstances, we think it would be most convenient to consider in the first instance whether the appellants are entitled to succeed on the interpretation issue.

Evidence on the interpretation issue

24. The evidence adduced on behalf of the appellant HM on the interpretation issue is contained in an affidavit of Mr James MacGuill, Solicitor for the appellant HM, sworn on the 25th of January 2021, and the documents therein exhibited; and in an affidavit of Mary Phelan sworn on the 29th of September 2021, and the documents therein exhibited. The appellant BO also relies on this evidence.
25. Mr MacGuill exhibits the transcript of the appellant HM's testimony at the trial. The transcript reveals that the appellant gave evidence with the aid of an interpreter in the French language. He says at paragraph 25 of his affidavit that arising from concerns as to the quality of the interpretation of the appellant HM's evidence which were apparent from the transcript he obtained an order from the Court of Appeal allowing him to take up the digital audio recording of the trial. He stated that he subsequently sought expert assistance in assessing the quality of the interpretation provided to the appellant in the course of his trial and commissioned a joint report from a Dr Mary Phelan of Dublin City University, a Professor Christian Driesen and a Ms Liese Katschinka, who are expert interpreters and translators. He exhibits a copy of that report, which is entitled "*Expert Report on the Competency of Interpretation Provided to the Appellant at Trial*". The same report is also exhibited in the affidavit of Dr Mary Phelan. Dr Phelan identifies herself in her affidavit as being a lecturer in The School of Applied Language and Intercultural Studies (SALIS) at Dublin City University (DCU). She characterizes her co-rapporteurs as being each highly qualified and experienced interpreters and translators. There is no issue about that. Their expertise is accepted by the respondent.
26. Mr. MacGuill deposes to the fact that the appellant HM is a native of Somalia. According to Mr. MacGuill he was raised in Djibouti, a former colony of the Republic of France and spent 4 years in Morocco. The interpreter who attended to the interpretation of the appellant HM's direct evidence and cross-examination was provided by the Courts Service, an independent contractor (being the employer of the said interpreter) having been retained by the Courts Service pursuant to a contract for services to provide an

English/French/English interpretation service at the said trial. The interpreter was a Dr Kingilda Mwaba Daba Macquire, known as Dr King. According to his curriculum vitae, he is originally from the Democratic Republic of Congo. He studied at the University of Congo in Kinshasa from where he then moved to South Africa for postgraduate studies and onto a PhD at University College Dublin. He had worked as an interpreter since 2016 and was represented by his employer as being qualified to interpret for Circuit Court and High Court cases. Mr. MacGuill avers that while Dr King appears to meet the minimum requirement for court interpreters in Ireland, in that he is a native speaker of the required language, French, with a PhD through English, he says and believes based on the report of Dr Phelan and her colleagues that there are issues surrounding Dr King's mastery of the French language. This averment reflects statements of the same effect in the affidavit of Dr Phelan and in the aforementioned joint report.

27. Mr. MacGuill goes on to aver that the transcript of evidence indicates many difficulties concerning the interpretation of the appellant's answers to questions asked in direct examination of him and in his cross examination. These difficulties were in respect of the translation of questions into French, and in respect of answers received in French and interpreted into English. Mr. MacGuill provides numerous illustrations of those difficulties in his affidavit, taken from part 4 of the joint report which is entitled "Specific Examples of Lack of Interpreter Competence". However, a completely comprehensive review is contained in a 147 page appendix to the joint report which is described as a "Commented Transcript".
28. This "Commented Transcript" reproduces the entirety of the transcript of the appellant HM's evidence in 3 column tabular format.
29. The first column sets out each question and answer as recorded in English on the official court transcript. Accordingly, where a question is asked in English the speaker's *ipsissima verba*, which are verifiable on the digital audio recording system, appear here in English. However, if the answer to a question asked has been received in French then what is recorded in this column is the answer as translated into English by the interpreter at the trial, again as recorded on the digital audio recording system.
30. The second column sets out two things. First, in respect of questions asked in English, but translated into French by the trial interpreter, it sets out the interpreter's *ipsissima verba*. Secondly, it sets out the *ipsissima verba* in French of the appellant's answers to questions asked of him in English but purportedly translated into French by the trial interpreter.
31. The third column sets out accurate and high quality English translations, agreed amongst the appellant's three experts, (i) of the trial interpreter's purported translation into French of questions that had been asked in English, as recorded on the digital audio recording system; and (ii) of the appellant's actual answers in French during his questioning, as recorded on the digital audio recording system.
32. No issue is taken by the respondent with the form in which information is presented in the "Commented Transcript", or with the accuracy of the comparisons made.

33. The Court has gone through this document carefully and we are satisfied that there were serious, and potentially far reaching, inaccuracies in the interpretation process. The respondent acknowledges, in the words of her counsel, that there were “shortcomings”, but says they were not so far reaching as to have rendered the trial unfair, or to lead to concern that the verdict may have been unsafe. We beg to disagree.
34. In considering the inaccuracies revealed it requires to be highlighted once again that the defence was not to deny that “S” had received a perineal injury but to assert that it had been sustained accidentally when the child fell on to a toy. The evidence led from the appellant HM during his examination in chief, and the questions asked of him in cross-examination, were in those circumstances understandably focused on HM’s recall of the incident and concerning the dynamics of what he was maintaining had occurred.
35. Amongst the inaccuracies revealed are omission of information and confusion of the pronouns her/him. There is also incorrect interpretation of the term female genital mutilation (or FGM). The interpreter interprets this term incorrectly throughout the appellant HM’s testimony. Sometimes he uses the English abbreviation FGM which, according to the experts’ joint report, is not used in French. At other times he uses “*incisions génitales*” meaning “*genital incisions*” when he should refer to “*mutilations génitales féminines*”. He never uses the word “*excision*” which means female circumcision or the verb “*exciser*” meaning to remove the clitoris.
36. It is clear that medical terms caused the interpreter difficulty. In the following example, the interpreter gave a garbled rendition of the term “crushing injury”:
- COUNSEL: Q: And even though she was walking backwards or moving backwards she had no, to use the words of Dr Paran, crushing injury. You heard Dr Paran say that, no crushing injury?*
- INTERPRETER: A: Despite as soon as she returned behind ran behind you heard the doctor was saying that she had no wounds when she banged into.*
37. Further, the meaning of some questions was distorted. Not all of these instances would necessarily have impacted on the appellant’s credibility before the jury, but we are satisfied that some of them could have. In circumstances where the defence were not disputing the fact of injury, but rather were maintaining that the cause of it was accidental, the credibility and reliability of the appellant HM’s account would have been a major issue for the jury and it was critical, in the interests of justice, that they should receive his account accurately so as to be able to properly assess its credibility and reliability.
38. An example of a potentially significant inaccuracy is to be found at page 45 of the Commented Transcript, where the interpreter appears to completely misunderstand the question being asked of the appellant by his own counsel about “hurt”, and repeatedly mistranslates this word as “hate”. The appellant gives one word ‘no’ answers to each of the questions. The questions as put to the appellant appear to lack context and it is not

apparent to counsel that the appellant has misunderstood the question. The appellant was deprived of the opportunity to expand upon the idea of "hurt" or give a more nuanced answer:

COUNSEL Q: Would you hurt her? Would you hurt her?

INTERPRETER: Q: Do you hate her?

WITNESS: A. No

COUNSEL: Q: Would you let anybody else hurt her?

INTERPRETER: Q: Would you allow anybody else to hate her?

WITNESS: A.: No

COUNSEL: Q: Did you ever let anybody else hurt her?

INTERPRETER: Q: Have you ever hated someone?

WITNESS: A: No.

39. A key line of questioning during cross-examination was in relation to "S" supposedly running backwards. At page 100 of the Commented Transcript it was put to the appellant that the child "*backed away*" from the toy, but the interpreter communicated this as "*turned away from you*" and the appellant agreed with this. This led to a potential misunderstanding of the follow-up questions, in which the cross-examiner put it to the appellant that it would be something unusual for a child of that age to be able to walk in a backwards motion in such a way.

COUNSEL: Q: Would you agree with me that it's extremely unusual, to the point of not being possible, that a 21-month old child would be able to walk backwards or move backwards away from you like that

INTERPRETER: Q: Do you think, can you accept with him that it is really something unusual for a 21 year old child to leave, to run away because of that?

WITNESS: A: I respect your opinion, but I am saying what I saw that day.

40. There is in our view a big difference between "*walk backwards*" and "*run away*" as used in this instance. Prosecuting counsel was trying to communicate the fact that developmentally, a child of that age would not be capable of walking backwards. The question as interpreted by the interpreter fails to communicate this idea. Upon reiteration by prosecuting counsel, who asks if the appellant thinks it is possible for a child of that age to "*back away not fast, not slow, from you*", the interpreter again mistranslates the question and puts to the appellant that "*at the age of 21 months she cannot run very fast, not very slowly but a bit there*". Had the appellant properly understood the question,

he might have been able to clarify this or elaborate further on his understanding of how exactly the child moved at the moment of the alleged fall. His answers would suggest that he believes that the child was able to walk backwards, when he was in fact answering a question about the ability to run.

41. Further confusion arises at page 103 of the Commented Transcript, when a question arises as to where the child was positioned when the injury took place. It is first put to the appellant that he did not see the child fall on the toy. The interpreter repeatedly asks if the child was "*sitting*" on the toy, instead of "*standing*", as was being asked by prosecuting counsel. The appellant states a number of times that the child was "*standing*" on the toy but this is repeatedly interpreted as "*up on the toy*". It is never fully ascertained where her feet were at the moment of the injury. After an issue with the use of the French word "*debout*" is identified, prosecuting counsel asks more specifically (at page 109) if the toy was "*underneath her*", or "*were her legs astride the toy or not*". This is communicated to the appellant as, "*was the toy between her feet or not?*". The appellant appears not to have got an understanding of precisely what was being asked of him at this point, and misses the opportunity to explain in detail where the child was standing when the injury took place, and what exactly caused her to fall on the toy as he claimed had occurred.

42. At page 109 of the Commented Transcript, the interpreter also fails to communicate the full answer given by the appellant to the question just asked:

COUNSEL: Q: And was the toy underneath her? Were her legs astride the toy or not?

INTERPRETER: Q: Was the toy between her feet or not.

WITNESS: A: No. I don't remember exactly where it was, it was behind her, all I remember, it was, it was just there. I didn't think, I couldn't look. I picked her up, she was screaming so much. I didn't concentrate.

INTERPRETER A: I was not concentrate, I just pick it up."

43. The interpreted answer does not convey the emotional distress being described by the appellant.
44. At page 141 of the Commented Transcript, the repeated mistranslation of '*female genital mutilation*' to '*genital incisions*' by the interpreter does not appear to have affected the appellant's understanding as he uses the correct term '*FGM*' in his answers. However, the interpreter does not communicate his use of the correct acronym to the jury. At pg 141, when it is put to the appellant that he committed the act of FGM on his daughter while she was in his care, the interpreter does not translate the appellant when he said "*I never caused an FGM. She had an accident, that is all I can tell you*". The use of the verb '*caused*' is particularly noteworthy, as is the use of the acronym '*FGM*', as this may be indicative of an awareness of the negative connotations FGM has in this country:

COUNSEL: *Q: I'm going to say to you clearly that an act of female genital mutilation was done to your daughter while she was in your care and that you allowed that to happen. You have an opportunity to reply to that if you wish?*

WITNESS: *A: It is a judgement that goes quickly. I never caused an FGM. She had an accident, that is all I can tell you.*

INTERPRETER: *A: No, you are just going there first of your judgment, I never done the genital – the incision and I never allowed that also.*

45. The inaccuracies revealed in the analysis conducted by Dr Phelan and her colleagues are very numerous, and for the purposes of this judgment it has sufficed to simply highlight a number of them.

Submissions on the Law

Directive 2010/64/EU – The Interpretation and Translation Directive

46. The appellants rely on Directive 2010/64/EU of the European Parliament and of the Council of the 20th of October 2010 on the right to interpretation and translation in criminal proceedings (“the Interpretation and Translation Directive”).
47. This Directive established minimum EU-wide rules on the right to interpretation and translation in criminal proceedings and in proceedings for the execution of the European Arrest Warrant.
48. The background to the promulgation of this instrument is that the Council of the European Union published a resolution of the Council on the 30th of November 2009 setting out a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings (“the Roadmap”) (2009/C295/01). The Roadmap addressed issues such as translation and interpretation; information on rights and information about charges; legal advice and legal aid; communication by suspected or accused persons with relatives, employers and consular authorities; special safeguards for suspected or accused persons who are vulnerable; and it also set out a Green Paper on pre-trial detention.
49. Insofar as the Roadmap concerned itself with translation and interpretation it stated:
- “The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.”*
50. The Interpretation and Translation Directive represented a first legislative step in a series of measures to establish minimum rules for procedural rights across the EU in accordance

with the Roadmap. It was followed in 2012 by Directive 2012/13/EU on The Right to Information in Criminal Proceedings.

51. The Interpretation and Translation Directive creates, in Article 2(1) thereof, a right to interpretation on foot of which interpretation must be provided free of charge to suspected or accused persons who do not speak or understand the language of the criminal proceedings including during police questioning, essential meetings between client and lawyer and at all court hearings and any necessary interim hearings. It further provides in Article 2 (8) that interpretation provided in criminal proceedings 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.
52. For completeness, although it is not strictly relevant in the context of the present case, the directive also provides in Article 3(1) for a right to the translation of essential documents in the context of criminal or European arrest warrant proceedings. Again, there is a requirement that the quality of translation shall be sufficient to safeguard the fairness of the proceedings (Article 3(9)).
53. The Interpretation and Translation Directive goes on to provide in Article 5 that 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).
54. The Interpretation and Translation Directive entered into force on the 15th of November 2010 and was required to be transposed into EU countries' national law by the 27th of October 2013. It became directly applicable from the transposition deadline. Ireland opted into this directive. It was considered that Ireland's existing arrangements for interpretation and translation met in practice the requirements of the Interpretation and Translation Directive. However, secondary legislation was enacted at an early stage to give additional legal certainty and clarity to ensure effective transposition, i.e., the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Siochána Stations) Regulations, 2013, (S.I. 564/2013) and, more relevantly for the purposes of the present proceedings, the European Communities Act 1972 (Interpretation and Translation in Criminal Proceedings) Regulations, 2013, (S.I. 565/2013) ("the Interpretation and Translation Regulations").

SI 565/2013 – the Interpretation and Translation Regulations

55. Regulations 3 to 7 inclusive of SI 564/2013 deal with interpretation of court proceedings and provide that:

3. A person—

- (a) who appears before a court either charged with an offence or who, having been convicted of an offence, is appealing against that conviction or the penalty imposed on conviction, and

- (b) who does not speak or who does not understand the English language shall, where the proceedings are being conducted in the English language, have the right to the assistance, at no cost, of an interpreter as set out in these Regulations and to the translation of the documents specified in these Regulations.
4. Where, in proceedings which are being conducted in the English language, it appears to the Court that the person before it does not speak or understand the English language sufficiently to enable the person to participate fully in the proceedings and thereby effectively exercise his or her right to a fair trial, the Court shall order the attendance of an interpreter at all hearings.
5. Where a Court orders the attendance of an interpreter, the Courts Service shall arrange for the attendance of the interpreter and shall bear the cost of such attendance.
6. The role of the interpreter and the manner in which it is carried out in each case shall be as directed by the Court.
7. Where the Court, of its own motion or on application by any of the parties to the hearing, considers that the interpretation being provided is not of such a quality as to ensure that the person before it can effectively exercise his or her right to a fair trial, it may direct that the interpreter be replaced.
56. The appellants contend that in the present case the answers given by the appellant HM to questions asked were not interpreted accurately. Further, the questions asked by the prosecutor were not interpreted accurately. Accordingly, they say, the interpretation service provided to the appellants at trial failed to achieve the interpretation goals of accuracy, impartiality and competence required pursuant to the Interpretation and Translation Directive.

Article 38 of the Constitution of Ireland, Article 6(1) and (3) ECHR
and Article 47 of the Charter of Fundamental Rights

57. The appellants further rely upon Article 38 of the Constitution of Ireland which guarantees trial in due course of law.
58. They also rely on the right of an accused "to a fair ...hearing" guaranteed under Article 6(1) of the European Convention on Human Rights, and elaborated upon in Article 6(3)(e) as including the right to "the free assistance of an interpreter if he cannot understand or speak the language used in court".
59. They further rely on the right of an accused "to a fair ...hearing" guaranteed under Article 47 of the Charter of Fundamental Rights of the European Union.
60. The appellants have submitted that it is fundamental to the notion of a fair trial, and a trial in due course of law, that an accused should be able to understand the proceedings

and that he/she should have the right to participate effectively in those proceedings, if necessary with the assistance of effective interpretation of sufficient quality to safeguard the fairness of the proceedings.

61. We were referred to the case of *The Director of Public Prosecutions (at the suit of Detective Garda Patrick Fahy) v. Savickis* [2019] IEHC 557, a Consultative Case Stated in which the High Court was concerned with 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 s.10(1) of the Sex Offenders Act 2001 as amended by the Criminal Law (Human Trafficking) Act 2008 (“the Act of 2001”).
62. Under the relevant legislation a person who “fails, without reasonable excuse” to comply with s.10(1) of the Act of 2001 shall be guilty of an offence. The accused had maintained that he had attempted to advance a reasonable excuse to gardaí following his arrest but had not been able to do so due to the inadequacy of interpretation facilities when he was being interviewed. At the accused’s subsequent trial his solicitor submitted that the proceedings were tainted by an inherent unfairness with the result that the District Court Judge ought to exercise her jurisdiction to dismiss the charge. A procedural issue arose in the context of the District Court Judge’s consideration of that issue, leading the District Court Judge to state a case. It is not necessary for the purposes of the present judgment to consider the detail of the procedural issue. However, what is of interest is that in giving judgment in response to the question referred, the High Court considered in some detail the right to adequate interpretation and translation as an aspect of an accused’s wider rights to a trial in due course of law as guaranteed under the Irish Constitution, and to a fair trial as guaranteed under the ECHR and under the Charter of Fundamental Rights.
63. In the course of her judgment in that case, Donnelly J opined (at para 41) that *“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.”* She further expressed the view, with which we agree, that *“the applicable law in this jurisdiction can only be understood after consideration of the interplay between the relevant Regulation, the 2010 Directive [i.e., the Interpretation and Translation Directive], the case law of the ECtHR on Article 6(1) and (3) and the case law on Article 38 of the Constitution.”*
64. Donnelly J pointed out that as the provisions of the Interpretation and Translation Directive are themselves derived from the requirements of the ECtHR, it was appropriate to commence with the developing principles established by that court. In *Vizgirda v. Slovenia* [2018] ECHR 674, para 83, the ECtHR held that *“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”* . Donnelly J further noted that

in *Vizgirda*, the ECtHR had stated 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 must be regarded as wholly unfair.

65. In Donnelly J's view, the interplay between the ECtHR's understanding of the right, and the Interpretation and Translation Directive, is demonstrated by the fact that the ECtHR in *Vizgirda* expressly referred to Recital 22 of that 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*".

66. Donnelly J also highlighted at paragraph 45 of her judgment that in a case of *Hacioglu v Romania*, (Application No 2573/03) 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."

67. Donnelly J considered that on the basis of the ECtHR's judgment in *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*".

68. Donnelly J also considered the cases of *Salduz v Turkey* (Application No 36391/02), a decision of the Grand Chamber of the ECtHR, and of *Diallo v. Sweden* [2010] E.C.H.R. 84, although being concerned with pre-trial procedures they are not directly in point in the context of the present litigation.

69. The learned judge noted that 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 v Sweden*, 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.

70. The High Court judge considered that the Interpretation and Translation 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' ".

Donnelly J opined that the right of the trial court to consider retrospectively the quality of the interpretation is necessarily implied because the right under the Interpretation and Translation 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. The appellant in the present case argues that analogously an appellate court must be able to intervene to provide a remedy where the trial at first instance was unfair by reason of inadequate interpretation or translation.

71. Donnelly J further considered the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013, (S.I. 564/2013) as they were directly relevant in Mr Savickis's case. However, it is not necessary to review her commentary on that because the relevant regulations for the purposes of the present proceedings are different, namely (S.I. 565/2013) the aforementioned Interpretation and Translation Regulations, 2013.
72. In the *Savickis* case the DPP accepted that the fairness of the proceedings are the focus of the Interpretation and Translation Directive, but did not expressly concede that the trial court has any role to play in assessing the quality of the interpretation. She also argued in the alternative that if the trial court has a role to play, it was exercised sufficiently in that case by the District Court Judge.
73. In Donnelly J's view, 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, she held, 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 was to be found in 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 which she had considered formed part of that matrix of protection of fair trial rights and placed a requirement on members in charge to protect the right of interpretation.

74. In the High Court judge's view 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. She felt it unnecessary in her judgment in Savickis to expand upon the circumstances or manner in which a court will exercise its jurisdiction to ensure the fairness of the trial. It was sufficient, in her view, 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, as far as Donnelly J was concerned, was 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"*.
75. The appellants argue that analogously, in the context of an appeal, the appellate court must ultimately be the adjudicator of whether the appellant received a fair trial at first instance.
76. Donnelly J makes reference at paragraph 55 of her judgment to the authoritative decision on the meaning of a trial in due course of law, i.e., that of *The State (Healy) v. Donoghue* [1976] I.R. 325, where O'Higgins C.J. observed 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."

77. 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."

78. The *State (Healy) v Donoghue* had been specifically concerned with whether there was a right to be provided with criminal legal aid. It is authority for the proposition that it is only through the provision of legal aid that justice can 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*". However, in her judgment in *Savickis Donnelly J* expressed agreement with the submission of counsel for the accused in that case, that the principles enunciated in *The State (Healy) v. Donoghue* could be adopted and applied insofar as the provision of interpretation was concerned. She opined that 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 an interpreter.
79. In the High Court judge's view, 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. She considered that as the right to the assistance of an interpreter, even at the investigative stage, is one of the essentials of justice, it follows that a trial judge who is under a constitutional duty to ensure the administration of justice, must ensure that there is no unfairness in 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, a trial judge must, where the circumstances demand, enquire into the adequacy of interpretation facilities that are in the course of the trial being 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 Interpretation and Translation Directive.
80. Importantly, Donnelly J went on to say:
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" of 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.*
81. In the present proceedings the respondent accepts that the law is as counsel for the appellants outlined, and as just rehearsed. However, great reliance was placed on the statement in paragraph 72 of Donnelly J's judgment that "*[i]n 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*" ...[adapting the quotation for the purposes of the present case] ... the appellants' right to a fair trial/trial in due course of law.
82. We were also referred to *The People (Director of Public Prosecutions) v Malai* [2020] IECA 304 where Ní Raifeartaigh J observed (at para 36):
- "As was discussed in DPP (at the Suit of Detective Garda Patrick Fahy) v. Savickis [2019] IEHC 557, the question of language interpretation is a matter which can be seen as a matter falling within the embrace of the constitutional right to a fair trial, whether it arises during a trial or during Garda detention. However, it does not follow that every breach of the 2013 Regulations necessarily amounts to a breach of a constitutional right. A breach of the Regulations and a breach of a constitutional right may coincide in a particular case but this does not mean that every breach of the Regulations necessarily involves a breach of the constitutional right. Some aspects of the Regulations are administrative in nature and do not necessarily trench on the core issue of whether the person needs the assistance of an interpreter to understand what is going on."*

83. The respondent has submitted that the shortcomings in interpretation when considered in light of the other evidence/submissions in the case, which emphasised/highlighted to the jury the nature and extent of the defence being put forward by the appellants, were not such as would warrant a finding by this honourable Court that the appellants (or either of them) have been deprived of their entitlement to a fair trial.
84. It was further submitted that while the appellants have sought to highlight the inaccuracies in translation of the evidence of the appellant HM, the appellants have failed to demonstrate how, in light of the other evidence/submissions in the case, these inaccuracies in translation give rise to the conclusion that the trial was unfair. We are reminded that, "*A fair trial should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective*" – per McLachlin C.J., in *R v. Find* [2001] 1 S.C.R. 863, 199 D.L.R. (4th) 193 at [28].
85. The respondent ultimately contends that the verdict of the jury in this case was entirely consistent with the evidence and ought not be set aside by this honourable Court.

Decision

86. We completely accept that it does not follow that every breach of the 2013 Regulations, or of the underlying Directive, necessarily amounts to a breach of a constitutional right or a convention or charter right. However, having considered the nature and extent of the deficiencies, or "shortcomings" as they are characterised with understatement by the respondent, in the interpretation of the appellant HM's evidence for the defence at the trial, we are in no doubt but that they were sufficiently far reaching as to have potentially undermined the fairness of the trial.
87. It is true that no objection was raised at the trial to the quality of the interpretation. However, we are satisfied that that was in circumstances where there is no evidence to suggest that the extent to which it was deficient was apparent at the time to either the appellants or their lawyers. The transcript reveals that there was an intervention on just one occasion, when during the cross examination of the appellant HM by Senior Counsel for the respondent, Senior Counsel for appellant interjected in the following circumstances:

"Q. *Second question, was she standing on the toy or not?*

A. *I didn't understand that, she was putting her feet or*

Q. *What don't you understand? I'm asking you if when you turned around and saw her crying was she standing on the toy or not?*

A. *I don't understand. She was I don't understand. She was up and it was on top of the toy.*

Q. *Her feet were on top of the toy?*

A. *No.*

Q. No?

A. No.

Q. So, she wasn't standing on the toy?

A. Yes, it was

MR FITZGERALD: Judge, I just don't like interrupting but the word ... as I understand it and maybe there's a different translation, it means over.

JUDGE: We have an interpreter.

MR FITZGERALD: I know, I'm aware of that.

Q. *MR COSTELLOE: Well, we've had another word introduced to the cross examination now so let's deal with that as well. So, we have standing, sitting and over, I want you to describe, because we weren't there, a picture of what you see when you turn around in response to your child crying?*

A. *She was there standing*

INTERPRETER: Sorry, you know the French is quite difficult between I don't know if she can express that between on top of that or beside or what he's saying

Q. *JUDGE: Just one second, Mr. M., could you just tell Mr Costelloe where ["S"]'s feet where when you turned around, where they were?*

A. *She was not on top of the toy.*

88. In our assessment, notwithstanding the existence of uncontroverted expert evidence adduced for the prosecution that the injury appeared to be non-accidental, the issue as to whether it was or was not non-accidental was still a live matter for the jury to determine. There had been no concession by the accused in that respect, and the evidence was that the appellant HM had provided a history to the doctors at a relatively early stage to the effect that the child had injured herself by falling on to a toy. That explanation was consistently maintained when the appellant HM was interviewed by gardaí, and again when the appellant HM testified for the defence and on behalf of both appellants at the trial. How the jury might assess his credibility and reliability as a witness was therefore of critical importance. If they found him to be credible and reliable they might well, and notwithstanding the views of the experts, have not been satisfied to the standard of beyond reasonable doubt that the injury was non-accidental, in which case they might well have acquitted. The appellants were entitled to expect that the jury would not simply receive "the gist" of what he was saying, but rather that they would get to assess his credibility and reliability based on his exact responses to questions asked of him, including nuances arising from the precise phraseology of questions asked and answers provided.

89. With great respect to the respondent's view that the shortcomings in interpretation when considered in light of the other evidence in the case were not such as would warrant a finding by us that the appellants were deprived of their entitlement to a fair trial, we cannot agree. The fact that the prosecution regarded the testimony adduced from their experts as having been particularly strong, and the fact that no contradictory expert opinion had been adduced by the defence, does not entitle us to treat the issue of whether the injury was accidental or not as irrelevant, or as something that could not have been of real concern to the jury. It was, as we have said, a live issue, and one in respect of which the jury could conceivably have entertained a doubt based on the testimony provided by HM if they regarded it as credible and reliable. However, due to inadequate interpretation they did not receive an accurate account of what he had had to say in his testimony. Some of what he had had to say was omitted. Further, he was positively misrepresented in some respects. His exact words and meaning were not accurately reproduced. In other respects, questions asked by counsel were re-phrased so that he was answering a different question to that which had been asked. A jury could be expected to have been closely scrutinising how he was being tested in respect of his account. It was inimical to any fair testing of his account that questions put to him should be seriously distorted or mis-conveyed to him during the interpretation process, because in those circumstances the answers provided by him were liable to have been misinterpreted as avoidance of the question, or dissemblance, or simply as a failure to engage with what was being asked. On an issue where assessment of the credibility and reliability of the witness's account was potentially going to be critical to how the jury would determine that issue, it was simply unfair that the jury did not receive an accurate interpretation of the witness's testimony.
90. We also have no hesitation in rejecting the suggestion that the appellants have failed to engage with how it is argued that the quality of the interpretation interfered with the appellants' right to a fair trial/trial in due course of law. In a case where assessment of the credibility and reliability of the witness whose evidence was being interpreted was important, it was sufficient to demonstrate that the witness's evidence was not just superficially, but materially, misrepresented and distorted. We are satisfied that that is the case here. We are satisfied that the uncontroverted evidence adduced in the affidavits of Dr Phelan and Mr MacGuill, accompanied by the exhibited joint report (to which there was no objection), and the detailed analysis provided therein based on the Commented Transcript, more than suffices to demonstrate material misrepresentation and distortion of the appellant HM's evidence.
91. It seems to us that in so far as the appellants' trial was concerned it must be regarded as having been unsafe and unsatisfactory for not having complied with either the spirit or the substance of what is required by the Interpretation and Translation Directive in order to safeguard the fairness of the proceedings, and in particular to ensuring that the appellants were properly able to exercise their right of defence. We have no hesitation in finding that the appellants' trial was unfair in that respect and other than a trial in due course of law.

92. The appeal must therefore be allowed on the basis of the interpretation issue.
93. It is not necessary for us in the circumstances to proceed to determine the outstanding motions or to conclude the appeal hearing in so far as the expert evidence issue is concerned.
94. The Court will hear submissions concerning whether a re-trial should be directed.