

JUDGMENT : LORD WOOLF LCJ : Administrative Court. Monday 14 May 2001

1. This is an application for judicial review of a decision of Deputy District Judge Shrimpton at the Thames Magistrates' Court on 6 October 2000. The Deputy District Judge dealt with a preliminary issue of some practical significance which raises a point of principle. The issue can be identified as being, is it an abuse of process or unfair or in breach of Articles 6(3)(c), 8 and 14 of the European Convention on Human Rights for the prosecution to rely on the evidence of an interpreter, who had acted as an interpreter at the police station after the arrest of a defendant (when the defendant took a breath test and was charged) when at the initial hearing at the magistrates' court, the same interpreter had acted as an interpreter at an interview between the duty solicitor and the defendant, the defendant having not been asked for his consent for the interpreter to act as interpreter, notwithstanding the fact that the interpreter could be called as a witness for the prosecution.
2. The facts can be very shortly stated as follows. The applicant is a Kurdish national who speaks little English. In the early hours of 29 August 2000 he was found asleep across the front seat of his car. He exhibited signs of being drunk. The bonnet of the car was warm and the keys were in the ignition. The applicant was arrested and taken to the police station. An interpreter, Mrs Guerdeniz, was called and was present to interpret during the normal drink-drive procedure. A police doctor examined the applicant and found him unfit to drive through drink. He was therefore charged with two offences: first, being unfit to drive whilst in charge of a vehicle; and secondly, having excess alcohol whilst in charge of a vehicle.
3. Two days later, on 31 August 2000, the applicant attended at the Thames Magistrates' Court in accordance with his conditions of bail. On that occasion the police had arranged for the same interpreter to be present at court. The applicant was not represented. The interpreter therefore introduced the applicant to the duty solicitor and was present during the course of the interview between the solicitor and the applicant. The interpreter interpreted what was said by the applicant and the solicitor, which included advice that the applicant should plead not guilty. At no time did the interpreter inform the duty solicitor that she was the interpreter who had attended the police station on the night that the applicant was charged. As Mr Lyons who appears on behalf of the applicant today accepts, the applicant would have been aware that he had previously seen the interpreter when she had interpreted two days earlier when he was arrested. However, he would not know that in order to prove their case, if the prosecution were required to do so, they would have to call the interpreter to give evidence to establish that the proper procedures had occurred on 29 August at the police station.
4. The use of interpreters is subject to two sets of guidance. The first is provided by the Metropolitan Police. The publication is described as "Guidelines for Interpreters". The guidelines are extensive. They start by reference to the Police and Criminal Evidence Act 1984 as follows: "*The circumstances under which the police are required to call an interpreter are governed by Section 13 of the Police and Criminal Evidence Act (PACE) Code of Practice C. Paragraph 13.2 includes the following: '... unless Annex C applies', a person must not be interviewed in the absence of a person capable of acting as interpreter if:*
 - (a) *he has difficulty in understanding English;*
 - (b) *the interviewing officer cannot himself speak the person's own language;*
 - (c) *the person wishes an interpreter to be present.*

Paragraph 13.8 states: '*All reasonable attempts should be made to make clear to the detained person that interpreters will be provided at public expense.*'

Note: Annex C relates to urgent interviews, where delay would be likely to lead to adverse consequences such as interference with evidence, physical harm to others, alerting other suspects or hindering the recovery of property. These interviews require the authority of a superintendent.'

A copy of the Codes of Practice is held at all police stations, but interpreters may find it useful to obtain a copy for their own reference. In addition to the provisions on interpreters, it contains details of many of the procedures for which interpreters are required and will clarify the whole process and the terms that interpreters might be called upon to translate."

5. Under the heading "THE ROLE OF THE INTERPRETER AT THE POLICE STATION" the following paragraph appears: "2.2.1 -- impartiality

Interpreters are required to be impartial at all times. Interpreters shall not 'side' with either the police or the detainee for whom they are interpreting. Their role is one of a bi-lingual mouthpiece only, facilitating communication between two individuals who, but for the presence of the interpreter, would not be able to communicate.

Interpreters should avoid becoming personally or emotionally involved in a case. This includes assisting prisoners, witnesses and victims and having any contact with anyone involved in a case, including families, solicitors and the detainee, witness or victim, other than in an official context and always under the supervision of the police officer in the case. Any approaches encountered by interpreters, which conflict with this principle, must be reported to the officer in the case. Interpreters should never give out their personal address or telephone numbers to anyone.

In addition, interpreters may well be asked for advice, legal or otherwise, by the detainee. It should always be remembered that the interpreter is an aid to communication and should in no way step into the advocacy role. The interpreter should remind the detainee of the limitations of the role s/he fulfils, ie that any advice should be sought from legal representation, that the interpreter is only competent to interpret and that everything said has to be interpreted back to the officer in the case."

6. Paragraph 2.2.3 deals with independence: "Interpreters are freelance individuals engaged by the Metropolitan Police Service (MPS) to provide professional linguistic services on a sessional basis, as and when required. As such, they are not MPS employees and are totally independent of the Police Service. This should be stressed to the detainee by the officer in the case, through the interpreter on his/her arrival at the station.

Some detainees are very nervous of accepting an interpreter called by the Police and are wary of the quality of service they may receive from that interpreter. It should also be emphasised that although interpreters are independent and impartial, their fees will be met from public funds and this will not compromise the quality of service offered to the detainee."

7. Under the heading "confidentiality" paragraph 2.2.4 provides so far as relevant: "Everything that an interpreter is party to in an official capacity is strictly confidential and must not be communicated to any third party"

8. Paragraph 2.2.5 deals with legal representation: "A detainee or his legal representative may arrange for their own interpreter to attend the station at their own expense for their private consultation. However, if all parties are in agreement the Official interpreter may also be used for this purpose. Interpreters should not divulge anything of this consultation to any third party (including the police) and no notes should be taken."

9. Under the heading "Interpreting for a witness or defendant giving evidence", paragraph 3.2 reads: "Recent developments in the criminal justice system mean that official interpreters likely to be booked for court interpreting assignments by criminal justice units at police stations only where required for a defendant at a Magistrates' Court or as/for a prosecution witness. The following are included in this manual as general guidelines for interpreters working in the courts. Any specific instructions issued by the courts themselves should be adhered to."

10. Paragraph 3.2.1 "use of different interpreter as police" reads: "Except in cases where a rare language is used, or in urgent 'overnight' cases, the interpreter at court must not be the same as that used at the police station. The latter may well be called as a witness for the prosecution and this position should not be compromised, except where absolutely necessary. The consent of all parties must be obtained if necessary dictates the use of the police station interpreter in court."

11. The Lord Chancellor's Department has also issued a press release dealing with interpreters. It includes the following paragraph: "The police or investigating agency will arrange interpreters for any part of an investigation, and for the requirements of the suspect, or person charged whilst in custody. The court will be responsible for arranging the interpreter for the defendant at court, except where the first court appearance is within two days of the charge when the police or prosecuting agency will make the arrangements on behalf of the court. In normal circumstances a separate interpreter will be arranged for each defendant. The interpreter must interpret for the benefit of the defendant at court throughout the court proceedings and not only, for example,

when the defendant is giving evidence. The prosecution and defence will be responsible for arranging interpreters for their own witnesses."

12. Reliance was made on section 78 of the Police and Criminal Evidence Act 1984, which is in these terms:
"(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."
13. Having heard the preliminary issues, the Deputy District Judge overnight prepared a judgment, a copy of which is before us. In it the Deputy District Judge carefully dealt with the submissions that had been advanced before him. He recorded the fact that at no time had the interpreter told the defendant or the solicitor that she had been the interpreter at the police station. The Deputy District Judge referred to the relevant authorities, and came to the conclusion that this was a situation where, although he had not at that time seen the interpreter's witness statement, it was doubtful that it did more than describe the interpretation of the drink-drive procedure. He went on to say that so far as the matters complained of were concerned, if there were any issues as to unfairness they could more appropriately be explored at the trial, if necessary in a voir dire, but that this was not a case where the defendant had been deceived or misled by the prosecution and that there was no suggestion that the interpreter had acted improperly.
14. Having referred to the Strasbourg principles, he posed the question: *"Are the proceedings, as a whole, including the way the evidence was taken, fair?"*
15. He continued: *"If there has been a breach of Article 8, it does not follow that there is a breach of Article 6."*
16. Finally, he said: *"The interpreter is bound by strict rules of confidentiality. There is no suggestion that this has been breached, therefore there is no reason to suggest that the defendant cannot have a fair trial or has been prejudiced."*
17. In his submissions before us, Mr Lyons attached importance to the fact that it appears that what happened in the applicant's case is something which happens fairly regularly in the Metropolitan Police district. He submitted that communications between a defendant and his solicitor are protected from disclosure by legal professional privilege. That privilege is a fundamental condition on which the administration of justice depends. For that reason he referred us to the well-known decision of the House of Lords in **R v Derby Magistrates' Court, ex parte B** [1996] 1 Cr App R 385, in which Lord Taylor CJ emphasised the fundamental nature of legal professional privilege and its central importance to the administration of justice. I draw attention to pages 398D-E, 401 and 402E-G.
18. I would not seek to qualify anything said by Lord Taylor in his speech in that case. However, in considering the application of legal professional privilege in the circumstances of the present application, it is also desirable to have well in mind that, quite apart from the guidance which has been provided to the police, in a conference which takes place between a solicitor and his client, at which an interpreter interprets, the privilege which attaches to that communication also attaches to the interpreter. The interpreter is under an equal duty to that of the solicitor to keep confidential what he or she hears during a conference. Authority confirming that that is the position can be found in **Du Barre v Livette**, Peake's Nisi Prius Cases 107 at page 96, reprinted in Volume 170 English Reports. The headnote reads: *"An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed is at an end."*
19. The fact that the interpreter is in that position means, in my judgment, that there should be no question of anything which passed between the solicitor and his client being conveyed to any third party, in particular to the prosecution. It is absolutely critical that that should be the position because otherwise a defendant or any other client of a solicitor who is unable to communicate with the solicitor without the assistance of an interpreter could not obtain advice without the risk of not

receiving the protection of legal professional privilege which is so important to the administration of justice.

20. Mr Lyons contended that if the interpreter is also to be a witness for the prosecution, the privilege is breached by the use of an interpreter who is going to perform that function. He contended that the use of the interpreter in the present case meant that the applicant was deprived of legal professional privilege. He drew attention, in addition, to Code C of the Codes of Practice of the Police and Criminal Act 1984 which in paragraph 13A says categorically: *"If the interpreter is needed as a prosecution witness at the person's trial, a second interpreter must act as the court interpreter."*
21. He also relied upon the duty which is apparent from the Metropolitan Police Service's guidance on the police to inform the duty solicitor that the interpreter had acted as an interpreter at the police station and was therefore a potential prosecution witness.
22. It would have been preferable either that a different interpreter had been used, or that at least the interpreter had obtained the consent of the applicant to her acting as an interpreter during the interview with the solicitor. However, Mr Lyons accepted that the fact that that did not happen was not due to any deliberate misconduct on the part of either the police or the interpreter. Further, the non-compliance with the guidelines was not due to any mala fides on the part of either the police or the interpreter.
23. In giving permission for the application for judicial review to be made to this court, Elias J observed: *"The case raises a matter of some general significance and in my view it is arguable that there is a perception of unfairness amounting to a breach of article 6. The other points advanced seem to me very thin. In particular, I consider the district judge was right to say that the question of whether the evidence should be excluded under section 78 PACE was a matter for the judge at trial. However, given that these are arguments that can be advanced shortly and succinctly I will not seek to bar the claimant running them if he thinks it appropriate to do so."*
24. I agree with Elias J's comment as to the relevance of the perception of unfairness. It seems to me that this is a case where, as Mr Lyons urged, the issue is not whether justice can be done, but whether it can be seen to be done.
25. Article 6 reflects the need for justice not only to be done but to be seen to be done. Article 6(3)(c), which is the particular provision on which Mr Lyons relied, provides: *"Everyone charged with a criminal offence has the following minimum rights:*
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."
26. In order to apply Article 6(3)(c) to the circumstances which exist here Mr Lyons relied on three authorities of the European Court of Human Rights. The first of those authorities is perhaps the most important: *S v Switzerland* (1992) 14 EHRR page 670. The judgment of the European Court in that case makes it clear that Article 6(3)(c) has not to be approached in a narrow technical manner, but generously so as to give to a defendant the proper protection intended by the article. At page 688, paragraph 48, the court said: *"The court considers that an accused's right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society and follows from article 6(3) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."*
27. It is, as it seems to me, in accordance with the spirit of Article 6(3)(c), so interpreted, that in this jurisdiction if an interpreter is required to be present during an interview between a solicitor and his client, the interpreter is subject to exactly the same duties in relation to confidentiality as the solicitor who is giving the advice. If there had been no question of the interpreter giving evidence, as was intended in this case, obviously there could be no objection to an interpreter being present. Does the fact that the interpreter was to be a witness make a difference? The Deputy District Judge was right, in my judgment, in coming to the conclusion that it made no difference which could not be properly dealt with at a trial. If any attempt was made to ask the witness about anything that happened during

the period she was consulting her client, then clearly that evidence should not be admitted at the hearing. But Mr Lyons went further. He submitted that the very fact that the interpreter was to be a witness meant that, automatically, the proceedings were flawed, where, as here, the interpreter's evidence was necessary.

28. The interpreter's evidence which was necessary was evidence at a different time from that of the interview between the solicitor and the applicant. The interpreter's evidence is formal evidence as to what happened at the police station prior to the charge. At this stage it cannot be anticipated that there is going to be any issue in relation to that evidence which could possibly be affected by what took place between the solicitor and the applicant. If any issue of that sort arose at the hearing, that would be a matter which the trial judge would have to deal with and apply section 78 of PACE to what occurred at the trial. Unless there is some occurrence at the trial, which cannot be anticipated at this stage, it seems to me that although it is unfortunate that the interpreter did not obtain the consent of the solicitor and the applicant to her acting as interpreter at the interview, there is no reason to think that any prejudice could have or could appear to have occurred by reason of her presence at the interview. As already made clear, she is bound by a firm duty of confidence not to disclose anything which occurred at the interview. At the hearing she should not be required to disclose anything that took place at the interview. The applicant, in my judgment, is fully protected from any prejudice or unfairness in consequence of the requirement of confidentiality and the ability of the trial judge to apply section 78. The events which occurred in this case are undesirable because, as Elias J indicated, they arguably create a perception of unfairness. However, on examination of the facts, I am satisfied that that perception is dispelled and would be recognised to have been dispelled by an objective onlooker aware of the relevant facts. Accordingly, I would refuse this application. In my judgment, there is no breach of any of the articles on which the applicant relies; nor is there any breach of section 78 of the Police and Criminal Justice Act 1984.
29. **MR JUSTICE BELL:** I agree.
30. **MR HEHIR:** My Lord, I think in those circumstances the Crown would seek an order that the case be remitted to the magistrates' court with directions that the Deputy District Judge continue with the trial.
31. **THE LORD CHIEF JUSTICE:** I do not think there is any need for any order from this court. We just refuse the application.
32. **MR HEHIR:** As your Lordship pleases.

John Lyons instructed by Traymans for K.

Christopher Hehir instructed by the Crown Prosecution Service for the respondent.