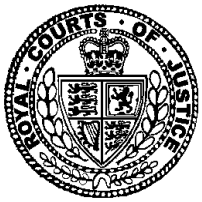

Neutral Citation Number: [2024] EWHC 3259 (Admin)

Case No: AC-2023-CDF-000141

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT (sitting in Wales)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 19 December 2024

Before:

LORD JUSTICE STUART-SMITH
and
MR JUSTICE KERR

- -

Between:

WILLIAM MORGAN THOMAS

Appellant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

- -
- -

Jeffrey Israel (instructed by **Keppe Rofer Solicitors**) for the **Appellant**
Simon Ray (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 28 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2014 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

1. This is the judgment of the Court.

2. On 2 February 2023 before DJ(MC) Stephen Harmes sitting in the Merthyr Tydfil Magistrates' Court the appellant was convicted of an offence of failing to provide a specimen of breath for analysis contrary to section 7(6) of the Road Traffic Act 1988 ["RTA 1988"]. He now appeals against that conviction by way of case stated, contending that evidence of the Intoxilyser Procedure conducted at Merthyr Tydfil Police Station in the early hours of 13 November 2022 should have been excluded.

The facts

3. Subject to one critical point, the facts are clear and commonplace. At 03.23 on 13 November 2022, the appellant was arrested after providing a positive roadside breath test. The roadside test recorded 54mg alcohol in 100ml of breath, the legal limit being 35mg/100ml. He was taken to Merthyr Tydfil police station. At approximately 03.40, as his detention was authorised, he asked the police to contact a specific firm of solicitors, Keppe Rofer. The police refused to delay the Intoxilyser breath testing procedure to allow the appellant to speak to a solicitor and the procedure began at 03.48. The officer in charge of the testing procedure, Police Sergeant France, explained clearly what the consequences would be if the appellant failed to provide a sample as required by section 7(7) of RTA 1988. The appellant then asked repeatedly to speak to his solicitor prior to agreeing to provide a specimen of breath.

4. Between 03.48 and 04.03, having initially prevaricated about whether to provide a sample of breath, the appellant asked for clarification from the officer administering the test, and again asked to speak to his solicitor. The appellant then purported to agree to be tested. However, he failed to blow with sufficient force and failed to provide a specimen. At 04.03, PS France informed the appellant he would be charged with failing to provide a specimen and began preparing the paperwork for a charge to be brought. The appellant was then returned to his cell.

5. The police took no steps to contact the appellant's solicitor until 04.31 when they contacted the Defence Solicitor Call Centre. Later that day the appellant was reminded of his rights to consult a solicitor and again asked the police to contact Keppe Rofer.

6. At 13.48 the same day the appellant was charged with the offence of failing to provide a sample of breath for analysis and at 13.57 he was released on bail. At no point during his detention in custody did the appellant receive advice from a solicitor.

7. At the trial, and after cross-examination of the police officer had concluded, it was submitted that the evidence of the Intoxilyser procedure should be excluded because "there was not only a breach of the Defendant's rights under section 58 [of PACE], there was wholesale abandonment of those rights." It was submitted that section 58 of PACE "compels" the Court to exclude the evidence of the Intoxilyser procedure as its admission would result in an unfair trial within the meaning of section 78 of PACE.

8. The District Judge referred to the relevant statutory provisions and authorities including *CPS v Chalupa* [2009] EWHC 3082 (Admin). He took the view that there is an overwhelming public interest in persons who have been breathalysed at the roadside,

who have no objective reason for not providing a sample and who ask for a solicitor, giving a prompt sample. Delay other than for a minimal time would be unacceptable. He recognised that the failure by the police to call the solicitor promptly constituted a breach of section 58 of PACE but rejected the submission that the breach was so severe that it could sustain a successful application under section 78 of PACE to exclude the evidence. In his judgment, any solicitor would have advised the appellant to perform the procedure and it was the appellant's deliberate decision not to proceed either promptly or properly after being told what the consequences of non-performance may be. It followed, in his view, that there was no proper basis for excluding the evidence.

9. On being given the District Judge's ruling on admissibility, the appellant's solicitor declined to call his client to give evidence. There was therefore no evidence about any reason (good, bad or indifferent) for not providing a sample and no reasonable excuse advanced for not doing so.

The questions for the opinion of the High Court

10. Two questions are raised for the opinion of the High Court. As formulated they are:

    i) "Does the Police' effective denial of his entitlement to legal advice pursuant to s58 Police and Criminal Evidence Act 1984, renders the admission of the evidence of the Intoxilyser Procedure unfair." and

    ii) "In accordance with the Defendant's entitlement pursuant to s58 Police and Criminal Evidence Act 1984 to legal advice, should the Police ought to have made enquiries as soon as reasonably practicable to determine whether the Defendant's legal representative of choice was immediately accessible."

The Case Stated

11. The Case was stated by the District Judge but drafted either largely or completely by the Appellant's solicitors. The District Judge had given a detailed ruling to explain his reasons for admitting the contested evidence and reaching the conclusion that the appellant should be convicted. The ruling is referred to in the Case Stated as containing the detail of the facts and the District Judge's reasoning on the issues raised at trial. It is agreed by the appellant that the District Judge's ruling forms part of the Case Stated and so can be referred to by this Court.

12. The critical point to which we have referred above relates to the availability of a solicitor who might have been available to give the appellant advice at short notice. Mr Israel, who represents the appellant before us but who did not appear before the District Judge, submits that the District Judge accepted that there was a solicitor immediately available to advise the appellant and that the Case Stated is drafted on that basis.

13. It is correct that the Case Stated included:

> "At this point, the Defendant was made aware that a representative of Keppe Rofer Solicitors had left the Custody Suite shortly before the Defendant arrived. This was put forward by Mr Rofer in submissions but there was no evidence adduced to prove or disprove this fact. The representative was on call for

> the firm and was therefore immediately available to give advice over the telephone. [These facts were not the subject of evidence during the trial, simply a submission by Mr Rofer of those as fact]."

14. It is also correct that the judgment of the District Judge said:

> "2. The facts are substantially agreed. …
>
> 3. … In fact, a Keppe Rofer representative had left the Police Station shortly before and was on duty that night to receive calls from clients. Merthyr police telephoned the Defence Solicitors Call Centre (DSCC) but there was no response. That call was made at 04.31 after the procedure had been completed. I shall return to that issue."

15. However, the judgment of the District Judge also said:

> "I am aware that this is a case that has no actual time limit that can be put forward by any party as to when advice may have been given, because the police appeared to rely on a single phone call to DSCC with no other effort. We therefore do not know even if a duty solicitor or the defendant's own solicitor had been contacted how long a delay there would have been."

16. It is a peculiar feature of the Case Stated that, although there is no evidential basis for the assertions, it asserts that a representative of the appellant's solicitors had recently left the custody suite before the appellant arrived; and that the representative was on call and would have been available to give advice over the telephone. The absence of evidence to support these assertions is expressly mentioned both by the District Judge in his ruling and in the main body of the Case Stated. This state of affairs is both surprising and regrettable. It is regrettable that the assertions (which could, if true, be relevant) are made in the knowledge that they are unsupported by evidence. It is surprising because, if true, there is no obvious reason why the necessary evidence could not have been called. To the contrary, the skeleton argument for the defendant before the District Judge said:

> "A representative of Keppe Rofer Solicitors had been present at Merthyr Tydfil Police Station until approximately 02.00 hrs on 13th November 2022 having represented three detainees from the late evening of 12th November 2022."

17. In reply to the Prosecution's response to that skeleton argument, which asserted that how promptly a representative would have taken a call was a matter of speculation, the defendant said:

> "It is not speculative to determine how promptly Keppe Rofer's representative would have answered the telephone to the Police. *The representative will give evidence* to confirm that following his leaving the Police Station at 2 am, he had no further commitments at that point and therefore would have been in a

> position to have answered a call from the Police immediately and provide legal advice to the Defendant immediately thereafter." (Emphasis added)

18. Mr Israel correctly concedes that, for the reasons we explain below, his appeal is unarguable and bound to fail if he cannot rely upon a finding that there was a solicitor immediately available to advise the appellant within a very short time. He goes on to submit that this would have been known to all who were responsible for drafting the Case Stated. He therefore submits that the Case Stated and this appeal should be approached on the factual basis that there was a solicitor immediately available to advise the appellant within a very short time.

19. This creates a dilemma for this court. On the one hand, it is not a sound basis for determining a Case Stated to rely upon a fact for which there was no evidence in the court below. On the other, there is force in Mr Israel's submission that, as a general proposition, the court below accepted that there was a solicitor readily available to advise the appellant.

20. How then should the Court proceed? In our judgment the fair way forward is to recognise that, strictly, there was no evidence to support the contention that there was a solicitor immediately available but, recognising that the opinion of the High Court has been requested on the basis that a solicitor was available, we should give our opinion on that basis.

21. We are not, however, persuaded that we should pay any attention to the fact that a solicitor had been in the police station earlier that evening. We cannot ignore the fact that the defendant's skeleton asserted that the solicitor had left the police station about 1 ½ hours before appellant was brought in. That seems to us to say nothing about the physical availability of the solicitor (or any other solicitor) at the critical time when and after the appellant had been brought in and asked to speak to a solicitor. Despite our having looked outside the Case Stated to the underlying materials for the express purpose of trying to find any support for the assertion that a solicitor was physically in close proximity or immediately available, we are not able to identify any such support either in the Case Stated or the underlying materials. We therefore approach the Case Stated on the basis that there was a duty solicitor on duty who could and should have been called when requested by the appellant. However, we also take into account the finding of the District Judge that it is not known how long the delay would have been if the call to the solicitors had been made.

The applicable principles

22. There are three statutory strands that need to be considered.

23. First, section 7 of the RTA 1988 provides, under the rubric "Provision of specimens for analysis":

> "(1) In the course of an investigation into whether a person has committed an offence under section 3A, 4 or 5 of this Act a constable may, subject to the following provisions of this section and section 9 of this Act, require him—

> (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or
>
> (b) to provide a specimen of blood or urine for a laboratory test.
>
> …
>
> (6) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.
>
> (7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution."

24. Second, section 58 of PACE provides, under the rubric "Access to legal advice":

> "(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.
>
> (2) …, [A] request under subsection (1) above and the time at which it was made shall be recorded in the custody record.
>
> (3) …
>
> (4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section.
>
> (5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above."

It is common ground in the present case that none of the circumstances in which it is permissible under section 58 of PACE for the police to delay access to a solicitor is applicable.

25. Under the rubric "Exclusion of unfair evidence", section 78 of PACE provides:

> "(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."

26. It is obvious that there is a potential tension between the obligation to provide a specimen "when required to do so" pursuant to section 7(6) RTA 1988 and the entitlement to consult a solicitor pursuant to section 58 of PACE, since consulting a

solicitor may lead to delay which (a) means that a person does not provide a specimen "when required to do so"; (b) may, if the person gives a specimen after a period of delay, affect the result when the specimen is analysed; or (c) may result in the person being "timed out", as happened here, if they do not provide a specimen within the specified time. That said, it is to be remembered at all times that the ultimate question to be asked where there is an application to exclude evidence pursuant to section 78 of PACE is: does it appear 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? Where, as here, the trial Court has formed the view that the evidence would *not* have such an effect on the fairness of the proceedings, the question for the Court considering an appeal by way of case stated is whether that view was *Wednesbury* irrational: in other words, is it a view to which no reasonable judge could have come: see *R v Dures* [1997] 2 Cr App R. 247, 261G.

27. It follows that the power to exclude evidence is not to be treated as a rod with which to beat the police for failure to put in place sufficient training for their officers: see *R (CPS) v Wolverhampton Magistrates' Court* [2009] EWHC 3467 (Admin) at [11].

28. RTA 1988 does not define what may be a "reasonable excuse" for a failure to provide a specimen when required to do so pursuant to section 7. There is, however, authority on the point.

29. In *DPP v Billington* [1988] 1 WLR 535, the Divisional Court held that neither the legislation nor the PACE code of practice entitled a defendant to refuse to give a specimen until having received legal advice.

30. To similar effect, in *R v Salter* [1992] RTR 386 the Divisional Court held that, in the absence of confusion, anxiety, incomprehension or any form of mental stress, a wish to consult a solicitor before taking the test could not amount to a reasonable excuse for not providing a specimen.

31. In *Kennedy v DPP* [2002] EWHC 2297 (Admin) the Divisional Court upheld the decision of the magistrates not to exclude the evidence of the procedure in a case where there was held to be a breach of section 58 as a result of a 21 minute delay between the defendant's request and the police calling a solicitor. The wish to speak to the defendant's solicitor did not provide a reasonable excuse for not providing the sample promptly. At [31] Kennedy LJ said (obiter):

> "Plainly, as it seems to me, it is a question of fact and degree in any given case whether the custody officer has acted without delay to secure the provision of legal advice, and whether the person held in custody has been permitted to consult a solicitor as soon as is practicable. Where the matter under investigation is a suspected offence contrary to section 5 of the Road Traffic Act 1988 it is really conceded by Mr Jennings, and in my view rightly conceded, that in this jurisdiction the public interest requires that the obtaining of breath specimens part of the investigation cannot be delayed to any significant extent in order to enable a suspect to take legal advice. That, to my mind, means this - that if there happens to be a solicitor in the charge office

> whom the suspect says that he wants to consult for a couple of minutes before deciding whether or not to provide specimens of breath he must be allowed to do so. Similarly, if the suspect asks at that stage to speak on the telephone for a couple of minutes to his own solicitor or the duty solicitor, and the solicitor in question is immediately available. But where, as here, the suspect does no more than indicate a general desire to have legal advice, I see no reason why the custody officer should not simply continue to take details, and alert the solicitors' call centre at the first convenient opportunity."

32. In *Gearing v DPP* [2008] EWHC 1695 (Admin), [2008] RTR 72 the Divisional Court held that a delay of 22 minutes in calling a solicitor, during which time the defendant refused to take a breath test, did amount to a breach of section 58 but upheld the decision of the magistrates not to exclude the evidence. Nelson J said at [20]-[21]:

> "20. As to Mr Madden's points in relation to Kennedy, it does indeed demonstrate that someone who asks for legal advice must be permitted to consult a solicitor as soon as is practicable, and indeed the officer must act under the Code 6.5 without delay in seeking that advice. But having said that, it is also clear that there can be no significant delay because of the important public interest in those who have in fact failed a roadside breath test being tested promptly. Were that not to be so, many who in fact had committed an offence and were above the limit would not be successfully prosecuted, the consequence being a significantly increased likelihood of road accidents and consequent injuries. So there cannot be any significant delay, and it is only in circumstances such as where there is a duty solicitor there and present who can be spoken to for a couple of minutes, or where the individual wishes to speak to his or her own solicitor or the duty solicitor and that solicitor in question is known to be immediately available. What Kennedy LJ is emphasising, is that anything other than a very, very short period will amount to a significant delay, given the public interest in prompt testing. The example he gives is 'a couple of minutes' and he uses the words 'immediately available' when referring to the availability of the solicitor. That emphasises the need for there to be no more than a very short delay.
>
> 21. When one turns, therefore, as I do on my finding that section 58 is breached, to section 78, one must of course have regard to Mr Madden's submission that once the right has been breached a remedy must be given and that here, had the advice been given, no offence would have been committed because the appellant would simply have followed the legal advice that she was given. That, however, is only one of the factors to be taken into account when considering section 78. The important features are the public interest which I have indicated, the fact that the procedure carries with it its own safeguards, the practicability of obtaining

> prompt legal advice, the extent of the delay, and whether it is significant; each case must be dealt with on its own facts."

Latham LJ gave a concurring judgment.

33. It is to be noted that in neither *Kennedy* nor *Gearing* was it either held or suggested that a breach of section 58 would necessarily or even probably lead to a conclusion that evidence of the procedure should be excluded pursuant to section 78. The main thrust of all the cited authorities is that, in the absence of confusion, anxiety or mental stress, it is not a reasonable excuse for not providing a sample promptly that the defendant either wishes to receive or does in fact receive advice from a solicitor. The reference to delaying for a very few minutes where a solicitor is immediately available goes to the application of section 58; it says little or nothing about whether, if there is a breach of section 58, such a breach may trigger exclusion of evidence pursuant to section 78.

34. These and other authorities were reviewed by the Divisional Court in *R (CPS) v Chalupa* [2009] EWHC 3082 (Admin). In *Chalupa* there was a 20 minute delay between when the defendant confirmed that he wanted legal advice and the call to the duty solicitor. Meanwhile, the defendant procrastinated and, in practice, refused to take part in the test despite being told of the potential consequences. The Divisional Court accepted that there was a breach of section 58; but the defendant's appeal (again on the basis that the evidence of the test procedure should have been excluded pursuant to section 78 of PACE) was dismissed.

35. At 1.27 Elias LJ giving the judgment of the court said:

> "The authorities establish that the right to prompt legal advice and any breach of that right will, in general, have no bearing whatsoever upon the obligation to provide a specimen of breath. It is not a reasonable excuse to refuse to provide a specimen until advice has been received. Indeed, and perhaps more importantly, it is not even a reasonable excuse to refuse to provide the breath specimen when that is in accordance with the lawyer's advice, see *Dickenson vs DPP* [1989] Crim Law Reports 741. Accordingly, there is nothing unfair or improper with the police insisting on a specimen being provided before advice is obtained. To use the language of Section 78, there is nothing about the particular circumstance in which the evidence is obtained which might even arguably render it unfair to admit the evidence. Nor can the general circumstance that section 58 is infringed as a result of a short albeit unjustified delay in contacting the solicitor, begin to constitute such a justification. It could not possibly be said that to admit this evidence would have an adverse [e]ffect on the fairness of the trial. It would simply punish the prosecution in a manner wholly disproportionate to the nature of the wrongdoing, given in particular the public interest in the test being promptly conducted, and the importance of bringing to book those who are suspected of breaking this law. "

That being so, the court held that, notwithstanding the breach of section 58, the court below had been entitled to exercise its discretion so as to refuse to exclude the evidence of the breath test procedure.

36. In our judgment, *Chalupa* and the passage we have just cited highlight the fact of the public interest in persons giving a prompt sample. Accordingly, the statutory regime has been interpreted (correctly in our respectful judgment) as meaning that "there is nothing unfair or improper with the police insisting on a specimen being provided before advice is obtained". Since it is not unfair for the police to insist on a specimen being provided before advice is obtained, it will be a very rare case in which that insistence justifies excluding evidence of the procedure, particularly if it is plain that the failure to provide a specimen was the result of the informed decision of the defendant not to provide one.

Discussion and resolution

37. We accept that the failure by the police to call the solicitor promptly constituted a breach of section 58. Whether that breach occurred because the officers on duty were not properly trained or for some broader reason does not appear with any clarity.

38. In our judgment, Mr Israel was entirely correct to concede that, unless he could rely upon the immediate availability of the duty solicitor as necessarily triggering exclusion of the evidence pursuant to section 78, the appeal was bound to fail. The appeal therefore turns on the availability of the duty solicitor and whether, in these circumstances, the appellant can draw support from the obiter dicta of Kennedy LJ and Nelson J that we have set out above.

39. In our judgment there is no basis upon which it could be said that the District Judge was not properly entitled to exercise his discretion as he did. To the contrary, his decision not to exclude the evidence of the procedure was both justifiable and clearly right in the light of the consistent line of authority to which we have referred. While we do not exclude the possibility that there might be a case where the obiter dicta of Kennedy LJ and Nelson J might lead to a conclusion that the failure to call a solicitor who happens to be available is capable of triggering a decision to exclude evidence of a breathalyser procedure that was otherwise properly conducted, we are not persuaded that this comes close to being such a case. Furthermore, for the reasons we have given, we consider that the dicta should be treated with considerable caution as potentially distracting from the questions to be asked pursuant to section 78 of PACE in the context of the powerful public interest in the prompt giving of samples.

40. On the contrary, this seems to us to be an entirely routine case where there is a duty solicitor in the background but it is not clear how long it would have taken between the duty solicitor being called and advice being given. It is clear on the authorities to which we have referred that neither asking for a solicitor nor even relying upon a solicitor's advice provide a reasonable excuse for not complying with the Intoxilyser procedure. We agree with the consistent thrust of those authorities as we have attempted to explain above. Adopting an approach that is consistent with them leads to the conclusion that the District Judge was entitled to exercise his discretion pursuant to section 78 as he did.

41. The District Judge applied the right test and asked himself the right question. He expressly addressed the question whether the fact that the police had not called the solicitor until after the procedure was complete (with the result that the appellant received no advice until much later) was so severe a breach of section 58 that it could amount to grounds for a successful application under section 78. He held that it was not so severe and exercised his discretion to admit the evidence. That was, in our judgment, a view to which he was fully entitled to come. We would only add that the critical period was the period between when the appellant asked to speak to a solicitor and the end of the Intoxilyser procedure. Once it is accepted that (a) neither waiting for advice from a solicitor nor refusing to take the test on the basis of a solicitor's advice would amount to a reasonable excuse for refusing to provide a specimen, and (b) the appellant was warned of the consequences of not providing a specimen, it is not reasonably arguable that evidence of the appellant's informed refusal to take the test renders the proceedings unfair. In particular, we remind ourselves that section 78 is not a stick for beating the Respondent for a failure by the police to train their officers. In our judgment, the admission of the evidence had no materially adverse effect on the fairness of the proceedings.

42. For these reasons, we answer the questions for the opinion of the High Court as follows:

    i) No.

    ii) Yes, but their failure to do so does not affect the answer to the first question.

43. For these reasons, the appeal is dismissed.