

£UNITED KINGDOM @The Right of Silence - Update

The right of a detained or accused person to remain silent during police questioning and at trial is an essential safeguard in accusatorial legal systems of two fundamental rights guaranteed by international standards: the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt. The right of silence has long been an essential and fundamental element of the British system of criminal justice. Despite international trends protecting this right and Royal Commission recommendations that the right be fully maintained, the Government of the United Kingdom curtailed the right of silence in Northern Ireland in 1988 and has recently announced its intention to curtail the right in England and Wales. Amnesty International is concerned that the curtailment of the right of silence is a violation of international standards.

In February 1993, Amnesty International published a document entitled **UNITED KINGDOM Northern Ireland: the Right of Silence** (AI Index: EUR 45/01/93)¹. This document set out Amnesty International's concerns that, unlike in other jurisdictions in the United Kingdom, people in Northern Ireland who exercise their right to remain silent during police questioning or during their trial risk having inferences of guilt drawn against them under the Criminal Evidence (Northern Ireland) Order 1988 (the "Order"), a law which went into effect in Northern Ireland in December 1988.

Amnesty International considers this law to be inconsistent with the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt, which are protected by international conventions to which the United Kingdom is a party, and therefore bound to comply.

In the context of a review of cases in Northern Ireland in which the Order was applied, Amnesty International expressed its belief that the curtailment of the right of silence under the Order constitutes a form of direct pressure by law enforcement officials and the courts to obtain evidence from detainees and accused people. Contrary to the rights not to be compelled to confess guilt or testify against oneself, a detainee is left with no reasonable choice between remaining silent (which may be taken as incriminating evidence) and making a statement during police questioning or at trial. In the case of **Kevin Sean Murray** in 1992, the House of Lords summed up the predicament posed by the Order: "The accused cannot be compelled to give evidence but must risk the consequences if he does not do so."² The

¹ See also: **UNITED KINGDOM: Fair trial concerns in Northern Ireland: the right of silence**, AI Index EUR 45/02/92, which is an in-depth analysis of the Criminal Evidence (Northern Ireland) Order 1988.

² *R vs. Kevin Sean Murray*. This case has been submitted for review before the European Commission on Human Rights. If the case is deemed admissible, one of the issues to be examined will be whether the adverse inferences

organization believes that the Order, which places a detained or an accused person in this position is in violation of Article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR), which provides that people accused of crimes may not be compelled to confess guilt or testify against themselves.

Further, international standards³ provide that everyone charged with a criminal offence shall be "presumed innocent until proved guilty according to law". The Human Rights Committee⁴ has stated: "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt." The Order, however, has the effect of lowering the standard of proof necessary to establish the guilt of the accused at trial. Since the enactment of the Order, the courts have ruled that once the prosecution has established a *prima facie* case against the accused, in appropriate cases, a judge or jury may draw such inferences "as appear proper" from a person's silence either during police questioning or at trial. The inferences which may be drawn are not limited to specific inferences from specific facts, but also, "in a proper case, the drawing of the inference that the accused is guilty of the offence charged." Further, the courts have ruled that "[W]here commonsense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence, that there is no reasonable possibility of an innocent explanation to rebut the *prima facie* case established adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence in the case has been considered, that the accused is guilty"⁵. Amnesty International believes that this lowering of the standard of proof violates the internationally protected right to be presumed innocent, as in certain cases an accused is being called upon to explain (or prove) his or her innocence.

The organization has been particularly concerned about the application of this law to people charged under emergency legislation, to whom special procedures are applied. People detained under emergency legislation in Northern Ireland can be detained and questioned without charge for up to seven days before presentation before a court. During that time, they can be denied access to a lawyer for an initial period of up to 48 hours, and subsequent 48-hour periods. Unlike in other parts of the United Kingdom, people arrested

drawn against the accused for exercising his or her right to silence are in violation of Article 6 (1 and 2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

³ ICCPR Article 14(2) and European Convention Article 6(2).

⁴ The Human Rights Committee is an expert body established under the ICCPR to monitor implementation of the treaty.

⁵ *R vs. K.S. Murray*, unreported judgment, Court of Appeal in Northern Ireland, 28 October 1991.

under emergency legislation in Northern Ireland are not allowed to have their lawyer present during police interviews. Thus many detainees in Northern Ireland are questioned and must decide whether to exercise their right to remain silent during police questioning before they have had an opportunity to consult with their lawyer to discuss the consequences of this decision.

Furthermore, those people in Northern Ireland who are charged with "scheduled" offences are tried in jury-less "Diplock Courts", where a single judge hears the evidence and makes decisions on matters of law and fact, guilt or innocence and sentencing. Many of these cases are based on uncorroborated confession evidence, and the standard under which confession evidence is deemed admissible is lower. The combination of this lower standard of admissibility of confession evidence with the curtailment of the right of silence is inconsistent with the internationally recognized rights of presumption of innocence and the prohibition of the use of compulsion to obtain evidence from the accused.

In response to letters sent by members of Amnesty International setting out these concerns, the government has stated its belief that

"the Order does not affect the presumption of innocence, nor lower the standard of proof required to establish guilt. It also believes that the Order is in full conformity with the United Kingdom's international obligations, and that the Order continues to fulfil an important purpose in protecting the rights of the community in Northern Ireland from the depredations of serious crime, including terrorist crime, while fully upholding the rights of accused people."

OTHER JURISDICTIONS

The right of silence has been recognized both by the European Court of Human Rights and in other criminal justice systems in Europe.

On 25 February 1993 the European Court of Human Rights expressly recognized in Funke v. France, No. 83/1991/334/407, that a defendant in a criminal case had a right to silence under Article 6 (1) of the European Convention, to which the United Kingdom is a party. The European Court found that the prosecution of the accused for refusing to produce documents to customs officials was "an infringement of the right of anyone 'charged with a criminal offence', within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself".

The Dutch Criminal Procedure Code provides that "in all cases in which a suspect is interrogated, the questioning judge or official should refrain from any act aimed at provoking a statement, of which it cannot be said that it was freely given. The suspect is not required to answer. Before the interrogation, the suspect is informed that he/she is not required to

answer." (Article 29). The German Criminal Procedure Code likewise provides that the courts should inform the accused that he or she has the freedom to decide to speak to the charge or to remain silent. No inferences unfavourable to the accused may be drawn, if he or she opts for silence. (Article 243, par.4). In Belgium, where the right of silence is not explicitly provided for in legislation, the right is nevertheless upheld by the courts.

In addition, the United Nations (UN) International Law Commission, a body of experts which seeks to promote the progressive development of international law and its codification, recently submitted a draft statute for an International Criminal Tribunal with jurisdiction over war crimes, crimes against humanity and genocide. The draft statute expressly recognizes the right to silence in pre-trial interrogation. Article 30 (4) (a) of that draft statute provides that a person suspected of a crime, even before being formally charged, shall: "Prior to being questioned in an investigation under the Statute, be informed of the right to remain silent without such silence being a consideration in the determination of guilt or innocence". This is a welcome recognition by the leading body of international law experts, not only that the right of silence is an essential guarantee of the right to fair trial in the most serious of crimes under international law, but that the defendant may not suffer any adverse consequences from asserting that right. The Sixth Committee of the UN General Assembly debated this draft extensively in October 1993; not a single government delegate, including the United Kingdom delegate, who spoke at length about the draft, criticized this provision. The International Law Commission is expected to submit a final version of the statute to the General Assembly for adoption in September 1994.

RECENT DEVELOPMENTS IN THE UNITED KINGDOM

In the United Kingdom both the Royal Commission on Criminal Procedure of 1981 and the Royal Commission on Criminal Justice in its report of 1993, after detailed study

and debate of the issue, recommended that the right of silence be maintained⁶.

Despite the court decisions, the trends in other European countries, the recommendations of international and national bodies, and criticisms of the Order in Northern Ireland, the Government of the United Kingdom, during the Conservative Party Conference in October 1993, announced its intention to curtail the right to silence in England and Wales, in a manner similar to that in Northern Ireland. The change will be introduced in The Criminal Justice Bill which is expected to be published in December 1993.

Amnesty International has urged the government to repeal the Criminal Evidence (Northern Ireland) Order, and opposes the introduction of similar legislation for England and Wales.

⁶ In so finding, in its July 1993 Report, the Royal Commission on Criminal Justice expressed its belief "that the possibility of an increase in convictions of the guilty was outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent" (p. 54).

On an accused's silence at trial, the Royal Commission stated (at p. 55) "Given the principle that the burden of proof should rest on the prosecution, it must be wrong for defendants who leave the prosecution to prove its case to be exposed to comment by either the prosecution or the judge to the effect that their failure to enter the witness box corroborates the prosecution case."