

UNITED KINGDOM @Northern Ireland: the Right of Silence

INTRODUCTION

Unlike in other jurisdictions in the United Kingdom, people in Northern Ireland who exercise the right to remain silent during police questioning or during their trial risk having inferences of guilt drawn against them under a law which went into effect in Northern Ireland in December 1988.

The right of an arrested person to remain silent during police questioning and the right of an accused person to remain silent during the trial of the charges against him or her have been fundamental and essential elements of the criminal justice system of the United Kingdom. In 1988, however, the government of the United Kingdom enacted a law by use of an expedited procedure, justified as necessary in light of the emergency situation and the need to deal with the terrorist suspects in Northern Ireland, which significantly curtails the right of silence of all people detained or arrested in Northern Ireland. Under the Criminal Evidence (Northern Ireland) Order 1988, a court may draw adverse inferences against an accused for having remained silent during police questioning or during trial. In contrast, the right of silence in the rest of the United Kingdom has been maintained, including for people arrested under emergency legislation.

Amnesty International, under its mandate on fair and prompt trial for political prisoners, considers the Criminal Evidence (Northern Ireland) Order 1988 (hereafter referred to as "the Order") to be inconsistent with the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt. Both of these rights are protected by international standards, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), to which the United Kingdom is a party and therefore bound to comply.

The organization is particularly concerned about the application of the Order to people arrested under emergency legislation in Northern Ireland. Unlike in other parts of the United Kingdom, people arrested under emergency legislation in Northern Ireland can be detained (and questioned) for up to seven days without charge, without being brought before a judge during those seven days, which the European Court of Human Rights found

in 1988 to be a violation of the European Convention. During that time, they can be denied access to their lawyer for an initial period of up to 48 hours, and for subsequent 48-hour periods. In addition, they are not allowed to have lawyers 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 the opportunity to consult with their lawyer to discuss the consequences of this decision.

Further, those people charged with "scheduled" offences¹ in Northern Ireland are tried in the 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 cases in these courts are based on uncorroborated confession evidence, and the standard under which confession evidence is deemed admissible is lower in Northern Ireland than in other jurisdictions in the United Kingdom. The combination of this lower standard of admissibility of confessions 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. Examples of cases in which the Order has been applied, which are of concern to Amnesty International, are described below.

INTERNATIONAL STANDARDS

Amnesty International is concerned that the Order curtails the right of detainees and accused people in Northern Ireland to remain silent in a manner which is inconsistent with international standards. These standards include the guarantee of the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt.

The ICCPR and the European Convention² both provide that everyone charged with a criminal offence shall be "presumed innocent until proved guilty according to law". As the Human Rights Committee, an expert body established under the ICCPR to monitor implementation of that treaty, has explained, this burden is a heavy one. This guarantee includes the obligation for the prosecution to bear the burden of proof of the offence charged. The accused is to be presumed innocent until the prosecution has proved guilt beyond a reasonable doubt.³

¹ "Scheduled offences" include among others murder, manslaughter, false imprisonment, robbery with firearms, explosives and firearms offences.

² ICCPR Article 14(2); European Convention Article 6(2).

³ The Human Rights Committee General Comment on ICCPR Article 14 states:
"By 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 ICCPR⁴ and other international standards also provide that people accused of crimes may not be compelled to confess guilt or to testify against themselves. This guarantee requires investigating authorities to abstain from any direct or indirect physical or psychological pressure with a view to obtaining a confession of guilt, and from compelling a person to incriminate themselves or to testify against any other person. International standards prohibit use of evidence against the accused obtained through any form of compulsion.⁵

According to international humanitarian law⁶, the guarantees of the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt, to which the right of silence is inherent, are to be safeguarded even during periods of armed conflict.

However, justifying the Order as necessary in light of the emergency situation in Northern Ireland and the need to deal with terrorist suspects, the Order was rushed through Parliament by means of an expedited procedure and came into effect on 15 December 1988. It is not an emergency measure; it is part of the general criminal law of Northern Ireland and applies to all criminal suspects in Northern Ireland.

THE CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

The Criminal Evidence (NI) Order 1988 curtails an accused's right of silence in both the investigatory and trial phases of criminal proceedings. The Order permits a Court to draw adverse inferences against an accused for failing or refusing during police questioning after detention or arrest to:

- account for his or her presence at a place at or about the time the offence for which he or she was arrested is alleged to have been committed;⁷

Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore the duty of all public authorities to refrain from prejudging the outcome of a trial."

⁴ ICCPR Article 14(3)(g).

⁵ Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1 and 12; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1 and 15; ICCPR, Articles 7, 14 and Human Rights Committee General Comment 13 under Article 40 para. 4 of the ICCPR; *See* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 21 and 27;

⁶ See Third Geneva Convention relative to the Treatment of Prisoners of War at Article 99, para. 2; Optional Protocol I at Article 75 para.s 4(d) and (f); Additional Protocol II at Article 6 para.s 2(d) and (f).

⁷ Criminal Evidence (N.I.) Order 1988, Article 6.

- explain the presence of objects, substances or marks on his or her person or clothing or in his or her possession, or in the place in which he or she was arrested;⁸

- mention a fact later relied on in his or her defence, if in the circumstances existing at the time of questioning, it would have been reasonable to do so.⁹

In addition, during the trial, if the accused refuses to be sworn or to give evidence at trial, the Court may draw such inferences against him or her which appear to be proper.¹⁰

The court may draw the inferences permitted by the Order during both pre-trial and trial phases of the proceedings against the accused. In pre-trial proceedings, adverse inferences about a defendant's silence during police questioning may be drawn by a court in determining whether an accused should be committed for trial and whether there is a case against the accused to answer. During trial, adverse inferences from a defendant's silence during police questioning, as well as his or her failure to testify during the trial, may be drawn when determining the question of guilt or innocence of the accused.

The text of the Order offers little detail as to the scope of the inferences which may be drawn. The Order provides that the court and jury may draw such inferences "as appear proper". The Order specifies that, on the basis of such inferences, silence may be treated as, or capable of amounting to, corroboration of any evidence against the accused which is material. The inferences drawn may thus be used to bolster the prosecution's case. They may not, however, be the sole basis of a determination of whether a person should be committed for trial, of whether there is a case to answer, or of whether the accused is guilty.¹¹ The appropriateness of the drawing of inferences is, to a large extent, left to the discretion of the courts. The courts in Northern Ireland have gradually widened the scope of permissible adverse inferences drawn from a defendant's silence.

RECENT CASES

⁸ Criminal Evidence (N.I.) Order 1988, Article 5.

⁹ Criminal Evidence (N.I.) Order 1988, Article 3.

Article 3 applies to questioning taking place before a person has been charged with an offence, when the questioning constable need not believe that the person questioned committed an offence, and when the person questioned may not have been informed of the allegations against him or her. It also applies to questioning taking place once the accused has been officially informed that he or she might be prosecuted. When making a decision as to whether to draw adverse inferences against an accused for remaining silent during police interrogation, the person's access to legal advice (which may be delayed for up to 48 hours) is deemed irrelevant.

¹⁰ Criminal Evidence (N.I.) Order 1988, Article 4.

¹¹ Criminal Evidence (N.I.) Order 1988, Article 2, para 4.

The cases of Dermot Quinn, Kevin Sean Murray and Daniel Morrison are illustrative of the application of the Order in Northern Ireland.

Dermot Quinn was arrested on the night of 13 April 1988 as he was being driven by his employer to his girlfriend's home, under suspicion of having participated an hour earlier in a nearby ambush and attempted murder of two members of the Royal Ulster Constabulary (RUC, the police force of Northern Ireland). Upon being stopped at a roadblock Quinn explained that an hour earlier he had been at work nearby, and explained where he was going. His employer, the driver, confirmed Mr Quinn's statement. Nonetheless, both he and his employer were arrested under the Prevention of Terrorism (NI) Act and taken to Gough Barracks for questioning; Quinn exercised his right to remain silent during interrogation. After seven days' detention, his employer was released and Quinn was charged with two counts of attempted murder and possession of firearms.

Charges against Dermot Quinn were dropped in September 1988. Mr Quinn was, however, rearrested on 16 July 1990. In the time intervening between the dismissal of the first case against him and the second arrest, the Criminal Evidence (NI) Order 1988 came into effect. Upon his arrival at Gough Barracks, he requested to consult with his lawyer. This request was not acted upon until the late morning, after the police had questioned him and he had again invoked his right to remain silent. That same day, he was presented before the court, charged with the original charges.

At trial, in the "Diplock Court", the prosecution's case was based primarily on disputed scientific evidence. Mr Quinn took the stand in his defence and gave evidence of his alibi, which was corroborated by the testimony of his employer. Quinn also explained to the court why he had chosen to exercise his right of silence during police questioning: he knew that the law had changed but didn't know what the changes were, the allegations against him were serious, he had heard of people being forced to make statements during police questioning, and although he had asked to see his lawyer, he was questioned before his lawyer was contacted or arrived. Notwithstanding the statements of alibi made initially at the road-block, the corroboration of his alibi by his employer, his trial testimony, and the fact that the events had taken place before enactment of the Order, the trial judge applied the Order and drew adverse inferences from the fact that Mr Quinn had remained silent during police questioning. The court convicted Dermot Quinn on all charges and sentenced him to 25 years in prison. The appeal of the conviction was heard in November 1992; a decision of the Court of Appeal in Northern Ireland is pending.

Kevin Sean Murray was charged with the attempted murder of a part-time member of the Ulster Defence Regiment. He made a brief statement to a police officer at his home while it was being searched in connection with the shooting. After his arrest, he remained silent. He made no reply during interrogation, and did not testify during his trial.

In deciding the case, the trial judge found that the different elements of evidence (including forensic findings) introduced by the Crown were

"not inconsistent with the guilty participation of the accused in the crime. Some are more consistent with guilt than others. Not one of them, however, in itself, proves guilt to the standard of proof required ... It would however, be unrealistic, for a trier of fact, to ignore their cumulative effect."

The judge then went on to draw adverse inferences from Kevin Murray's silence in the face of police questioning and at trial. In its judgment the Court stated:

"it seems that what the prosecution has proved in evidence calls for evidence from the accused in the witness-box ... It is only commonsense ... to infer as proper inference that he is not prepared to assert his innocence on oath because that is not the case."

The Court found Kevin Sean Murray guilty and sentenced him to 18 years in prison.

The Court of Appeal upheld the conviction.¹² Its judgment confirmed that adverse inferences could be drawn from a defendant's silence once a *prima facie* case against the accused was established. The Court of Appeal stated that: "it would be improper for the court to draw the bare inference that because the accused refused to give evidence in his own defence he was therefore guilty." However, once the Prosecution has established *prima facie* evidence against the accused, a court may draw the inference from an accused's refusal to give evidence, that there is no innocent explanation. When considered together with the evidence against the accused, the inference may lead to the conclusion that the accused is guilty.

The case was then heard in the highest court, the House of Lords, as it was considered to raise a point of law of general public importance. The judgment of the House of Lords, which was published at the end of October 1992, stated that, under Article 4 of the Order, where the prosecution has made out a *prima facie* case and the defendant refuses to testify, a judge or jury may draw "such inferences from the refusal as appear proper". 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". While reiterating that a court cannot simply conclude that because the accused does not give evidence that she or he is guilty, the House of Lords stated:

"The accused cannot be compelled to give evidence, but must risk the

¹² See *R. vs. K.S. Murray*, unreported judgment, Court of Appeal in Northern Ireland (Hutton, LCJ., McCollum, J.), 28 October 1991.

consequences if he does not do so."

Amnesty International is also concerned about the application of the Order by the Court in the case of **Daniel Morrison**, the National Director of Publicity for Sinn Fein, a legal Republican political party. The case involved the detention by the Irish Republican Army (IRA) of a man who was suspected of being a police informant, in a house in Belfast. The man was detained and interrogated from Friday evening to Sunday afternoon, when the police and the army arrived. Daniel Morrison was found and arrested in a neighbouring house. He was charged with false imprisonment and conspiracy to kill the alleged informer.

On the advice of his lawyer, Mr Morrison remained silent during interrogation at the Castlereagh Holding Centre in Belfast. He did, however, testify in his own defence in court. Mr Morrison testified that he had been asked by IRA contacts to organize a press conference involving an IRA volunteer who wished to publicize that he had been threatened by the RUC in order to force him to work as an informer. Morrison was asked to see the volunteer. He explained to the court that at that time it did not occur to him that the man in question was being held under restraint. The police arrived only a few moments after Morrison himself arrived at the house where the man was being held, and before Morrison had seen the detained man or spoken to any of the people in the house.

Morrison explained that his refusal to answer questions during interrogation was, in part, a political decision, as, in the press in November/December 1988, he had advised people taken to Castlereagh for interrogation to exercise their right to remain silent.

The trial judge stated that he believed Morrison to have been present in the house for a longer time than he had admitted. He also stated that he believed that Morrison knew that the informer was being held against his will, and that he knowingly became involved in false imprisonment. In arriving at this conclusion, the judge relied on Article 3 of the Order. He held that Morrison's failure to speak during interrogation, and his later explanations in the witness box at the trial:

"gives rise to very strong inferences against him that his account of what he did (in the house) and the state of his knowledge as to what was happening in that house was false, and strongly supports the conclusion that he was guilty of criminal involvement in ... false imprisonment".

The judge stated he believed that Morrison's failure to give an explanation to the police was dictated:

"not by any political attitude or matter of principle on his part, but by his desire to see the evidence which could be adduced against him in court before he gave an explanation

of his conduct and from a tactical desire not to reveal his line of defence at that stage".
R. vs. Martin & others¹³

The judge found Morrison guilty of aiding and abetting false imprisonment, but not guilty of conspiring to commit murder. Daniel Morrison was sentenced to eight years' imprisonment.

It is apparent that the inferences drawn under the Order were crucial to the court's judgment about the state of knowledge of the accused, and thus in finding him guilty of criminal involvement in false imprisonment. The court's decision turned on Morrison's knowledge of what was happening in the house, and the credibility of his defence that, as a Sinn Fein spokesman, he would not knowingly become involved in an ongoing IRA operation or co-operate with the police at Castlereagh. Apparently, the trial judge believed that this line of defence did not withstand the "commonsense" test, and used the adverse inferences as a primary factor in determining the extent of Morrison's knowledge of the false imprisonment.

AMNESTY INTERNATIONAL'S CONCERNS

Amnesty International believes that attaching inferences of guilt to the exercise of the right of silence results in lowering the requirements of proof to be established by the prosecution in order to prove guilt. The prosecution is no longer required to prove guilt beyond reasonable doubt; it is only required to present sufficient evidence to allow the court, when adding to this evidence the impact of the inference drawn against the accused as a consequence of his silence, to conclude guilt. In other words, the adverse inferences allow the court to establish guilt on the basis of evidence which otherwise would be insufficient. The organization believes therefore that the Order is inconsistent with the principles of the presumption of innocence and the benefit of the doubt for the accused which are protected in international law.

The curtailment of the right of silence sanctioned by the Order is also inconsistent with the internationally recognized right not to be compelled to testify against oneself or to confess guilt. Permitting adverse inferences to be drawn from an accused's silence is a means of compulsion. It constitutes a form of direct pressure exercised by law enforcement bodies to obtain evidence; an accused is left with no reasonable choice between silence (which will be taken as incriminating evidence against oneself) and testifying. During interrogation, undue advantage of the situation of the detainee can be taken in order to obtain a statement with the threat of adverse inferences being drawn against him for remaining silent. This is of additional concern in light of the fact that in Northern Ireland a detainee's access to a lawyer

¹³ R. vs. Martin & Others, unreported judgment, Belfast Crown Court (Hutton, LCJ.), May 1991.

may be delayed for at least an initial period of 48 hours following arrest and that detainees are not permitted access to a lawyer during police questioning.

In light of these concerns, Amnesty International wrote a detailed report entitled **UNITED KINGDOM Fair Trial Concerns in Northern Ireland: the right of silence**¹⁴, which it sent to the government in November 1992. The government's response of December 1992, a copy of which is attached, stated that the report misconceives the effect of the Order. In its view, the law does not effect the presumption of innocence or shift the burden of proof. Rather, the government believes that the Order protects the rights of the Northern Ireland community from serious crime, including terrorist crime, while upholding fundamental rights of accused people.

Amnesty International remains concerned about the application of the law, as illustrated by the above cases. It has called on the government to repeal the Criminal Evidence (Northern Ireland) Order 1988.

¹⁴ AI Index: EUR 45/02/92