

THE IMPACT OF THE HUMAN RIGHTS ACT 2003 ON CRIMINAL LAW

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I. INTRODUCTION

The purpose of this paper is to consider the impact that the European Convention on Human Rights Act 2003 (hereinafter “the Act”) has had on Irish criminal law. The jurisprudence built up by the European Court of Human Rights has the potential to affect not only substantive criminal law, but also police investigation, trial procedures, evidence, sentencing and the prison system. It might be expected to have a particular impact on prisoners, which is appropriate given that modern international human rights treaties grew up out of revulsion at the way prisoners were treated during the Second World War.

It is fair to say that the impact of the Act to date in the sphere of criminal law has been muted. This may simply be because the Irish Constitution already protects most of the rights at the same level as the Convention. In a recent publication,¹ Gerard Hogan, SC states that:

Since the enactment of the Constitution in 1937, the Irish Courts have, of course, been working within a system of judicial review of legislation which confers on them far-reaching powers of review. Outside, therefore, of the United States, the Irish judiciary have probably the longest and most extensive experience of judicial review of legislation in the common law world and over 80 individual statutory provisions, statutory instruments and common law rules have been found to be unconstitutional during this period. While it is true that there are other Council of Europe Member States with an elaborate domestic constitutional jurisprudence – Germany, Italy, Spain,

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¹ Kilkelly (ed.), *ECHR and Irish Law* (Jordan’s, 2004) by Gerard Hogan, SC at pp. 14-15.

Norway and Portugal come particularly to mind – there is probably no other member state with a longer unbroken tradition.

One concern about the Act was that the courts would immediately be inundated with challenges to every aspect of Irish criminal law. This was the experience in Canada, where a flood of litigation followed the passing of the Charter of Rights and Freedoms in 1982. Nobody could be sure that an offence or procedure still applied until it had been tested against the Charter. For example, in *MS*,² the accused argued that the criminalisation of incest was unconstitutional as consent was not a defence and there was no age limit appended to the definition of “child” in the offence. He also claimed that the offence breached his right to freedom of association, equality and religious freedom. Needless to say, the British Columbia Court of Appeal rejected all of these claims.

Of course, a flood of litigation that tested our often outdated criminal laws against international human rights standards would not necessarily be a bad thing. As a result of litigation under the Charter, Canada now has a highly developed and sophisticated criminal law jurisprudence. For example, at common law, the defence of duress is not available if the threats were not immediate and the threatener was not present when the offence was committed. In *R. v. Ruzic*,³ the Ontario Court of Appeal held that this limitation on the defence was in breach of the Charter as it failed to take into account the human frailties of the accused.

In England, the Lord Chancellor estimated that, in 99 per cent of cases, the courts would decline to make a declaration of incompatibility, although only time will tell whether this is an overly optimistic (or, depending on one’s point of view, pessimistic) prediction.⁴

With the passing of the Human Rights Act 1988, at least some sections of the English judiciary relish the task of not only taking jurisprudence from Strasbourg into account, but also developing it in their own way. The Lord Chief Justice, speaking in Parliament, has stated that British judges have a significant

² (1997) 111 C.C.C. (3d) 467.

³ (1998) 165 D.L.R. (4th) 574.

⁴ *Hansard* (H.L.) Vol. 585, Col. 840 (5 February 1998).

for possession.

23rd December 2003: the appellant lodged an appeal in the Circuit Court.

31st December 2003: the Act of 2003 came into force.

14th October 2004: the appeal came on for hearing before the Circuit Court.

The Circuit Court stated a case as to whether the appellant could rely on the Act.

The case turned on s. 2 of the Act which provides as follows:

- (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
- (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

Kearns J., giving the judgment of the Supreme Court, noted Article 15 of the Constitution of Ireland, 1937 provides that "The Oireachtas shall not declare acts to be infringements of the law which were not so at the time of their commission" and the fact that the Act provided that damages could be sought from a public authority which had acted "unlawfully."¹⁰ He further stated that "these consequences, which arise where a breach of the 2003 Act is found to have occurred, strongly suggest that the 2003 Act should, for the purpose of complying with the spirit of Article 15.5, be interpreted as having prospective effect only."¹¹

He noted that there are well established presumptions in statutory interpretation that a statute does not operate retrospectively unless a contrary intention appears. Kearns J. observed that the

¹⁰ *Ibid.* at 310.

¹¹ *Ibid.*

language of the Act suggested prospective obligations only and that “In a matter of such far-reaching importance it would be a considerable omission on the part of the draftsman not to include a provision for retrospective application to past events if such was the intention.”¹² Kearns J. concluded that “the 2003 Act cannot be seen as having retrospective effect or as affecting past events.”¹³

He also held that time could not be artificially extended by somehow viewing the Circuit Court proceedings as a new and stand alone process which post-dated the commencement of the Act. He concluded that it was the service of the notice to quit which set the wheels in motion and determined the parties’ legal rights and obligations and that that was the relevant date.

In *Carmody v. Minister for Justice*,¹⁴ the plaintiff sought a declaration that Section 2 of the Criminal Justice (Legal Aid) Act, 1962 was incompatible with the State’s obligations under the European Convention on Human Rights. He had made his legal aid application in the year 2000, before the Human Rights Act had come into force. In the High Court, Laffoy J. held that the issue was properly before the court irrespective of the fact that the proceedings were initiated before the coming into force of the 2003 Act. The standing of the plaintiff to prosecute the proceedings derived not from the fact he was granted a Legal Aid Certificate under Section 2 in October 2000, but from the fact he was facing trial on criminal charges with the benefit of a Certificate under Section 2, which, he contended, would not enable him to be effectively represented and would expose him to an unfair trial. Therefore, the pursuit by the plaintiff of a declaration of incompatibility under Section 5(1) of the 2003 Act did not involve any element of retrospectivity.

III. ISSUES OF INTERPRETATION

In *Carmody*, Laffoy J. held that it cannot have been the intention of the Oireachtas that, where a statutory provision enjoys the presumption of constitutionality, the question of its compatibility with the State’s obligations under the Convention provisions which are invoked should be postponed until a determination of its

¹² *Ibid.* at 313.

¹³ *Ibid.* at 318.

¹⁴ [2005] 2 I.L.R.M. 1.

constitutional validity. The court should first consider whether Section 2 of the 1962 Act is incompatible with the State's obligations under the Convention. If, and only if, the court is satisfied that there has been no violation of the Convention should the court go on to consider whether Section 2 is invalid, having regard to the provisions of the Constitution.¹⁵

This issue of interpretation is dealt with in some detail by the House of Lords in *Ghaidin v. Godin-Mendoza*.¹⁶ Lord Nicholls of Birkenhead stated as follows:

It is now generally accepted that the application of Section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, Section 3 may nonetheless require the legislation to given a different meaning.

From this it follows that the interpretative obligation decreed by Section 3 is of an unusual and far-reaching character. Section 3 may require a Court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to parliament in using the language in question. Section 3 may require the Court to depart from this legislative intention, that is depart from the intention of the Parliament which enacted the legislation.

Since Section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that Section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would

¹⁵ *Ibid.* at 3-4.

¹⁶ [2004] 2 A.C. 557.

otherwise bear, it becomes impossible to suppose Parliament intended that the operation of Section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of Section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, Section 3 would be available to achieve Convention-compliance. If he chose a different form of words, Section 3 would be impotent.

[Section 3 is] apt to require a Court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting Section 3 was that, to an extent bounded only by what is 'possible', a Court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the Courts should adopt a meaning inconsistent with the fundamental feature of legislation. That would be to cross the constitutional boundary Section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.¹⁷

The relevant United Kingdom provision is contained in their Human Rights Act and Section 3 provides as follows:

So far as it is possible to do so primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

¹⁷ *Ibid.* at 571.

IV. DOES A BREACH OF THE CONVENTION MEAN THAT EVIDENCE MUST BE EXCLUDED?

The Convention does not require the automatic exclusion of unconstitutionally or unlawfully obtained evidence. In *Khan v. UK*,¹⁸ the European Court of Human Rights stated:

While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the court to determine as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the ‘unlawfulness’ in question and, where violation of another Convention right is concerned, the nature of the violation found.¹⁹

In *Jones v. University of Warwick*,²⁰ an insurance company had detected a fraudulent claim after an inquiry agent acting for the insurance company obtained entry to the claimant’s home by posing as a market researcher. While in her home, the agent used a hidden camera to film her without her knowledge. The insurance company wished to adduce the evidence of the footage in the civil trial. The English Court of Appeal held that the best way to reconcile the conflicting public interests that arose (i.e. the interest that the truth be revealed in litigation and the interest that the courts should not acquiesce or encourage a party to use unlawful means to obtain evidence) was by admitting the footage, but also making a costs order so as to mark its disapproval of the method the insurance company had used. In respect of the Convention, Lord Woolf C.J., delivering the judgment of the Court of Appeal, stated:

¹⁸ (2000) 31 E.H.R.R. 1016.

¹⁹ *Ibid.* at 1025-1026.

²⁰ [2003] 3 All E.R. 760.

Mr Weir argues that unless it was necessary for the insurers to take the actions they did, the evidence must inevitably, at least in a case such as this, be held inadmissible. He submits that otherwise the court would be contravening the duty that it is under, pursuant to section 6 of the Human Rights Act 1998, not to contravene article 8. While the court should not ignore the contravention of article 8, to adopt Mr Weir's approach would fail to recognise that the contravention would still remain that of the insurer's inquiry agent and not that of the court. *The court's obligation under section 6 of the Human Rights Act 1998 is to not itself act in a way which is incompatible with a Convention right.*

As the Strasbourg jurisprudence makes clear, the Convention does not decide what is to be the consequence of evidence being obtained in breach of Article 8. This is a matter, at least initially, for the domestic courts. Once the court has decided the order, which it should make in order to deal with the case justly, in accordance with the overriding objectives set out in CPR r 1.1 in the exercise of its discretion under rule 32.1, then it is required or it is necessary for the court to make that order. Accordingly, if the court could be said to have breached article 8(1) by making the order which it had decided the law requires, it would be acting within article 8(2) in doing so.”²¹ (emphasis added) (internal citations omitted)

V. THE RIGHTS OF THE ACCUSED

In *DPP v Desmond*,²² McCracken J. stated that:

This Court would like to make it quite clear that there

²¹ *Ibid.* at 767.

²² Court of Criminal Appeal, unreported, McCracken J., 3 December 2004.

is not, nor could there be in the interests of justice, a 'no adjournment rule' in the Central Criminal Court. Such a rule, were it to exist, would be contrary to all principles of constitutional natural justice. It should also be said that had this case been heard since 31st December 2003, being the date when the provisions of the European Convention on Human Rights Act 2003 became operative, on an application for an adjournment such as in the present case the Court would have to be mindful of the rights of the accused seeking an adjournment under Article 6 of the first schedule to the Act, and decisions such as *Quaranta v Switzerland*. There can be no element of punishment involved in considering whether to grant an adjournment or as to the consequences of an adjournment being granted, the Court is solely concerned with the balance of justice.

In *Carmody*, Laffoy J. rejected a challenge to Section 2 of the Criminal Justice (Legal Aid) Act, 1962. She held that the only element of inflexibility in Section 2 is the restriction on the number of lawyers which the Court is empowered to assign and the branch of the legal profession to which the sole lawyer which the Court is entitled to assign belongs. This limitation does not render Section 2 incompatible with the State's obligations under Article 6 of the Convention. It was not established that a qualified Solicitor on the Legal Aid Panel exercising normal professional skill and care could not afford effective and practical representation for a person being tried summarily on a minor offence in the District Court, nor had it been established that there was a risk of an unfair trial if an indigent accused was represented by a solicitor alone on any charge which was triable summarily in the District Court. The fact that a rich farmer facing similar charges may choose to spend his money in retaining a legal team, including a solicitor and leading Senior counsel to act in his defence, did not amount to discrimination under Article 14 in conjunction with Article 6. The fact that there may, in terms of lawyers, be a numerical imbalance or a divergence of legal

qualification between the prosecution team and the defence team does not disadvantage the accused person to the extent that his guarantee to a fair trial is imperilled unless the lawyer defending him cannot do so effectively. It has not been shown that this would be the case. Therefore, Section 2 of the Act of 1962 did not violate a person's constitutional right to a fair trial.

In *Hooper v. United Kingdom*,²³ the applicant appeared before a Magistrate's Court charged with minor offences. As the applicant caused a disturbance in Court, the Magistrate concluded there was a risk of a breach of the peace and bound him over to keep the peace, with 28 days imprisonment in default of his own recognisance and/or a suitable surety. The magistrate did not give the applicant or his lawyer any opportunity to make submissions about the terms of the order before it was imposed. The applicant was later committed to custody, after the magistrate deemed the proposed surety unsuitable. The European Court of Human Rights held that, as breach of the order could lead to committal to prison, the Court needed to take particular care that imposing the order did not effectively amount to an automatic sentence of imprisonment. Where deprivation of liberty was at stake, the interests of justice called for legal representation and for that legal representative to be heard. The failure to give the applicant or his representative the opportunity to address the Court before the order was made constituted a breach of natural justice and a breach of Article 6 of the Convention.

VI. THE RIGHTS OF VICTIMS

The Convention sometimes requires positive measures to be taken. For example, in *X and Y v. Netherlands*,²⁴ a 16-year old mentally handicapped girl was sexually assaulted by an adult male of sound mind. Due to a loophole in Dutch law, he could not be prosecuted. This was because, under Dutch law, only the victim of the crime could register a criminal complaint, a rule that applied even where the victim was incapable of doing so due to her handicap. The European Court found that the absence of an effective criminal

²³ (2005) 41 E.H.R.R.1.

²⁴ (1986) 8 E.H.R.R. 235.

procedure was a violation by the Netherlands of its duty to secure respect for the victim's private life under Article 8. The Court stated that Article 8:

...does not merely compel the State to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.²⁵ (footnotes omitted)

Presumably, under our Constitutional framework of separation of powers, an Irish Court could not directly compel the State to fill a loophole in our criminal code.

VII. CHILDREN

The decision of the European Court of Human Rights in *V v. United Kingdom* and *T v. United Kingdom*,²⁶ established that, in certain circumstances, trying children in adult courts can amount to a breach of the Convention. The case concerned the murder of toddler Jamie Bolger. The applicants had been ten years old when they had played truant from school, abducted a two-year old boy from a shopping precinct, taken him on a journey of over two miles and then battered him to death. The trial of the two boys was conducted in Preston Crown Court with most of the formality of an adult criminal trial. The boys were 11 at the time of the trial and the trial procedure was modified slightly in view of the defendants' age. For example, they were seated next to social workers in a specially raised dock. In addition, the hearing times were shortened to reflect the hours of the school day. At the end of the trial, the jury were satisfied that the accused knew that what they were doing was wrong and thus were criminally responsible for their actions. A medical examination of the applicants later revealed that they had been

²⁵ *Ibid.* at 239-240.

²⁶ (1999) 30 E.H.R.R. 121.

terrified by the court proceedings and had been unable to participate in them in any meaningful way. Instead, the boys passed the trial by counting numbers in their head and making shapes with their shoes. On the basis of this report, the boys instituted proceedings alleging that the conduct of their trial breached their rights under the European Convention of Human Rights.

The applicants claimed that they had been denied a fair trial in breach of Article 6(1) of the Convention. In the absence of a European standard, the court held that attribution to the applicants of criminal responsibility in respect of acts committed when they were 10 years old could not of itself give rise to a violation of Article 6. The court then proceeded to examine the conduct of the trial itself. In an important statement of principle, the court stated that, where a child is charged with an offence:

...it is essential that his age, level of maturity and intellectual and emotional capacities be taken into account in the procedures followed.²⁷

The court noted that the formality and ritual of the three week trial in the Crown Court must at times have seemed incomprehensible and intimidating for a child. There was also evidence that certain modifications to the courtroom, in particular the raised dock which was designed to enable the accused to see what was going on, had the effect of increasing the applicants' sense of discomfort during the trial, since they felt exposed to the scrutiny of the press and the public. Taking into account medical evidence of the immaturity of the applicants, the Court was satisfied that it was not sufficient for the purposes of Article 6(1) that they were represented by skilled and experienced lawyers. Given the applicants' immaturity and disturbed emotional state, they would not have been capable of corresponding with their lawyers and giving them information for the purposes of their defence. Thus, they had not received a fair trial.

In the subsequent case of *SC v. United Kingdom*,²⁸ the applicant, a minor aged 11, was charged with robbery and tried in a Crown Court. It was held that there had been a violation of Article

²⁷ *Ibid.* at 155.

²⁸ (2005) 40 E.H.R.R. 226.

6. The court stated that:

The Court considers that, when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.²⁹

In *Independent Newspapers v. Judge Hogan*,³⁰ Dunne J. held that there is nothing in the Children Act 2001 which would permit a child who appears before the Central Criminal Court to benefit from anonymity. The DPP had relied on the decision of *Ghaidin v. Godin-Mendoza*³¹ as a basis for arguing that the Convention required that such protection be read into the Children Act. Dunne J. noted the text of Article 6 and stated that:

... I do not think that this assists the court in any way in determining the issue before me. It is clear that the Convention recognises that there may be circumstances in which a hearing otherwise than in public may be required but of course certain circumstances have to exist for that to be done. Reference is made to the position of juveniles but of course the Convention does not direct that in the case of juveniles the proceedings must be heard otherwise than in public. The Convention is merely permissive in respect of a hearing otherwise than in public in certain circumstances including circumstances that may pertain to minors.

²⁹ *Ibid.* at 239.

³⁰ High Court, unreported, Dunne J., 14 January 2005.

³¹ *Supra* n. 16.

VIII. THE RIGHT TO SILENCE

Irish courts have consistently upheld statutory provisions that permit the guilt of the accused to be inferred from certain external factors. For example, in *Rock v. Ireland*,³² the constitutionality of s. 18 of the Criminal Justice Act 1984 (which permits an inference to be drawn from the failure of the accused to account for any object, substance or mark found on him) was upheld. It is probable that these cases are compatible with the Convention. In *Murray v. UK*,³³ the Court held that, where a *prima facie* case was established and the burden of proof remained on the prosecution, adverse inferences could be drawn from a failure to testify. In the earlier case of *Salabiaku v. France*,³⁴ the Court held that presumptions against the accused must be confined within reasonable limits which take into account the importance of what is at stake and which respect the rights of the defence. In *Averill v. UK*,³⁵ the European Court rejected the applicant's claim that the drawing of an adverse inference against him rendered his trial unfair. However, the court did hold that the complete denial of any access to a solicitor for the first 24 hours of interrogation had breached the applicant's right to legal representation under Article 6 of the Convention.

In *Heaney v. Ireland*,³⁶ a violation of Article 6 was found to exist in respect of legislation that made it an offence to fail to answer certain questions.

IX. INDECENCY OFFENCES

An area that one would have thought would be at risk from the Convention would be our outdated indecency and obscenity laws. However, the European Court has always recognised that Member States enjoy a wide margin of appreciation in this area. In *Handyside v. UK*,³⁷ the publisher of the Little Red Schoolbook was convicted and fined under the Obscene Publications Act 1959. The European Court held that it was not possible to find in the domestic law of the various contracting states a uniform European conception of morals. Thus, member states enjoyed a broad "margin of appreciation" on the subject.

³² [1997] 3 I.R. 484.

³³ (1996) 22 E.H.R.R. 29.

³⁴ (1991) 13 E.H.R.R. 379.

³⁵ (2001) 31 E.H.R.R. 36.

³⁶ Unreported, E.C.H.R. 21 December 2000/[2001] Crim. L.R. 481.

³⁷ 29 April 1976, Series A No. 24.

In *Muller v. Switzerland*,³⁸ the applicant had been convicted after displaying three paintings that depicted sexual relations between men and animals. A prosecution for obscenity had been brought against him after a visitor to the exhibition had thrown down one of the paintings, trampled on it and crumpled it. The Swiss Court had rejected the applicant's attempts to compare his works to those of Michelangelo and was equally unconvinced by his assertion that the paintings were "symbolic." The European Court noted that there was no uniform European conception of morals and, after viewing the paintings for itself, held that the conclusion of the Swiss Courts that they were capable of causing gross offence was not unreasonable. Judge Spielman dissented and referred to the transcript of the trial of Charles Baudelaire, who had been convicted of writing indecent poetry, only for his conviction to be posthumously quashed.

X. ARREST AND SEARCH

In *Fox v. UK*,³⁹ the European Court made it clear that a reasonable suspicion is required before a person can be detained. Under s. 14 of the English Prevention of Terrorism Act 1978, the arresting officer could arrest any person whom he suspected of being a terrorist. The House of Lords interpreted this as incorporating a subjective test, and held that the officer was not required to hold a reasonable degree of suspicion. The European Court considered this to be a breach of Article 5(1)(c) of the Convention. The Court stated that it had to be furnished with some facts or information capable of satisfying it that the arrested persons were reasonably suspected of having committed the alleged offence. The fact that the two applicants had previous convictions for terrorist offences was not sufficient to justify their arrest seven years later without further material to support the reasonableness of the suspicion.

The right to respect for one's private life under Article 8 of the Convention has been successfully invoked to challenge the issue or execution of search warrants. For example, in *Niemietz v. Germany*,⁴⁰ a warrant that permitted the search of a lawyer's office

³⁸ (1991) 13 E.H.R.R. 212.

³⁹ (1991) 13 E.H.R.R. 157.

⁴⁰ (1993) 16 E.H.R.R. 97.

was held to be “not necessary in a democratic society.” The power, which took no account of any special protection which might be desirable in relation to a lawyer’s premises, was disproportionate to its purposes.

XI. DISCLOSURE

To date, the European Convention on Human Rights Act 2003 does not appear to have had any real impact in this area. That has not been the experience in the U.K. In *Rowe and Davis v. United Kingdom*,⁴¹ the Court stated that:

In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6.1. Moreover in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities...

In *Dowsett v. United Kingdom*,⁴² it was held that non-disclosure of certain information by the prosecution had rendered the applicant’s trial unfair. The Court stated, at paragraph 42, that:

... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the

⁴¹ (2000) 30 E.H.R.R. 1.

⁴² (2004) 38 E.H.R.R. 845.

defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Art 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by judicial authorities.⁴³

In *O’Callaghan v. Judge Mahon*,⁴⁴ Hardiman J. noted these developments and made the following observation:

A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This has led to the development of *an impressive body of jurisprudence* both in the United Kingdom and in *Strasbourg*. *The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of “égalité des armes”, which might be regarded as the opposite of that state of imbalance and disadvantage described by Ó Dálaigh C.J. as clocha ceangailte agus madraí scaoilte.* (emphasis added)

XII. THE PRIVILEGE AGAINST SELF-INCRIMINATION

In the leading case of *Saunders v. United Kingdom*,⁴⁵ the Court of Human Rights stated, at paragraph 68, that:

The right not to incriminate oneself, in particular, presupposes that *the prosecution in a criminal case* seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the

⁴³ *Ibid.* at 857-858.

⁴⁴ Supreme Court, unreported, Hardiman J., 9 March, 2005.

⁴⁵ (1997) 23 E.H.R.R. 313.

accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.⁴⁶

In the subsequent related case of *IJL, GMR and AKP v. United Kingdom*,⁴⁷ the Court of Human Rights rejected a claim that the DTI should be treated as part of the prosecution process because of collusion between the inspectors and the prosecuting authorities. It stated that:

The applicants are not correct in their assertion that a legal requirement for an individual to give information demanded by an administrative body necessarily infringes Article 6 of the Convention.

The court considers that whether or not information obtained under compulsory powers by such a body violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial.⁴⁸

The privilege against self-incrimination only applies to statements made by a person and not to materials which exist independently of that person. In *Saunders*,⁴⁹ the Court of Human Rights stated, at paragraph 69, that:

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, *documents acquired pursuant to a warrant*,

⁴⁶ *Ibid.* at 337.

⁴⁷ [2001] Crim. L.R. 133.

⁴⁸ *Ibid.* at 134.

⁴⁹ (1997) 23 E.H.R.R. 313.

breath, blood and urine samples, and bodily tissues for the purpose of DNA testing.⁵⁰ (emphasis added)

And in *Dunnes Stores v. Ryan*,⁵¹ Kearns J. stated that “where the incriminating material has an objective reality, the requirement for protection is less compelling.”

XIII. DELAY

In *Henworth v. United Kingdom*,⁵² the applicant was serving a life sentence for murder. He was arrested in June 1995 and first convicted in July 1996. The first conviction was quashed on appeal, following a misdirection by the Judge. In August 1998, the jury was unable to reach a verdict on the re-trial. A secondary trial was held in July 1999, but this too collapsed when the applicant attempted to defend himself. A final re-trial was held in September 1999 in which the applicant was convicted by jury and sentenced to life imprisonment. The European Court of Human Rights held that there had been a breach of the Applicant’s right to a fair trial under Article 6 of the Convention. It held that the reasonableness of the length of the proceedings was to be assessed, with reference to the circumstances of the case, and, in particular, the complexity of the case, the conduct of the parties and the importance of what is in issue for the applicant. The importance of what was at stake for the applicant, namely a serious criminal conviction and sentence to life imprisonment, was self evident. While the charge was serious, the Court was not persuaded it was a particularly complex trial. Given the history of this matter, the State was under responsibility to proceed with particular diligence, and keep delay to a minimum, especially as the applicant was in custody for this whole period. There were no unusually long and unexplained periods of inactivity, but the cumulative effects of the delays and the decision to re-try the Applicant again after July 1998 had resulted in the proceedings not being completed within a reasonable period of time.

⁵⁰ *Ibid.* at 337-338.

⁵¹ [2002] 2 I.R. 60 at 117.

⁵² (2005) 40 E.H.R.R. 33.

XIV. PRISONERS

In *Pfeifer and Plankl v. Austria*⁵³, the two applicants had corresponded with each other while on remand. One of their letters was censored by blacking out the following passage:

I wonder whether there is anybody left in this monkey house who is still normal...In life they are nobodies, here they think they are gods. Some of the officers are guests like us. They are always spying on the women, these monkeys are proper peeping toms! I hate it!

The European Court held that Article 8 (right to respect for private life) had been breached by stopping the letter:

The Commission rightly concluded from the account given by Mrs Plankl that the letter consisted rather of criticisms of prison conditions and in particular the behaviour of certain prison officers. Although some of the expressions used were doubtless rather strong ones, they were part of a private letter which under the relevant legislation should have been read by Mr Pfeifer and the investigating judge only.

In the case of Silver the Court held that it was not 'necessary in a democratic society' to stop private letters 'calculated to hold the authorities up to contempt.' The deletion of passages is admittedly a less serious interference, but in the circumstances of the case this too appears disproportionate.⁵⁴

The basis for censoring prisoners' correspondence in this jurisdiction is Rule 63 of the Prison Rules, 1947. The constitutionality of Rule 63 was upheld by the High Court in *Kearney v. Minister for Justice*.⁵⁵ In 1998, the European Commission of Human Rights made clear its view that the decision in *Kearney* to uphold the constitutionality of Rule 63 was incorrect and that it

⁵³ (1992) 14 E.H.R.R. 692.

⁵⁴ *Ibid.* at 714-715.

⁵⁵ [1986] I.R. 116.

expects it to be overruled when the matter next comes before an Irish court.

In *O'Hara v. Ireland*,⁵⁶ the applicant claimed that all his correspondence (including that with the European Commission of Human Rights, the Committee for the Prevention of Torture and his solicitors) was systematically opened and read by the prison authorities and that certain correspondence was copied onto his prison file, suppressed and delayed. He claimed that this breached his right of access to a court under Article 6(1) of the Convention and his right to respect for private life and correspondence under Article 8. In order to justify its stance on correspondence, the Irish Government identified three major problems in Irish prisons:

- i) drug abuse
- ii) correspondence by convicted sexual offenders to their victims escape attempts.

The Commission refused to decide if there had been any breaches of the Convention, as the applicant had not exhausted all the domestic remedies that were open to him. The applicant had claimed that it would be pointless for him to bring a case in Ireland, given that the judgment of the High Court in *Kearney* was regarded as settled law. However, the Commission held that the correct course of action for him was to bring a constitutional challenge in the High Court and then appeal to the Supreme Court if necessary. It noted that the *Kearney* decision was 12 years old at this stage and that the Supreme Court had never issued a judgment on the issue. The Commission also rejected the applicant's claim that domestic constitutional proceedings would be ineffective because the authorities would have access to all of his legal correspondence.

What is perhaps most interesting about the decision of the Commission is that the Commission clearly hints that it would expect a different result to the *Kearney* judgment to be reached the next time this issue arises before an Irish court:

⁵⁶ (1998) 25 E.H.R.R. (C.D.) 57.

The Court found in the Campbell case (against the background of “routine scrutiny” of that applicant’s correspondence) that prison authorities may open a letter from a lawyer to a prisoner only when they have reasonable cause to believe that it contains an illicit enclosure; that even in such circumstances the letter should not be read and suitable guarantees should be provided in this respect such as opening the letter in the presence of a prisoner; and that the reading of legal correspondence of a prisoner would only be justifiable in exceptional circumstances. The Court also found that there was “no compelling reason why such letters from the Commission should be opened.” In the present case, Rule 63 of the 1947 Rules provides for the systematic opening and reading of all correspondence including correspondence with the Commission, lawyers and the domestic courts, a substantial amount of which correspondence was copied onto the applicant’s prison file.⁵⁷

The Commission expressed concern at the copying of correspondence into the applicant’s prison file:

...the contents of the applicant’s prison file would appear to demonstrate a significant extension of the practice of the prison authorities in applying Rule 63. It is clear, from the voluminous copy correspondence to and from the applicant on his prison file that the prison authorities’ control of his correspondence went as far as the taking and retaining of copies of a significant portion of mainly legal correspondence. The control exercised by the prison authorities is thus substantially more extensive than that examined by the High Court in the Kearney judgment, in which case the High Court noted that the instructions to prison staff were to read legal correspondence only to

⁵⁷ *Ibid.*

the extent necessary to ensure that it relates to the prisoner's legal affairs and to treat as confidential all information obtained as a result of the operation of Rule 63.⁵⁸

In *Ezeh v. The United Kingdom*,⁵⁹ it was held that a prison disciplinary hearing which results in a loss of liberty is a criminal proceeding. The decision is of the Grand Chamber of the Court on the 9th October 2003, upholding an earlier decision of the Third Section of the Court on the 15th July 2002. The Court stated, at paragraphs 123-124:

The reality of awards of additional days was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence.

Accordingly, the Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability ... The Court finds further support for this view in the provisions of Rule 54(1) of the Prison Rules which allow for the imposition of additional days during a prisoner's detention on remand and, therefore, prior to any conviction, although such days would not be served in the event of acquittal.⁶⁰

XV. OVER-VAGUE OFFENCES

There is an offence of breach of the peace at common law in Scotland. In *Smith v. Donnelly*,⁶¹ it was argued that the offence was incompatible with Article 7 of the European Convention on Human Rights. The Magistrates Court found that such a charge had been

⁵⁸ *Ibid.*

⁵⁹ (2004) 39 E.H.R.R. 1.

⁶⁰ *Ibid.* at 32.

⁶¹ (2001) S.L.T. 1007

