

**IN THE PRIVY COUNCIL
ON APPEAL FROM THE APPEAL COURT, HIGH COURT OF JUSTICIARY**

BETWEEN:

MARGARET ANDERSON BROWN

- and -

PROCURATOR FISCAL, DUNFERMLINE

**THIRD PARTY INTERVENTION
ON BEHALF OF *JUSTICE***

A. Introduction and summary.

1. *JUSTICE* is an independent all-party human rights law reform organisation, and is the British Section of the International Commission of Jurists. In this intervention, *JUSTICE* advances, and seeks to support, the following five propositions:

- (1) Article 6 of the European Convention on Human Rights (ECHR) is subject to very special rules of interpretation: unlike rights of an absolute nature, such as Articles 2 and 3, the general public interest is relevant to its interpretation, but, unlike rights of a qualified nature, such as Articles 8 to 11, a breach of Article 6 can never be justified by reference to the general public interest. In other words, the general public interest can be taken into account when determining what the right to a fair trial under Article 6 means in any given context; but, once that meaning has been properly determined, Article 6 assumes an absolute character, such that no-one should be denied a fair trial because the general public interest so demands.
- (2) The right against self-incrimination is one aspect of a fair trial under Article 6. Its purpose is to protect individuals from improper compulsion and/or the unfair use of evidence obtained by compulsion and it should be interpreted

according to that purpose. Consequently, it is neither absolute nor inflexible in character.

- (3) Such an approach to the interpretation of the right against self-incrimination is consistent with the approach of the European Court of Human Rights to other rights which are integral to the right to a fair trial under Article 6 ECHR. These include the right of access to a court, the right to silence and the right not to shoulder the burden of proof in criminal prosecutions, none of which, upon analysis, are absolute or inflexible in character.
- (4) Factors relevant to the proper interpretation of the right against self-incrimination in the context of s.172 of the Road Traffic Act 1972 ('RTA') include:
 - (a) The nature and degree of compulsion used to obtain the information in question, the offence being prosecuted, and the use made of the information obtained in the prosecution.
 - (b) The general public interest in obtaining the information in question and using it to support criminal prosecution under the RTA.
- (5) Adopting this approach to the interpretation of the right against self-incrimination, there is nothing in the ECHR which rules out the use of information obtained under s.172(2) of the Road Traffic Act 1972 in support of a prosecution for an offence under s. 172(1) of that Act.

B. The special rules of interpretation applying to Article 6, ECHR.

2. It is well-recognised that certain rights under the ECHR are absolute in nature, Articles 2 (the right to life) and 3 (the prohibition on torture, inhuman and degrading treatment/punishment) being the classic examples. The general public interest cannot provide justification for interference with these rights. So, for example, the general public interest in the suppression of terrorism was irrelevant to the assessment by the European Court of Human Rights of whether the five interrogation techniques in issue in *Ireland v UK* (1979-80, 2 EHRR 25) amounted to inhuman or degrading treatment. Likewise, the 'undeniable difficulties inherent in the fight against crime' were irrelevant to the question of ill-treatment in custody in *Tomasini v France* (1993, 15 EHRR 1); and the European Court of Human Rights rejected the government's submission in *Chahal v UK* (1997, 23 EHRR 413) that there was an implied limitation to Article 3 entitling states to expel an individual even where a real

risk of ill-treatment existed, if such removal were required on national security grounds.

3. It is equally well-recognised that certain other rights under the ECHR are qualified in nature. These include Articles 8 (privacy), 9 (religion), 10 (expression) and 11 (peaceful assembly and association). The general public interest can be invoked to justify interferences with these rights, so long as any interference is prescribed by law, necessary and proportionate. What the Strasbourg bodies seek to achieve in relation to qualified rights is the appropriate balance between the rights of the individual and the requirements of the general public interest. The classic exposition of the principle of proportionality is whether there is 'a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the contested limitation' (*Fayed v UK*, 1994, 18 EHHR 393).
4. Article 6 is different. The general public interest can be taken into account when determining what the right to a fair trial under Article 6 means in any given context; but, once that meaning has been properly determined, Article 6 assumes an absolute character, such that no-one should be denied a fair trial because the public interest so demands. In other words, the general public interest is relevant to the proper interpretation of Article 6, but cannot justify its breach.
5. So, for example, the interests of national security are relevant to the interpretation of the extent of duty of disclosure in criminal cases (*Jasper v UK*, *Fitt v UK*, Appln 27052/95 and 29777/96 20th October 1999), as is privacy (*Z v Finland*, 1998, 25 EHRR 371); and the interests of the alleged victims of sexual offences are relevant to the interpretation of the meaning of the right to examine witnesses under Article 6(3)(d) (*Baegen v Netherlands*, 1992, A/327-B), as is the need to protect witnesses who genuinely fear reprisals (*Kostovski v Netherlands*, 1990, 12 EHHR 434):

'. . . in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.' (European Commission of Human Rights, *Baegen*, para. 77)

The question in such cases is not whether the general public interest justifies interference with the right to a fair trial, but whether – when the public interest is taken into account – there are counter-balancing factors or safeguards which ensure that there is a fair trial.

6. The same approach has been applied to the interpretation of other rights under Article 6, including the right of access to a court, the right to silence and the right not to shoulder the burden of proof in criminal prosecutions. See section D below.

C. The purpose and character of the right against self-incrimination.

7. When assessing the extent to which the general public interest can be taken into account in the interpretation of Article 6 rights, the European Court of Human Rights primarily has regard to the purpose and character of the right in question. So, for example, in *Kostovski*, the Court recognised the legitimacy of interpreting Article 6(3)(d) in such a way as would protect the rights of witnesses in genuine fear of reprisals, but found a breach of that provision because, on examination, the approach adopted in that case did not ensure a fair trial. The evidence of two anonymous witnesses was taken before the examining magistrates and then presented in hearsay form at the applicant's trial. Although the defence lawyers were permitted to ask questions of the magistrates at the trial, they had not been present at the earlier stage, and this defeated the purpose of Article 6(3)(d) which is to give the defence, at some stage of the proceedings, an adequate and proper opportunity to challenge and question prosecution witnesses.

8. On the other hand, in *X v UK* (1993, 15 EHRR CD 113), where screens were used to protect the identity of witnesses in a murder trial in Northern Ireland, the Commission found no breach of Article 6 (1) or 6 (3)(d). The fact that the witnesses could be seen by the judge and by both prosecution and defence counsel, their evidence could be heard by everyone and did not involve identification of the applicant, meant that their anonymity did not defeat the purpose of Article 6(3)(d).

9. The purpose of the right against self-incrimination is therefore important to any assessment of the extent to which the public interest can be taken into account in its interpretation. That purpose was examined in *Saunders v UK* (1997, 23 EHRR 313):

'The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused from improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and the fulfilment of the aims of Article 6.' (para.68)

Thus, the purpose of the right against self-incrimination is not a general protection against compulsion, nor a general prohibition of compulsorily obtained evidence in criminal proceedings, but a more specific protection against improper compulsion on the one hand and protection against unfair use of compulsorily obtained evidence.

10. Thus, consistent with the approach of the European Court In *Kostovski* and the approach of the European Commission in *X v UK*, the general public interest can be taken into account in the proper interpretation of the right against self-incrimination, but only insofar as it does not defeat its central purpose: protection against improper compulsion and protection against unfair use of compulsorily obtained evidence.

11. This interpretation of the right against self-incrimination gives appropriate weight to the general public interest in the fair prosecution of crime, while safeguarding the Article 6 rights of the individual. The question for determination is not simply whether there was compulsion and/or whether compulsorily obtained evidence is used in support of a criminal prosecution; but rather whether the nature and degree of compulsion makes it 'improper' and/or whether the circumstances in which the prosecution seek to use compulsorily obtained evidence render it unfair. The factors likely to be relevant to these issues in road traffic cases are discussed in section E below.

12. It is accepted that in *Saunders* the Court also observed 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 accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.' (para.68)

However, it is submitted that the words 'coercion' and 'oppression' here are used as examples of improper compulsion, not as an indication that the use of any evidence obtained by compulsion is improper.

13. Support for this proposition can be found in the next passage of the Court's judgement where it sets up the question for determination in the following terms;

'In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. The

question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6(1) of which the right not to incriminate oneself is a constituent element.’ (para.69)

If any use of compulsorily obtained evidence was outlawed under Article 6, there would be no need for assessing whether the use in any given case was ‘unjustifiable’; nor any need to examine all the circumstances of the case to see whether the use of ‘resulting testimony’ offended the principles of fairness demanded by Article 6.

14. This is consistent with the European Court’s refusal in *Saunders* to characterise the right against self-incrimination as absolute:

‘Nor does the Court find it necessary, having regard to the above assessment as to the use of interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.’ (para. 74)

And its conclusion in *Murray v UK* (1994, 22 EHRR 29) that the linked right of silence is not absolute (see para. 47): a conclusion drawn after analysis of the dual ‘immunities’ of the right against self-incrimination and the right of silence, which does not suggest that any different result would follow in the case of the right against self-incrimination (see further section D below).

15. It is further supported by the European Commission of Human Rights’ approach to traffic offences in *Tora Tolmos v Spain* (Appln. 23816/94), *D.N. v Netherlands* (Appln. 6170/73) and *J.P., K.R. and G.H. v Austria* (Appln. 15136-7/890). The fact that none of these decisions concerned the use of any reply as evidence in criminal proceedings is irrelevant. In *Tora Tolmos* the applicant invoked the right against self-incrimination as a defence to a prosecution for failing to provide information about the identity of the driver of his car when it was caught in a police speed radar trap. The Commission rejected this on the basis that the requirement to provide the information in question did not infringe the right against self-incrimination.

D. Consistency of approach with the interpretation of other Article 6 rights.

- 16 It is further submitted that the approach to the interpretation of the right against self-incrimination set out above is consistent with the approach adopted by the European Court of Human Rights to other rights under Article 6 ECHR, such as the right of access to a court, the right to silence and the right not to shoulder the burden of proof in criminal prosecutions.

Access to a court

- 17 In *Goulder v UK* (1979-80, 1 EHRR 524) the European Court recognised that a right of access to the courts was integral to the right to a fair trial under Article 6 on the basis that ‘. . . one can scarcely conceive of the rule of law without there being a possibility of access to the courts.’ (para. 34). However, it also recognised that the right of access is neither absolute nor inflexible: the right of access ‘by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.’ (para. 38)
- 18 This approach has been followed in cases involving minors, bankrupts (*M v UK*, 1987, 52 DR 266), those suffering from mental illness (*Ashingdane v UK*, 1985, 7 EHRR 528) and vexatious litigants (*H v UK*, 1985, 45 DR 281). The question in each case being the appropriate relationship between the general public interest and the right of the individual to access the court (see *Osman v UK* (2000, 29 EHRR 245), in relation to blanket immunities). Any restriction which destroys the very essence of the right of access being incompatible with Article 6.

The right to silence

19. The European Court has frequently referred to the right against self-incrimination and the right to silence as closely linked (see *Funke v France*, 1993, 16 EHRR 297, *Saunders v UK* (above), and *Murray v UK* (above)). In such circumstances, it is submitted, the Court’s approach to the right to silence is particularly instructive to the proper interpretation of the right against self-incrimination. As noted above, in *Murray* the Court observed that the right to silence is not absolute:

‘On the one hand it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s

silence or on the refusal to answer questions or give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative. . . .

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.' (para. 47)

The 'immunities' referred to at the outset of this passage being the right to silence and the right against self-incrimination.

The burden of proof

20. Closely allied to the right against self-incrimination is the right not to shoulder the burden of proof in criminal prosecutions. Yet this too is neither absolute nor inflexible. As a general rule the burden of proof is on the prosecution (*Barbera, Messegue and Jabardo v Spain*, 1989, 11 EHRR 360 at para. 77), but presumptions of fact and/or law are permitted, so long as they are kept 'within reasonable limits' (*Salabiaku v France*, 1991, 13 EHRR 379). A presumption that those in possession of large quantities of drugs are guilty of smuggling is not inconsistent with the proper interpretation of Article 6(2), so long as the individual in question is able to put forward a defence (*Salabiaku*): hence the distinction maintained in English law between legal and evidential burdens. (Note: the Court did not proceed on the basis that some breaches of Article 6(2) can be justified.)

E Factors relevant to the proper interpretation of the right against self-incrimination.

21. It is submitted that the following factors are relevant to the proper interpretation of the right against self-incrimination in the context of s.172 of the Road Traffic Act 1972:
 - (a) The nature and degree of compulsion used to obtain the information in question, the offence being prosecuted, and the use made of the information obtained in that prosecution.

- (b) The general public interest in obtaining the information in question and using it to support a criminal prosecution.

(a) Nature and degree of compulsion and nature of proceedings in question

22. *JUSTICE* submits that, as with the proper interpretation of the right to silence, the nature and degree of compulsion is a highly relevant factor in the proper interpretation of the right against self-incrimination. On the one hand, any compulsion backed up by the threat or use of force would necessarily be improper. On the other hand, the compulsory provision of information in the context of a truly regulatory scheme - such as fishing pursuant to a special licence - would normally be proper (see the Canadian Supreme Court in *R v Fitzpatrick* [1995] 4 SCR 154).
23. *JUSTICE* accepts, for the reasons set out in the subsequent Canadian Supreme Court case of *R v White* ([1999] 2 SCR 417), that it is questionable whether the ownership of a vehicle and/or the obtaining of a driving licence can properly be characterised as regulatory in the sense used in *Fitzpatrick*. However, it does not follow that the fact that ownership and driving of a vehicle are voluntary activities and/or that the owners and drivers are subject to special obligations, not applicable to the general public, are irrelevant to the question of whether compulsion is proper or improper. While it may be proper to obtain and use information for the purposes of prosecuting an offence under the RTA, it may be improper to obtain and/or use the same information for other purposes.
24. Ultimately, what is improper compulsion and/or unfair use will be a question for the courts to determine on a case by case basis. But, *JUSTICE* submits, it is perfectly consistent with the purpose underpinning the right against self-incrimination that the use of detailed information obtained in the course of seven lengthy DTI interviews to wholly undermine a defence presented in subsequent criminal proceedings, as in *Saunders*, is improper or unfair, while the use of a standard s.172(2) RTA admission to support a prosecution for a road traffic offence may not be.

(b) The general public interest

25. *JUSTICE* further submits that there is a clear and obvious public interest in the prosecution of RTA offences. This public interest can justify a more restrictive interpretation of the right against self-incrimination in the context of RTA prosecutions than would be permitted in relation to other offences, so long as any such interpretation leaves intact the twin pillars of the right against self-incrimination:

protection from improper compulsion and unfair use of compulsorily obtained evidence.

F Application of approach to s. 173 Road Traffic Act 1972

26. In the circumstances, it is submitted that there is nothing in the ECHR which rules out the use of information obtained under s. 172(2) of the Road Traffic Act in support of a prosecution for an offence under s.172(1) of that Act.

30th October 2000

[signed]

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