THE CHALLENGE OF THE ECHR

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INTRODUCTION: INCORPORATION IN THE UK

The UK Human Rights Act, 1998 which incorporated the European Convention on Human Rights into domestic law, came into effect in England and Wales in October 2000 (it had come into effect in Scotland two years earlier). Speaking at the opening of the judicial year at the European Court of Human Rights in Strasbourg two years later in January 2003, the then Lord Chief Justice of England and Wales, Lord Woolf, said:

> ...[W]hile previously a few experts in the United Kingdom were aware of the rich jurisprudence of this [Strasbourg] Court, now that jurisprudence is familiar to every judge and competent lawyer in the country. In the cases that I hear it is rare for a decision from Strasbourg not to be cited at some stage of the hearing ...[1]

Four and a half years on from then, virtually every major decision in the Court of Appeal for England and Wales or the House of Lords involves serious consideration of the European Convention, which frequently has a significant effect on the outcome. The Convention has permeated and helped to reinvigorate the UK legal system and the judiciary. At its best, this has resulted in a productive cross-fertilisation between the Convention and the common law which perhaps helped to steel the British judiciary to curb some of the worst assaults on civil and human rights by the Blair administration.

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[1] Speech on the occasion of the opening of the judicial year, European Court of Human Rights, Strasbourg, 23 January 2003; www.judiciary.gov.uk.

One of the most notable examples was the Belmarsh detainees case in December 2004 when the House of Lords held that the indefinite detention without charge of foreign terrorist suspects was incompatible with Articles 5 and 14 of the European Convention.[2] The Law Lords also quashed the derogation which the British government had entered to the European Convention to allow them to hold the detainees without trial. The decision led to the release of the detainees and the resignation of the then Home Secretary, David Blunkett.

In another key decision in December 2005, the House of Lords ruled out the use of evidence in immigration tribunals which had been obtained by torture inflicted by foreign agencies. Lord Woolf's successor, Lord Bingham, based his decision on both the common law and the European Convention. He said:

> The principles of the Common Law, standing alone, compelled the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.
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> But those principles did not stand alone. Effect had to be given to the Human Rights Convention which itself took account of the all but universal consensus embodied in the Torture Convention.[3]

And in June this year, in the teeth of strong opposition by the UK Attorney General, the Lords held that the Human Rights Act, and therefore the provisions of the European Convention, applied to the death in British army custody of Baha Mousa, an Iraqi civilian who had been seized by British soldiers in southern Iraq.[4]

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[2] *A and Others v. Secretary of State for the Home Department* [2004] U.K.H.L. 56, 16 December 2004.

[3] *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] U.K.H.L. 71, 8 December 2005.

[4] *Al-Skeini and Others v. Secretary of State for the Home Department* [2007] U.K.H.L. 26, 13 June 2007.

Needless to say, not all recent decisions by the higher courts in the UK have been quite as independent and challenging to the executive as the ones I have cited. And the judges have not all been equally robust in their defence of human rights and civil liberties. In the torture evidence case, for example, Lord Bingham was in a minority in holding that immigration tribunals should exclude evidence if there was any doubt as to whether it had been obtained by torture. The majority held that where there was a doubt, the evidence might be admitted but the doubt should affect its credibility.

Nevertheless, many less headline-making decisions in criminal and civil cases in the UK have turned on Convention points and some 18 declarations of incompatibility with the Convention had been made and upheld by the courts up to July 2007. Twelve of these have already resulted in changes in the law, two are under appeal, and in the remaining four cases, the UK government is considering how to remedy the incompatibility.[5] Six declarations made by the High Court have been overturned on appeal. In a number of other cases statutes have been "read down" or amended by the courts to bring them into line with the Convention. There can be no doubt that the European Convention has had a very significant and positive effect on the British legal system.

THE IRISH POSITION

The European Convention on Human Rights Act, 2003 has been in force in this jurisdiction for three and a half years now, one year longer than the Human Rights Act at the time Lord Woolf addressed the Strasbourg Court. How do we compare?

Can we say with confidence that the Strasbourg jurisprudence is familiar to every judge and competent lawyer in the State, or that it is rare for a decision from Strasbourg not to be cited in the cases heard by our senior judiciary? I will not attempt to answer that.

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[5] See Appendix, 'Declarations of Incompatibility made under section 4 of the Human Rights Act, 1998'. Table compiled by the UK Ministry of Justice, up to date to 24 July 2007. Available at www.jsijournal.ie.

At the time of delivering the paper on which this article is based (June 2007) no declarations of incompatibility had been granted in this jurisdiction and the Convention appeared to have played a critical role in only two cases that I knew of: *Bode v. The Minister for Justice, Equality and Law Reform*,[6] where judgment was given by Ms Justice Finlay Geoghegan on 14th November 2006 and where the State's appeal had been heard a few months earlier by the Supreme Court; and *O'Donnell v. South Dublin County Council*[7] where judgment was given by Ms Justice Laffoy on 23rd May 2007. In that case the court found a breach of Article 8 of the Convention where the Council had failed to provide adequate accommodation for a Traveller family, three of whom suffered from a severely incapacitating condition.

On the plus side, both of these decisions were extremely thorough, comprehensive and well argued and in the *O'Donnell* case Ms Justice Laffoy held that Article 8 of the Convention imposed a positive obligation on the county council to provide appropriate accommodation for the family in question. Her judgment was also notable because she found a breach of a Convention right where there was no breach of the family's Constitutional rights, strengthening the argument that the Convention can sometimes supplement the protections offered by the Constitution.

The first declaration of incompatibility under the ECHR Act, 2003 has now been granted, by Mr Justice McKechnie in the case of *Lydia Foy v. An t-Ard Chlaraitheoir & Others*.[8] The European Convention also played a significant role in the decision by Mr Justice McKechnie in the case of "Mr. G", an unmarried father whose former partner had removed their children to England without his consent. Judge McKechnie held

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[6] *Bode v. Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 341, 14 November 2006

[7] *O'Donnell v. South Dublin County Council*, unapproved, High Court 2006/1904P, 22 May 2007.

[8] "Judge says State did not recognise female identity of woman", *Irish Times*, 20 October 2007.

that the removal of the children without his consent was a breach of Mr G's rights under Article 8 of the Convention.[9]

Up to now there does not appear to have been any decision in a criminal case that depended wholly or significantly upon a Convention provision.[10]

There have been varying explanations for the low take-up of the 2003 Act compared with the position in the UK, one of them being that because of the fundamental rights provisions already present in the Constitution and the well developed tradition of judicial review and constitutional jurisprudence in this jurisdiction, we have less need of the protections provided by the European Convention than our nearest neighbours.

While there is probably some truth in this argument, it would be disrespectful of the long tradition of common law jurisprudence in the UK, especially around the issue of fair trial, to place too much stress on this factor. It would also raise questions about the long-running practice of relying on UK case law as authority in our criminal and civil courts. And while the British courts went badly wrong in the series of IRA bombing trials in the 1970s, something which may have contributed to their development of a more independent and questioning role today, we cannot afford to be too complacent here. The Sallins Mail Train case should serve as a salutary reminder that all legal systems have their failings and miscarriages of justice.

DIFFERENT PERSPECTIVES

In a perceptive paper to a recent conference in Trinity College Dublin on *The Constitution at 70*,[11] Dr. Colm Ó Cinnéide argued that while the fundamental rights protected by the Irish

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[9] "Unmarried father wins right to seek return of twin boys", *Irish Times*, 12th September 2007.

[10] In the case of *Quinn v. O'Leary and Others* [2004] I.E.H.C. 103, the High Court quashed the applicant's conviction under s.52 of the Offences Against the State Act, 1939 following a decision by the Strasbourg Court that his rights under Article 6 of the Convention had been breached (see below). The reasoning of the Court was somewhat opaque, however.

[11] Dr. Colm Ó Cinnéide, "The ECHR and the Irish Constitutional Scheme of Rights: Complementary or Divergent?", presented at the conference *The Constitution at 70*, Trinity College Dublin, 8-9 June 2007.

Constitution overlapped quite closely with those protected by the European Convention, there were differences in emphasis in the jurisprudence of the domestic and European courts, with some elements more developed in one forum than the other. This was due in particular to the more heterogeneous and culturally diverse community served by the Strasbourg Court. He pointed, for example, to Strasbourg's greater tolerance of differing sexual orientation and gender identity and of different family forms, and its somewhat more developed view of positive obligations on the State and public authorities. He suggested that Strasbourg might take a more robust view than the domestic courts of the executive's responsibility to provide, for example, for the education of autistic children.

Dr. Ó Cinnéide pointed to these as areas where Strasbourg case law might bring added value to and even help to revitalise our constitutional jurisprudence.

I would add as well two other areas, more directly relevant to the theme of this conference, where Strasbourg might take a different and sharper view than our domestic courts. One is the area of emergency or anti-terrorist legislation, where I would suggest that our courts have grown complacent about exceptional measures which have now been in force for some 35 years without any 'decommissioning'. The courts have also tolerated a situation where these measures have from time to time been used to deal with "ordinary" crime as well as paramilitary activities, as when the Special Criminal Court was used to try drugs cases and persons charged in connection with the murder of the journalist Veronica Guerin.

The other area is the series of measures introduced in recent times under the banner of 'Rebalancing the Criminal Justice System' and ostensibly directed against organised or "gangland" crime, and in particular the provisions for allowing courts to draw inferences from the silence of the accused when being questioned by the Gardaí. I might add in passing that it seems ironic that in an era of extraordinary advances in forensic science that can assist in detecting and preventing crime, we should still place so much reliance on interviews with suspects and obtaining admissions, and that we are now proceeding to dismantle some of

the safeguards developed over the years to protect people from being pressurised into making false admissions.

Faced with the undoubtedly disturbing growth of drug-related violent crime, there has been a political consensus to bring in ever harsher laws to combat this phenomenon. This does not appear to have been accompanied by much thought about how to eliminate the causes of this type of crime, or about the effect these broad brush measures will have on the small fry who get caught up on the fringes of criminal activity through their own vulnerability.

Courts and judges are not immune to the shrill clamour of radio talk shows and the political consensus for tougher measures. A court that sits at a distance and with a broader perspective, and whose remit is to uphold fundamental rights rather than to adjudicate upon the particular facts of each case, may help to hold the line on the basic principles of due process and fair trial at a time when we are in danger of seeing serious damage done to our criminal justice system.

As for the question of emergency laws, the Strasbourg Court is no stranger to the problem of balancing the need for public security against the importance of preserving the fundamentals of the democracy that its member states are striving to protect. It has had to grapple with such issues in relation to other member states such as Spain and Italy, as well, of course, as the UK. But once again judges a little removed from the immediate effects of the problem can sometimes see things more clearly and can keep the overall principles more firmly in view.

Thus, in relation to this jurisdiction, the Strasbourg Court in the cases of *Heaney and McGuinness v. Ireland*[12] *and Quinn v. Ireland*[13] in December 2000 held that section 52 of the Offences Against the State Act, 1939, which made it an offence for someone arrested under the 1939 Act not to give an account of his/her movements "destroyed the very essence of [the] privilege against self-incrimination and [the] right to remain silent", whereas the Supreme Court had upheld the constitutionality of s. 52 in *Heaney v. Ireland* in 1996.[14] The Strasbourg Court had

[12] *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 12.
[13] *Quinn v. Ireland* (2001) 33 E.H.R.R. 264.
[14] *Heaney v. Ireland* [1996] 1 I.R. 580 (S.C.).

gone on to state that a perceived crisis situation did not justify undermining fundamental legal principles.

Following the *Quinn* and *Heaney and McGuinness* decisions, the heavens have not fallen, the barbarians have not come noticeably closer to the gates and legal commentators have generally nodded their heads and agreed that s.52 of the 1939 Act was obviously in conflict with Convention and constitutional rights all along. But complacency had set in and the Supreme Court could see nothing wrong with this measure. It took the more critical eye of an external court to see the flaws in something that had just become too familiar to our legal community.

THE CHALLENGE

The topic of this paper is "The Challenge of the ECHR" and I suggest that in the criminal justice area that means using the European Convention to scrutinise and test our laws and practice so as to ensure that they measure up to the common standards that lie at the core of the Constitution and the European Convention, but are sometimes accorded less priority in one system than the other.

I would like to look at just two specific examples out of the many that could be chosen. One is in the field of emergency laws and the other is a section of the new Criminal Justice Act, 2007.

THE CHIEF SUPERINTENDENT'S BELIEF EVIDENCE

In the emergency law area, Section 3 (2) of the Offences Against the State (Amendment) Act, 1972 provides that:

> Where an officer of the Garda Siochana, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said Section 21 [membership of an unlawful organisation] states that he believes that the accused was at the material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

This provision is frequently used in the Special Criminal Court in connection with charges of IRA membership and its use was upheld last year (April 2006) by the Supreme Court in the case of *D.P.P. v. Martin Kelly*.[15] When questioned about the basis for his belief, the Chief Superintendent has invariably claimed privilege, saying that to give any information about his sources would endanger lives. This has been generally understood to refer to informants. The result is that the court is effectively receiving hearsay evidence from anonymous sources and about unknown events and is totally dependent on the Chief Superintendent's assessment of the reliability of those sources.

The accused person cannot defend him or herself against allegations of involvement in unspecified criminal conduct made by persons who cannot be cross-examined and whose character or motives cannot be challenged, despite the obvious dangers of relying on evidence from informants – unreliability, spite, desire to cover their own tracks etc. This latter point has been thrown into sharp relief by recent revelations in Northern Ireland, where it appears that some police informers in the IRA and loyalist organisations were at the very core of the activities of those groups and may have set up others in order to protect themselves.

The scheme of s.3(2) seems to effectively transfer some of the functions of the court to the Chief Superintendent, empowering him to evaluate the evidence of his sources and come to a conclusion about the guilt or innocence of the accused without the latter having any opportunity to rebut the allegations, and without any of the procedures and safeguards that have been developed so painstakingly over the years to protect accused persons.

The Special Criminal Court has adopted a practice of requiring some corroboration of the Chief Superintendent's evidence before convicting but the value of that practice has been undermined by the introduction of section 2 of the Offences Against the State (Amendment) Act, 1998, which allows the court to draw adverse inferences from an accused's failure to answer "material" questions when in Garda custody. This means that an accused could conceivably be convicted on the basis of just the

[15] *D.P.P. v. Kelly* [2006] 3 I.R. 115 (S.C.).

Chief Superintendent's belief and the accused's own silence under questioning, and without the need for any evidence of the old-fashioned variety at all.

All this appears to run clearly counter to Article 6(3)(d) of the European Convention which provides that "Everyone charged with a criminal offence has the following minimum rights … to examine or have examined witnesses against him …" .

The Strasbourg Court dealt with this issue in a series of cases beginning with *Kostovski v. The Netherlands*[16] in 1989, in which the Court reviewed instances where trial courts in several countries had relied on statements from anonymous witnesses or hearsay evidence from the parents of children alleging sexual abuse, or evidence from police who had interviewed the complainants. Despite allowing the possibility that some witnesses might be allowed to remain anonymous in particular circumstances, the European Court held that a defendant could not have a fair trial unless s/he had had an opportunity to confront and cross-examine the prosecution witnesses or have them examined by lawyers for the defence.

In *P.S. v. Germany*[17] in 2001, the Strasbourg Court summed up its rulings in a number of such cases:

> 21. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage…
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> 24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or

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[16] *Kostovski v. Netherlands* (1990) 12 E.H.R.R. 434; *Windisch v. Austria* (1990) 13 E.H.R.R. 281; *Ludi v. Switzerland* (1993) 15 E.H.R.R. 173; *Doorson v. Netherlands* (1996) 22 E.H.R.R. 330; *Van Mechelen v. Netherlands* (1997) 25 E.H.R.R. 647; *A.M. v. Italy*, Application No. 37019/97, 14 December 1999; *Luca v. Italy*, Application No/ 33354/96, 27 February 2001.

[17] *P.S. v. Germany*, Application No. 33900/96, 20 December 2001.

> have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 …

A similar view was taken by the late Mr. Justice Diarmuid O'Donovan when, giving the judgment of the Special Criminal Court in the case of *D.P.P. v. Binead and Donohue*[18] in November 2004, he said:

> [I]t is the view of the court that, if no enquiry whatsoever is made into the basis of Chief Superintendent Kelly's belief, there is substance to the defence argument that there is an imbalance in the trial in favour of the prosecution and an absence of equality of arms which could be interpreted as a lack of fairness insofar as the accused are concerned. The court is also of the view that Article 6 of the European Convention on Human Rights, which is now part of the domestic law in this country, does augment the traditional rights of an accused person in the course of his/her trial, in that it is now the law that one of their minimum rights is the right to examine and <u>have examined</u> [original emphasis] witnesses against them. In the context of this case, this right would appear to the court to include the right to have Chief Superintendent Kelly examined with regard to the basis of his belief.

The court's solution was not much improvement from the defence point of view as they then proceeded to examine documents produced by the Chief Superintendent without disclosing them to the defence and the accused were convicted. However, the judges had at least signalled their unease about this provision.

On the other hand, the Supreme Court, in the case of *D.P.P. v. Martin Kelly*, as referred to above, upheld s.2(3) of the 1972 Act in April 2006. Mr Justice Geoghegan, giving the majority

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[18] *D.P.P. v. Binead and Donohue*, Special Criminal Court, Bill No. SP011/03, 18 November 2004; see also decision of the Court of Criminal Appeal, *D.P.P. v. Binead and Donohue* [2006] I.E.C.C.A. 147.

judgment, acknowledged that "the normal rights of an accused are being infringed" by the use of the Chief Superintendent's evidence, but held that this was justified in the context of protecting the security of the State and where witnesses might not otherwise come forward for fear of reprisals. He also stressed that in the instant case, there was other significant evidence against the accused.

Mr Justice Fennelly, in a separate judgment, seemed more troubled by the restriction on the defendant's right to cross-examine his accusers which, he said, had "the potential for unfairness". He too took comfort from the fact that there was other significant evidence against the accused and suggested that his decision might be different if the Chief Superintendent's evidence stood alone and the accused denied the charge in evidence.

Such cut and dried cases rarely occur in real life, however, and this appears to be an issue that will have to go to Strasbourg to be resolved. It may be that this is another case where our courts have become too complacent about emergency or anti-terrorist laws which undermine the rights of defendants and where the European Court, with the benefit of distance, may take a more stringent view.

INFERENCES FROM SILENCE

The other specific area I want to look at is the provision in the Criminal Justice Act, 2007 allowing a court to draw adverse inferences from the failure of accused persons to mention facts during questioning which they later rely on in their defence. Similar provisions were already included in the Criminal Justice (Drug Trafficking) Act, 1996 (s.7), and the Offences Against the State (Amendment) Act, 1998 (s.5) but were rarely, if ever, used. Now section 30 of the 2007 Act, which inserts a new section 19A into the Criminal Justice Act, 1984, allows courts to draw inferences in relation to all arrestable offences. That means the new provision will apply to all except the most minor offences, not just drug trafficking, IRA offences and the serious "gangland" crime which was originally said to be the target of this Act.

The 2007 Act also re-enacts Sections 18 and 19 of the 1984 Criminal Justice Act which allow for inferences to be drawn from the accused's failure to account for marks or objects found on his or her person or for their presence in a particular location. These provisions had also been very little used up to now. It will also retain the provision in the 1998 Offences Against the State (Amendment) Act for drawing inferences from failure to answer "material" questions already referred to above. However, I want to concentrate here on inferences from failure to mention facts relied on in defence. Because this applies to such a wide range of offences, it threatens to fundamentally alter the right to silence which has been up to now a core element of our criminal justice system.

In 1999, Keane C.J. said in the Supreme Court in the case of *D.P.P. v. Finnerty*[19] that the right to silence

> would…be significantly eroded if at the subsequent trial of the person concerned the jury could be invited to draw inferences adverse to him from his failure to reply to those questions and, specifically, to his failure to give the questioning Gardai an account similar to that subsequently given by him in evidence. It would also render virtually meaningless the caution required to be given to him under the Judges' rules.

It is worth reflecting for a moment on why persons being questioned in a Garda station might fail to mention facts later relied on in their defence – or why a solicitor might advise them not to answer questions.

A great many of the people questioned in Garda stations are poorly educated, come from deprived backgrounds and are often vulnerable due to addiction to drugs or alcohol. They are likely to be frightened and confused and may not remember where they were or who they were with on any given date and they may have no idea what facts may be relevant to their defence until they have had an opportunity to discuss the case in detail with their solicitor.

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[19] *D.P.P. v. Finnerty* [1999] 4 I.R. 364 (S.C.).

And a solicitor may feel that the best advice he or she can give to certain clients is not to answer questions because in their confused or frightened state they may make mistakes and get themselves into deeper trouble, or even, like the unfortunate – and innocent – Dean Lyons, end up confessing to a murder they did not commit. By the same token, this new provision also creates considerable problems for solicitors who will have to consider carefully the advice they give to clients as it could lead to adverse inferences being drawn against the client and/or to pressure on the solicitor to give evidence as to why that advice was given.

The new Section 19A does contain certain important safeguards, *i.e*. that inferences cannot be drawn unless the accused had "a reasonable opportunity to consult a solicitor *before* such failure occurred,"[20] and unless, as a general rule, the interview was electronically recorded. And an accused person may not be convicted solely or mainly as a result of such an inference being drawn. But the real danger is that inferences may be used to bolster a weak or circumstantial case that would not succeed otherwise.

The new provision is closely modelled on section 34 of the UK's Criminal Justice and Public Order Act, 1994 and its sister provision section 35 (allowing inferences from an accused's failure to give evidence at trial), about which Lord Bingham said with considerable foresight in *R v. Birchall* in 1998:

> The drawing of inferences from silence is a particularly sensitive area. Many authorities have voiced the fear that Section 35 and its sister sections may lead to wrongful convictions. It seems very possible that the application of these provisions could lead to decisions adverse to the United Kingdom at Strasbourg under Article 6.1 and 6.2 of the European Convention of Human Rights …[21]

In fact, s.34 has twice been considered by the European Court, in *Condron v. United Kingdom*[22] in 2000 and in *Beckles v.*

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[20] Emphasis added.
[21] *R v. Birchall* [1998] E.W.C.A. Crim. 177.
[22] *Condron v. United Kingdom* (2001) 31 E.H.R.R. 1.

United Kingdom[23] in 2002. The Strasbourg Court had held in *Murray v. United Kingdom*[24] in 1996 that the right to silence was not absolute and that a court could take into account the accused's silence in a situation that clearly called for an explanation. However, in *Condron* the Court held that there had been a violation of the Convention because an inference had been left to the jury where a solicitor had advised the accused, whom he felt were suffering from drug withdrawal symptoms, not to answer questions. And in *Beckles* the Strasbourg Court had also found a violation where the judge had not advised the jury that they could only draw an inference if they believed that the accused's silence "must be consistent only with guilt."

In another, non-UK, case, *Telfner v. Austria*[25] in 2001, the Strasbourg Court held that drawing an inference from silence where the prosecution had not established a *prima facie* case had "unfairly shifted the burden of proof from the prosecution to the defence."

The UK appeal courts have had to consider a large number of cases involving sections 34 and 35 of the Criminal Justice and Public Order Act, 1994 since they came into operation, to the extent that the Court of Appeal described s.34 as "a notorious minefield" in *R. v. B (K. J.)*[26] in 2003.

As a result of the Strasbourg jurisprudence and their own efforts to interpret and apply the law consistently with the Convention, the British courts have developed some further safeguards to be applied before adverse inferences can be drawn:

- the fact or facts that the defendant failed to mention must be accurately identified;
- there must be a warning that no inferences may be drawn unless the jury is satisfied that there is a case to answer without the inferences;
- before drawing an adverse inference, the jury must be sure that the accused remained silent not because of

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[23] *Beckles v. United Kingdom* (2003) 36 E.H.R.R. 162.
[24] *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29.
[25] *Telfner v. Austria* (2002) 34 E.H.R.R. 207.
[26] *R. v. B (K. J.)* [2003] E.W.C.A. Crim. 3080.

his/her solicitor's advice but because he or she had no satisfactory evidence to give.

These and some other matters are set out in a Practice Direction adopted by the England and Wales Judicial Studies Board in 1995.[27]

The challenge of the Convention in relation to this major and worrying change in our criminal law is to ensure that the courts apply this provision in a way that incorporates all the safeguards developed from the Convention itself, the Strasbourg jurisprudence and the UK courts' endeavours to interpret s.34 of their 1994 Act consistently with the Convention. In a paper for a conference on the 2007 Act in May last in TCD,[28] I attempted to draw together a list of the main safeguards so developed, compiled from Strasbourg and UK jurisprudence. [29]

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[27] Judicial Studies Board of England and Wales, 'Practice Direction 40. Defendant's Failure to Mention Facts when Questioned or Charged – Section 34 CJPOA 1994'. Available on the website of the Judicial Studies Board at athttp://www.jsboard.co.uk/criminal_law/cbb/mf_05.htm. See also *Archbold* (2003) 15-321, p.1460 et seq. and *Blackstone* (2003) F19.4, p.2326 *et seq*.

[28] *The Criminal Justice Bill 2007: Implications for Law and Practice*, Trinity College, Dublin 9 May 2007

[29] These are:

1. The accused person must have access to legal advice at the commencement of any interviews which might lead to adverse inferences being drawn; *quaere*: should this right to legal advice extend to having a solicitor present during interviews?
2. The caution given before questioning must be clear and specific as to what sort of inferences can be drawn from failure to answer questions, and what sort of questions may lead to inferences being drawn;
3. If an explanation for marks, objects, or being in a certain place at a specific time etc. is furnished some time after questioning but before trial, that fact and when the information was supplied must be taken into account in deciding whether to draw inferences;
4. Where it is suggested that an inference should be drawn from the accused's failure to mention a fact later relied on in the defence, no comment should be made on the accused's silence until the defence has been presented and it becomes clear that the accused is relying on something not previously mentioned;
5. The jury must be instructed as to exactly what fact or facts are the subject of an application for them to draw inferences;

However, it is important to point out that there is one major difference between the UK situation and here. In the UK, persons being interviewed in police stations are entitled to have their solicitors present during interviews. Given the complexity of the issues involved and the major change in the nature and consequences of Garda interviews that this new provision entails, I would suggest that perhaps the most important safeguard against injustice resulting would be that solicitors should be allowed to attend at any interviews and that no inferences could be drawn where a solicitor was not present. If that is not accepted, then I suggest that our courts must apply all the safeguards developed by Strasbourg and the UK courts but with a considerably heightened or more anxious level of scrutiny than applies in the UK.

It may be that after all these important and necessary safeguards have been applied, this new provision will turn out to be more trouble than it is worth.

THE RIGHT TO PROTEST

There are many more challenges posed by the European Convention but because it is topical here at the moment I would just like to mention in passing the right to assemble and to protest under Articles 10 and 11 of the Convention. These were given a refreshingly broad and facilitative interpretation by the House of Lords in November 2006 in the case of *R. (Laporte) v. Chief*

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6. The jury must be instructed not to consider drawing inferences unless they are satisfied that the accused has a clear case to answer without reliance on the suggested inferences;
7. The jury must take into account whether the accused was relying on his/her solicitor's advice when declining to answer questions;
8. Before drawing any adverse inference, the jury must be sure/satisfied that the accused's silence was due to having no answer to offer or none that would stand up to cross-examination. "[I]f the defendant gives any exculpatory explanation of his failure to mention [something not mentioned earlier] which the jury accept as true or possibly so, it would be obviously unfair to draw any inference adverse to him from his failure to mention it". (R v. Webber [2004] 1 W.L.R. 404; [2004] U.K.H.L. 1)

Any adverse inference drawn can only be supportive of the State's case. It cannot form a substantive part of the reasons for conviction.

Constable of Gloucestershire.[30] The Lords held that the Gloucestershire police had breached the applicant's rights when they stopped a busload of protesters on their way to an anti-Iraq war demonstration at an air force base and compelled them to return to London under police escort. The police had justified their action on the basis that they believed that some of the protestors intended to use violence when they got to the base. It would be interesting to see if this has any implications for anti-war protests at Shannon or protests against the Corrib gas pipeline at Rossport in County Mayo.

CONCLUSION

In conclusion, the ECHR Act, 2003 has brought the European Convention directly into our law, and I would stress that way of putting it. The Act does not just make the Convention more persuasive in our courts. It creates a legal obligation on state organs to act compatibly with the Convention and an obligation on the courts to interpret the law as far as possible in accordance with the Convention.

That should not be seen as a threat to or as likely to undermine the Constitution. It should be seen instead as an opportunity to combine the insights of our constitutional law with those of a court implementing essentially the same principles but from the sometimes different and wider perspective of a Europe-wide jurisdiction with all the diversity that that involves. It also has the advantage that in a situation where our legislation is more and more driven by other European institutions, the Convention, though operating in a parallel sphere to the European Union, has been ratified and incorporated by all the EU member states and can play an important role in developing safeguards in relation to EU legislation as well as national laws.

The UK courts have, perhaps surprisingly, embraced the European Convention and it has led to a welcome reinvigoration of rights protection in that jurisdiction. While acknowledging, of course, that some will believe that we do not need the same

[30] *R. (Laporte) v. Chief Constable of Gloucestershire* [2006] U.K.H.L. 55, 13 November 2006.

external prompting as our less enlightened neighbours, it is still possible that the Convention could help to shine a light into some dark or neglected places in this jurisdiction as well.

The challenge is to use the Convention willingly and constructively to broaden and deepen our already substantial body of fundamental rights jurisprudence. In that sense perhaps we can say that the Convention has come not to destroy the Constitution but to fulfil it.