

The Challenges of Transnational Investigation: Protection against self-incrimination and the obligation to contribute to investigations

Jacqueline Hodgson

School of Law, University of Warwick, UK

Self-incrimination

- In and out of court
- Direct compulsion implies a criminal sanction for non-compliance
- Indirect compulsion eg the caution in E&W

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.”

A definition

- Direct self-incrimination eg confession
- Indirect self-incrimination eg information assisting the prosecution
- The (New Zealand) Evidence Act 2006 s.4 defines self- incrimination as:

“the provision of information that could reasonably lead to, or increase the likelihood of, the prosecution of that person for a criminal offence.”

- ECtHR and national courts have adopted a more restrictive approach to the scope of the privilege



An implied right under Art 6 ECHR

- Art 6 – presumption of innocence; RTS and privilege against self-incrimination not explicitly included
- Recognised in *Funke v France* (1993) and *Murray v UK* (1996) where the Court stated:

“...there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6...By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6”

Rationale of the privilege

- Supports the presumption of innocence by requiring the state to produce independent evidence of the guilt of the accused – without being tempted to coerce her to provide incriminating evidence (*Saunders v UK* 1997)
- Coercion is seen to undermine evidence credibility, as well as the dignity of the accused
- Compelling answers to the administrative enquiry (a non-judicial investigation) was acceptable; using them in a subsequent criminal trial was not
- Is this distinction realistic? Is it acceptable to rely on the compelled testimony indirectly eg prompting investigations that lead to prosecution? (*cf* the New Zealand definition)



Material which has an existence
independent of the will of the
suspect



This is thought to apply to
“documents acquired pursuant to a warrant,
breath, blood and urine samples and bodily
tissue for the purpose of DNA testing.”

(Saunders v UK 1997)

Documents

- In *Funke v France* (1993) and *JB v Switzerland* (2001) compulsion to provide financial documents was held to breach Art 6
- Is this explained because not acquired pursuant to a warrant ie there is a choice and so compulsion? Is a warrant more akin to force and so no choice/compulsion?
- But in *A-G's Ref (No. 7 of 2000)* documents obtained by compulsion (**not a warrant**) did not breach Art 6 – provided they did not contain any compelled statements of the accused. Distinction between information and personal testimony.

Real Evidence & Body Samples

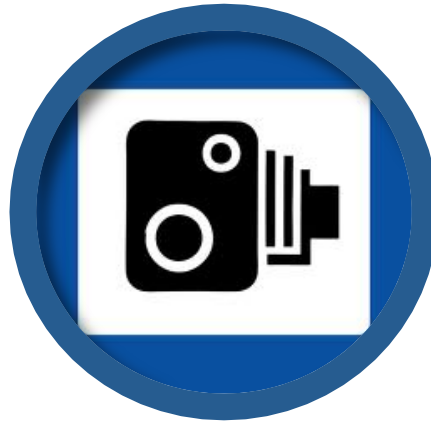
- In the graphic case of *Jalloh v Germany* (2007) the accused was **forced** (not compelled) to regurgitate a bag of cocaine through forced administration of emetics.
- So, no choice, more like the warrant situation
- But, held to breach Art 6 (as well as Art 3 inhuman & degrading treatment)
- *Saunders* contemplated that the privilege would not attach to body samples



Neutral evidence

- *Jalloh* argued that the cocaine was real evidence – not like a body sample that will then be tested to see if it contains evidence such as alcohol or drugs
- Same analogy used for requiring an encryption key – this was neutral, but may then allow the discovery of incriminating evidence on the computer (*R v S(F)* 2008)
- This would not fit with the New Zealand definition. The encryption key and body sample are no incriminating *per se* but they may amount to “the provision of information that could reasonably lead to, or increase the likelihood of, the prosecution of that person for a criminal offence.”

Driving cases



O'Halloran & Francis v UK 2008 – providing information as to the driver of the vehicle is not *per se* incriminating and no violation of Art 6. Balancing exercise:

Terrorism offences

- What of terrorism offences that require disclosure of information that might be of practical assistance in preventing acts of terrorism or in capturing a terrorist?
(s38B Terrorism Act 2000)
- This is neither neutral (or the obligation would not exist) nor enforced by a warrant – there is a choice and there is compulsion backed by criminal sanction



Overall approach to indirect compulsion

- The privilege applies only to incriminating evidence, not 'neutral' material (or where the probability of its being used is unclear)
- The privilege concerns compulsion to cooperate, not the use of force
- The use of severe force may engage the privilege (eg if there is also a finding of Art 3 violation as in *Jalloh*)

Right to silence

- ECtHR held criminalising refusal to answer police questions violates Art 6 even in investigation of 'serious & subversive crime'

... the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.
(*Heany & McGuinness v Ireland* 2001)

- Adverse inferences may be drawn provided there is no credible explanation for failure to provide the information, where it is not the sole basis of conviction and where the jury is properly directed (*Condon v UK* 2001)



RTS in context

- Suspect must be informed of RTS for it to be effective
- France pre-2011 – understanding of police investigation as preliminary and unimportant; rights kick in during judicial investigation (but, less than 5% & limited nature of prosecutor supervision)
- *Conseil constitutionnel* 2010 recognised centrality of police evidence obtained during GAV
- Arrest, charge & prosecution understood differently eg EAW cases
- Adverse inferences in E&W



RTS & other safeguards

- Rights often inter-dependent – more palatable to attenuate RTS once s58 PACE provided statutory right to custodial legal advice
- But what if other rights are ineffective? Poor quality legal advice; distant and retrospective judicial supervision
- Requirements to disclose defence outline to receive full disclosure in E&W and as part of ‘case management’ – undermines adversarial model and so effectiveness of other safeguards

Transnational investigations

- Evidence sharing as under proposed Eurc Investigations Order
- How treat material gathered under differ regime?
eg pre 2011 suspects in France questione
no lawyer and not told of RTS
- May be prejudicial to take material gathered for use by neutral judicial officer, and use it in a police enquiry within a party controlled (rather than judicial) procedure

