Human Rights and Evidence: The Relationship between Fair Trial Rights and the Exercise of Police Powers

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Section 6 provides that public authorities, including courts and tribunals, are obliged to act in a way which is compatible with the Convention rights unless provisions in primary legislation require them to act differently.

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... judgment [or] decision ... of the European Court of Human Rights ... whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen”: section 2(1)(a).

2. Evidence Obtained in Violation of the Right to Privacy

*Khan v UK* (2001) 31 EHRR 45

“With specific reference to the admission of the contested tape recording, the Court notes that ... the applicant had ample opportunity to challenge both the authenticity and the use of the recording. ... The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it ... In these circumstances, the Court finds that the use at the applicant’s trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6(1) of the Convention.” ([38]-[40])

3. Entrapment


*R v Looseley* [2001] UKHL 53; [2001] 1 WLR 2060
4. The Right to Silence

Criminal Justice and Public Order Act 1994, section 34 (allows a court or jury, in determining guilt, to “draw such inferences ... as appear proper” from the defendant’s silence under police questioning)

Caution:
“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 do say may be given in evidence.”

Condron v UK (2001) 31 EHRR 1 (judgment of 2000)
“... as a matter of fairness, the jury should have been directed that if it was satisfied that the applicants’ silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference.” [61]
“... the Court considers that a direction to that effect [is] more than merely ‘desirable’. It notes that the responsibility for deciding whether or not to draw such an inference rest[s] with the jury. ... it is impossible to ascertain what weight, if any, was given to the ... silence. [In a trial by judge alone], the trier of fact ... [is] an experienced judge who [is] obliged to explain the reasons for his decision to draw inferences and the weight attached to them. Moreover, the exercise of the judge’s discretion to do so [is] subject to review by the appellate courts. However, these safeguards [are] absent in [a trial by judge and jury]. It [is] thus even more compelling to ensure that the jury [is] properly advised on how to address the issue of the ... silence.” [62]

“... the trial judge failed to give appropriate weight in his direction to the applicant’s explanation for his silence at the police interview and left the jury at liberty to draw an adverse inference from the applicant’s silence notwithstanding that it may have been satisfied as to the plausibility of the explanation given by him. ... he invited the jury to reflect on whether the applicant’s reason for his silence was ‘a good one’ without also emphasising that it must be consistent only with guilt.” [64]

5. The Privilege against Self-Incrimination

O’Halloran and Francis v UK, Grand Chamber judgment of 29 June 2007

6. Reading
