THE PRE-CHARGE STAGE OF THE CRIMINAL PROCESS: ARE THE RIGHTS OF THE PUBLIC ADEQUATELY PROTECTED?

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A INTRODUCTION

The pre-charge stage of the criminal process has experienced an important transition in recent decades. Arrest was originally intended to facilitate a person being charged before a court. In the case of *The People (DPP) v Shaw* Walsh J in the Supreme Court of Ireland stated 'no person may be arrested (with or without a warrant) for the purpose of interrogation or the securing of evidence from that person.'[1] However, it is now common for gardaí to arrest a person, detain and question them in relation to an offence. With the arrival of such practices has come the need to provide adequate safeguards to protect the rights of the person being detained.

The decision whether to charge a person or not is often taken on the basis of what has happened in a short period of time when the gardaí are interrogating a person. These factors make the pre-charge stage of paramount importance in the criminal process and subsequently the public's rights must be protected during this time. In recent years the notion of the rights of 'the public' has been allied with the side of the prosecution in the criminal process. Legislators discuss erosion of rights as protecting the public against gangland crime or drug barons. It should be remembered that such legislation affects everyone's rights and people charged with criminal offences and tried before our courts are also members of the public.

The Criminal Justice Act 1984 introduced significant changes to Irish criminal procedure, including a new regime of detention without charge under section 4. The section allows for a person to be detained for six hours but in reality this can result in twenty hours detention.[2] Since the 1984 Act the trend has been to move the criminal process further away from the courts towards the garda station through legislation such as the Criminal Justice (Drug Trafficking) Act 1996 and the Criminal Justice Act 2006. Despite the lengthy periods of detention now provided for in the various pieces of legislation, adequate safeguards for detainees have not been provided.[3]

The rights of detainees have been eroded through the same legislation that has provided for extensive periods of detention, in particular the right to silence has come under attack. Now at the trial stage inferences may be drawn from silence, while in some cases silence of itself is sufficient to imprison a person. While such provisions can clearly be confusing for detainees it is easy to see that access to a solicitor is necessary in order to explain the

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[1] [1982] IR 1, 29.

[2] s 4(3)(b). This is due to an eight-hour rest period between midnight and 8 a.m. and a further extension of six hours authorised by a Garda Superintendent.

[3] The Criminal Justice (Drug Trafficking) Act 1996 section 2 provides for the possibility of seven day detention without charge. The Criminal Justice Act 2006 section 9 adds a third 12-hour period of detention to section 4 of the Criminal Justice Act 1984 which can effectively lead to 40-hours detention without charge.

consequences of any actions that might be taken while in custody. Access to a solicitor is essential because detainees are often unaware of their rights and may be confused and it is not beneficial for the gardaí to explain their rights clearly.

In *The People (DPP) v Healy* Finlay CJ stated '[t]he availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.'[5] However, it will be shown how the right of access to a solicitor is, in reality, far from being as effective as it could be. The result, it is submitted, is that there is no equality between the detained persons and their interrogators, with the balance of power moving further to the side of the gardaí.

The 1987 Regulations[6] were brought in with the 1984 Act in order to provide safeguards for persons detained in garda custody. The ineffectiveness of these regulations will be demonstrated to show how the balance of power is strongly in favour of the gardaí when interrogating a person.

B THE 1987 REGULATIONS

The 1987 Regulations were justified on the basis that they gave effect to the recommendation of the Ó Briain Committee Report of 1978.[7] However, that report, which criticised the use of interrogation by the gardaí, called for the presence of a solicitor and the recording of interviews. While the 1987 Regulations do mention access to a solicitor, the inadequacy of the provisions will be discussed later. Also, while the 1987 Regulations did provide for the audio-visual recording of interviews, this did not come into effect until 1997 and then only on a limited basis.

The custody record is usually kept by the member in charge. It is the purpose of the custody record to keep account of everything that happens in relation to an arrested person. A record must be kept of each interview with the arrested person detailing the time of commencement, termination, breaks and the people present. According to the 1987 Regulations, the record should be as complete as practicable[8] but there is no obligation on the gardaí to take down everything that is said, however they should record 'anything of consequence.'[9] This does not go nearly as far as the safeguards in place in England and Wales and Northern Ireland where meticulous verbatim note taking of all questions asked and all answers given is provided for. It is clear that such note taking is necessary in order to avoid a garda omitting, possibly without malice, something that is actually of consequence.

As far back as 1978 the Ó Briain Committee recommended that 'feasibility studies should be instituted at once to establish whether

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[5] [1990] 2 IR 73, 81.

[6] Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 SI 1987/119.

[7] Irish Council for Civil Liberties *Police Interrogation Endangers the Innocent* (Reprint Dublin 1993) 33.

[8] art 12(11)(b)(i).

[9] *The People (DPP) v McKeever* [1992] 2(2) Irish Crim L J 210.

videotaping of interrogations in the investigation of serious crime is a viable proposition. In addition, tape-recording should be tried on as wide a basis as possible.'[10] The 1984 Act provided for the introduction of interviews but they were not enforced and the 1987 Regulations did not require audio-visual recording of interviews. In 1989 the Martin Committee recommended that 'as a safeguard towards ensuring that inculpatory admissions to the garda síochána are properly obtained and recorded, that the questioning of suspects take place before an audio-visual recording device.'[11] The Martin Committee referred to a Canadian study conducted by Alan Grant, which involved 540 interviewees:

> What is of interest is that the Canadian experiment caused the need for 'a trial within a trial' entirely to disappear. Furthermore, Canadian defence lawyers were of the view that such a system of recording was far more accurate than police note taking, and were prepared to accept it as such.[12]

The fact that audio-visual recording benefits all parties involved in the criminal process was referred to by O'Flaherty J in *The People (DPP) v Quilligan (No 3)* when he stated 'the introduction of audio or audio/visual recordings is as likely to be of benefit to the gardaí as it is to the accused. It would, I am convinced, be a much better way to ensure that a just verdict is reached....'[13]

In England and Wales the recording of police interviews came into effect in 1984.[14] However, in Ireland despite the recommendations and the fact that recording had been provided for in the 1984 Act, audio-visual recording only came into operation in March 1997 when new regulations were put in place.[15] As a safeguard, the regulations are not as effective as they could be: recording is only required to take place where questioning occurs at a station where the necessary equipment is available.[16] As well as this interviews can proceed in the absence of electronic recording where the equipment is faulty, or already in use in another interview, or where the recording 'is not practicable.'[17]

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[10] *Report of the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Síochána* (Stationery Office Dublin 1978), 67.

[11] *Report of the Committee to Enquire into Certain Aspects of Criminal Procedure* (Stationery Office Dublin 1990), 36. An audio device was found to be insufficient because it would not give an idea of the conduct or expressions of the persons involved.

[12] ibid.

[13] [1993] 2 IR 305, 357.

[14] Police and Criminal Evidence (UK) Act 1984 s 60(1)(b).

[15] Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, SI 1997/74.

[16] Art 3(1).

[17] Art 4(3)(a)(i)-(b).

Where the 1987 Regulations are not complied with the presiding judge has the option of allowing the evidence to be admitted. Section 7(3) of the 1984 Act provides that a failure to observe any provision of the Regulations 'shall not of itself … affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.' The test used is that evidence will be excluded if there is a causative link between the breach and the obtaining of the evidence. In *The People (DPP) v Darcy*[18] a juvenile of below average intelligence was questioned by three gardaí in breach of article 12(3) of the 1987 Regulations. The evidence was admitted on the basis that it was not suggested on behalf of the appellant that the questioning was otherwise oppressive or unfair. The court did not consider the fact that three gardaí interrogating a person, especially a juvenile of below average intelligence, might of itself be oppressive and could certainly not be seen as a situation where the equality envisioned by Finlay CJ in *Healy* was present.[19]

In the 2002 case of *The People (DPP) v Connolly*[20] Hardiman J referred to the Martin Committee recommendations and particularly the results of the Alan Grant study. He condemned the slowness of the implementation of audio-visual recording stating:

> It is clear from the history of legal and legislative concern with uncorroborated confessions over a period of nearly two decades that legislators and judges alike have emphasised the importance of the audio-visual recording of interviews. This is routine in most first world common law countries. Its failure to become routine, or even remotely to approach that status in this country, nearly twenty years after statutory provision for it was first made, has ceased to be a mere oddity and it is closely approaching the status of an anomaly. … The courts have been very patient, perhaps excessively patient, with delays in this regard. The time cannot be remote when we will hear a submission that, absent extraordinary circumstances (by which we do not mean that a particular Garda station has no audio-visual machinery or that the audio-visual room was being painted), it is unacceptable to tender in evidence a statement which has not been so recorded.[21]

Hardiman J went on to condemn the lack of audio-visual recording in *The People (DPP) v Diver* when he cast doubt on a recent public statement claiming that 96 percent of all garda interviews are audio-visual recorded. In the case before him the accused was convicted of murdering his wife.[22] The accused had been interviewed five times while in custody and none of the interviews were audio-visually recorded and two of the interviews were not

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[18] *The People (DPP) v Darcy* (Court of Criminal Appeal, 29 July 1997).

[19] A Ryan 'Arrest and Detention: A Review of the Law' (2000) 10(1) Irish Crim L J 2, 10.

[20] [2003] 2 IR 1.

[21] ibid 17-18.

[22] [2005] 3 IR 270, 281.

even recorded in writing, in clear breach of article 12(11)(a) of the 1987 Regulations. The accused's denial of involvement in the incident was excluded from notes of the interviews and the reason given by the sergeant conducting the interviews was that he felt taking notes would hinder the investigation. Hardiman J went on to order a re-trial in the case but this was after the Court of Criminal Appeal had upheld the conviction stating that although the breaches of the 1987 Regulations were deplorable they were rightly admitted into evidence by the trial judge. Such blatant disregard for the Regulations being ignored, it is submitted, by the Court of Criminal Appeal cannot function to deter the gardaí from further breaches of the Regulations and abuses of power.

C THE RIGHT TO SILENCE

The right to silence is a fundamental part of the presumption of innocence and if respected can lead to a measure of equality in the balance of power between a detainee and interrogators. The right to silence also exists to prevent people from confessing to a crime that they did not commit. It can protect innocent people who may be worn down by the duration of questioning from confessing in order for the interrogation to stop. The right to silence is recognised as a constitutional right in article 38.1 of *Bunreacht na hÉireann*, which provides for the trial of criminal charges by the due course of law, and by article 6 of the European Convention of Human Rights, which entitles accused to a fair and public hearing, as well as the International Covenant on Civil and Political Rights.[23]

The reasons for remaining silent can vary; an exculpatory fact may be embarrassing or the suspect might be forgetful or not quite understand what response is required. Nonetheless, the right to silence has come under attack and it is not just a recent occurrence. Almost one hundred and seventy years ago Jeremy Bentham stated:

> If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.[24]

In 1991, the then Director of Public Prosecutions, Eamonn Barnes criticised those who say that the right to silence is essential to civil liberties. He stated that the right to silence 'is of no value at all to the innocent.'[25] Garda Commissioners have constantly called for an end to the right to silence. In 1981, the then Garda Commissioner, Patrick McLaughlin, stated that it would

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[23] Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that an accused shall not 'be compelled to testify against himself or to confess guilt'. Article 67(1)(g) of the Rome Statute of the International Criminal Court goes even further by providing that the suspect has the right 'Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence'.

[24] Balance in the Criminal Law Review Group 'The Right to Silence Interim Report' <http://www.justice.ie/en/JELR/InterimReport.pdf/Files/InterimReport.pdf> (3 March 2008) 4.

[25] *The Irish Times* (18 November 1991).

help if suspects 'had to give an explanation, if not to the gardaí, then to the court … we should not be compelled to tell a suspect to remain silent.'[26] His successor Patrick Culligan attacked the right to silence in an *Irish Times* article in 1994.[27] He talked of 'a system of justice which consistently allows guilty persons to go free because of technicalities.' No mention was made of the origin of the 'technicalities' deriving from vital principles of law designed to protect innocent citizens.[28]

The 1984 Act made a number of encroachments on the right to silence. Sections 6 makes it an offence to refuse to give one's name or address. Sections 15 and 16 make it an offence for a person to refuse to account for firearms, ammunition or property found to be in their possession. Sections 18 and 19 allow inferences to be drawn where a person refuses to account for objects, marks or substances on their person or to account for their presence at a place around the time of the commission of an offence.

The constitutionality of sections 18 and 19 were challenged in the Supreme Court of Ireland in *Rock v Ireland* where the accused was found in possession of forged bank notes that he allegedly knew were forged, contrary to section 8 of the Forgery Act 1913.[29] It was alleged that the accused declined to reply to questions put to him during interrogation and was subsequently prosecuted under sections 18 and 19. Murphy J accepted that article 38.1 of the Constitution protects the right to silence.[30] Nonetheless, the court found that the right was not an unlimited one and went on to hold that the sections were not excessive intrusions on the rights of an accused and were therefore not invalid having regard to the provisions of the Constitution.[31] In upholding the decision the Supreme Court went on to confirm two important factors in assessing the sections, firstly, that a person cannot be convicted solely on the basis of an inference and, secondly, that an adverse inference can only be drawn where a court deems it proper to do so.[32]

The 1984 Act, however, was not the first legislative encroachment on the right to silence. The Offences Against the State Act 1939 requires a person to give their name and address under section 30(5) and under section 52(1) the gardaí may demand that a suspect give a full account of his movements and any information which the suspect may have relating to the commission by another person of an offence under the Act or a scheduled offence. Section 52(2) renders the suspect liable on summary conviction to imprisonment for six months if such information is not provided.

The constitutionality of section 52 was challenged in *Heaney v Ireland* where the two appellants were sentenced to the full six months

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[26] P McLaughlin 'Legal Constraints in Criminal Investigation' (1981) XVI *Irish Jurist* 217, 224.

[27] P O'Mahony 'The ethics of police interrogation and the Garda Síochána' (1996) 6 *Irish Crim L J* 46, 53.

[28] ibid.

[29] [1997] 3 IR 484.

[30] ibid 493.

[31] ibid.

[32] ibid 501.

imprisonments for failing to account for their movements even though they were not charged with any other offence.[33] In a remarkable decision the Supreme Court refused the appeal with O'Flaherty J stating, 'the innocent person has nothing to fear from giving an account of his or her movements.'[34]

The Offences Against the State (Amendment) Act 1998 has eroded the right to silence even further by the possibility of a five-year prison sentence under section 9 where a person stays silent without a reasonable excuse, when he has information which he knows or believes might be of material assistance to the gardaí. Sections 2 and 5 of the 1998 Act are similar to section 7 of the Criminal Justice (Drug Trafficking) Act 1996 and allow inferences to be drawn from the failure of an accused to mention 'facts later relied on' in his defence when being questioned or charged by the gardaí.

In the original proposals for the 1984 Act a section was included which would have allowed a court to infer guilt if the accused tried to rely on anything in defence, which he or she had not, previously told the gardaí. However, the section was dropped due to widespread criticism of trying to force confessions from suspects.[35] Section 7 of the 1996 Act places an extraordinary burden on the detainee. In deciding how to respond to questions put to him by the gardaí the detainee must attempt to predict what charge, if any, that may follow and what kind of a defence he might use in court.[36] It should be recognised that section 7 of the 1996 Act and its similar sections in the Offences Against the State (Amendment) Act 1998 require a detainee to have a legal competency that may well be beyond many legal professionals. It is not appropriate to expect a suspect to be capable of determining what defence, if charged with an offence, would be used at the trial stage. To prevent such unfairness, the right to silence of the accused worked so that inferences could not be drawn from his failure to establish his defence during his pre-trial communications with the gardaí.[37]

With the balance of power shifting further towards the interrogators due to the erosion of the right to silence and the drawing of inferences from silence, it would have been common sense to include some accompanying provisions to give comprehensive access to obtaining legal advice. Such a balancing of power in garda interrogations has not been afforded to detainees. However, the Criminal Justice Act 2007, discussed in further detail below, has made a significant change in relation to inferences being drawn under the 1984 Act where the detainee has not had legal advice.

D THE RIGHT OF ACCESS TO LEGAL ADVICE

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[33] [1996] 1 IR 580.

[34] ibid 590.

[35] Irish Council for Civil Liberties (n 6) at 30.

[36] D Keane 'Detention Without Charge and the Criminal Justice (Drug Trafficking) Act 1996: Shifting the focus of the Irish criminal process from trial court to garda station' (1997) 7(1) Irish Crim L J 1, 8.

[37] F Breen & P MacEntee 'The Right to Silence: In light of *Deaglán Lavery v Member-in-Charge, Carrickmacross Garda Station'* (1999) Bar Rev 6.

In *Healy* the right of access to a solicitor was held to be a constitutional right as Finlay CJ stated 'to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give.'[38] However, the case dealt with the question of access to a solicitor in a very narrow frame, the concern of the court was only with the issue of when a solicitor had been requested by the person in custody or on his behalf. The case did not deal with the right to be informed of a right to a solicitor, but regardless of whether or not the right to be informed is a constitutional right, it has been recognised as a legal right and is provided for in section 5 of the 1984 Act. The member in charge is obligated to inform a detainee of his right to consult with a solicitor under section 5 of the 1984 Act and article 8 of the 1987 Regulations echoes this obligation. However, section 5 is limited in its scope to arrest under three statutes: the 1984 Act, the Offences Against the State Act 1939 and the Criminal Law Act 1976. Therefore section 5 does not require the gardaí to inform a suspect of his right to a solicitor in the case of an ordinary arrest or in the case of a 'focused questioning.'[39]

The facts in *Healy* were that the defendant had been convicted of attempted murder, shooting with intent and robbery when the only evidence against him was a confession made during incommunicado interrogation[40] under section 30 of the 1939 Act. Healy was arrested at 7.55 am and was interrogated on different occasions by different gardaí. He had requested access to his solicitor who arrived at the station at 4 pm Healy began making a confession at 3.40 pm which was completed at 4.30 pm. The sworn evidence of the garda superintendent as to his reason for not permitting Healy access to his solicitor on arrival was that he felt it would be bad manners to interrupt the interview between the two interrogators and the defendant. The successful appeal on conviction was based on the fact that the solicitor had not been permitted to see the appellant and that the appellant had not been informed of his solicitor's arrival.

Deaglán Lavery v The Member in Charge, Carrickmacross Garda Station[41] serves to highlight the ineffectiveness of the constitutional right of access to a solicitor. The constitutional right is one of 'reasonable access' to a solicitor. In practice this means that in a six-hour period of detention a suspect is permitted to spend one hour with a solicitor and the solicitor is not permitted to be present at the interviews.

Mr Lavery was detained under section 30 of the 1939 Act on suspicion of being a member of an unlawful organisation. After one hour Mr. Lavery contacted his solicitor who requested that all interviews would be audio-visually recorded or if that was not possible that complete notes of all questions and answers would be kept. The requests were refused. The detention lasted for 60 hours in which time Mr. Lavery met with his solicitor

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[38] *Healy* (n 4), 81.

[39] A S Butler 'The Right to be Informed of the Right to a Lawyer – The Constitutional Dimension' (1993) 3(2) Irish Crim L J 173, 188.

[40] Interrogation without the presence of a legal adviser.

[41] [1999] 2 IR 390.

twice. He claimed that while notes were taken in the interviews, they did not record all the questions and answers. The solicitor requested access to the notes so that he could advise his client whether the questions would expose him to prosecution under section 52 of the 1939 Act or section 5 of the 1998 Act. Access to the notes was refused.

The issue in the High Court was whether refusal of access to the notes rendered the detention unlawful. Admirably, McGuinness J considered that due to the new obligations under the 1998 Act, persons in custody should have access both to legal advice and to notes taken of garda interviews. This would allow the detainee access to informed legal advice of what he was obliged to volunteer as information under the legislation. However, the decision was subsequently overturned in the Supreme Court. The Court referred to the right of 'reasonable access' to a solicitor but that this right did not require that the gardaí should give 'regular updates and running accounts of the progress of their investigation'. The court went on to emphasise that 'the solicitor is not entitled to be present at the interviews.'[42] That issue had been addressed in the Ó Briain Committee Report in 1978 when Mr Justice Barra Ó Briain stated 'I can think of no way of guaranteeing that ill-treatment of persons in garda custody will not take place except by providing, as far as practicable, the surveillance of an independent eye-witness throughout that custody.'[43]

However, to this day the recommendation has still not been put into force and the fact that the Supreme Court in *Lavery* expressly condoned the practices of the gardaí shows how far away the Irish criminal justice system still is from the recommendations of the Ó Briain Committee. The *Lavery* case firmly established a gross inequality between detainees and their interrogators.

A person is not entitled to get legal advice at the pre-trial stage unless he or she can afford to obtain the services of a solicitor. This was set out in *State (O) v Daly* where O'Higgins CJ acknowledged the constitutional right to legal aid in criminal trials but stated that the right does not extend to 'the earlier or ancillary stages of the criminal proceedings.'[44] The Irish position is in stark contrast to the U.S. position as set out by Warren CJ in *Miranda v Arizona*:

> [A]uthorities … have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial….[45]

Under section 2 of the 1996 Act a judge must approve the requests made for extension of the detention periods. However, unless the detainee can afford a solicitor, they will be on their own, faced with the gardaí or a solicitor

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[42] ibid 400.

[43] n 9 [21].

[44] [1977] IR 312, 315.

[45] (1966) 384 US 436, 472-3 (footnote omitted).

on the gardaí's behalf requesting the extension. During the Dáil debate on the 1996 Act it was suggested that the issue of granting legal aid to person detained in garda stations should be examined,[46] however this is yet to be followed through.

The safeguards in place in England and Wales provide a better balance of power between detained persons and their interrogators. Under the Police and Criminal Evidence Act 1984 (PACE) all interviews are recorded, solicitors are present and if a person cannot afford a solicitor one is provided for them from a list of specially trained 'duty solicitors.'[47] Section 58 of PACE confers the right on all persons detained for questioning under the Act to obtain legal advice at the police station, free of charge and regardless of their means. In limited circumstances a solicitor may be asked to leave the interview, however if this happens the detainee is permitted to postpone the interview until another solicitor is present to advise him or her.[48]

The position of persons detained for questioning is also better protected in the United States. *Miranda v Arizona* not only provides for free legal advice at the pre-trial stage, but also acknowledges the need for the legal advisor to be present during all interviews and when statements are taken.[49] In comparison to section 5 of the 1984 Act, which requires that detained persons be informed of the right to contact a solicitor only under three statutes, the *Miranda* doctrine requires police officers to inform a person of the right to a lawyer whenever a person is 'in custody.' The US Supreme Court defined 'custody' broadly so that it extends to where a person feels they are not free to leave.[50]

While the drafting of the 1996 Act was influenced by the European Court of Human Rights decision in *Brogan v UK*[51] there may be another European decision that could challenge the legality of the 1996 Act. In *Murray v UK*[52] the European Court of Human Rights found that the drawing of adverse inferences from an accused's silence, coupled with being denied access to legal advice, violated the right to a fair trial under Article 6 of the Convention:

> [T]he concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for

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[46] Dáil Éireann *Criminal Justice (Drug Trafficking) Bill, 1996: Report and Final Stages* 2 July 1996, 2345 (Mr Currie).

[47] Police and Criminal Evidence (PACE) Act 1984, Code of Practice F, Code of Practice on Visual Recording with Sound of Interviews with Suspects [3.1], [6.1].

[48] ibid 6.10.

[49] *Miranda* (n 45).

[50] 'Custody' was defined by the Supreme Court as a situation where a person is 'taken into custody or otherwise deprived of his freedom of action in any significant way', ibid 444.

[51] *Brogan v UK* Series A No 145-B (1988) 11 EHRR 117.

[52] *Murray v UK* Series A 1996-I (1996) 22 EHRR 29. The accused had been arrested under the Prevention of Terrorism (Temporary Provisions) Act 1989 (UK).

> the first 48 hours of police questioning in a situation where the rights of the defence may well be irretrievably prejudiced is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6.[53]

In *Averill v UK*[54] the European Court of Human Rights went even further and found a breach of Article 6 where adverse inferences were drawn from the silence of the accused when he was denied access to a solicitor for the first twenty-four hours of his detention but was given access to daily consultations for the rest of the period of his detention. The accused remained silent throughout his detention as he stated that it was his policy not to cooperate with the Royal Ulster Constabulary.[55] At the trial the accused put forward his defence to forensic evidence linking him to two murders and an attempted murder. The English legislation involved is similar in terms to section 7 of the 1996 Act. The trial judge drew 'very strong inferences' from the fact that the accused did not disclose this defence when questioned by the police but subsequently went on to use the defence at trial. The accused made reference to a document circulated by the Home Office in the United Kingdom to inform prosecutors of the implication of the *Murray* judgment. The Home Office issued Circular 53/98 that stated:

> The Prosecution should not seek to rely on inferences from silence before access to legal advice has been granted. In the event the court, or of its own volition, indicates an intention to draw any such inferences, its attention should be drawn to the judgment of the European Court of Human Rights in *John Murray* v *the United Kingdom*.

While the judicial intervention provided for in the 1996 Act seems to make it immune from challenge on the basis of duration alone, following *Murray* and *Averill* it seems that a challenge to the 1996 Act may be successful where legal advice is denied coupled with the adverse inferences provision in section 7. While the Irish government may argue that legal advice was not denied and point to the constitutional guarantee of access to a solicitor as enunciated in *Healy*, the reality has been shown that unless a detainee can afford their own solicitor that right is worthless. Furthermore, the test laid down in *Brogan*, *Murray* and *Averill* is a subjective one and as the 1996 Act is in reference to drug trafficking it may be even more likely that detention could be found to be unlawful in individual cases, as Farrell points out: '[d]rug abusers are particularly vulnerable and susceptible to the pressure of prolonged detention and interrogation.'[56]

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[53] ibid 66.

[54] *Averill v UK* Series A 2000-VI (2001) 31 EHRR 839.

[55] The RUC, Northern Ireland's police force at the time, was perceived by some to be biased against Catholics and republicans, some of whom refused, as policy, to cooperate in any way.

[56] Farrell 'The Criminal Justice (Drug Trafficking) Bill 1996 - The Seven Day Detention Bill' ICCL Briefing Paper No 2 quoted in S Costelloe 'Detenton for Questioning and Oppressive Interrogation' (2001) 11(1) *Irish Crim L J* 12, 13.

In the Criminal Justice Act 2007, it seems the government have realised the possible effect of *Murray* and *Averill*. Sections 28 and 29 of the Criminal Justice Act 2007 alter the inferences procedure under sections 18 and 19 of the 1984 Act. The 2007 Act now provides that inferences cannot be drawn from failure or refusal to account for a matter unless 'the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred'. While this is certainly a step in the right direction in relation to the 1984 Act, it is submitted that the legality of section 7 of the 1996 Act may still uncertain due to the European Court of Human Rights decisions.

E CONCLUSION

The two greatest safeguards that can be put in place to ensure equality between members of the public detained by the gardaí are audio-visual recording and the presence of a solicitor during interviews. As shown by Alan Grant, audio-visual recording eliminates the need for a 'trial within a trial' and it serves to show that interviews were conducted fairly, thus also protecting gardaí from false claims of wrongdoing. The presence of a solicitor is now more essential than ever to maintain a balance of power in the interrogation room. Detained persons cannot be expected to know or understand the complex legal rules that have been introduced by legislation. If there is to be equality – as Finlay CJ called for in *Healy* – then detained persons should have the right to informed legal advice at all times, and not just 'reasonable access.