COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF O'HALLORAN AND FRANCIS
v. THE UNITED KINGDOM

(Applications nos. 15809/02 and 25624/02)

JUDGMENT

STRASBOURG

29 June 2007

In the case of O'Halloran and Francis v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Luzius Wildhaber,
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Rıza Türmen,
Volodymyr Butkevych,
Josep Casadevall,
Matti Pellonpää,
Snejana Botoucharova,
Stanislav Pavlovschi,
Lech Garlicki,
Javier Borrego Borrego,
Alvina Gyulumyan,
Ljiljana Mijović,
Egbert Myjer,
Ján Šikuta, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 27 September 2006 and on 23 May 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 15809/02 and 25624/02) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr Gerard O'Halloran and Mr Idris Richard Francis ("the applicants"), on 3 April 2002 and 15 November 2001 respectively.

2. The applicants, one of whom had been granted legal aid, were represented by Mr J. Welch of Liberty, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. Mr O'Halloran alleged that he had been convicted solely or mainly on account of the statement he had been compelled to provide under threat of a penalty similar to the offence itself. Mr Francis complained that having been compelled to provide evidence of the offence he was suspected of

committing had infringed his right not to incriminate himself. Both applicants relied on Article 6 §§ 1 and 2 of the Convention.

4. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 26 October 2004 the applications were joined and on 25 October 2005 they were declared admissible by a Chamber of that Section composed of Josep Casadevall, Nicolas Bratza, Matti Pellonpää, Stanislav Pavlovschi, Lech Garlicki, Ljiljana Mijović, Ján Šikuta, judges, and Michael O'Boyle, Section Registrar. On 11 April 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. On 19 January 2007 Luzius Wildhaber's term as President of the Court came to an end. Jean-Paul Costa succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Luzius Wildhaber and Matti Pellonpää continued to sit following the expiry of their terms of office, in accordance with Article 23 § 7 of the Convention and Rule 24 § 4.

6. The applicants and the Government each filed observations on the merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 September 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	D.WALTON,	*Agent*,
Mr	D. PERRY,	*Counsel*,
Ms	L. CLARKE,	
Mr	M. MAGEE,	
Mr	J. MOORE,	*Advisers*;

(b) *for the applicants*

Mr	B. EMMERSON QC,	*Counsel*,
Mr	J. WELCH,	*Solicitor*,
Mr	D. FRIEDMAN,	*Adviser*,
Mr	G. O'HALLORAN,	
Mr	I. FRANCIS,	*Applicants*.

The Court heard addresses by Mr Emmerson and Mr Perry and their answers to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1933 and 1939 and live in London and Petersfield respectively.

A. Mr O'Halloran (application no. 15809/02)

9. On 7 April 2000, at 4.55 a.m., a vehicle of which the applicant was the registered keeper, registration number T61 TBX, was caught on a speed camera driving at 69 miles per hour (mph) on the M11 motorway where the temporary speed limit was 40 mph.

10. On 17 April 2000, the police camera enforcement unit of the Essex Constabulary wrote to the applicant:

> "I have photographic evidence that the driver of T61 TBX failed to comply with the speed limit ... It is intended to institute proceedings against the driver for the offence of failing to comply with the speed limit ... You have been named as the driver of the vehicle at the time of the alleged offence and have a legal obligation to comply with the provisions of the notice contained on page 2. I must warn you that if you fail to comply with this demand within 28 days you will commit an offence and be liable on conviction to a maximum penalty similar to that of the alleged offence itself – a fine of £1,000 and 3-6 penalty points."

11. The attached Notice of Intended Prosecution informed the applicant that it was intended to institute proceedings against the driver of the vehicle. He was asked to furnish the full name and address of the driver of the vehicle on the relevant occasion or to supply other information that was in his power to give and which would lead to the driver's identification. He was again informed that a failure to provide information was a criminal offence under section 172 of the Road Traffic Act 1988.

12. The applicant answered the letter confirming that he was the driver at the relevant time.

13. On 27 March 2001 the applicant was summoned to attend North Essex Magistrates' Court where he was tried for driving in excess of the speed limit. Prior to the trial, the applicant sought to exclude the confession made in response to the Notice of Intended Prosecution, relying on sections 76 and 78 of the Police and Criminal Evidence Act 1984 read in conjunction with Article 6 of the Convention. His application was refused in the light of the decision of the Privy Council in *Brown v. Stott* [2001] 2 WLR 817. Thereafter the prosecution relied upon the photograph of the speeding vehicle and the admission obtained as a result of the section 172 demand. The applicant was convicted and fined 100 pounds

sterling (GBP), ordered to pay GBP 150 costs and his licence was endorsed with six penalty points.

14. On 11 April 2001 the applicant asked the magistrates to state a case for the opinion of the High Court:

> "Whether in the circumstances of this case, the admission that the defendant was indeed the driver should have been excluded under sections 76 and 78 of the Police and Criminal Evidence Act 1984 having regard to the Human Rights Act and the recent cases decided by the European Court as he had been obliged to incriminate himself?"

15. On 23 April 2001 the magistrates' clerk informed the applicant that the magistrates refused to state a case as the issue had already been decided definitively by the Privy Council in *Brown v. Stott* (cited above) and by the High Court in *Director of Public Prosecutions v. Wilson* ([2001] EWHC Admin 198).

16. On 19 October 2001 the applicant's application for judicial review of the magistrates' decision was refused.

B. Mr Francis (application no. 25624/02)

17. A car of which the applicant was the registered keeper was caught on speed camera on 12 June 2001 driving at 47 mph where the speed limit was 30 mph.

18. On 19 June 2001 the Surrey Police sent the applicant a Notice of Intended Prosecution in the following terms:

> "In accordance with section 1, Road Traffic Offenders Act 1988, I hereby give you notice that proceedings are being considered against the driver of Alvis motor vehicle registration mark EYX 622 ...
>
> This allegation is supported by means of photographic/recorded video evidence. You are recorded as the owner/keeper/driver or user for the above vehicle at the time of the alleged offence, and you are required to provide the full name and address of the driver at the time and location specified. Under section 172 of the Road Traffic Act you are required to provide the information specified within 28 days of receipt of this notice. Failure to supply this information may render you liable to prosecution. The penalty on conviction for failure to supply the information is similar to that for the offence itself, i.e. a fine and penalty points."

19. On 17 July 2001 the applicant wrote to the Surrey Police invoking his right to remain silent and privilege against self-incrimination.

20. On 18 July 2001 the Surrey Police informed the applicant that the appeal in *Brown v. Stott*, cited above, held that section 172 did not infringe the said rights.

21. The applicant refused to supply the information.

22. On 28 August 2001 the applicant was summoned to the Magistrates' Court for failing to comply with section 172(3) of the Road Traffic Act 1988. He obtained an adjournment.

23. On 9 November 2001 the Magistrates' Court agreed to a further postponement, apparently with reference to the applicant's proceeding with an application in Strasbourg. The applicant wrote to the Court on 15 November 2001, relying on Article 6 §§ 1 and 2 of the Convention.

24. On 8 February 2002 the Magistrates' Court cancelled the postponement and fixed the trial for 15 April 2002, on which date the applicant was convicted and fined GBP 750 with GBP 250 costs and three penalty points. He states that the fine was substantially heavier than that which would have been imposed if he had pleaded guilty to the speeding offence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Road traffic legislation

25. Section 172 of the Road Traffic Act 1988 ("the 1988 Act") deals with the duty to give information of a driver of a vehicle in certain circumstances. Subsection (1) refers to the traffic offences to which the section applies. They include parking on a cycle track (under section 21 of the 1988 Act) and causing death by reckless driving (section 1), offences under a number of other provisions, including speeding, and manslaughter by the driver of a motor vehicle.

Subsection 2 provides:

> "Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies –
>
> (a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and
>
> (b) any other person shall if required as stated above give any information which it is in his power to give and may lead to identification of the driver."

Subsection 3 provides:

> "Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence."

Subsection 4 provides:

> "A person shall not be guilty of an offence by virtue of paragraph (a) of subsection (2) above if he shows that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle was."

26. A person guilty of an offence under subsection 3 can be disqualified or have his licence endorsed with three penalty points; he may also be fined up to level three on the standard scale, that is, GBP 1,000.

27. Section 12(1) of the Road Traffic Offenders Act 1988 provides that on summary trial for a relevant offence, including speeding offences, a statement in writing signed by the accused under section 172(2) of the 1988 Act that he was the driver of the vehicle on that occasion may be accepted as evidence of that fact.

B. The Police and Criminal Evidence Act 1984

28. Section 76 provides

> "(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section;
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
>
> ..."

29. Section 78(1) provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

C. Relevant domestic case-law

30. In *Brown v. Stott*, cited above, the Privy Council considered the case of a woman arrested for shoplifting in the vicinity of a car that appeared to be hers. She was breathalysed and tested positive for alcohol consumption. With a view to ascertaining whether she had been guilty of driving her car while under the influence of alcohol (contrary to section 5 of the 1988 Act), the police served her with a section 172 notice. The Procurator Fiscal sought to use her answer that she had been driving as the basis for a prosecution for driving with excess alcohol. The High Court of Justiciary allowed the

defendant's appeal, finding that the prosecution could not rely on evidence of the admission which she had been compelled to make.

31. On appeal by the Procurator Fiscal, the Privy Council found that the use of the admission did not infringe the requirements of Article 6 of the Convention. Lord Bingham of Cornhill, giving the leading judgment, held, *inter alia*:

> "The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it in an effective way, for the benefit of the public, cannot be doubted. Among other ways in which democratic societies have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Materials ... incomplete though they are, reveal different responses to the problem of enforcement. Under some legal systems (Spain, Belgium and France are examples) the registered owner is presumed to be the driver guilty of minor traffic infractions unless he shows that some other person was driving at the relevant time or establishes some other ground of exoneration. There being a clear public interest in enforcement of road traffic legislation the crucial question in this case is whether section 172 represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.
>
> I do not for my part consider that section 172, properly applied, does represent a disproportionate response to this serious social problem, nor do I think that reliance on the respondent's admission in the present case, would undermine her right to a fair trial. I reach that conclusion for a number of reasons.
>
> 1. Section 172 provides for the putting of a single, simple question. The answer cannot of itself incriminate the suspect, since it is not without more an offence to drive a car. An admission of driving may, of course, as here, provide proof of a fact necessary to convict, but the section does not sanction prolonged questioning about facts alleged to give rise to criminal offences such as understandably was held to be objectionable in Saunders, and the penalty for declining to answer under the section is moderate and non-custodial. There is in the present case no suggestion of improper coercion or oppression such as might give rise to unreliable admissions and so contribute to a miscarriage of justice, and if there were evidence of such conduct the trial judge would have ample power to exclude evidence of the admission.
>
> 2. While the High Court was entitled to distinguish ... between the giving of an answer under section 172 and the provision of physical samples, and had the authority of the European Court in *Saunders* ... for doing so, this distinction should not in my opinion be pushed too far. It is true that the respondent's answer whether given orally or in writing would create new evidence which did not exist until she spoke or wrote. In contrast, it may be acknowledged, the percentage of alcohol in her blood was a fact, existing before she blew into the breathalyser machine. But the whole purpose of requiring her to blow into the machine (on pain of a criminal penalty if she refused) was to obtain evidence not available until she did so and the reading so obtained could, in all save exceptional circumstances, be enough to convict a driver of an offence ... [I]t is not easy to see why a requirement to answer a question is objectionable and a requirement to undergo a breath test is not. Yet no criticism is made of the requirement that the respondent undergo a breath test.

> 3. All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like, for example, shotguns ...) are recognised to have the potential to cause grave injury. It is true that section 172(2)(b) permits a question to be asked of 'any other person' who, if not the owner or driver, might not be said to have impliedly accepted the regulatory regime, but someone who was not the owner or driver would not incriminate himself whatever answer he gave. If, viewing this situation in the round, one asks whether section 172 represents a disproportionate legislative response to the problem of maintaining road safety, whether the balance between the interests of the community at large and the interests of the individual is struck in a manner unduly prejudicial to the individual, whether (in short) the leading of this evidence would infringe a basic human right of the respondent, I would feel bound to give negative answers. If the present argument is a good one it has been available to British citizens since 1966, but no one in this country has to my knowledge, criticised the legislation as unfair at any time up to now."

The decision was adopted by the English High Court in *Director of Public Prosecutions v. Wilson*, cited above.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

32. The applicants complained that they had been subject to compulsion to give incriminating evidence in violation of the right to remain silent and the privilege against self-incrimination. Article 6 of the Convention provides, in so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Applicability of Article 6 § 1 of the Convention

33. The applicants submitted that the criminal limb of Article 6 § 1 was applicable in their case because each of them had received a Notice of Intended Prosecution, and each of them was fined, Mr O'Halloran for driving in excess of the speed limit, and Mr Francis for refusing to give the name of the driver on the occasion in issue.

34. The Government did not suggest that Article 6 § 1 was not applicable to the cases.

35. The Court finds that the applicants were "substantially affected" by the Notices of Intended Prosecution they received, such that they were "charged" with their respective speeding offences within the autonomous meaning of that term in Article 6 of the Convention (see *Serves v. France*, 20 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). In any event, Article 6 of the Convention can be applicable to cases of compulsion to give evidence even in the absence of any other proceedings, or where an applicant is acquitted in the underlying proceedings (see *Funke v. France*, 25 February 1993, §§ 39 and 40, Series A no. 256-A, and *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 43-45, ECHR 2000-XII).

36. The Court accepts that Article 6 is applicable in the present case.

B. Compliance with Article 6 § 1 of the Convention

1. The parties' submissions

37. The Government submitted that the privilege against self-incrimination and the right to remain silent were not absolute and their application could be limited by reference to other legitimate aims in the public interest. In addition to the cases on the right to remain silent (see, for example, *Saunders v. the United Kingdom*, 17 December 1996, § 62, *Reports* 1996-VI), they referred to the limitations on access to court (see, for example, *Ashingdane v. the United Kingdom*, 28 May 1985, § 58, Series A no. 93), to case-law showing that in certain circumstances Contracting States were permitted to reverse the onus of proof of certain matters provided that this did not disturb the fair balance between the interests of the individual and the general interests of the community (see, for example, *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A), to acceptable limitations on the rights of the defence in cases on equality of arms (see *Fitt v. the United Kingdom* [GC], no. 29777/96, § 45, ECHR 2000-II), and the questioning of witnesses (see *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V), and also to the general principle that it is primarily for national law to regulate the admissibility of evidence, including incriminating evidence (see, for example, *Khan v. the United Kingdom*, no. 35394/97, § 38, ECHR 2000-V).

38. The Government argued that the power under section 172 of the Road Traffic Act 1998 ("the 1998 Act") to obtain an answer to the question who was driving a car when a suspected motoring offence was committed and to use that answer as evidence in a prosecution or, alternatively, to prosecute a person who failed to provide information was compatible with Article 6. There were very good reasons why the owner should be required to identify the driver: driving offences are intended to deter dangerous conduct which causes risk to the public and deterrence depended on effective enforcement (research showed that speed cameras, etc., had

reduced crashes by up to 28%), there was no obvious generally effective alternative to the power contained in section 172 and without such a power it would be impossible to investigate and prosecute traffic offences effectively, and the simple fact of being the driver of a motor car was not in itself incriminating. Nor did section 172 breach the presumption of innocence as the overall burden of proof remained on the prosecution. It provided for the putting of a single question in particular circumstances and all the usual protections against the use of unreliable evidence or evidence obtained by improper means remained in place, while the maximum penalty was only a fine of GBP 1,000.

39. The Government considered that the use of section 172 was more limited in its effect on drivers than would-be alternatives such as the drawing of adverse inferences from a failure on the part of a registered keeper to provide the name of the driver when required to do so, or a statutory presumption of fact that the registered driver was the driver at the material time unless he showed otherwise. The Government also considered that the very fact that other legislative techniques could bring about substantially the same result indicated that questions of proportionality – rather than the absolute nature of the rights suggested by the applicants in cases of direct compulsion – were at issue.

40. The applicants submitted that the serious problem caused by the misuse of motor vehicles was not sufficient to justify a system of compulsion which extinguished the essence of the rights under Article 6. The relatively minor nature of the penalties was irrelevant as the Article 6 rights, including the principle against self-incrimination and right to remain silent, applied to criminal proceedings of all kinds without distinction. They disputed that there was no obvious alternative, asserting that methods of indirect compulsion, or the use of incriminating information obtained compulsorily outside the context of the criminal proceedings themselves, would achieve the same end. They argued that an actual or potential defendant could not be compelled on pain of penalty to provide information which only he was capable of providing and which could not be provided by documents or physical evidence independent of his will. The prosecution were required to prove their case without recourse to coercion in defiance of the will of the accused.

41. The applicants considered that the existence of other legislative techniques in bringing about the same or similar results but in a manner less intrusive of the rights of the accused (the drawing of adverse inferences from a failure to answer questions, or establishing a statutory presumption of fact that the registered owner was the driver unless he or she provided evidence to the contrary) confirmed that the existing regime was not strictly necessary in a democratic society.

42. They observed that in *Saunders* and *Heaney and McGuinness* (both cited above) the Court had held that the public interest could not be invoked

to justify the use of answers compulsorily obtained. They rejected the Government's arguments that there was any protection against use of the material in the provisions of the Police and Criminal Evidence Act 1984, as sections 76 and 78 of that Act could not exclude testimony collected in accordance with a statutory provision. As the applicants had been subject to pending criminal proceedings and not a purely regulatory inquiry when subjected to direct compulsion, there had therefore been breaches of both Article 6 § 1 and Article 6 § 2 of the Convention.

2. The Court's assessment

(a) Introduction

43. The Court first notes that the applicants were in different factual situations. Mr O'Halloran accepted that he had been the driver on the occasion in issue, and attempted, unsuccessfully, to have that evidence excluded from his trial. He was then convicted of speeding. Mr Francis refused to give the name of the driver at the time and date referred to in his Notice of Intended Prosecution, and was convicted for the refusal. The case of Mr O'Halloran appears at first sight to resemble that in *Saunders* (cited above), in which the applicant complained of the use in criminal proceedings of evidence which, he claimed, had been obtained in breach of Article 6. Mr Francis's case, on the other hand, would seem to be more similar to the cases in *Funke* (cited above), *J.B. v. Switzerland* (no. 31827/96, ECHR 2001-III), *Heaney and McGuinness* (cited above), and *Shannon v. the United Kingdom*, (no. 6563/03, 4 October 2005), in each of which the applicant was fined for not providing information, and in each of which the Court considered the fine independently of the existence or outcome of underlying proceedings.

44. The central issue in each case, however, is whether the coercion of a person who is the subject of a charge of speeding under section 172 of the 1998 Act to make statements which incriminate him or might lead to his incrimination is compatible with Article 6 of the Convention. To the extent possible, the Court will therefore consider the two cases together.

(b) The Court's case-law

45. In *Funke*, the applicant was convicted for his failure to produce "papers and documents ... relating to operations of interest to [the customs] department" which they believed must exist (Article 65 of the Customs Code). The Court found that the attempt to compel the applicant himself to provide the evidence of the offences he had allegedly committed infringed his right to remain silent and not to contribute to incriminating himself (*Funke*, cited above, § 44). The Court elaborated no further on the nature of the right to remain silent and not to contribute to incriminating oneself.

46. *John Murray v. the United Kingdom* (8 February 1996, *Reports* 1996-I) concerned, amongst other things, the drawing of inferences from a person's silence during questioning and trial. The Court found that there was no doubt that "the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised 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" (see *John Murray*, cited above, § 45). The Court saw two extremes. On the one hand, it was self-evident that it was incompatible with the immunities to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the immunities could and should not prevent the accused's silence from being taken into account in situations which clearly called for an explanation. The conclusion was that the "right to remain silent" was not absolute (ibid., § 47). In discussing the degree of compulsion in the case, the Court noted that the applicant's silence did not amount to a criminal offence or contempt of court, and that silence could not, in itself, be regarded as an indication of guilt (ibid., § 48). The Court thus distinguished the case from *Funke*, where the degree of compulsion had, in effect, "destroyed the very essence of the privilege against self-incrimination" (ibid., § 49).

47. The case of *Saunders* concerned the use at the applicant's criminal trial of statements which had been obtained under legal compulsion under the Companies Act 1985. The domestic provisions required company officers to produce books and documents, to attend before inspectors and to assist inspectors in their investigation on pain of a fine or committal to prison for two years. The Court referred to the cases in *John Murray* and *Funke*, and found that the right not to incriminate oneself was primarily concerned with respecting the will of an accused person to remain silent. It did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which had an existence independent of the will of the suspect, such as breath, blood and urine samples. The Court held that the question whether the use made by the prosecution of the statements obtained from the applicant by the inspectors under compulsion amounted to an unjustifiable infringement of the right "had to be examined in the light of all the circumstances of the case": in particular, it had to be determined whether the applicant had been subjected to compulsion to give evidence and whether the use made of the resulting testimony offended the basic principles of a fair procedure under Article 6 § 1 (see *Saunders*, cited above, §§ 67 and 69).

48. The applicant in *Serves* (cited above) was called as a witness in proceedings in which he had initially been charged as an accused, although at the date of the witness summons and the subsequent proceedings the

relevant steps of the investigation had been declared void. He declined to take the oath as a witness under the Code of Criminal Procedure on the ground that evidence he might be called to give before the investigating judge would have been self-incriminating. The Court accepted that it would have been admissible for the applicant to refuse to answer questions from the judge that were likely to steer him in the direction of self-incriminating evidence, but found on the facts that the fine in the case was imposed in order to ensure that statements were truthful, rather than to force the witness to give evidence. Accordingly, the fines were imposed before a risk of self-incrimination ever arose (see *Serves*, cited above, §§ 43-47).

49. In *Heaney and McGuinness*, the applicants, who had been arrested in connection with a bombing, declined to answer questions under special legislation requiring an individual to provide a full account of his movements and actions during a specified period. They were acquitted of the substantive offence, and imprisoned for failing to give an account of their movements. After reviewing the case-law and finding Article 6 §§ 1 and 2 to be applicable, the Court accepted that the right to remain silent and the right not to incriminate oneself were not absolute rights. It then found, after considering the various procedural protections available, that the "degree of compulsion" imposed on the applicants, namely, a conviction and imprisonment for failing to give "a full account of [their] movements and actions during any specified period and all information in [their] possession in relation to the commission or intended commission [of specified offences]", "in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent". Thereafter, the Court considered that the security and public-order concerns relied on by the Government could not justify the provision (see *Heaney and McGuinness*, cited above, §§ 47-58, with reference back to § 24).

50. The applicant in *Weh v. Austria* (no. 38544/97, 8 April 2004) was fined for giving inaccurate information in reply to a request from the District Authority under the Motor Vehicles Act to disclose the name and address of the driver of his car on a particular date. Proceedings had already been opened against unknown offenders. The Court declined to rely on the earlier cases of *P., R. and H.* (*v. Austria*, nos. 15135/89, 15136/89 and 15137/89, Commission decision of 5 September 1989, Decisions and Reports 62, p. 319), and it noted that the applicant had been required to do no more than state a simple fact – who had been the driver of his car – which was not in itself incriminating. The Court found that in the case before it, there was no link between the criminal proceedings which had been initiated against persons unknown and the proceedings in which the applicant was fined for giving inaccurate information (see *Weh*, cited above, §§ 32-56).

51. In *Shannon* (cited above) the applicant was required to give information to an investigator into theft and false accounting under the

Proceeds of Crime (Northern Ireland) Order 1996. He did not attend an interview to give the information, and was fined. Although the applicant was acquitted in the underlying proceedings against him for false accounting and conspiracy to defraud arising from the same set of facts, the Court concluded that it was open to the applicant to complain of an interference with his right not to incriminate himself. As to a justification for the coercive measures, the Court noted that not all coercive measures gave rise to a conclusion of an unjustified interference with the right not to incriminate oneself. The Court found that neither the security context nor the available procedural protection could justify the measures in the case (see *Shannon*, cited above, §§ 26-40).

52. *Jalloh v. Germany* ([GC], no. 54810/00, ECHR 2006-IX) concerned the use of evidence in the form of drugs swallowed by the applicant, which had been obtained by the forcible administration of emetics. The Court considered the right to remain silent and the privilege against self-incrimination in the following terms:

> "94. ... While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV).
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> ...
>
> 100. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court recalls that these 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 against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. 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 (see, *inter alia*, *Saunders*, cited above, § 68; *Heaney and McGuinness*, cited above, § 40; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan* [*v. the United Kingdom*, no. 48539/99], § 44[, ECHR 2002-IX]).
>
> 101. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Tirado Ortiz and Lozano Martin v. Spain* (dec.), no. 43486/98, ECHR 1999-V; *Heaney and McGuinness*, cited above, §§ 51-55; and *Allan*, cited above, § 44).
>
> 102. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of

material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect ...

113. In the Court's view, the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, as with the impugned measures in *Funke* and *J.B. v. Switzerland*, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in the *Saunders* case concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity so as to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences (see, *inter alia*, *Tirado Ortiz and Lozano Martin*, cited above).

116. ... [T]he principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."

(c) The Court's assessment

53. The applicants contended that the right to remain silent and the right not to incriminate oneself are absolute rights and that to apply any form of direct compulsion to require an accused person to make incriminatory

statements against his will of itself destroys the very essence of that right. The Court is unable to accept this. It is true, as pointed out by the applicants, that in all the cases to date in which "direct compulsion" was applied to require an actual or potential suspect to provide information which contributed, or might have contributed, to his conviction, the Court has found a violation of the applicant's privilege against self-incrimination. It does not, however, follow that any direct compulsion will automatically result in a violation. While the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. This was confirmed in the specific context of the right to remain silent in *Heaney and McGuinness* and, more recently, in the Court's judgment in *Jalloh*, in which the Court identified the factors to which it would have regard in determining whether the applicant's privilege against self-incrimination had been violated.

54. The applicants maintained that the *Jalloh* case was distinguishable from the present in that it concerned not the obtaining by compulsion of incriminatory statements but rather the use of "real" evidence of the kind indicated in *Saunders* such as breath, blood and urine samples and thus was an exception to the general rule laid down in that judgment. The Court accepts that the factual circumstances of *Jalloh* were very different from the present case. It is nevertheless unpersuaded by the applicants' argument. Even if a clear distinction could be drawn in every case between the use of compulsion to obtain incriminatory statements on the one hand and "real" evidence of an incriminatory nature on the other, the Court observes that the *Jalloh* case was not treated as one falling within the "real" evidence exception in *Saunders*; on the contrary, the Court held that the case was to be treated as one of self-incrimination according to the broader meaning given to that term in *Funke* and *J.B. v. Switzerland* to encompass cases in which coercion to hand over incriminatory evidence was in issue (see *Jalloh*, cited above, §§ 113-16).

55. In the light of the principles contained in its *Jalloh* judgment, and in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put.

56. The nature and degree of the compulsion used to obtain the evidence in the case of Mr O'Halloran, or to attempt to obtain the evidence in the case of Mr Francis, were set out in the Notice of Intended Prosecution each applicant received. They were informed that, as registered keepers of their vehicles, they were required to provide the full name and address of the driver at the time and on the occasion specified. They were each informed that failure to provide the information was a criminal offence under

section 172 of the Road Traffic Act 1988. The penalty for failure by the applicants to give information was a fine of up to GBP 1,000, and disqualification from driving or an endorsement of three penalty points on their driving licence.

57. The Court accepts that the compulsion was of a direct nature, as was the compulsion in other cases in which fines were threatened or imposed for failure to provide information. In the present case, the compulsion was imposed in the context of section 172 of the Road Traffic Act, which imposes a specific duty on the registered keeper of a vehicle to give information about the driver of the vehicle in certain circumstances. The Court notes that, although both the compulsion and the underlying offences were "criminal" in nature, the compulsion flowed from the fact, as Lord Bingham expressed it in the Privy Council in the case of *Brown v. Stott* (see paragraph 31 above), that "[a]ll who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like, for example, shotguns ...) are recognised to have the potential to cause grave injury". Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion.

58. A further aspect of the compulsion applied in the present cases is the limited nature of the inquiry which the police were authorised to undertake. Section 172(2)(a) applies only where the driver of the vehicle is alleged to have committed a relevant offence, and authorises the police to require information only "as to the identity of the driver". The information is thus markedly more restricted than in previous cases, in which applicants have been subjected to statutory powers requiring production of "papers and documents of any kind relating to operations of interest to [the] department" (see *Funke*, cited above, § 30), or of "documents, etc., which might be relevant for the assessment of taxes" (see *J.B. v. Switzerland*, cited above, § 39). In *Heaney and McGuinness* the applicants were required to give a "full account of [their] movements and actions during any specified period" (cited above, § 24), and in *Shannon*, information could be sought (with only a limited legal professional privilege restriction) on any matter which appeared to the investigator to relate to the investigation (see reference at § 23 of *Shannon*, cited above). The information requested of the applicant in *Weh* was limited, as in the present case, to "information as to who had driven a certain motor vehicle ... at a certain time ..." (see *Weh*, cited above, § 24). The Court found no violation of Article 6 in that case on the ground that no proceedings were pending or anticipated against him. It noted that

the requirement to state a simple fact – who had been the driver of the car – was not in itself incriminating (ibid., §§ 53-54). Further, as Lord Bingham noted in *Brown v. Stott* (paragraph 31 above), section 172 does not sanction prolonged questioning about facts alleged to give rise to criminal offences, and the penalty for declining to answer is "moderate and non-custodial".

59. The Court referred in *Jalloh* to the existence of relevant safeguards in the procedure. In cases where the coercive measures of section 172 of the 1988 Act are applied, the Court notes that by section 172(4), no offence is committed under section 172(2)(a) if the keeper of the vehicle shows that he did not know and could not with reasonable diligence have known who the driver of the vehicle was. The offence is thus not one of strict liability, and the risk of unreliable admissions is negligible.

60. As to the use to which the statements were put, Mr O'Halloran's statement that he was the driver of his car was admissible as evidence of that fact by virtue of section 12(1) of the Road Traffic Offenders Act 1988 (see paragraph 27 above), and he was duly convicted of speeding. At his trial, he attempted to challenge the admission of the statement under sections 76 and 78 of the Police and Criminal Evidence Act 1984, although the challenge was unsuccessful. It remained for the prosecution to prove the offence beyond reasonable doubt in ordinary proceedings, including protection against the use of unreliable evidence and evidence obtained by oppression or other improper means (but not including a challenge to the admissibility of the statement under section 172), and the defendant could give evidence and call witnesses if he wished. Again, as noted in the case of *Brown v. Stott*, the identity of the driver is only one element in the offence of speeding, and there is no question of a conviction arising in the underlying proceedings in respect solely of the information obtained as a result of section 172(2)(a).

61. As Mr Francis refused to make a statement, it could not be used in the underlying proceedings, and indeed the underlying proceedings were never pursued. The question of the use of the statements in criminal proceedings did not arise, as his refusal to make a statement was not used as evidence: it constituted the offence itself (see *Allen v. the United Kingdom* (dec.), no. 76574/01, ECHR 2002-VIII).

62. Having regard to all the circumstances of the case, including the special nature of the regulatory regime in issue and the limited nature of the information sought by a notice under section 172 of the Road Traffic Act 1988, the Court considers that the essence of the applicants' right to remain silent and their privilege against self-incrimination has not been destroyed.

63. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

C. Article 6 § 2 of the Convention

64. The applicants referred to Article 6 § 2 of the Convention and the presumption of innocence in the course of their submissions, but made no separate complaint in respect of the provision.

65. The Court finds that no separate issue arises to be considered under Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* by fifteen votes to two that there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 6 § 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 June 2007.

Vincent Berger Jurisconsult	Jean-Paul Costa President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Borrego Borrego;
(b) dissenting opinion of Judge Pavlovschi;
(c) dissenting opinion of Judge Myjer.

J.-P.C.
V.B.

CONCURRING OPINION OF JUDGE BORREGO BORREGO

(Translation)

Although I too voted against finding a violation, I regret that I am unable to subscribe to the approach and reasoning adopted by the majority in this judgment.

In 2004 there were 216 million private motor vehicles in the European Union alone. From that we can deduce that, for all the member States of the Council of Europe, the figure could now be in excess of 400 million. Consequently, the question of road traffic, including road-traffic offences, is of very direct interest to, and has a very direct impact on, a considerable number of European citizens.

In my view, while the Court should always endeavour to draft its judgments in a simple and clear manner in order to make them easier to understand, a particular effort is called for where, as in the present case, the issue is one which affects hundreds of millions of citizens. The "wider public" becomes in this instance the "even wider public".

It is true that the crucial component of a judgment is the operative provisions (the finding of a violation or no violation). However, in the present case, the route taken to arrive at the final result is, I believe, every bit as important.

The present judgment sets out and explores in detail the Court's case-law concerning the right to remain silent and not to incriminate oneself. Eight cases are cited, all of which are placed on the same footing, with the result that all the issues concerned (terrorism, drug trafficking, road-traffic offences and so on) are mixed up together. After an almost two page long citation from *Jalloh v. Germany* ([GC], no. 54810/00, ECHR 2006-IX), the Court attempts to justify its reasoning "[i]n the light of the principles contained in its *Jalloh* judgment" (see paragraph 55).

I believe that the Court is on the wrong track in the present case. This is made no less true by the fact that the circumstances of the *Jalloh* case are very different to those of the present case (see paragraph 54) – something which, moreover, seems obvious to me – or by the fact that the examination of the *Jalloh* judgment (see paragraph 55) is confined to just some of the principles set out therein.

To my mind, the path chosen by the Court in the present judgment follows the individualist, sacrosanct approach which views human rights as abstract rights which are set in stone. According to this school of thought, human rights are not intended to enable the individual to live in society, but to place society at the service of the individual.

I do not share this view. Where human rights are concerned, we cannot and must not forget that, as far back as the French Revolution, the phrase

used was "rights of man and the citizen". Humans are individuals but, as members of society, they become human citizens.

This obvious fact would have been a good reason for making the judgment shorter and clearer. It would have been sufficient to say, in line with the approach adopted by the Privy Council (see paragraph 31) and others, that by owning and driving a motor car, the human citizen accepts the existence of the motor-vehicle regulations and undertakes to comply with them in order to be able to live as a member of society. These regulations clearly entail certain responsibilities, which form the subject of the applications we have examined today. End of story.

In the instant case, citing the entire case-law on the right to remain silent and the privilege against self-incrimination and then applying the resulting principles in order to arrive at a conclusion which merely adds a further shade of nuance complicates matters for no good reason. The Court, in paragraph 57, accepts the wise reasoning of Lord Bingham, a member of the Privy Council. I would point out that, according to that opinion, "[a]ll who own or drive motor cars know ...". If indeed, "[a]ll ... know that by doing so they subject themselves to a regulatory regime ...", we must ask: why spend twelve pages trying to explain what everyone already knows?

Making simple things complicated is tantamount to choosing a path which is not only wrong but dangerous, and which might one day lead the Court to examine under Articles 5 and 8 of the Convention whether, when individuals are stuck in a traffic jam, the deprivation of their liberty and failure to respect their private lives on the part of the authorities might not amount to a breach by the State of its positive obligations.

Human rights constitute a tremendous asset to modern society. In order to preserve this extraordinary achievement, the fruit of countless efforts and sacrifices, we must continue to combat acts of tyranny. However, we must also, in my opinion, avoid playing with fire by placing on the same footing the duty to cooperate of car-owning citizens and the right not to incriminate oneself.

DISSENTING OPINION OF JUDGE PAVLOVSCHI

The case before us is both interesting from a legal point of view and important for the cause of human rights protection.

This case is not just about police cameras and speed traps, it is about much more important issues such as the fundamental principles governing modern criminal procedure and the basic elements of the notion of a fair trial.

In its judicial practice this Court has already had a chance to examine some aspects of the prohibition of compulsory self-incrimination and the presumption of innocence as they exist in different European States, and also to express its vision on what is and is not acceptable in this field in a democratic society and in the circumstances of our daily lives.

The circumstances of the present case give us a further opportunity to examine these rather difficult questions.

The applicants' cars were photographed by police speed cameras at a speed trap, whereupon the applicants received a Notice of Intended Prosecution which informed them that proceedings were to be instituted against them as actual or potential defendants in connection with a specified road-traffic offence for which the police had technical and photographic evidence. In accordance with section 172 of the Road Traffic Act 1988 the applicants were asked in each case – as registered keepers of the vehicles in question, which had been photographed – who had been the driver of the car on the occasion in question. Failure to comply with this statutory request constitutes a criminal offence.

Under the threat of criminal prosecution, Mr O'Halloran informed the police that he had been the driver, and was fined for speeding. His attempts to have the evidence excluded were unsuccessful.

Mr Francis, on being required to furnish the name and address of the driver of his car, refused to do so, relying on his right to silence and the privilege against self-incrimination, and was fined for failure to supply the information.

The penalties for the substantive offence and for failure to supply the information are similar.

The applicants claimed that their right not to incriminate themselves was violated – either because they gave the information under threat of a fine, and were convicted on the strength of that confession, or because they were convicted for refusing to give self-incriminating information. They alleged a violation of Article 6 §§ 1 and 2.

In my opinion there are some issues of crucial importance to understanding and correctly adjudicating the present case. Allow me here to repeat the words of Judge Walsh in his concurring opinion in *Saunders v. the United Kingdom* (17 December 1996, *Reports of Judgments and Decisions* 1996-VI): "It is important to bear in mind that this case does not

concern only a rule of evidence but is concerned with the existence of the fundamental right against compulsory self-incrimination ..." I fully subscribe to these words.

The emergence of the privilege against compulsory self-incrimination in English common law can be traced back to the thirteenth century, when ecclesiastical courts began to administer what was called the "oath *ex officio*" to suspected heretics. By the seventeenth and eighteenth centuries in England the oath *ex officio* was employed even by the Court of Star Chamber to detect those who dared to criticise the king. Opposition to the oath became so widespread that there gradually emerged the common-law doctrine whereby a man had a privilege to refuse to testify against himself, not simply in respect of the special kind of procedure referred to above but, through evolution of the common law, as a principle to be upheld in ordinary criminal trials also (see the concurring opinion of Judge Walsh in *Saunders*, cited above).

Particular attention was paid to the development of this issue by common-law legal systems and, first of all, by the authorities in the United States.

In the second part of the eighteenth century the Fifth Amendment to the Constitution of the United States was enacted. In so far as it relates to the issue at stake here, the amendment reads as follows: "No person shall be ... compelled in any criminal case to be a witness against himself."

The United States Supreme Court Opinion in the case of *Miranda v. Arizona*, delivered in 1966, was a landmark ruling concerning confessions. In that case the Supreme Court stated as follows:

> "... Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. ..."[1]

Since that time, in the overwhelming majority of jurisdictions, if not quite all, this Miranda rule has become a fundamental legal provision enshrined in national legislation.

Now, a typical Miranda warning goes as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense."

The general understanding of this procedural rule is that nobody can be forced to answer questions or to give evidence that may help to prove his

1. See *Miranda v. Arizona* 384 US 436 (1966).

own guilt. Before being questioned a person should be told the nature of the offence of which he is accused and that he has the right not to make any statement, and that if he does it can be used against him in court. No statement obtained by threats or trickery can be used as evidence in court.

In this respect the United States Uniform Code of Military Justice is very illustrative. Article 31 of the Code provides that no person may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him. No person may interrogate, or request any statement from, an accused or a person suspected of an offence without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offence of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court martial. No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court martial[1].

Nowadays the prohibition of compulsory self-incrimination has become a generally recognised standard in the field of criminal procedure.

In my opinion, the majority has committed a fundamental mistake in accepting the Government's position that obtaining self-incriminating statements under the threat of criminal prosecution can be considered as a permissible method of prosecution in certain very specific circumstances, such as those of the present case. This is not only wrong, but is also an extremely dangerous approach.

Of course the majority is right in stating that the right to remain silent is not absolute.

There are indeed some jurisdictions which allow self-incriminating evidence to be obtained from the accused under compulsion. However – and I would like to emphasise this fact – this evidence cannot be used for the purposes of prosecuting that defendant.

Canadian criminal procedure, for instance, provides as follows:

> "Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him ... [and is] ... compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence." (Canada Evidence Act, C-5)

In the case of *R. v. S. (R.J.)*, the Supreme Court of Canada ruled as follows:

> "... The right of an accused not to be forced into assisting in his own prosecution is perhaps the most important principle in criminal law and the principles of fundamental justice require that courts retain the discretion to exempt witnesses from

1. See Uniform Code of Military Justice, Article 31 "Compulsory self-incrimination prohibited", http://www.constitution.org/mil/ucmj19970615.htm.

being compelled to testify, in appropriate circumstances. The person claiming the exemption has the burden of satisfying the judge that in all the circumstances the prejudice to his interests overbears the necessity of obtaining the evidence. ...

Defining 'self-incrimination' over-inclusively as arising whenever the State obtains evidence which it could not have obtained 'but for' the individual's participation would take the notion of self-incrimination far beyond the communicative character that grounds it at common law. ... Both the common law and the Charter draw a fundamental distinction between incriminating evidence and self-incriminating evidence: the former is evidence which tends to establish the accused's guilt, while the latter is evidence which tends to establish the accused's guilt by his own admission, or based upon his own communication. The s. 7 principle against self-incrimination that is fundamental to justice requires protection against the use of compelled evidence which tends to establish the accused's guilt on the basis of the latter grounds, but not the former."[1]

In the United States legal system the issue of obtaining confessions can be settled by means of a non-prosecution agreement, which provides partial immunity against prosecution in relation to self-incriminating evidence submitted by an accused under compulsion.

In general, as far as the United States legal system is concerned, it is worth noting that the American judiciary treats the privilege against self-incrimination as a Constitutional principle.

In this respect the case of *Malloy v. Hogan* is of particular interest. In this case the US Supreme Court ruled as follows:

"*Brown v. Mississippi* ... was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confessions against him. ... [I]n *Bram v. United States*, ... the Court held that '[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself"' ... Under this test, the constitutional inquiry is not whether the conduct of State officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. ...' ... In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. ...

The marked shift to the federal standard in State cases began with *Lisenba v. California*, ... where the Court spoke of the accused's 'free choice to admit, to deny, or to refuse to answer.' ... The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. ... Governments, State and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person

1. See *R. v. S. (R.J.)* [1995] 1 S.C.R. 451.

> to confess through 'sympathy falsely aroused' ... or other like inducement far short of 'compulsion by torture', ... it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against State invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence."[1]

Our Court has also contributed to development of the doctrine of the privilege against compulsory self-incrimination. A recapitulation of the Court's case-law concerning this issue can be found in *Weh v. Austria* (no. 38544/97, 8 April 2004).

In that judgment the Court reiterates 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 against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports* 1996-I).

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 in question is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention (see *Saunders*, cited above, § 68; *Serves v. France*, 20 October 1997, § 46, *Reports* 1997-VI; *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40, ECHR 2000-XII; and *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III).

The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent (see *Saunders*, cited above, § 69, and *Heaney and McGuinness*, cited above, § 40).

A perusal of the Court's case-law shows that there are two types of cases in which it has found violations of the right to silence and the privilege against self-incrimination.

Firstly, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, in other words, in respect of an offence with which that person has been "charged" within the autonomous meaning of Article 6 § 1 (see *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A; *Heaney and McGuinness*, cited above, §§ 55-59; and *J.B. v. Switzerland*, cited above, §§ 66-71).

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1. See *Malloy v. Hogan*, 378 US 1 (1964), http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=nytimes&navby=case&court=us&vol=378&invol=1.

Secondly, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (see *Saunders*, cited above, § 67, and *I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, § 82-83, ECHR 2000-IX).

However, it also follows from the Court's case-law that the privilege against self-incrimination does not *per se* prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned.

For instance, it was not suggested in *Saunders* that the procedure whereby the applicant was requested to answer questions on his company and financial affairs, with a possible penalty of up to two years' imprisonment, in itself raised an issue under Article 6 § 1 (see *Saunders*, ibid.; see also *I.J.L. and Others*, cited above, § 100). Moreover, in a recent case the Court found that a requirement to make a declaration of assets to the tax authorities did not disclose any issue under Article 6 § 1, although a penalty was attached to a failure to comply and the applicant was actually fined for making a false declaration. The Court noted that there were no pending or anticipated criminal proceedings against the applicant and the fact that he may have lied in order to prevent the revenue authorities from uncovering conduct which might possibly lead to a prosecution did not suffice to bring the privilege against self-incrimination into play (see *Allen v. the United King*dom (dec.), no. 76574/01, ECHR 2002-VIII).

Indeed, obligations to inform the authorities are a common feature of the Contracting States' legal orders and may concern a wide range of issues (see for instance, as to the obligation to reveal one's identity to the police in certain situations, *Vasileva v. Denmark*, no. 52792/99, § 34, 25 September 2003).

Furthermore, the Court accepts that the right to silence and the right not to incriminate oneself are not absolute; hence, for instance, the drawing of inferences from an accused's silence may be admissible (see *Heaney and McGuinness*, cited above, § 47, with a reference to *John Murray*, cited above, § 47).

Given the close link between the right not to incriminate oneself and the presumption of innocence, it is also important to reiterate that Article 6 § 2 does not prohibit, in principle, the use of presumptions in criminal law (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141, and *Weh*, cited above).

To this recapitulation some more rules could be added:

In *Jalloh*, the Court adopted what appears to be a wholly new approach to self-incrimination. For the first time, it considered the following factors: (a) the nature and degree of compulsion used to obtain the evidence; (b) the weight of the public interest in the investigation and punishment of the offence in issue; (c) the existence of any relevant safeguards in the

procedure; and (d) the use to which any material so obtained is put (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 117-21, ECHR 2006-IX).

The general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings (see *Saunders*, cited above, § 74).

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 (see *Heaney and McGuinness*, cited above, § 58).

In my view, the provisions of section 172 of the Road Traffic Act 1988 amount to a deviation from the principle of prohibition of "compulsory self-incrimination" and a breach of the right to silence, and can be considered as subjecting the individuals concerned to a legal compulsion to give evidence against themselves. Moreover, the applicants in this case were actually subjected to legal compulsion to give evidence which incriminated them.

It is of crucial importance to provide an answer to the question whether or not the information which the applicants were requested to submit to the investigating authorities was really "self-incriminating".

In comparable circumstances in *Rieg v. Austria* (no. 63207/00, 24 March 2005), the First Section stated as follows:

> "... It was merely in his capacity as the registered car owner that he was required to give information. Moreover, he was only required to state a simple fact – namely who had been the driver of his car – which is not in itself incriminating. ..."

Personally, I cannot agree with the above statement, because no attempt was made to determine the meaning of the word "incriminating" and how it differs from "self-incriminating". Nevertheless, without answering this question it is not possible *in abstracto* to determine whether a statement is or is not incriminating.

Unfortunately, our case-law does not provide us with a clear definition of this notion. On the other hand, we can find some indications which might help us to establish such a definition. In *Saunders*, the Court stated as follows:

> "... there were clearly instances where the statements were used by the prosecution to incriminating effect in order to establish the applicant's knowledge of payments to persons involved in the share-support operation and to call into question his honesty ... They were also used by counsel for the applicant's co-accused to cast doubt on the applicant's version of events ...

> In sum, the evidence available to the Court supports the claim that the transcripts of the applicant's answers, whether directly self-incriminating or not, *were used in the course of the proceedings in a manner which sought to incriminate the applicant.*" (emphasis added) (§ 72)

So, from this authority we are entitled to draw the conclusion that evidence supplied by a defendant and used or intended to be used in order to establish his or her guilt in committing a criminal act can be considered as "self-incriminating".

I agree with the applicants' argument that they were required to submit crucial information which would result in their conviction of the charges laid against them.

It is perfectly obvious that for an individual to state that he was the driver of a car which was speeding illegally is tantamount to a confession that he was in breach of the speed regulations.

Accordingly, the applicants were compelled by the authorities of the respondent State to commit an act of "self-incrimination".

With reference to the "degree of compulsion", I would like to draw readers' attention to the fact that the punishment laid down by the United Kingdom legislation for failure to disclose information about a person alleged to have committed a criminal offence is equal to the punishment laid down for the criminal offence itself. I find this "degree of compulsion" disproportionately high.

In my view, in the particular circumstances of this case, compelling an accused to provide self-incriminating evidence contrary to his will under the threat of criminal prosecution amounts to a kind of compulsion which runs counter to the notion of a fair trial and, accordingly, is incompatible with the Convention standards.

Coming back to the applicants, I feel it necessary to mention the following considerations.

As far as Mr O'Halloran is concerned, I would ask two questions: firstly, was a traffic offence committed and secondly, was that offence committed by Mr O'Halloran? While the prosecuting authorities did have evidence concerning his speeding car and – accordingly – concerning an offence that had been committed, the issue of Mr O'Halloran's role as defendant is not that simple. The Government failed to submit any other proof relating to the defendant apart from Mr O'Halloran's own statements.

It is clear from the judgment (see paragraph 57) that these statements were obtained by the prosecuting authority under compulsion of "a direct nature" – the threat of criminal punishment – and that it intended to and indeed did use them in order to prove the applicant's guilt. It is also obvious that the prosecution did not have any other evidence against the applicant as a defendant and that without his confession there would have been no conviction.

In *Saunders*, the Court ruled that it must be determined whether the applicant had been subjected 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.

In the instant case, my answer to both these questions is in the affirmative. Yes, Mr O'Halloran was subjected to compulsion to give evidence and yes, the use made of this evidence did offend the principles of fundamental justice, including the basic principles of a fair trial.

Where Mr Francis is concerned the situation is slightly different. Unlike the first applicant, he chose to make use of his right not to incriminate himself and refused to provide information. As a result, he was punished for his refusal to give self-incriminating evidence. Put more simply – he was punished for making use of his fundamental right not to incriminate himself.

Despite this difference, I consider that the overall approach should be similar to that taken with regard to the first applicant.

In seeking to explain the deviation from the general principles established by the Court in its previous case-law the Government argued, *inter alia*, that the power under section 172 to obtain an answer to the question who was driving a car when a suspected motoring offence was committed and to use that answer as evidence in a prosecution or, alternatively, to prosecute a person who failed to provide information, was compatible with Article 6. In their view, there were very good reasons why the owner should be required to identify the driver: the punishment of driving offences was intended to deter drivers from dangerous conduct which caused risk to the public; deterrence depended on effective enforcement; there was no obvious generally effective alternative to the power contained in section 172; and without such a power it would be impossible to investigate and prosecute traffic offences effectively (see paragraph 38 of the judgment).

In my view, this argument is clearly based on policy considerations. This runs counter to the above-mentioned case-law, according to which "... 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." (see *Heaney and McGuinness*, cited above, § 58)

Given that, in *Jalloh*, the Court expressly found that the requirements of fairness applied equally to all types of criminal proceedings, it is very difficult for me to accept that the United Kingdom legislation permits deviation from the basic principles of a fair trial for minor offences which do not present any particularly serious threat to society. Furthermore, if we accept policy reasons as a valid ground for violation of the prohibition of compulsory self-incrimination or the presumption of innocence for offences which present a minor danger, why not accept the same approach to areas of

legitimate public concern which might justify encroaching on the absolute nature of Article 6 rights: terrorism, banditry, murder, organised crime and other truly dangerous forms of criminal behaviour?

If the public interest in catching minor offenders (persons committing speeding or parking offences) is so great as to justify limitations on the privilege against self-incrimination, what would be the position when the issue concerned serious offences? Is the public interest in catching those who commit crimes which cost people's lives less great than in catching those who slightly exceed the speed limit?

In my view it is illogical for persons who have committed minor offences to find themselves in a less favourable situation than those who have committed acts which are truly dangerous to society.

I am very much afraid that if one begins seeking to justify departures from the basic principles of modern criminal procedure and the very essence of the notion of a fair trial for reasons of policy, and if the Court starts accepting such reasons, we will face a real threat to the European public order as protected by the Convention.

I understand the reasoning behind the departure from the basic principles of a fair trial in the case of speed violations: namely, that such offences represent hundreds of thousands if not millions of cases, and that the State is unable to ensure that in each of this vast number of cases all the procedural guarantees have been complied with. I repeat: I understand this line of reasoning, but I do not accept it. In my opinion, if there are so many breaches of a prohibition, it clearly means that something is wrong with the prohibition. It means that the prohibition does not reflect a pressing social need, given that so many people choose to breach it even under the threat of criminal prosecution. And if this is the case, maybe the time has come to review speed limits and to set limits that would more correctly reflect peoples' needs. We cannot force people in the twenty-first century to ride bicycles or start jogging instead of enjoying the advantages which our civilisation brings. Equally, it is difficult for me to accept the argument that hundreds of thousands of speeding motorists are wrong and only the government is right. Moreover, the government is free to breach the fundamental rights of hundreds of thousands of its citizens in the field of speed regulations. In my view, the saying "the ends justify the means" is clearly not applicable to the present situation.

My understanding is the following. I think that in such situations any Contracting State to the Convention has just two options – either to prosecute offenders in full compliance with the requirements of Article 6 or, if that is not possible owing to the huge number of offences committed by the population, to decriminalise an act which is so widely committed that it can be considered as normal rather than exceptional. In my view, there should be no "third way" in the field of criminal liability.

The last thing I would like to mention is the following. At the end of paragraph 57 the Court reaches the following conclusion:

> "... Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion."

This is another argument with which I am unable to agree. In my opinion, it would run counter to the letter and the spirit of the Convention to allow member States to apply to a huge swathe of the population such a "blanket" statutory deprivation of their fundamental rights in the field of criminal law and criminal procedure.

Of course, and there should be no doubt about this, motor-car drivers are under an obligation to comply with the various traffic regulations. However, when one of their number faces criminal prosecution and trial, he or she must enjoy all the guarantees provided by Article 6, regardless of how heavy a burden this entails.

These are the reasons which prevent me from sharing the position taken by the majority in the present case.

DISSENTING OPINION OF JUDGE MYJER

1. I disagree with the opinion of the majority that there has been no violation of Article 6 § 1 of the Convention.

2. The dissenting opinion of Judge Pavlovschi contains many elements to which I fully subscribe. Even so, I have chosen to write my own dissenting opinion. This enables me to elaborate on points which are not mentioned in the dissenting opinion of Judge Pavlovschi. Besides, it saves me from indicating where I dissent from his dissent.

3. I take the Government's point that the definition in criminal law of driving offences is intended to deter dangerous conduct that may well cause serious harm and even injury to members of the public, that deterrence depends on effective enforcement, and that the authorities should have the power to investigate and prosecute traffic offences effectively. And it is clear that this is the case in all Contracting States. But I also agree with the applicants that the serious problem caused by the misuse of motor vehicles is not sufficient to justify a system of compulsion which extinguishes the essence of the rights under Article 6.

4. Practice shows that in order to be able to investigate and prosecute traffic offences effectively without unduly limiting the rights of the defence, a number of Contracting States have used various legislative techniques avoiding the pitfalls in issue in the present case. They have, for example, chosen to draw adverse inferences from a failure to answer questions, or established a statutory but rebuttable presumption of fact that the registered owner of the motor vehicle was the driver in question (see, for instance, *Falk v. the Netherlands* (dec.), no. 66273/01, ECHR 2004-XI). The Government's argument that "the very fact that other legislative techniques could bring about substantially the same result indicated that questions of proportionality – rather than the absolute nature of the rights suggested by the applicants in cases of direct compulsion – were at issue" (paragraph 39) is unconvincing. To put it plainly, if the desired result can be achieved by proceeding in a way that is both effective and right, then one should not choose a wrong way, however effective it may be. In my opinion the applicants were right in submitting that the United Kingdom has just chosen the wrong legal solution to deal with the problems caused by the misuse of motor vehicles.

5. Although this has not been expressly mentioned in the judgment, the majority find no violation because this case is about "implied consent". In paragraph 57 of the judgment the majority – having quoted and endorsed the views of Lord Bingham in the case of *Brown v. Stott* – accept that "[t]hose who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor violations, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of

suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion." I do not agree with that view. Our own case-law makes it very clear that some rights under Article 6 can indeed be waived, provided that this is done unambiguously and in an unequivocal manner. But I sincerely doubt whether the majority accept the corollary which is unavoidable if the judgment in the present case is to be consistent with that case-law: under the British system, when it comes to the identity of the driver of a car, all those who own or drive cars are automatically presumed to have given up unambiguously and unequivocally the right to remain silent. Just to make this point clear: I accept that the driver of a car may be obliged to carry his driving licence with him and to surrender it to a police officer immediately when so requested, and also that the failure to do so may in itself be an offence. But, to use another phrase from the Court's case-law (see *Saunders v. the United Kingdom*, 17 December 1996, *Reports of Judgments and Decisions* 1996-VI), a driving licence has "an existence independent of the will" of the driver concerned. The licence may be read but the lips of the owner may remain sealed. In the criminal context the use of the right to remain silent should not be an offence in itself.

6. In quoting and endorsing the views of Lord Bingham, the majority in fact also seem to play the "public interest" card in the form of a rather tricky new criterion which was first stated in § 117 (but not in § 101) of *Jalloh v. Germany* (no. 54810/00, ECHR 2006-IX) in order to determine whether the right not to incriminate oneself has been violated: "the weight of the public interest in the investigation and punishment of the offence in issue." This is, moreover, a new criterion which is incompatible with the established case-law that the use of incriminating statements obtained from the accused under compulsion in such a way as to extinguish the very essence of the right to remain silent cannot in principle be justified by reference to the public interest served. Surprisingly, however, paragraph 55, which sets out the criteria on which the Court bases its examination "[i]n the light of the principles contained in its *Jalloh* judgment, and in order to determine whether the essence of the applicant's right to remain silent and privilege against self-incrimination was infringed", makes no mention of the public interest criterion: it only mentions the other *Jalloh* criteria (the nature and degree of compulsion used to obtain the evidence; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained was put).

7. I accept that, having regard especially to this new *Jalloh* criterion, the present judgment might be considered as a legal continuum to that judgment. However, in my opinion, today's judgment also shows what may happen if "the weight of the public interest" is allowed to play a role in deciding whether or not the right to remain silent should be upheld.

It is clear that I do not agree with the majority in this respect. Since, in paragraphs 35 and 36, the majority rightly accepted that (the criminal limb of) Article 6 is applicable in the present case (which is consistent with the reasoning in *Öztürk v. Germany*, 21 February 1984, Series A no. 73) it should, in my opinion, also have accepted that the right to remain silent ought to have been respected. That is not the case under the system in the United Kingdom, where section 172 of the Road Traffic Act provides that where the driver of a vehicle is alleged to be guilty of an offence, the registered owner of that vehicle (or any other person) must give information as to the identity of the driver, even when he himself was the driver, and the registered owner who fails to give such information is guilty of an offence.

8. It is well known that the Court is faced with an enormous backlog. This has prompted, among other things, the new admissibility criterion that is due to be introduced by Protocol No. 14 to the Convention (the new Article 35 § 2 (b) of the Convention) which, if one will, the present judgment appears to anticipate for a particular category of cases. If in fact the majority had decided unequivocally that, in order to be able to deal with the real core human rights issues, a *de minimis non curat praetor* rule for this "Treaty of Rome" was inevitable, which would mean reversing *Öztürk* and accepting that from now on the handling of traffic offences would no longer fall within the ambit of Article 6, then I might have agreed with such an approach. But my consent to such an approach would have had to be conditional on the provision of safeguards against abuse – and express, not implied.