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## Vulnerable Defendants and the Right to Silence

*O'Donnell v United Kingdom* [2015] ECHR 16667/10

Keywords: Right to silence; adverse inferences; vulnerable witnesses; effective participation; right to a fair trial

### The facts

The applicant, O'Donnell, was tried and convicted of murder in Northern Ireland. O'Donnell had an IQ of 62, placing him within the bottom one percent of the general population, and the understanding of spoken English equivalent to a six-year old. The prosecution case was that, in October 2004, following a day of drinking, O'Donnell and another man killed the deceased. There was evidence from witnesses that O'Donnell had been aggressive and threatening towards the deceased, and that he had asked the deceased to come out and fight with him after being refused admission to a public house. The police found two sets of clothes at O'Donnell's flat which were heavily stained with the blood of the deceased. One of the items of clothing had O'Donnell's name tag ironed on to it. A plastic bag was also found at the premises which contained a knife with the blood of the deceased on it.

At trial, the defence applied for a ruling that O'Donnell's mental condition made it undesirable for him to give evidence. The effect of a favourable ruling would have been that no adverse inference could be drawn from O'Donnell's silence under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988. A *voir dire* was held at which the trial judge considered expert evidence from a clinical psychologist, who was of the opinion that O'Donnell "would be highly suggestible, he would have problems understanding questions, and would find it difficult to give coherent responses" (at [15]). Consideration was also given to the evidence of a consultant psychiatrist, who was of the opinion that O'Donnell "'should be capable of following proceedings and actively contributing to them' if account were taken of his need to have material simply phrased, and if he were allowed adequate consultation with others to ascertain his understanding..." (at 25]). The trial judge preferred this second expert opinion and refused the defence application, finding that the manner of questioning could be controlled to ensure no unfairness. O'Donnell elected not to testify and the jury was invited to draw an adverse inference from his silence.

O'Donnell's application for leave to appeal was dismissed by the Court of Appeal, as was his request that the Court certify questions of general public importance for the consideration of the Supreme Court. The case was then brought to the European Court of Human Rights. O'Donnell complained that his trial had been unfair, in contravention of Article 6 of the European Convention on Human Rights. In particular, it was argued that the trial judge's ruling as to the desirability of his giving evidence was improper and unfair, as he would have been unable to understand the significance of questions or provide a coherent account of what had happened. In addition, it was argued that the trial judge's direction to the jury in respect of adverse inferences had been flawed, as he had omitted to direct the jury that no inference should be drawn unless they considered that there was a case to answer.

**HELD, DISMISSING THE APPLICATION**, there had been no violation of Article 6. Taking all the circumstances of the case into account, including the weight of the circumstantial evidence against O'Donnell calling for an explanation, the competing medical evidence and the trial judge's clear and detailed direction to the jury, there had been no unfairness regarding the adverse inference instruction (at [58]). As to the second issue, the position in Northern Ireland at the time of the trial was that the judge was not bound to instruct the jury that no inference should be drawn unless there was a case to answer. Taking into consideration the strong circumstantial evidence against O'Donnell

and the trial judge's careful direction to the jury, there had been no violation of Article 6 in respect of the trial judge's failure to give a direction on a case to answer (at [61]).

## Commentary

*O'Donnell v UK* is the first case in which the European Court of Human Rights has considered whether it is 'desirable' for a defendant to give evidence. The Court confirmed that the right to silence is one of the generally recognised international standards which lies at the heart of a fair procedure (at [48]-[50]). However, it is not an absolute right: "

Whether the drawing of adverse inferences from an accused's silence infringes upon his rights under Article 6 is a matter to be determined in light of the circumstances of the case, having regard to the situation where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation... The trial judge's direction to the jury on adverse inferences is of particular relevance to this inquiry (at [51]).

The Court agreed with the Government that the evidence against O'Donnell was strong and clearly called for an explanation from him (at [54]). The Court, noting the competing expert evidence which had been presented to the trial judge, found that "there was nothing unreasonable about the manner in which the trial judge preferred the evidence of one expert over that of another" (at [55]). The Court also noted that the trial judge had used clear terms in directing the jury and had set out the expert evidence regarding O'Donnell's intellectual disability, limited capacity to understand English, and limited capacity to provide a coherent account of his actions (at [56]). Also relevant was the trial judge's instruction to the jury that they could only draw adverse inferences from O'Donnell's silence if they were satisfied beyond a reasonable doubt that the evidence relied upon to justify his silence presented no adequate explanation for his absence from the witness box (at [56]).

In finding no unfairness in O'Donnell's trial, the Court upheld a restrictive approach to determining whether it is 'desirable' for a defendant to give evidence. This is consistent with the restrictive approach taken by the domestic courts. Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 is the equivalent of s.35 of the Criminal Justice and Public Order Act 1994. Section 35 allows 'such inferences as appear proper' to be drawn from a defendant's failure to give evidence or refusal, without good cause, to answer any question. The inference drawn from a defendant's silence may be one of guilt; that the defendant did not give evidence because he has no explanation to give because he is guilty (See *Murray v DPP* [1994] 1 WLR 1).

Section 35(1)(b) of the 1994 Act and Article 4(1)(b) of the Criminal Evidence (Northern Ireland) Order 1988 provide that inferences cannot be drawn if it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence. These provisions have the potential to act as safeguards for vulnerable defendants against the indiscriminate drawing of adverse inferences, linking silence directly to guilt, notwithstanding a legitimate explanation for silence.

There is no definition of 'undesirable'; judges have been afforded wide discretion on the matter (see *R v Friend* [1997] 2 Cr App R 231). The case law thus far suggests that it is only in exceptional cases that a defendant's evidence will be judged undesirable (see, for example, *R v Friend* [1997] 2 Cr App R 231; *R (on the application of DPP) Kavanagh* [2005] EWHC 820 (Admin); *R v Ensor* [2009] EWCA Crim 2519; *R v D* [2013] EWCA Crim 465). The decision in *O'Donnell* indicates that a restrictive approach does not, in principle, infringe Article 6. The decision also highlights three particular issues relating to

the application of s.35(1)(b) and Article 4(1)(b) which warrant critical analysis, and which will be addressed in the following paragraphs. These are: the relationship between the desirability of a defendant's evidence and the availability of special measures for vulnerable defendants; the relevance of expert evidence in determining the desirability of a defendant's evidence; and the relevance of the strength of the prosecution case in determining the desirability of a defendant's evidence.

*O'Donnell* confirms that the availability of special measures is an important factor in determining the desirability of a defendant's evidence. Where the defendant can be assisted in giving evidence, including having questions put to him in a manner which he is likely to understand and be able to respond to, it seems unlikely that his testimony will be deemed undesirable. While those who wish to actively participate in their trials should be able to do so effectively, it is concerning that the availability of special measures can overshadow the problems faced by those who do not wish to participate and who would struggle with participating. Eligibility for special measures should signal that a defendant will have particular difficulty in giving evidence. In practice, however, the availability of special measures has contributed to finding that defendants should testify. If they do not testify, adverse inferences can be drawn against them. This situation has arisen despite the fact that special measures will not necessarily enable effective participation.

The expert evidence available in *O'Donnell* demonstrates the uncertain effectiveness of special measures. While the consultant psychiatrist believed that O'Donnell could play an active role with assistance, the clinical psychologist entered a 'significant reservation' in relation to O'Donnell's ability to give evidence and expressed doubts as to whether the proposed assistance would enable him to provide a coherent account (at [17]). The argument that the proposed safeguards were not adequate was rejected by the trial judge. A similar argument was rejected by the Court of Appeal in *R v D* [2013] EWCA Crim 465, where the availability of a registered intermediary was a significant factor in the judge's decision that it was desirable for the defendant to give evidence. The defence submission that the assistance which was provided was insufficient to enable effective participation was rejected. The current approach to assessing the desirability of a defendant's evidence in the light of the availability of special measures has rendered a finding of 'undesirable' an unlikely last resort, despite the highly speculative nature of the matter. Vulnerable defendants thus face a difficult choice between remaining silent and risking inferences of guilt being drawn against them, or testifying and potentially prejudicing the jury because, for example, they may give inconsistent testimony, or be unable to follow proceedings or respond adequately to questioning.

As to the second issue, there must be an evidential basis to support a finding that it is undesirable for a defendant to give evidence (see *R v Friend* [1997] 2 Cr App R 231 at [241]). However, expert evidence to this effect is not decisive. Where there is competing expert evidence, the judge is entitled to prefer the evidence that she finds most persuasive. In *O'Donnell*, the judge was persuaded by the expert opinion most favourable to the prosecution. The judge is also 'entitled to look beyond the expert material' and consider other factors in the case (*R v D* [2013] EWCA Crim 465 at [55]). Given the uncertain effectiveness of special measures, and the uncertainties inherent in diagnosing and predicting the effects of particular mental conditions, it would be more consistent with fairness to take a cautious approach and attach greater weight to expert opinions in support of the defence.

The current assumption seems to be that any unfairness in favouring the prosecution can be dealt with by allowing the defence to present its expert evidence to the jury, and by directing the jury clearly on this evidence (at [55] and [56]). If the jury is satisfied that there is an acceptable explanation for the defendant's silence, then no adverse inference should be drawn (see The Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (JSB, 2010); *R v Cowan* [1996] QB 373; *Condon v UK* (2001) 31 EHRR 1). However, it is far from certain that this is sufficient to counteract the unfairness of

correlating silence directly with guilt in cases where the defendant suffers from a physical or mental condition which could affect his ability to give evidence. The legislative provisions which allow inferences to be drawn from silence have created an expectation of defendant participation, and the onus has been placed squarely on the defence to justify any lack of participation. Where inferences can be drawn from silence, the jury is effectively invited to penalise the defendant for his failure to participate. Moreover, the obvious assumption underlying the legislation is that the innocent, with nothing to hide, will want to assert their innocence. If a judge has determined that the defendant is in a position to assert his innocence, it seems dangerously optimistic to assume that the jury will not defer to this view.

As to the third issue, in reaching its conclusion, the Court took account of 'the weight of the circumstantial evidence against the applicant calling for an explanation' (at [58]). That the case 'clearly calls for an explanation' is a necessary prerequisite to drawing inferences from silence in cases where the desirability of the defendant giving evidence is not in question (*Murray v UK* (1996) 22 EHRR 29 at [47]). Arguably, it is unnecessary and unhelpful to consider the strength of the case against the defendant when determining whether it is desirable for him to give evidence, or when assessing the fairness of proceedings in which his giving evidence was deemed desirable. These determinations should be confined to whether, regardless of the strength of the prosecution case, the defendant is, or was, in a position to testify. This should require consideration of the defendant's particular mental or physical condition, the impact which giving evidence could have on the defendant's health, and the effect which the defendant's condition could have on the quality of his testimony.

In addition, as noted in the concurring opinion of Judge Wojtyczek:

'If in a specific case there is sufficient evidence to decide a case without drawing any inferences from the accused's silence, then there is no need to resort to any adverse inferences from his silence in deciding the case.' (at [6] of concurring opinion)

Since the prosecution case must be strong enough to call for an explanation, it is unnecessary to take account of silence in determining guilt; there is other evidence on which to base a conviction. This, taken together with the requirement that silence cannot be the sole or main basis for conviction, means that silence should ordinarily be afforded little, if any, evidential value. This is particularly true where, due to the defendant's difficulties, 'the value of his personal testimony would, in any event, have been extremely limited' (at [5] of concurring opinion).

Judge Wojtyczek expressed 'strong hesitation' in voting with the majority and took the view that, 'the instant case shows clearly that the criteria established by the Court for the assessment as to whether Convention standards in respect of the right to silence were observed should be revisited' (at [6] of concurring opinion). This statement was made in regards to the right to silence generally, but it seems especially relevant in relation to vulnerable defendants. It is unfortunate that the European Court of Human Rights passed over an opportunity to not only reconsider the compatibility of Article 6 with drawing inferences from silence, but also the fairness of expecting vulnerable defendants to participate and penalising their failure to do so by presenting it as evidence of guilt (see A Owusu-Bempah 'Judging the Desirability of a Defendant's Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994' [2011] *Crim LR* 690).