

## ISSUES OF CRIMINAL JUSTICE

### *Paul Mageean, Rapporteur for the Working Group on Criminal Justice*

I acted as rapporteur for the working group on criminal justice (hereinafter “the working group”). The working group included barristers, solicitors, a police officer, an ex-prison governor, ex-prisoners, representatives from ex-prisoner groups, representatives from NIACRO and probation, the youth justice sector and other practitioners from the criminal justice sector.

Generally the working group reached its conclusions by consensus. There was dissent on some issues and this was reflected in the text.

While the working group drew on the views and expertise of those contained within it, the submission was informed primarily by reference to the particular circumstances of the human rights situation in Northern Ireland and international human rights standards.

The report of the working group contained four sections dealing with pre-trial rights, trial rights, custody and release, and the rights of children and young people in the criminal justice system.

We were of course cognisant of the international standards which are now part of our domestic law, those contained in the European Convention on Human Rights, and particularly Articles 5 and 6 of the Convention. While we largely incorporated Article 6 into our draft, we did not attempt to incorporate Article 5. We felt that Article 5 was not sufficiently precise in terms of its protection for arrest and detention rights and, given the way in which these rights have on occasion been abused in Northern Ireland, we felt it appropriate to draft what we considered to be stronger protections than those afforded by Article 5.

The bulk of the recommendations we eventually made to the Commission were taken on board in the draft Bill of Rights, but there were nevertheless some significant additions and omissions.

One of the areas of divergence centred on the fact that the Commission included Article 5 of the Convention in their draft in its entirety but then also added most of the specific recommendations of the working group as well. Interestingly the Commission chose also to insert a clause in their draft text which sought to ensure that no-one would be detained solely on the ground that he/she was a member of one of the categories in Article 5(1)(e) of the Convention (which allows for the detention of persons “for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”).

Our submission to the Commission began with a section on arrest and detention rights. It included a right to be “secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.” This provision was reflected with minor amendments in the draft Bill of Rights.

We also set out a series of rights which are engaged whenever someone is arrested. Most of these were also replicated largely in the final text adopted by the Commission. The first of these proposals was the right to consult with a solicitor of the suspect's choice. The working group indicated that this right should extend to having that solicitor present during questioning given the history in Northern Ireland of allegations of ill-treatment of those detained under the emergency laws, and also widespread complaints of abuse and threats against solicitors being issued to unaccompanied suspects by police officers. The Commission appears to have shared this concern and indeed it has added to the equivalent provision in the Bill of Rights by stating that a suspect also has the right to have the interview subject to video and audio recording. However, the issue as to whether a suspect has a right to a solicitor of his/her choice is made subject to one of the questions which pepper the draft Bill of Rights, indicating that the Commission could not reach consensus on this issue.

The working group, with two members dissenting, also included a provision designed to restore the right to silence to the position before the introduction of the Criminal Evidence (NI) Order 1988. This impacted on the situation during interview with the police and also during trial given that under the 1988 Order inferences can be drawn if the suspect remains silent during either questioning or at trial. The Commission accepted these recommendations but unusually in terms of fair trial provisions, made them subject to a limitations clause. Indeed the Commission indicate that the current legislative inroads on the integrity of the right to silence may be considered legitimate under the draft Bill of Rights as they may be "reasonable and justifiable in an open and democratic society."

Working group provisions guaranteeing suspects under arrest the right to inform a relative/friend where they are being detained, and to communicate with and be visited by a range of individuals were both accepted by the Commission and articulated in their draft text.

The Commission also appears largely to accept the recommendation by the working group that suspects should be released or charged within 24 hours of the time of arrest. This reflected the fact that the vast majority of suspects are indeed released or charged within this timescale and also concern that, certainly in the emergency law context, the police used arrests not as a means of gathering evidence with a view to charging someone, but as a means of gathering intelligence. However, the Commission provision reads "[E]veryone who is detained has the right to be charged or to be released within 24 hours unless a court orders an extension to the detention for exceptional reasons." The wording of the Commission's clause is unclear as to what the maximum limit of detention is whereas the working group explicitly made the limit 24 hours. Presumably this confusion will be remedied in the final text.

Provisions suggested by the working group relating to the rights to have a competent interpreter present during questioning and to be informed of one's rights in a language and manner one understands were also included in the draft Bill of Rights.

The working group, conscious of the allegations made in Northern Ireland in relation to ill-treatment of detainees, included a provision outlawing cruel,

inhuman or degrading treatment but also accompanied by an explanatory note drawn from the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. This note explained that the term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses. The Commission obviously included protection against ill-treatment in its draft but only by way of the inclusion of Article 3 of the European Convention of Human Rights.

The penultimate pre-trial recommendation made by the working group attempted to ensure that those detained for questioning had the right to certain adequate conditions of detention in terms of access to food, exercise, reading material etc. Once again this relatively uncontroversial recommendation was accepted by the Commission with the addition of ensuring that those detained had access to “spiritual counselling”. The omission of this consideration may speak to the religious commitment of those on the working group.

The practitioners on the working group were concerned that in the past bail applications by those charged with serious politically motivated offences were often marked by the Crown making unsubstantiated allegations that individuals were active members of paramilitary groups. Such comments by the Crown were generally accepted by the judiciary as reasons to refuse the granting of bail to the applicant. The working group therefore included a provision to the effect that bail should be granted unless the release of the applicant would “constitute a real risk to public safety.” This provision was also informed by consideration of the relevant European Convention jurisprudence.<sup>1</sup> The Commission also appears to have been influenced by similar concerns in relation to the manner in which bail applications have operated to the disadvantage of the applicant in Northern Ireland. Yet the relevant provision states that suspects should be released on bail unless the “prosecution can produce admissible evidence to show that there are relevant and sufficient reasons to justify continued detention.” While clearly designed to deal with the same difficulty identified by the working group it is hard to see how this provision will work in practice. How can a bail court judge what is admissible evidence without a much fuller hearing than that which would normally occur at this stage? In addition, surely the primary consideration in relation to decisions whether to release on bail should relate to public safety rather than guilt or innocence of the accused.

Both the working group and the Commission incorporated Article 6 of the Convention into their respective drafts and both also included a number of additional rights. The working group, conscious of the extensive delays there had often been in bringing individuals to trial in Northern Ireland, argued that all trials had to take place within 100 days of the suspect being charged with the offence unless it was extended because the accused agreed or where the interests of justice so required. The Commission accepted the thrust of this recommendation but introduced the qualification that for the time limits to be engaged, the accused had to be in custody. In those circumstances, the time limit for indictable offences would be 110 days, and 40 days for summary offences. While the working group, as a result of the

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<sup>1</sup> *Wemhoff v FRG* A 7 (1968).

inclusion of these time limits, omitted the sub-clause from Article 6 of the Convention relating to trials being held within a reasonable time, the Commission did not.

The working group also included protection for the double jeopardy rule in its submission and included a right of appeal in relation to both conviction and sentence. The Commission essentially mirrored the latter of these recommendations but made the former subject to another of the questions which are found in the draft Bill of Rights.

Similarly subject to question, is the working group proposal to reinstate the right to trial by jury for indictable offences.

The Commission accepted without qualification the suggestion from the working group that “[E]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded.”

Surprisingly the Commission did not include in their draft any provision to reflect the concern expressed by the working group about disclosure of material by the prosecuting authorities and the police. We had suggested a provision obliging the disclosure of used and unused material. However, the Commission have not included any such provision in their Bill of Rights.

The working group also attempted, in the section of the report dealing with fair trial rights, to address concerns arising in relation to the issues of witnesses’ rights, victims’ rights and the behaviour of judges and other court officials. All of these were essentially included in the draft Bill of Rights although the provisions in relation to victims’ rights were re-drafted and covered by a directive provision in the Victims Chapter which obliges the state to introduce legislation to give effect to certain enumerated rights including the bulk of those identified by the working group.

There were three provisions which the Commission included which were not covered in the report by the working group.

The first was the inclusion of Article 7 of the European Convention which prohibits the retrospective application of criminal law. The second was an important provision, mirroring one from the South African Constitution, guaranteeing fair trial in administrative proceedings. The third was equally positive, particularly in light of the experience in Northern Ireland regarding official intimidation and harassment of defence lawyers. It is taken from the UN Basic Principles on the Role of Lawyers and the Basic Principles on the Independence of the Judiciary and places an obligation on government to ensure that lawyers can perform their professional functions without intimidation or interference.

The section of the working group’s report dealing with custody and release was also largely incorporated into the draft of the Bill of Rights. The first provisions in the section are directive in nature, stating that custodial sentences:

“ . . . shall only be used as a measure of last resort. The police, prosecuting authorities and judiciary shall consider alternatives to prosecution and custodial sentences at all stages of the criminal justice process.”

The latter sentence is not included in the draft Bill of Rights but the former is, as is the second provision from the working group in this section obliging criminal justice agencies to “develop and encourage the use of alternatives to prosecution and the use of custodial sentences.”

Provisions suggested by the working group guaranteeing prisoners, in most circumstances, the rights contained in the Bill of Rights and ensuring they are treated humanely were incorporated into the draft text.

The working group also recommended that the Bill of Rights should include a right to reintegration for prisoners. The Commission accepted the need for such a provision but again drafted their equivalent clause in order to place an obligation on the state to “ensure that favourable conditions are created for the reintegration of ex-prisoners into society.” Obviously an integral aspect of this reintegration should be a bar on discriminating against former prisoners on the grounds of their criminal record. The working group therefore recommended that the general provision relating to discrimination in the Bill of Rights should include those convicted of, or charged with a criminal offence. The Commission accepted this recommendation and the general anti-discrimination clause includes a bar on discrimination against those in “possession of a criminal record.”

The one area in this section where there is significant divergence between the recommendations of the working group and what the Commission proposed in its draft text is in relation to a clause proposed by the working group relating to those convicted of politically motivated offences. The working group felt that, given the particular difficulties faced by former politically motivated prisoners, such prisoners should be able to get their criminal records expunged subject only to measures necessary for the protection of the safety of the public. The Commission did not include any such provision in its final draft.

The final section of the report of the working group dealt with the rights of children and young people in the criminal justice system. There was also a Children’s Working Group so that overlap to a certain extent was inevitable. All of the provisions suggested by the working group were dealt with in the chapter of the draft Bill of Rights dealing with the rights of children.

There was extensive discussion within the group as to whether the age of criminal responsibility should be raised from 10. The unanimous view was that it should be raised and, while consensus was not reached about the appropriate age, almost all members of the group considered that it should be at least 14. The Commission has raised the age from 10 to 12 and has also exhorted the government to keep it under review.

The working group’s recommendations in relation to the definition of a child and ensuring that the best interests of the child are the paramount consideration in every matter concerning the child were included in the draft Bill of Rights. This was also the case with the provision guaranteeing a child being questioned by the police the right to have an appropriate adult present, in addition to the right to legal advice.

Equally, the rights relating to how children are treated once arrested and if charged, and in custody were largely replicated in the draft text as was the

provision drafted by the working group to deal with the judgment in *T & V v United Kingdom*<sup>2</sup> relating to fair trial rights for children.

The only apparent area of disagreement between the Commission and the working group in this section was in relation to a proposal by the working group to effectively incorporate the UN Convention on the Rights of the Child into domestic law. The Commission considered this option but decided against it, instead including a provision which obliges public bodies to “carry out their functions in relation to children in accordance with the provisions of the UN’s Convention on the Rights of the Child.”

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<sup>2</sup> Application numbers 24724/94 and 24888/94, 4<sup>th</sup> December 1998.