

STANDARD OF THE PROTECTION OF THE RIGHT TO SILENCE APPLICABLE TO PERSONS EXAMINED AS WITNESSES IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW*

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1. INTRODUCTION

The issue of the protection of the right to silence provokes scientific discussions in the systems of particular states as well as in the light of international legal acts. Some acts of international law *expressis verbis* lay down the right to silence (e.g. Article 14(3g) of the International Covenant on Civil and Political Rights of 1966 and Article 8(2g) and (3) of the American Covenant on Human Rights of 1969), and in case of other acts, there is no clear reference made to this right, e.g. in the European Convention on Human Rights (hereinafter: ECHR). This did not prevent the European Court of Human Rights (ECtHR) from stating that the right to silence and against self-incrimination are international norms and constitute the essence of a fair trial. In its case law so far, the ECtHR not only determined the essence of the right to silence but also distinguished the guarantees of the right to silence, which enable an individual to efficiently oppose the state's coercion into providing incriminating information.¹ Therefore, it is necessary to have a close look at the standard of the protection of the right to silence and its

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¹ See, M. Berger, *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, *European Human Rights Law Review* Vol. 5, 2007, p. 515.

limits determined by the ECtHR, especially as Article 6(1) ECHR in the part concerning indictment in a criminal case is interpreted by the ECtHR as covering, within its scope, not only proceedings that are criminal ones in national law but also those that are repressive in nature (e.g. disciplinary proceedings) or lead, in the meaning of national administrative regulations, to imposing financial penalties.²

It is worth drawing attention to the fact that in the ECtHR case law, apart from the term “the right to silence”, there is also a concept of “the right not to incriminate oneself”. Sometimes the two terms are used interchangeably; sometimes, it is indicated that the right to silence constitutes an element of the right against self-incrimination; and finally, there are opinions that the scopes of the two concepts overlap. On the one hand, the right to silence constitutes an element of the right against self-incrimination, which covers not only non-provision of statements that are incriminating but also non-provision of incriminating material evidence. On the other hand, the right to silence covers not only incriminating statements within its scope.³ The essence of the right to silence is undoubtedly complex. In general, it can be said that the right constitutes a form of the right to defence, an element of the right not to incriminate oneself and a guarantee of the presumption of innocence.

The relations of the right to silence indicated above can be found in the ECtHR case law. Based on the analysis of the Strasbourg Court’s decisions, a few issues connected with this right can be distinguished, especially coercion into provision of documents (things) for the proceeding bodies, obtaining testimonies or explanations with the use of prohibited methods of interrogation, drawing negative conclusions from the accused party’s silence and infringement of being free from self-incrimination in the light of interrogation of persons examined as witnesses. The framework of the text does not allow a detailed analysis of all these issues so attention will be focused on the last of the indicated matters. The issue has not received much attention in literature so far, in spite of the fact that the nature of the right, its scope and exercise have been the subject of a few opinions presented in the literature concerning criminal proceedings.⁴ The significance of the issue is especially great as the ECtHR, creating the European standard for the right to silence, influences the shape of the legal systems of the Member States of the Council of Europe. Thus, it is worth having a close look at what the standard of the protection of the right to silence is in relation to people testifying as witnesses in the light of the ECtHR case law. Moreover, one cannot fail to notice that the knowledge may be useful from the perspective of interpretation of the provisions of the Polish procedural act and potential amendments to them in the future.

² Compare the ECtHR judgement of 3 May 2001 in the case of *J.B. v. Switzerland*, application no. 31827/96; also see, D. Vitkauskas, G. Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Strasbourg 2012, pp. 16–21.

³ Thus, S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 342.

⁴ Compare, M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*” w orzecznictwie Europejskiego Trybunału Praw Człowieka, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki, *Orzecznictwo sądowe w sprawach karnych. Aspekty europejskie i unijne*, Warsaw 2008, p. 182 and the literature cited therein; W. Jasiński, *Prawo do nieobciążania się w procesie karnym w świetle standardów strasburskich*, Prok. i Pr. No. 7–8, 2015, p. 14 ff; B. Gronowska, *Prawo oskarżonego do milczenia oraz wolność od samooskarżenia w ocenie Europejskiego Trybunału Praw Człowieka*, Prok. i Pr. No. 7–8, 2009, pp. 7–24.

2. ANALYSIS OF THE ECtHR CASE LAW CONCERNING THE RIGHT TO SILENCE (ARTICLE 6 ECHR)

2.1. CASES *SAUNDERS V. THE UNITED KINGDOM* AND *KANSAL V. THE UNITED KINGDOM*

The analysis of the ECtHR case law should be started from the case of *Saunders v. the United Kingdom*⁵. The applicant was interviewed several times as a witness by inspectors of the Department of Trade and Industry (DTI) acting based on the Companies Act of 1985 in connection with the inquiry concerning irregularities in the purchase of Guinness PLC shares. Seven interviews of the applicant took place within administrative proceedings and the next two after an accusatorial process was commenced against him. In the course of the interviews, Saunders was obliged to reveal the truth. Refusal to testify could result in the imposition of a fine or imprisonment for up to two years.⁶ Evidence collected during interrogations was passed to the court conducting a trial, which convicted the applicant and other co-defendants for five years in prison. The court recognised that only the transcripts of the testimonies during the interrogations by the DTI inspectors after the criminal proceedings were started must be treated as inadmissible. The prosecutor and the court used the minutes of the earlier interviews as evidence incriminating the applicant. The applicant did not agree and complained that his conviction was based on the minutes of interviews developed by the inspectors in the conditions of procedural coercion because in the inquiry he was a witness and was obliged to give evidence.

Deliberating on the accusation, the ECtHR decided that the right not to incriminate oneself is primarily concerned with respecting the will of the accused person to remain silent. With respect to that, a prosecutor should prove guilt without coercion or pressure in order to obtain evidence in the form of statements, testimonies or explanations directly incriminating as well as other information and facts that may be used to support indictment via, e.g. confrontation with other evidence.⁷ The Court decided that the right to silence does not extend to obtaining material that may be provided by the accused through the use of coercion existing independent of the will of the suspect, e.g. blood or urine sample, or tissue for the purpose of DNA testing.⁸ It is so because the samples and tissues for the purpose of DNA testing

⁵ ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91; a similar factual state occurred in the judgement of 19 September 2000 in the case of *IJL, GMR and AKP v. the United Kingdom*, applications no. 29522/95, 30056/96 and 30574/96.

⁶ ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §49–50.

⁷ Compare, B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights and Criminal Justice*, London 2012, p. 616; J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar*, Berlin 2009, p. 195; A. Lach, *Granice badań oskarżonego w celach dowodowych*, Toruń 2010, p. 62.

⁸ ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §69; A.L.-T. Choo, 'Give Us What You Have' – *Information, Compulsion and*

exist independent of the will of an individual.⁹ The Court emphasised that, with respect to the idea of a fair trial, pursuant to Article 6 ECHR, the right not to provide evidence against oneself cannot be in any way a justification for limitation to testify by the suspect who pleads guilty or makes statements that incriminate him directly.

Deliberating on the matter of the perpetrator, the ECtHR indicated that the content of the applicant's testimonies to the DTI inspectors has been obtained under compulsion to give evidence because Saunders could not refuse to answer questions pursuant to the right not to provide self-incriminating evidence. Moreover, such refusal could have led to imposition of a fine or committal to prison. Negating the UK Government's premise¹⁰ that the applicant's answers were not of an incriminating nature, the ECtHR stated that testimony obtained under compulsion which appears on its face to be of non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubts upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury (lay judges), the use of such testimony may be especially harmful.¹¹ The Court added that the establishment whether the prosecutor's use of the testimony obtained by the inspectors under compulsion meant the infringement of law required the assessment of all the circumstances. It had to be determined whether the accused had been subject 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. The fact that some documents exist independent of the will of the applicant does not mean that their acquisition by the proceeding bodies is excluded from the protection of the right to silence and not to self-incriminate. In such a case, it is necessary to determine whether obtaining it was connected with the influence on the will of the accused.¹²

Based on the case of *Saunders v. the United Kingdom*, it should be added that in each case of using evidence incriminating the accused in a trial, information obtained from him under legal compulsion constitutes the infringement of the ban on providing self-incriminating evidence. Thus, the statement that the law enforcement bodies and a prosecutor in a criminal case, in its autonomous meaning, should 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 suspect

the Privilege Against Self-Incrimination as a Human Right, [in:] P. Roberts, J. Hunter (ed.), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Tradition*, Oxford–Portland 2012, pp. 243–244.

⁹ See, A. Lach, *Granice badań oskarżonego...*, pp. 62–63.

¹⁰ It should be added that the British government stated that the right to silence and the right not to self-incriminate could be limited because they were not clearly formulated in Article 6 ECHR.

¹¹ ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §71.

¹² B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights...*, pp. 621–622.

(the accused) is a truism.¹³ Although the ECtHR shared the opinion, it did not decide whether the administrative proceedings conducted by the inspectors were subject to protection under Article 4 ECHR¹⁴ nor did it challenge the possibility of interviewing a person under legal compulsion in non-criminal proceedings,¹⁵ even if the information obtained this way were used in such proceedings. The ECtHR rightly noticed that the public interest could not be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.¹⁶ The statement makes it possible to draw a conclusion that the infringement of Article 6 ECHR occurs, regardless of the fact whether the sanction for the exercise of the right to silence was imposed or there was only a threat of its application.¹⁷ It is a pity that the ECtHR did not copy the decision of the Commission in the case of *Saunders* stating that the right to silence under Article 6 ECHR must be applicable to the accused of committing an economic crime in the same way as the crime of rape, murder or terrorist acts.¹⁸

Judges Meyer, Repik and Pettiti more clearly expressed their stand in their concurring opinions stating that the right to silence in order not to self-incriminate is also applicable to administrative proceedings because activities undertaken in the course of them, evidence collection, do not differ from preparatory proceedings in criminal matters. Judge Repik illustrated it distinctly comparing the powers of the DTI inspectors to the prosecution at the stage of preparatory proceedings. Moreover,

¹³ See, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §68; also see, ECtHR judgement of 21 December 2000 in the case of *Quinn v. Ireland*, application no. 36887/97, §40; ECtHR judgement in the case of *IJL, GMR and AKP v. the United Kingdom*, applications no. 29522/95, 30056/96 and 30574/96, ECHR 2000-IX, (2001) §33; decision of 14 September 1999 in the case of *DC, HS and AD v. the United Kingdom*, application no. 39031/97; decision of 23 November 1999 in the case of *WGS and MLS v. the United Kingdom*, application no. 38172/97.

¹⁴ Thus also, W. Jasiński, *Pravo do nieobciążania się...*, p. 14. It is not possible to share the opinion of M. O'Boyle that the ECtHR held that Article 6 ECHR does not lay down the protection of the right to silence in non-judicial proceedings; see, M. O'Boyle, *Freedom from Self-Incrimination and the Right to Silence: a Pandora's Box*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights: The European Perspective*, Berlin 2000, p. 1029.

¹⁵ Compare, A. Ashworth, *Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review* Vol. 30, 2008, p. 756.

¹⁶ The judgement in the case of *Saunders v. the United Kingdom* states that: "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. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover, the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right" (§74); also see, M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 183; M. Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, *Columbia Journal of European Law* Vol. 12, 2006, pp. 361–362; M. O'Boyle, *Freedom from Self-Incrimination...*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights...*, pp. 1025–1027.

¹⁷ Compare, S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court Human Rights*, London 2007, p. 157.

¹⁸ Compare, the Commission report concerning the case of *Saunders* of 10 May 1994.

from the perspective of criminal proceedings, it does not matter whether testimony was obtained by the inspectors concerned or in the course of criminal proceedings in its strict sense. Indeed, because Section 434 the Companies Act of 1985 imposes compulsion to answer inspectors' questions, testifying under compulsion means that they may be used to determine a fine in accordance with the Companies Act of 1985 and constitute evidence in the future criminal proceedings. Due to that, the right to silence and the right not to incriminate oneself should be applicable in administrative proceedings. B. Gronowska is also right to raise that in the case of *Saunders v. the United Kingdom*, the decisive factor influencing the conclusion recognising the infringement of Article 6 §2 ECHR was the change of the procedural status of the applicant, i.e. at the initial stage he was a witness in the proceedings conducted by the inspectors and then his status was changed into the accused in criminal proceedings, in which the applicant's testimony in the former proceedings was used as the main incriminating evidence.¹⁹ Judge Morenilla also referred to this thread. In the concurring opinion, he noticed that due to the fact that Saunders was under statutory compulsion to contribute actively in the proceedings conducted by the DTI inspectors, there is no scope for examining the weight to be attached to the evidence and the use made of it at the trial.²⁰

The judgement in the case of *Saunders v. the United Kingdom* also indicates that the general fair trial requirements laid down in Article 6 of the Convention are applicable to criminal proceedings, regardless of the level of a case complexity and the nature of the evidence obtained. At the same time, the ECtHR refused the admissibility of referring to the public interest as justification for departure from the ban on self-incriminating in some circumstances.²¹ Despite this statement, the Court avoided giving an unambiguous answer to the question whether the right to silence and the right not to incriminate oneself are absolute in nature or may be infringed in specific circumstances, e.g. by means of reference to the public interest. The British government indicated such a possibility and added, at the same time, that the right to silence and not to self-incriminate can be limited because they were not directly formulated in Article 6 ECHR. In the successive judgements, the ECtHR assumed that the right not to incriminate oneself should not be absolute in nature.²²

¹⁹ B. Gronowska, *Prawo oskarżonego...*, p. 11.

²⁰ See, concurring opinion of Judge Morenilla, see, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91.

²¹ See, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §74; S. Trechsel, *Human rights...*, pp. 344–345; M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 183; M. O'Boyle, *Freedom from Self-Incrimination...*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights...*, pp. 1027–1028. On the other hand, Judges Valtico and Gölcüklü did not recognise the violation of the provision of Article 6 §1 ECHR indicating that the Companies Act 1985 makes it possible to maintain “proper sense of proportion” between the right to silence as well as the right not to self-incriminate and the possibility of prosecuting fraud.

²² See, e.g. ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97; see, A. Lach, *Granice badań oskarżonego...*, pp. 66–67.

In the case of *Kansal v. the United Kingdom*,²³ the ECtHR expressed a standpoint similar to the one in the case of *Saunders v. the United Kingdom*. The factual state in this case was as follows. The applicant's testimony in insolvency proceedings (Insolvency Act of 1986) in which he was under legal compulsion to answer questions was used as evidence against him. In accordance with the provision of Article 291(6) Insolvency Act of 1986, Y. Pal Kansal was obliged, under compulsion and exposure to sanctions of a fine or imprisonment, to answer questions asked by an official conducting the insolvency proceedings. On the other hand, the provision of Article 433 of the Act stipulated that a statement made for whatever purpose in insolvency proceedings might be used as evidence against the person who made it or took part in making it. Thus, the Act laid down legal compulsion towards the applicant because it excluded the admissibility of exercising the right to silence.²⁴ So stating, the ECtHR also noticed that British law did not contain a provision ensuring efficient protection of the applicant against self-incrimination.

2.2. CASES HEANEY AND MCGUINNESS V. IRELAND AND SHANNON V. THE UNITED KINGDOM

The ECtHR judgements in the cases of *Saunders v. the United Kingdom* and *Kansal v. the United Kingdom*, indicating that information obtained in the course of compulsory interview answers will not be used in criminal proceedings were also confirmed in judgements in the cases of *Heaney and McGuinness v. Ireland*²⁵ and *Shannon v. the United Kingdom*²⁶.

In the former case, the applicants were arrested in connection with a bomb attack at the British Army checkpoint. Heaney and McGuinness were informed that they have the right to silence and both refused to answer questions concerning participation in the bomb attack and the reasons for being in the house near the scene of explosion. Then the police officers informed them about the content of Article 52 of the Offences against the State Act 1939. Pursuant to this provision, a person questioned is obliged to give full account of his movements and actions over the period of 24 hours before the time of an incident that is subject to the investigation conducted. Non-compliance with the obligation exposed the applicants

²³ ECtHR judgement of 27 April 2004 in the case of *Kansal v. the United Kingdom*, application no. 21413/02.

²⁴ Compare, A. Krawczyk, who states that the exclusion concerned only "the insolvent's right not to self-incriminate", see, *Prawo do nieobciążania się postępowania restrukturyzacyjne*, Prok. i Pr. No. 2, 2017, pp. 109–110; M. Berger, *Europeanizing Self-Incrimination...*, pp. 361–362.

²⁵ ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97; also compare, the case of *Quinn v. Ireland*, application no. 36887/97, judged in a similar way; in the judgement of 21 December 2000, §56, the ECtHR clearly indicated that the degree of compulsion imposed on the applicant by the application of the provision of Article 52 of the Offences against the State Act 1939 destroyed the very essence of the ban on coercion to self-incriminate and the right to silence. Also see, S.J. Summers, *Fair Trials...*, pp. 156–157; B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights...*, pp. 620–621.

²⁶ ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §34–41.

to a penalty of six months' imprisonment which they were later sentenced to. It was the only penalty imposed on the applicants because they were acquitted of the charge of membership of an unlawful organisation. Before the ECtHR heard the case, the applicants had appealed against their conviction and sentence to the High Court challenging the conformity of Article 52 of the Offences against the State Act 1939 with the Constitution of Ireland.²⁷ The High Court rejected their claim of unconstitutionality of the provision in question stating that interference into the right to silence laid down in Article 52 of the Offences against the State Act 1939 meets the requirement of proportionality because it aims to protect the security of the state. British authorities also argued before the ECtHR that undertaking steps pursuant to the legal norm expressed in Article 52 of the Offences against the State Act 1939 was the right response to the threat of terrorism, and was justified by the need to ensure the appropriate functioning of the administration of justice and maintaining peace and public order. However, the ECtHR expressed a different opinion. Although at the beginning of its considerations the ECtHR indicated that the right to silence is not absolute in nature, it recognised the infringement of the right to silence and the presumption of innocence in the case of *Heaney and McGuinness v. Ireland*.²⁸ The factors supporting the judgement are as follows.

Firstly, there is a lack of a provision excluding the admissibility of using the interrogation minutes in criminal proceedings against the applicants in the Offences against the State Act 1939. At the same time, the ECtHR adds that it is not its role in the case to assess the influence of potential direct or indirect use of the accused party's statements in the successive criminal proceedings. What is more, there is no ban on using the interrogation minutes in the criminal proceedings in the light of the provisions of the Act referred to. Secondly, the "degree of compulsion" imposed on the applicants by Article 52 of the Offences against the State Act 1939 reduced their procedural guarantees, especially the right to silence, because they were sentenced for that "silence".²⁹ The ECtHR rightly noticed that general fairness requirements laid down in Article 6 ECHR are applicable to all types of offences, those simplest as well as those most complex ones. That is why, it is inadmissible to refer to the public interest to justify the use of testimony obtained under compulsion in a police investigation, which is then to support charges against the accused during a trial.

It is worth mentioning that in the course of the proceedings before the ECtHR, the government party indicated the possibility of limiting the right to silence based on the clause of the public interest. The opinion, like in the case of *Saunders*

²⁷ ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §14; also see, R. Goss, *Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights*, Oxford, Portland, Oregon 2016, pp. 191–193.

²⁸ ECtHR drew attention to the relation between the right to silence and the right not to self-incriminate in the judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §68 stating that both rights constitute "basic principles of a fair procedure inherent in Article 6(1)", also see, R. Goss, *Criminal Fair Trial Rights...*, p. 103.

²⁹ ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §57; W. Jasiński, *Prawo do nieobciążania się...*, p. 21; M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, pp. 188–189; S. Summers, *Fair Trials...*, p. 156.

v. the United Kingdom, was dismissed. In the case analysed, the ECtHR also added that the guarantees laid down in Article 6 ECHR should be applied to all criminal proceedings in the same way (in the autonomous meaning of the Convention). At the same time, the weight of an act or the level of the case complexity is not important. It was also emphasised in the justification for the judgement that public order concerns cannot justify extinguishing the applicants' rights to silence and against self-incrimination.³⁰

A similar adjudication policy is adopted in the case of *Shannon v. the United Kingdom*. The facts were as follows: the applicant failed to attend an interview with a financial investigator conducting proceedings under the Proceeds of Crime (Northern Ireland) Order 1996 at the time when criminal proceedings were already conducted against him in connection with false accounting in his club and conspiracy to defraud. The applicant sought a guarantee that no information obtained during the interview with the financial investigator would be used in the criminal proceedings against him. As a result of the lack of such a guarantee, the applicant referred to the right not to self-incriminate and refused to answer questions, thus he exercised the right to silence. As a consequence, he was convicted and fined the sum of GBP 200. In the course of the appeal, the case was heard before the Court of Appeal in Northern Ireland, which gave a judgement that Article 6 §1 ECHR was not applicable to extra-judicial proceedings like those conducted by financial investigators so a person could not refuse to comply with the requirement to attend an interview and answer questions, even in a situation when the information provided might be "potentially incriminating".³¹ The opinion and stand of the government that the applicant cannot refer to the right to silence because the criminal proceedings against him, in which the incriminating information might be used, were struck out was dismissed by the ECtHR.

The Court clearly stated that the applicant did not have influence on which information might be used in the criminal proceedings and he had to provide it under legal compulsion expressed in the form of a fine or deprivation of liberty. There

³⁰ Compare, ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §§57–59. It was pointed out in §59 that "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". For more see, A. Ashworth, *Self-Incrimination...*, p. 761 ff; M. Berger, *Self-Incrimination...*, pp. 517–518; J. Jackson, *Reconceptualising the Right of Silence as an Effective Fair Trial Standard*, *International and Comparative Law Quarterly* Vol. 58, No. 4, 2009, p. 837; S. Summers, *Fair Trials...*, p. 156; M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, pp. 188–189.

³¹ Compare, Lord Justice Carswell in the judgement of 11 December 2002 stated that: "Article 6 §1 of the Convention is directed towards the fairness of the trial itself and is not concerned with extra-judicial inquiries with the consequence that a person to whom those inquiries are directed does not have a reasonable excuse for failing or refusing to comply with a financial investigator's requirements merely because the information sought may be potentially incriminating", compare, ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §21. The case is analysed in the Polish literature in M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, pp. 189–190; W. Jasiński, *Prawo do nieobciążania się...*, p. 17.

was a probability that the information might be used in the criminal proceedings against the applicant. At the same time, the Court highlighted that there were no systemic guarantees in the law of Northern Ireland that could protect against the use of information passed to the financial investigator in the criminal proceedings against the applicant. Moreover, Strasbourg judges stated that reference to the right to silence and not to self-incriminate did not depend on whether a testimony obtained under compulsion in administrative proceedings might be used in criminal proceedings. In other words, statements made by the accused under compulsion in other proceedings or his silence do not have to be used in criminal proceedings in order to recognise the infringement of the right not to self-incriminate.³² However, the fact is that in the case of *Shannon v. the United Kingdom*, the Court went further and recognised that the applicant had the right to silence even before criminal proceedings were initiated and the information provided under compulsion could be used.³³ The condition for the exercise of the right to silence that could occur only in the event of criminal proceedings conducted simultaneously would create a state of uncertainty for the applicant. A person in such a situation would not know in what way the information obtained from him/her under compulsion might be used by the state authorities. In the case of *Shannon v. the United Kingdom*, there were no guarantees that the content of the applicant's statements made during the financial investigator's inquiry would not be used against him in other proceedings. In the light of this, M. Berger suggests that a state should regulate the right to silence during the first interview and create its protection.³⁴

2.3. CASES *SERVES V. FRANCE*, *MACKO AND KOZUBAL V. SLOVAKIA* AND *VAN VONDEL V. THE NETHERLANDS*

The presented ECtHR standpoints are not the only ones in the field of the protection of the right to silence as far as the interrogation of witnesses is concerned. In the abundant Strasbourg case law, one can also find judgements that underrate the scope of the Convention standard and state that the use of legal compulsion in order to obtain testimony does not constitute the infringement of Article 6 ECHR. To recognise it as the infringement of this provision, they also require that the information obtained this way should be used in criminal proceedings against the person who

³² As far as this is concerned, the ECtHR refers to the judgements in the cases of *Heaney and McGuinness v. Ireland*, §§43–46 and *Funke v. France*, §§39–40, see ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §34. See, M. Berger, *Self-Incrimination...*, pp. 522–523.

³³ W. Jasiński rightly indicates that, in the case of *Shannon v. the United Kingdom*, the ECtHR did not analyse whether the provision of Article 6 ECHR is applicable to proceedings concerning the recovery of objects obtained as a result of crime. Thus, the basis for the judgement was the potential opportunity to use the statements made in the course of the proceedings aimed at the recovery of objects obtained as a result of crime within the criminal proceedings conducted against the applicant; compare, W. Jasiński, *Prawo do nieobciążania się...*, p. 17.

³⁴ See, M. Berger, *Self-Incrimination...*, p. 525.

provided it. The judgement in the case of *Serves v. France*³⁵ may be an example of that. The circumstances of the case indicate that the applicant, together with a few other soldiers, was charged with murder of a poacher in the course of a military mission in Africa. After a few months the criminal proceedings were declared void because it had been commenced without the opinion of the Minister of Defence, which did not meet the requirements for prosecution. In the next proceedings commenced after the elimination of formal obstacles, Serves was summoned to appear as a witness before the investigative judge but he refused to take the oath obliging him to tell the truth. It happened three times. Each time, the applicant attended but refused to take the oath and give evidence. As a result, Serves was ordered to pay fines. He appealed against those fine orders to the First Indictment Division of the Paris Court of Appeal. His pleading was that in the light of the evidence collected and circumstances of the case known in connection with the former indictment, he should be charged again and interrogating him as a witness violated Articles 6 ECHR and 105 French CPC, which excludes a possibility of interviewing a person as a witness if there is grave and coherent evidence of his guilt. The First Indictment Division of the Paris Court of Appeal upheld the orders stating that, on the one hand, the material collected in the first proceedings could not be used against the applicant and that, on the other hand, the applicant did not give any reasons for his refusal to take the oath, which did not let the judges assess whether circumstances under Article 105 French CPC occurred.³⁶

Before the ECtHR started assessing whether the French authorities infringed the right to silence, it had to decide whether the applicant was entitled to the guarantees under Article 6 ECHR because he was not formally accused. Referring to the autonomous meaning of the concept of "indictment in a criminal case", the ECtHR decided that it is not only official charges but also each factual situation in a trial which substantially influences the situation of a given entity.³⁷ Although the ECtHR admitted that the penalty of a fine for refusal to take the oath was a type of compulsion, it stated that it was not aimed at obtaining testimony but only a guarantee that the interviewee would tell "the whole truth and nothing but the truth".³⁸ The Court stated that the applicant could not refuse to answer

³⁵ See, M. Wasek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, pp. 184–185; B. Gronowska, *Przegląd orzecznictwa ETPC, sprawa Serves przeciw Francji – wyrok z 20 października 1997 r. – zarzut naruszenia prawa do słusznej rozprawy sądowej*, PPE No. 1, 1998, p. 87; W. Jasiński, *Prawo do nieobciążania się...*, p. 16; P. Hofmański, A. Wróbel, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz*, Warsaw 2010, p. 278.

³⁶ Compare, ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, §26; also see, M. Berger, *Self-Incrimination...*, p. 522; M. Wasek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 185.

³⁷ ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, § 26; ECtHR judgement of 27 February 1980 in the case of *Deweere v. Belgium*, Series A no. 35, p. 22, §42, 46; ECtHR judgement of 15 July 1982 in the case of *Eckle v. Germany* Series A no. 51, p. 33, §73; also see, M. Wasek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 185.

³⁸ M. Berger approves of this opinion, see M. Berger, *Self-Incrimination...*, p. 522.

questions that, in his opinion, might violate his right not to self-incriminate. He did not give an investigating judge a chance to ask questions because he did not attend an interview. As a result, in the ECtHR opinion, imposition of a financial penalty cannot be recognised as compulsion to self-incriminate because such a risk did not occur at all. The aim of the penalty imposition was to execute the obligation ensuring truthfulness of evidence given.³⁹ The judgement was held by six votes to three. According to the joint dissenting opinion, as the applicant was actually a suspect at the same time, he should have the right to refuse to give evidence. Judges Pekkanen, Wildhaber and Makarczyk expressed the opinion that the obligation to take the oath served to ensure that his statements made to the investigating judge would be truthful. The judges added that by inciting on the applicant's obligation to take the oath without giving him an opportunity to explain the reasons for his refusal, the investigating judge put him in a position violating the right not to self-incriminate. That is why, they believed, rightly, that the applicant could feel that after the oath he would be forced to give evidence, including that incriminating him. It was not important what the applicant's role was: the accused or a witness. In each situation, the coercion would constitute the infringement of Article 6 §1 ECHR.

The judgement in the case of *Serves v. France* is not the only example where the ECtHR limited the scope of protection under the right to silence. It happened, e.g. in the case of *Macko and Kozubal v. Slovakia*⁴⁰. The facts were as follows. The applicants were the representatives of the company, one of the co-owners of which was accused of unauthorised trading. The applicants were summoned to an interview as witnesses, however, they refused to answer questions referring to the provision of Article 100 §2 Slovak CPC regulating the right to silence and the right not to self-incriminate. They were fined for refusal to give evidence and then they were charged with economic crimes based on other circumstances than in case of the co-owner of the company. However, for the prosecution, this was not an obstacle to conducting one investigation against all the accused.⁴¹ It is worth mentioning that taking the decision on imposing fines on the applicants, the investigators stated that a person who wants to refer to the right to silence should give reasons for his refusal to give evidence. The right is not subject to the witness's will but is the competence of the proceeding body. It may accept a witness's opinion but also dismiss the

³⁹ ECtHR clearly indicated that "the fines imposed on Mr Serves did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose", compare, ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, §47; also see, the comments on this judgement by W. Jasiński, *Prawo do nieobciążania się...*, p. 25. In Polish literature, the ECtHR is approved of by, e.g. A. Lach, who indicates that "the obligation to take the oath by a witness does not constitute the violation of the right to silence, which should be distinguished from the compulsion to give evidence", compare, A. Lach, *Współczesne tendencje w zakresie ograniczenia prawa do milczenia w procesie karnym*, [in:] A. Marek (ed.), *Współczesne problemy procesu karnego i jego efektywności. Księga Pamiątkowa Profesora Andrzeja Blusiewicza*, Toruń 2004, p. 236 ff.

⁴⁰ ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00.

⁴¹ M. Wasek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 186.

motives and order him to testify.⁴² Regardless of the applicants' doubts concerning the circumstances of interrogations and leaving the decision on the right to silence within the competence of the proceeding bodies, the ECtHR did not recognise the infringement of Article 6 ECHR. According to the Court, the applicants were summoned to interviews as witnesses in connection with other events than those that later became subject to charges against them. This let the Court recognise that the applicants' refusal to give evidence did not meet with the proceeding bodies' response violating the right to silence.⁴³

Also in the case of *Van Vondel v. the Netherlands*, the Court did not recognise the violation of Article 6 §1 ECHR, regardless of the fact that applicant's right to silence had been limited. The facts were as follows. Van Vondel was a police officer heard by the parliamentary commission of inquiry under legal compulsion and a threat of criminal liability for refusal to give evidence. In accordance with Section 3 §2 Parliamentary Enquiries Act (*Wet op de Parlementaire Enquête*), every person summoned by the commission of inquiry is obliged to appear and give evidence, except for persons who are subject to professional privilege and the protection of classified information. Apart from these exceptions, the Dutch law does not envisage an opportunity to refuse to give evidence or exercise the right to silence. A person summoned to give evidence is obliged to testify even in a situation when the evidence is self-incriminating, which without doubt means the abolition of the right to silence in proceedings before the commission of inquiry. However, in accordance with Section 24 Parliamentary Enquiries Act, evidence given to a commission of inquiry cannot be used as evidence in judicial proceedings against the interviewee, except for proceedings concerning perjury. Despite this guarantee, the applicant was accused of perjury and convicted.

Analysing the situation, the ECtHR held that the right not to incriminate oneself mainly focuses on the accused party's will to respect his silence. These rights of an individual cannot constitute grounds for excluding penalisation of every activity motivated by the desire to escape criminal liability. The judgement in the case of *Van Vondel v. the Netherlands* indicates that the circumstance that the evidence revealed by the commission could not be evidence against the interviewee was a sufficient protection of the applicant's procedural interests. Moreover, according to the justification to the judgement, the circumstance constituted a significant argument for the recognition that the right to silence was not violated.⁴⁴

⁴² ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00, §40.

⁴³ Compare, ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00, §§52–55; M. Wąsek-Wiaderek, „*Nemo se ipsum accusare tenetur*”..., [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe...*, p. 186.

⁴⁴ The ECtHR decision of 2 March 2006, in the case of *Van Vondel v. the Netherlands*, application no. 38258/03; it was stated in the decision that: “It may be that the applicant lied in order to prevent revealing conduct which, in his perception, might possibly be criminal and lead to prosecution. However, the right to silence and not to incriminate oneself cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation. Thus, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incriminations or that there has been any unfairness contrary to Article 6 §1

4. CONCLUSIONS

Summing up, it can be stated that the presented comments based on the ECtHR case law make it possible to draw a few conclusions. Firstly, there is no doubt that national authorities' activities obliging the accused to provide self-incriminating evidence in criminal proceedings are in conflict with the Strasbourg standard. Secondly, an individual may refer to the right to silence and the right not to incriminate oneself also when he is obliged to give incriminating evidence in proceedings different from criminal ones and the information was or may be used in criminal proceedings already initiated or likely to be initiated. Sometimes, it is even assumed that criminal proceedings do not have to be initiated to recognise the violation of Article 6 ECHR. It must be noted that, although this opinion was strongly emphasised in the judgement in the case of *Saunders v. the United Kingdom*, there are judgements (e.g. *Serves v. France*), in which the Court limited its standpoint only to the situation when the information obtained under legal compulsion was used in criminal proceedings against the interviewee providing it. Despite the discrepancies, it can be assumed that in the ECtHR opinion, it is inadmissible to use incriminating information provided to administrative bodies as evidence in criminal proceedings. This concerns statements unambiguously confirming circumstances unfavourable to the prospective accused as well as the circumstances that may be used to the accused party's disadvantage (e.g. the fact of exercising the right to silence).

As far as this is concerned, it is not the content of the specific evidence that is significant but the way in which it is used by the prosecution. Further conclusions should be carefully drawn because, due to the ECtHR imprecise assessment whether the right to silence has been infringed or not, it is not possible to unambiguously state what the consequences of the proceeding bodies' erroneous action might be. This state of things does not surprise because the ECtHR is far from expressing categorical opinions and precise reasoning; it prefers to treat every case individually, which limits predictability of the judgements and makes it impossible to present the standard of the Convention.

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STANDARD OF THE PROTECTION OF THE RIGHT TO SILENCE APPLICABLE TO PERSONS EXAMINED AS WITNESSES IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

Summary

The article discusses the issue of the application of the right to silence to persons giving evidence as witnesses in the light of the European Court of Human Rights case law. The author analyses the circumstances in which an individual may refer to the protection guaranteed by this right as well as how the provision of self-incriminating information should be understood. He focuses on the key ECtHR judgements concerning the protection against coercion to self-incrimination of a person on whom legal compulsion was imposed in non-criminal proceedings in order to obtain information relevant to criminal proceedings. The article presents the ECtHR judgements indicating that the protection is applicable also when

the incriminating information is not used in the future criminal proceedings. It also emphasises the lack of coherence in the ECtHR case law, which considerably limits predictability of the Court's judgements and makes it difficult to develop a uniform standard.

Keywords: criminal proceedings, right to silence, right not to incriminate oneself, European Court of Human Rights, human rights

STANDARD OCHRONY PRAWA DO MILCZENIA W KONTEKŚCIE OSÓB ZEZNAJĄCYCH W CHARAKTERZE ŚWIADKA NA TLE ORZECZNICTWA EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA

Streszczenie

W artykule omówiono problematykę prawa do milczenia w kontekście osób zeznających w charakterze świadka w orzecznictwie Europejskiego Trybunału Praw Człowieka. Autor analizuje, w jakich okolicznościach jednostka może powołać się na ochronę gwarantowaną przez to prawo, a także, co należy rozumieć pod pojęciem dostarczania dowodów na swoją niekorzyść. Zwraca uwagę na kluczowe orzeczenia ETPCz dotyczące ochrony przed przymuszeniem do samooskarżenia osoby, wobec której użyto przymusu prawnego poza ramami postępowania karnego w celu uzyskania informacji relevantnych z uwagi na postępowanie karne. Przedstawiono orzeczenia ETPCz wskazujące, że ochrona ta przysługuje także wtedy, gdy nie wykorzystano obciążających informacji w późniejszym postępowaniu karnym. Zaakcentowano również brak spójności w orzecznictwie Trybunału, co istotnie ogranicza przewidywalność wydawanych przez Trybunał rozstrzygnięć oraz stanowi trudność w stworzeniu jednolitego standardu.

Słowa kluczowe: postępowanie karne, prawo do milczenia, prawo do nieobciążania się, Europejski Trybunał Praw Człowieka, prawa człowieka

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