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Bearbeiter: Karsten Gaede
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EGMR Nr. 6563/03 (4. Kammer) - Urteil vom 4. Oktober 2005 (Shannon gegen Großbritannien)

Schweigerecht und Selbstbelastungsfreiheit (Grundsätze des Schutzes gemäß Art. 6 EMRK; Anwesenheitspflicht bei Vernehmungen im Ermittlungsverfahren durch Finanzbehörden; unzulässiger Aussage- und Anwesenheitszwang gegenüber Finanzbehörden ohne Verwertungsverbot im Strafverfahren; Steuerstrafverfahren); redaktioneller Hinweis.

Art. 6 Abs. 1 Satz 1 EMRK; § 393 AO

Leitsätze des Bearbeiters

1. Wird eine im Sinne der EMRK angeklagte Person verpflichtet, bei einem Verhör durch Finanzbehörden anwesend zu sein und Fragen auch zum Tatvorwurf zu beantworten, ist Art. 6 Abs. 1 Satz 1 EMRK verletzt, wenn die Finanzbehörden die Informationen an die strafrechtlichen Ermittlungsbehörden weitergeben dürfen. Besondere Sicherheitsbedürfnisse [hier: Nordirland] begründen hiervon keine Ausnahme.

2. Zum Schutz des Art. 6 EMRK gegen die zwangsweise Erlangung von Information vom Beschuldigten (vgl. § 32 und § 36 der Entscheidung).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

7. The applicant was born in 1948 and lives in Belfast. 2

8. The applicant was the chair of the Irish Republican Felons Club, a registered social club operating on the Falls Road, Belfast. In May 1997, the Royal Ulster Constabulary ("RUC") carried out a search of the premises and removed many documents. 3

9. The applicant was subsequently required to attend for interview with a financial investigator appointed under the Proceeds of Crime (Northern Ireland) Order 1996. He did so on 27 January 1998 and answered all questions put to him. 4

10. On 16 April 1998, the applicant was charged by the police with false accounting and conspiracy to defraud. 5

11. On 2 June 1998, a further notice was served on the applicant under the 1996 Order, requiring his attendance before financial investigators at a police station on 11 June 1998. The maximum penalty for failure to attend an interview was six months' imprisonment or a fine not exceeding GBP 5,000. The notice, which was dated 1 June, stated that the investigation was into whether any person had benefited from theft or false accounting, contributing to the resources of a proscribed organisation or from contraventions of betting regulations. The applicant was required to attend at Woodbourne Police Station on 26 June 1998. 6

12. On 9 June 1998, the applicant's solicitors sent a letter seeking a written guarantee that no information or statements obtained during the interview would be used in criminal proceedings. 7

13. On 16 June 1998, a further notice, dated 16 June, was served on the applicant, again requiring him to attend the interview on 26 June 1998. The notice was served with a letter in which the investigators confirmed that they were aware of the criminal proceedings pending against the applicant. They set out the safeguards in paragraph 6 of Schedule 2 to the Order, and stated that the applicant therefore had the guarantees he sought. They added that paragraph 7 of Schedule 2 restricted the disclosure of information obtained by a financial investigator, and added that "this does not prevent the answers or information being used to further the investigation". 8

14. On 22 June 1998, the applicant's solicitor sent a letter to the financial investigators indicating that the applicant's replies could become admissible evidence at a trial and suggesting that the purpose of the interview was to compel him to disclose his defence. He added that the applicant had been advised not to attend an interview unless a satisfactory response to the letter was received. 9

15. On 23 June 1998, the applicant's solicitor was informed by letter that the reason for the interview was not to force the applicant to disclose his defence but that a number of matters from the earlier interview required clarification and additional matters had also arisen. 10

16. On a request by the investigators, on 25 June the applicant's representatives informed the investigators that the applicant would not attend the interview. The interview did not take place. 11

17. On 14 September 1998, a summons charged the applicant with the offence of failing without reasonable excuse to comply with the financial investigator's requirement to answer questions or otherwise furnish information, contrary to paragraph 5(1) of Schedule 2 to the 1996 Order. On 25 February 1999, the applicant was convicted of this offence in the Magistrates' Court and fined the sum of GBP 200. 12

18. On 5 July 2002, the Belfast County Court allowed the applicant's appeal against conviction, finding that the prosecution had not proved the absence of a reasonable excuse. The judge noted that the Northern Ireland Court of Appeal had dealt with a similar case (Clinton v. Bradley [2000] NI 196) which related to the same legislation and the same investigation. The Northern Ireland Court of Appeal had held that as Parliament had put in place certain express limitations on the use of information obtained by investigators, it could not have intended that the person concerned could put forward the risk of self-incrimination as a "reasonable excuse". In Clinton v. Bradley, however, the accused had refused to answer questions at an interview, and he had not been interviewed by the police, or charged with any offence. 13

19. The judge further noted that one of the grounds on which the information obtained by investigators could be used in criminal proceedings was where evidence inconsistent with the information was relied on by the defence. That ground had been amended in the light of the Court's judgment in the case of Saunders v. the United Kingdom, and the amendment would have afforded the applicant the protection he sought had it been in place at the time. The judge took the view that once he had been questioned by the police and charged, the applicant had a right not to answer questions that would have tended to incriminate him. The only outstanding matter was whether the applicant should have attended the interview and then refused to answer questions, or, as he did, refuse to attend the interview once he failed to receive the assurances he had asked for. The judge regarded the distinction as technical, and found that the prosecution had failed to establish the absence of a "reasonable excuse" for not answering questions about the proceeds of a crime, with which he had been formally charged. 14

20. On 17 July 2002, the prosecutor requested the County Court to state a case for the purpose of an appeal to the Court of Appeal in Northern Ireland. 15

21. On 11 December 2002, the Court of Appeal in Northern Ireland heard the appeal. On 20 December 2002, Lord Justice Carswell, giving judgment, considered, in the light of R. v. Hertfordshire County Council, ex parte Green Environmental Industries Ltd ([2000] AC 326), 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". The appeal was upheld, and the applicant's conviction confirmed. 16

22. The criminal proceedings for false accounting and conspiracy to defraud (see § 10 above) were struck out on grounds of delay by the Belfast Magistrates' Court in June 2002. The magistrate was asked by the office of the Director of Public Prosecutions to state a case for the Court of Appeal, but he died before having prepared the stated case. 17

II. RELEVANT DOMESTIC LAW 18

23. The Proceeds of Crime (Northern Ireland) Order 1996 inter alia provides for investigatory measures and powers in respect of the tracing and confiscation of proceeds of criminal conduct. 19

24. Pursuant to paragraph 5(1) of Schedule 2, it was an offence for a person to fail, without reasonable excuse, to attend to answer questions by a Financial Investigator appointed under the Order. Paragraph 6 restricted the use that 20

could be made of the statements made to three situations:

(a) on a prosecution for an offence under the Perjury (Northern Ireland) Order 1979;

(b) on a prosecution for some other offence where evidence inconsistent with any such answers or information is relied on by the defence, or

(c) on a prosecution for failing to comply with a requirement of the 1996 Order, such as attending to answer questions

On 14 April 2000, paragraph 6(b) was limited by the Youth Justice and Criminal Evidence Act 1999 to permit use of the statements only if they are adduced, or if they are the subject of questions at trial, by the defence.

25. According to paragraph 7 of Schedule 2, information obtained by a person in his capacity as a financial investigator may not be disclosed by him except to (a) a constable; (b) any Northern Ireland department or government department discharging its functions on behalf of the Crown; (c) to any competent body as defined, or (d) any foreign equivalent of (a) -(c).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant contended that the requirement to attend an interview and give information to financial investigators exercising their powers under the Proceeds of Crime (Northern Ireland) Order 1996, and the ensuing prosecution and conviction for failing to attend, amounted to a violation of Article 6 of the Convention. That Article provides, so far as relevant, as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

27. The Government referred to the case of Green Environmental Industries Ltd (cited above) and to the subsequent Court of Appeal case of R. v. Kearns ([EWCA] Crim 748). They concluded that the right to remain silent in Article 6 is not absolute, even in the case of a statutory power to demand information which could be used in criminal proceedings. Questions arise under Article 6 once, and only once, the criminal proceedings have begun. There is nothing objectionable under Article 6 in requiring the provision of answers or information where that is done for use in an extra-judicial inquiry. Whether the use made of evidence in a subsequent trial is compatible with Article 6 depends on the circumstances of the case.

28. Applying these principles to the instant facts, the Government contended that there could only be a violation in the present case once (a) there had been a trial of the applicant for the independent offences of false accounting and conspiracy to defraud; (b) he had brought himself within the "inconsistency" exception in paragraph 6 of Schedule 2 of the Order, and (c) the trial court had decided that the answers could be used against him. The Government do not accept that the fact that the charge preceded the second interview can affect the analysis.

29. Alternatively, the Government submitted that the compulsion applied to the applicant in the present case was justified. They noted that the information that the investigators were looking for was required for the important purposes of tracing the proceedings of crime under the regime set up by the Order. Any answers the applicant gave could not have been used in independent criminal proceedings unless he advanced a case inconsistent with the answers given, and even then the judge would have had a discretion not to allow the answers to be admitted. If the mere existence of the possibility of use justified a complete refusal to answer or to co-operate with the investigation, the Order would be rendered largely ineffective.

30. In connection with the link between the proceedings under the Order and the proceedings for false accounting and conspiracy to defraud, the applicant noted that, by virtue of paragraph 7 of Schedule 2 to the Order, it would have been open to the financial investigators to supply any information they had received to a constable. He commented that in any event, a violation of Article 6 can result even if the underlying criminal proceedings do not subsequently come to trial (Funke v. France, judgment of 25 February 1993, Series A no. 256-A), which was not expressly disapproved by the majority in Saunders (Saunders v. the United Kingdom, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI).

31. The applicant added that the appointment of financial investigators was to assist an investigation into whether a

person had benefited from crime, and one might anticipate such an investigation to follow the conviction of individuals for a crime. Conducting such an investigation during the course of a criminal investigation is not necessary for the purposes of the legislation, nor is it justified.

32. The Court recalls the case-law on the use of coercive measures to obtain information, as summarised in the case of Weh (Weh v. Austria, no. 38544/97, 8 April 2004): 34

"39. 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, judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, p. 49, § 45). 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 v. the United Kingdom, judgment of 17 December 1996, Reports 1996-VI, p. 2064, § 68; Serves v. France, judgment of 20 October 1997, Reports 1997-VI, pp. 2173-74, § 46; Heaney and McGuinness v. Ireland, no. 34720/97, § 40, ECHR 2000-XII; [J.B. v. Switzerland, no. 31827/96, ECHR 2001-III], § 64). 35

40. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent (Saunders, cited above, p. 2064, § 69; Heaney and McGuinness, cited above, § 40). 36

41. A perusal of the Court's case-law shows that there are two types of cases in which it found violations of the right to silence and the privilege against self-incrimination. 37

42. First, 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, or - 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, judgment of 25 February 1993, Series A no. 256-A], p. 22, § 44; Heaney and McGuinness, §§ 55-59; J.B., §§ 66-71, ... cited above). 38

43. Second, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (Saunders, cited above, p. 2064, § 67, I.J.L. and Others v. the United Kingdom, no. 29522/95, § 82-83, 2000-IX). 39

44. 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. 40

45. For instance, it has not been 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 (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 Kingdom (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). 41

46. Furthermore, the Court accepts that the right to silence and the right not to incriminate oneself are not absolute, as for instance the drawing of inferences from an accused's silence may be admissible (Heaney and McGuinness, § 47 with a reference to John Murray, cited above, p. 49, § 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, judgment of 7 October 1988, Series A no. 141, p. 15, p. 28)." 42

33. The underlying proceedings in the present case - the prosecution for false accounting and conspiracy to defraud - were never pursued. The Government conclude from this that the right not to incriminate oneself cannot be at issue in the present case because in the event, there were no substantive proceedings in which the evidence could have been used in an incriminating way. 43

34. The Court recalls that in previous cases it has expressly found that there is no requirement that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings before the right not to incriminate oneself applies. In particular, in Heaney and McGuinness (cited above; §§ 43-46), it found that the applicants could rely on Article 6 §§ 1 and 2 in respect of their conviction and imprisonment for failing to reply to questions, even though they were subsequently acquitted of the underlying offence. Indeed, in Funke, the Court found a violation of the right not to incriminate oneself even though no underlying proceedings were brought, and by the time of the Strasbourg proceedings none could be (cited above, §§ 39, 40). 44

35. It is thus open to the applicant to complain of an interference with his right not to incriminate himself, even though no self-incriminating evidence (or reliance on a failure to provide information) was used in other, substantive criminal proceedings. 45

36. As to a justification for the coercive measures imposed on the applicant, the Court recalls that not all coercive measures give rise to the conclusion of an unjustified interference with the right not to incriminate oneself. In Saunders, for example, the Court listed types of material which exists independently of the will of a suspect and which fall outside the scope of the right (matters such as documents acquired pursuant to a warrant, breath, blood, DNA and urine samples - see the Saunders judgment cited above, § 69). In other cases, where no proceedings (other than the "coercive" proceedings) were pending or anticipated, the Court found no violation of the right not to incriminate oneself (see the Weh judgment and the Allen decision, both cited above). 46

37. The Government saw justification for the proceedings against the applicant for failing to attend the interview on 26 June 1998 in the importance of the tracing the proceeds of crime under the 1996 Order, and they noted the procedural protection available, namely the limitation on the use of any evidence obtained. 47

38. The Court recalls that in Heaney and McGuinness (cited above, § 58) it found that the security context of the relevant provision in that case (Section 52 of the Irish Offences against the State Act 1939) could not justify a provision which "extinguishes the very essence of the ... right to silence and ... right not to incriminate [oneself]". If the requirement to attend an interview had been put on a person in respect of whom there was no suspicion and no intention to bring proceedings, the use of the coercive powers under the 1996 Order might well have been compatible with the right not to incriminate oneself, in the same way as a statutory requirement to give information on public health grounds (see the case of Green Environmental Industries referred to by the Government, although in that case the applicants were also liable to prosecution by the local authority). The applicant, however, was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged. The security context - the special problems of investigating crime in Northern Ireland - cannot justify the application of the 1996 Order in the present case any more than could that in Heaney and McGuinness. 48

39. As to the procedural protection available to the applicant if he had attended the interview and if he had subsequently wished to prevent the use of information given in criminal proceedings, the Court first notes that it would have been open to the investigators to forward information to the police. Even though, as the Government say, the two investigations were being run separately, once the information had been passed to the police who were working on the criminal proceedings against the applicant, they would have converged, at least as far as the applicant was concerned. 49

40. Secondly, the Court notes that information obtained from the applicant at interview could have been used at a subsequent criminal trial if he had relied on evidence inconsistent with it. Such use would have deprived the applicant of the right to determine what evidence he wished to put before the trial court, and could have amounted to "resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused". The limitation on use in paragraph 6(b) of Schedule 2 cannot be seen as providing procedural protection for the applicant. It is true, as the Government note, that the applicant might not have been tried, and that even if he had, it would have been open to the trial judge to exclude the information obtained at interview. Both of those points, however, depend on the evidence actually being used in subsequent proceedings, whereas it is clear from the case-law referred to above that there is no need for proceedings even to be brought for the right not to incriminate oneself to be at issue. 50

41. The Court concludes that the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself. There has therefore been a violation of Article 6 § 1 of the Convention. 51

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 52

... 53

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 1of the Convention; 54

2. Holds 55

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into pounds sterling at the rate applicable at the date of settlement: 56

(i) EUR 1,750 (one thousand seven hundred and fifty euros) in respect of pecuniary and non-pecuniary damage; 57

(ii) EUR 2,200 (two thousand two hundred euros) in respect of costs and expenses; 58

(iii) any tax that may be chargeable on the above amounts; 59

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points; 60

3. Dismisses the remainder of the applicant's claim for just satisfaction. 61

... 62

[**Redaktioneller Hinweis:** Vgl. auch die übersetzte Entscheidung Weh v. Österreich {HRRS 2004 Nr. 459}, JR 2005, 423 ff. mit Anmerkung Gaede.]