Lord Bingham's speech, Article 6 makes a cameo appearance as the provision that allows reasonable limitations of access to the courts, provided that the very essence of the right is not impaired: it is a provision one need not bother with. Baroness Hale's speech, by contrast, is a prime example of what it means to re-orient the interpretation of statutory provisions towards the protection of human rights. It is a pity that her lucid analysis found no favour with the majority of the court. The bin of history may be awaiting, with an impatient anticipatory rattle, not only some of the less appealing substantive provisions of English law, but also some of the time-honoured rules of its construction.

ANTJE DU BOIS-PEDAIN

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND REAL EVIDENCE

SECTION 14 of the Civil Evidence Act 1968, which has been held to be declaratory of the scope of the privilege against self-incrimination at common law, refers to the right of a person in civil proceedings to refuse to "answer any question or produce any document or thing" which might incriminate him (*In re Westinghouse Electric Corpn. Uranium Contract Litigation MDL Docket No. 235 (Nos. 1 and 2)* [1978] A.C. 547, 636). The common understanding has, until now, been that this privilege protects a person both against compulsion to answer questions and against disclosure or seizure of documents or other real evidence. Thus, in *Rank Film Distributors Ltd.* v. *Video Information Centre* [1982] A.C. 380 defendants in a civil action for breach of copyright successfully invoked the privilege to avoid complying with orders to produce an affidavit giving their associates' names and to disclose documents which were to be exhibited to that affidavit, because to do so would tend to incriminate them of offences under the Copyright Act 1956.

The Court of Appeal in *C plc* v. *P* [2007] EWCA Civ 493, [2007] 3 W.L.R. 437 re-wrote the scope of the privilege and held that it does not extend to documents or things which have "an existence independent of the will" of the person seeking to invoke the privilege. This narrows a long-established common law right and it is unsatisfactory that such a far-reaching change was effected by a strained reading of House of Lords' authority and the 1968 Act, rather than by Parliament.

The company C plc obtained a civil search order against a businessman (P) in respect of alleged infringement of its intellectual property rights. The order required P to hand his computers over to an

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independent expert. The expert found indecent images of children stored on one of the machines, possession of which is a criminal offence, and applied to court to determine whether this material was privileged.

Evans-Lombe J. held, at first instance, that although real evidence was covered by the English version of the privilege, it should be modified to mirror the narrower Strasbourg version ([2006] EWHC 1226 (Ch), [2006] Ch. 549, noted [2007] C.L.J. 47). By way of background, the European Court of Human Rights has implied into Article 6 of the European Convention on Human Rights a right not to incriminate oneself (*Funke* v. *France* (1993) 16 E.H.R.R. 297, para. [44], and *Murray (John)* v. *UK* (1996) 22 E.H.R.R. 29, para. [45]). This Strasbourg version of the privilege does not cover pre-existing materials which subsist "independently of the will of the suspect" such as documents, body tissues, chattels or other real evidence (*L* v. *UK* [2000] 2 F.L.R. 322, 331 affirming *Saunders* v. *UK* (1996) 23 E.H.R.R. 313, at para. [69]).

The Court of Appeal unanimously rejected Evans-Lombe J's approach; Lord Bingham's partial exception to the rules of precedent in *Kay* v. *Lambeth Borough Council* [2006] 2 A.C. 465 would not permit binding domestic authority to be departed from in favour of a Strasbourg decision in order to abrogate individual rights which otherwise would exist under English law. However, the majority (Longmore L.J. and Sir Martin Nourse) held that the privilege under English law was in fact narrower than Evans-Lombe J. had thought it to be, so "modification" of the English privilege was unnecessary.

The majority considered that the Court of Appeal's decision in *Attorney General's Reference (No. 7 of 2000)* [2001] W.L.R. 1879 established that the privilege did not extend to documents which were independent evidence and therefore the same must apply to "things" which were independent evidence. The House of Lords' decisions in *Rank, Westinghouse* and *A T & T Istel* v. *Tully* [1993] A.C. 45 were distinguished on the basis that, although the privilege was successfully invoked to prevent disclosure of pre-existing documents, these cases involved a "testimonial obligation" to disclose *and verify* the documents.

Lawrence Collins L.J. agreed that there was no privilege on the facts because P was not ordered to produce incriminating material; incriminating material had simply been found following the execution of an order, authorised by section 72 of the Supreme Court Act 1981, for the production and imaging of P's computers. In his view, the case was no different to a situation in which counterfeit Gucci bags have been ordered to be produced and drugs are found in the pockets, or where the defendant has been ordered to give access to his premises

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and incriminating material is seen in the corner. However, he dissented and held that the English privilege did extend to real evidence which has an existence independent of the suspect.

There are several difficulties with the majority's reasoning. Firstly, it is based on a misreading of *Attorney General's Reference (No. 7 of 2000)*. Section 291(1) of the Insolvency Act 1986 removed any privilege which might have existed at common law in the context of bankruptcy proceedings and accordingly the Court of Appeal in *Attorney General's Reference (No. 7 of 2000)* was only required to determine whether the effect of the 1986 Act was compatible with Article 6 of the ECHR. It is not therefore authority for the proposition that, in the absence of statutory abrogation, the privilege does not extend to evidence which exists independently of the will of the suspect. Secondly, it is difficult for the Court of Appeal to distinguish the House of Lords' decisions in *Rank*, *Westinghouse Electric Corpn.* and *A T & T Istel* on the basis that they involved an obligation to produce and verify pre-existing evidence as opposed to a mere obligation to produce such evidence. This distinction does not appear in the authorities, nor is it supported by the wording of the 1968 Act. Moreover, the House of Lords has held that inroads into the privilege are primarily matters of Parliament (*A T & T Istel* and *In re Arrows Ltd. (No. 4)* [1995] 2 A.C. 75).

There are, however, strong policy grounds for excluding pre-existing real evidence from the scope of the privilege, save in situations where there is also a testimonial obligation to verify the material: see A. Zuckerman *Civil Procedure* 2nd ed., (2006), ch 17. The idea of a testimonial obligation inherent in the disclosure of certain real evidence also helps to explain a number of apparently inconsistent Strasbourg decisions where compulsion to produce real evidence which existed independently of the will of the suspect has been held to violate Article 6. For example, *Funke* v. *France* (1993) 16 E.H.R.R. 297 and *JB* v. *Switzerland* [2001] Crim. L.R. 748 where the ECtHR found a violation of Article 6 in circumstances where the applicants were compelled to disclose pre-existing documents in tax-evasion proceedings. Also, *Jalloh* v. *Germany* (2006) 44 E.H.R.R. 667 where the ECtHR held that forcing a suspect to regurgitate a small plastic bag of cocaine (which he had swallowed in order to avoid detection) violated amongst other things his right not to incriminate himself. *Funke* and *JB* are best treated as cases where there was a testimonial obligation to produce and verify the tax documents, and *Jalloh* as a case where the act of forced regurgitation not only yielded independent evidence, but the compelled "disclosure" also verified that the suspect had concealed the drugs.

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Although the result in *C plc* is to be welcomed, the reasoning is dubious and confirmation of the scope of the privilege by the House of Lords, or preferably Parliament, is desirable.

RICHARD MOULES

CURBING SPEED AND LIMITING THE RIGHT OF SILENCE

IN Agrigento, on the southern coast of Sicily, there stand the ruins of a row of huge Greek temples, which are said to be bigger than any ever built in Greece. The same tendency to outsize growth is sometimes found in other forms of cultural transplant too, including legal ones. The right to silence, when first consecrated as a human right at Strasbourg, was bigger than it had ever been in its native territory, the common law, and threatened for a time to dominate the local legal landscape. Later decisions of the ECtHR have cut it down to size: most recently *O'Halloran and Francis* v. *UK* (Applications 15809/02 and 25624/02, 29 June 2007), which is the subject of this note.

In its first case on the topic, *Funke* v. *France* (1993) 16 E.H.R.R. 297, the ECtHR held that the right of silence was infringed (and Article 6 of the Convention, which impliedly protects it, broken) by a French law requiring persons suspected of exchange control offences to produce their bank statements to the investigators on request. In the common law world, whence the right to silence originated, the right of silence was thought to be concerned with protecting suspects against compulsory interrogations, not against official orders to produce specific documents, which (as in England, with its "production orders") are a common feature of criminal procedure. The consternation *Funke* caused died down a little when, in *Saunders* v. *UK* (1997) 23 E.H.R.R. 313, the ECtHR then declared that

> The right not to incriminate oneself is primarily concerned… with respecting the will of an accused person to remain silent … it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers… [69]

In the common law world it was also generally assumed that the right to silence was not infringed by laws which allow the authorities to require the citizen to give them, if requested, a specific piece of information which might incriminate him. But in *Heaney and McGuiness* v. *Ireland* (2001) E.H.R.R. 264 the ECtHR held that legislation of this sort infringed the right to silence too: in this case, an Irish statute which, in the context of terrorist investigations, required

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