

#21: Presumed guilty unless proven innocent?

The presumption of innocence is a basic principle in the criminal law system. It is based in article 6 (2) of the European Convention of Human Rights. It states that *'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'*. The presumption of innocence dictates that the burden of proof lays with the prosecuting authority. This also entails that in principle the right to remain silent cannot be used against you. However, In Dutch case law we see a development – especially in relation to money laundering – that remaining silent can be held against you. Are suspects nowadays presumed guilty unless proven innocent? Does the presumption of innocence no longer exist?

The Dutch Supreme Court is quite clear on the fact that using the right to remain silent by a suspect cannot be used as evidence. The Supreme Court repeated its earlier ruling of 1997 in its [decision of 16 September 2014](#): the circumstance that a suspect refuses to give a statement or refuses to answer a certain question cannot be used to proof the suspicion. The silence of the suspect can be used in elaborations on the evidence if the suspect did not give a reasonable explanation for a circumstance which in itself or in relation to the further evidence can be considered as a reason for the crime. The Dutch Supreme Court finds itself in good company on this matter. The European Court of Human Rights is also strict when it comes to the prohibition to use the fact that the suspect used his fundamental human right to remain silent as evidence. In this respect for instance the cases [Murray against the United Kingdom](#) and [Telfner against Austria](#) are interesting.

The possibility to use the 'silence' of the suspect is mostly used in money laundering cases in the Netherlands. As explained in [Lawlunch #09](#) the money laundering jurisprudence shows who committed the crime from which the money originated or at what moment or where does not have to be proven. If 'there is no other explanation possible that the source of an object is a crime or if it is 'common knowledge' it is sufficient to come to a conviction. The circumstances on which it is based that the objects derived from a crime vary greatly. As soon as money laundering typologies are at stake an explanation can be asked from the accused about the source of the money. This statement has to be concrete, verifiable and not beforehand unreliable. If the suspect does not give a verifiable explanation for the heritage of the money the 'circumstantial' evidence is enough to come to a conviction. If the explanation of the suspect is concrete, verifiable and not beforehand unreliable the prosecutors office has to investigate this explanation in order to further substantiate their suspicion. If the prosecutor fails to do so the suspect needs to be acquitted.

The foregoing thus means that the suspect is 'forced' to not use his right to remain silent in money laundering cases, if the circumstances need an explanation. The Dutch Supreme Court allows this to happen. Is this a breach of the right to remain silent? Or is this a breach of the presumption of innocence?

In this respect the case of Zschüschen versus Belgium on which the European Court on Human Rights decided on 2 May 2017 is interesting. The suspect in this case, Mr. Zschüschen is convicted of tax fraud in the Netherlands. The European Court of Human Rights was to decide upon the question whether not giving a statement while he was suspected of money laundering was a breach of the presumption of innocence. The suspicion related to five transactions of in total € 75.000 Mr. Zschüschen made on a Belgian bankaccount. These transactions were reported by the bank as 'unusual transactions'. These

reported 'unusual transactions' in combination with the fact that no income was known of Mr. Zschüschen created a suspicion of money laundering. In that respect Mr. Zschüschen was asked where the money came from. He stated that he earned this money but he refused to give the name(s) of his employee(s). The Belgian Court convicted Mr. Zschüschen for money laundering, the fact that he did not give a concrete clarification on the source of the money was used to support the indirect evidence. The court also takes into account that Mr. Zschüschen has a criminal record with drug related crimes and that there is no known income of him in the Netherlands, where he lives.

The question before the European Court of Human Rights is whether this burden of proof on the suspect in these circumstances breaches article 6 of the European Convention of Human Rights. The European court judges that there is sufficient indirect evidence in order to require a statement on the source of the money. If this statement is not given, this absence of a statement is allowed to be used support of other (sufficient) indirect evidence. The European Court however emphasizes that using the right to remain silent as such cannot be used as evidence. Hence, there has to be enough indirect evidence in order to trigger the requirement for the suspect to give an explanation. Not giving an explanation only supports the indirect evidence that the money has a criminal origin.

Returning to the questions raised in the introduction of this Lawlunch; yes, the presumption of innocence still exists. The defence however has to be very critical towards the indirect evidence presented in order to avoid that the presumption of innocence would be breached. Only if there is enough indirect evidence when it comes to a suspicion of money laundering that the money originates from a crime it is not a breach of article 6 of the European Convention if the absence of an explanation on the origin of the money is used as a circumstance which supports the indirect evidence.

In our opinion the defence has to be very critical on the indirect evidence the prosecutors service presents. Is this evidence sufficient to require an explanation of the suspect? It is up to the defence to assist the judge in assessing the indirect evidence in these kind of cases.

Do you have any questions about this subject, are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.