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Silence in Suspicious Circumstances

Abenaa Owusu-Bempah

Introduction

It has been almost twenty years since ss.34-39 of the Criminal Justice and Public Order Act 1994 (CJPOA) qualified the right to silence by allowing adverse inferences to be drawn from silence. During this time, these provisions have been scrutinised by academics,¹ the appellate courts,² and the European Court of Human Rights.³ They have been praised for 'bringing the law back into line with common sense',⁴ but criticised for taking insufficient account of procedural safeguards.⁵ The focus of this scrutiny has tended to be on ss.34 and 35 of the CJPOA. Sections 36 and 37, on the other hand, have been largely overlooked. Section 34 allows 'such inferences as appear proper' to be drawn against a defendant who, in proceedings against him, relies on a fact that he failed to mention during police questioning. Section 35 allows adverse inferences to be drawn against a defendant who fails to give evidence in court. Sections 36 and 37 also allow the fact-finder to draw adverse inferences from a defendant's silence. However, the circumstances to which they apply are more specific. Section 36 permits inferences to be drawn from an arrested person's failure to account for suspicious objects, substances and marks. Section 37 permits inferences to be drawn from an arrested person's failure to account for his suspicious presence at a particular place around the time that an offence was committed.

This article seeks to clarify the significance of ss.36 and 37. It begins with a brief overview of the requirements of the provisions. It then considers four aspects of the provisions in greater detail: the requirement to 'account' for suspicious circumstances; the relevance of the defence case put forward at trial; the absence of a reasonableness requirement; and the relevance of legal advice. It is argued that

¹ See, for example, I. Dennis, 'The Criminal Justice and Public Order Act 1994: The Evidence Provisions' [1995] *Crim LR* 4; D. Birch, 'Suffering in Silence: a Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994' [1999] *Crim LR* 769; J. Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) *E & P* 145; M. Redmayne, 'English Warnings' (2008) 30 *Cardozo Law Review* 1047; A. Owusu-Bempah, 'Judging the Desirability of a Defendant's Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994' [2011] *Crim LR* 690.

² See, for example, *Cowan* [1996] Q.B. 373; *Bowden* [1999] 2 Cr. App. R. 176; *Webber* [2004] UKHL 1; *Hoare* [2004] EWCA Crim 784.

³ See, for example, *Murray v UK* (1996) 22 E.H.R.R. 29 (concerning the equivalent legislation in Northern Ireland); *Condron v UK* (2001) 31 E.H.R.R. 1; *Beckles v UK* (2003) 36 E.H.R.R. 13.

⁴ See, for example, *Webber* [2004] UKHL 1 at [33].

⁵ See, for example, J. Jackson, 'Interpreting the Silence Provisions: The Northern Ireland Cases' [1995] *Crim LR* 587; R. Pattenden, 'Silence: Lord Taylor's Legacy' (1998) 2 *E and P* 141.

the broad applicability of the provisions has increased the evidential significance of silence, such that it is difficult for an accused person, faced with certain suspicious circumstances, to avoid the possibility of adverse inferences being drawn against him. The article concludes with some suggestions to improve the operation of ss.36 and 37, so as to limit their detrimental effect on the right to silence and the accused's freedom to choose whether, and how, to respond to police questioning.

The provisions

In accordance with s.36, if, upon request by an investigating constable, an arrested person fails or refuses to account for any object, substance or mark, on his person, in or on his clothing or footwear, otherwise in his possession, or in any place in which he is at the time of his arrest, the court, in determining whether there is a case to answer, and the court or jury, in determining guilt, may draw such inferences from the failure or refusal as appear proper.⁶ Situations in which s.36 might apply include, being found in possession of a large sum of cash or a weapon, or with blood stained clothing.

In accordance with s.37, if a person arrested by a constable was found at a place at or about the time the offence for which he was arrested is alleged to have been committed and the accused, upon request by an investigating constable, fails or refuses to account for his presence at that place, the court, in determining whether there is a case to answer, and the court or jury, in determining guilt, may draw such inferences from the failure or refusal as appear proper.⁷ Situations in which s.37 might apply include, being present in a stolen vehicle or in a building where an offence, such as a kidnapping, was taking place.

Sections 36 and 37 apply only if the investigating constable reasonably believes that the relevant circumstances may be attributable to the accused's participation in the commission of the offence, and advises the accused that he so believes.⁸ The investigating constable must also explain to the accused, in ordinary language, that adverse inferences may later be drawn if he fails or refuses to account for the circumstances.⁹

⁶ ss.36(1) and 36(2).

⁷ ss.37(1) and 37(2).

⁸ ss.36(1)(b)-(c) and 37(1)(b)-(c).

⁹ ss.36(4) and 37(3).

Before a jury can be invited to draw adverse inferences under ss.36 or 37, they must be given a direction similar to that required in relation to ss.34 and 35, and in line with the Judicial Studies Board (JSB) specimen directions.¹⁰ This includes being told that they can only hold against the defendant a failure to give an explanation if they are sure that he had no acceptable explanation to offer.¹¹ Despite the directions being necessary to ensure compliance with the right to a fair trial under art.6 of the European Convention on Human Rights (ECHR),¹² the assumption underlying the provisions is that an innocent person would want to explain his innocence.¹³ Sections 36 and 37 thus associate silence with guilt and permit silence to contribute to a finding of guilt.¹⁴ One implication of this is that, at trial, the emphasis can fall on whether and how the accused co-operated during police questioning, rather than the prosecution case.

In comparison to s.34, ss.36 and 37 have generated very little case law.¹⁵ One might deduce from this that they are seldom used in practice. Yet, early research on the operation of the CJPOA provisions found that 39 per cent of suspects exercising their right to silence (amounting to five per cent of all suspects) were given a warning under ss.36 or 37.¹⁶ The majority of those given a warning failed to provide an account, or gave one which police officers considered unsatisfactory.¹⁷ Unfortunately, the proportion of trials in which a direction is given under ss.36 or 37 is not known. It is possible that the warnings given by police prompt guilty pleas. It is also possible that, although the police make use of the provisions, prosecutors tend not to rely on them in court. In some cases, the inferences that can be drawn from the objects, substances or marks, or the accused's presence at the scene of the crime, will be strong enough to render it unnecessary to also invite inferences to be drawn from the accused's

¹⁰ For the appropriate judicial direction see *Cowan* [1996] Q.B. 373 CA (Crim Div) at [381]; The Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (JSB, 2010). In *Milford*, it was held that the direction laid down in *Cowan* 'related to a case involving section 35 but it is common ground that the same principles apply when dealing with section 36': *Milford* [2002] EWCA Crim 1528 at [25].

¹¹ *Compton* [2002] EWCA Crim 2835 at [37].

¹² *Condron v UK* (2001) 31 E.H.R.R. 1. See also the discussion in I. Dennis, *The Law of Evidence* 5th edn (Sweet & Maxwell, 2013) pp.178-180.

¹³ In the context of s.34, Auld LJ observed that 'The whole basis of section 34 ... is an assumption that an innocent defendant ... would give an early explanation to demonstrate his innocence.' *Hoare* [2004] EWCA Crim 784 at [53].

¹⁴ However, a defendant shall not have a case to answer or be convicted of an offence solely or mainly on an inference drawn under the provisions: s.38(3); *Murray v UK* (1996) 22 E.H.R.R. 29 at [47].

¹⁵ For example, at the time of writing, a search of Westlaw for cases mentioning s.37 produced 2 results, s.36 produced 11 results and s.34 produced 214 results.

¹⁶ T. Bucke, R. Street and D. Brown, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000) Home Office, Research Study No.199, 39.

¹⁷ T. Bucke, R. Street and D. Brown, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000) Home Office, Research Study No.199, 39.

failure to provide an explanation. Nonetheless, the fact that early research indicates that the police take advantage of ss.36 and 37, together with the fact that there are some cases reaching the appellate courts which raise issues concerning their application, demonstrates a need for greater scrutiny of them.

In a recent article concerning s.36 in relation to expert evidence of drug traces, Marks explains that the provisions originated in the Republic of Ireland and were replicated in Northern Ireland before making their way into English law. However, they did not feature in the debates on the right to silence which preceded the introduction of the CJPOA and have subsequently been interpreted more broadly than the Irish legislation was intended to be.¹⁸

Accounting for suspicious circumstances

Sections 36 and 37 allow inferences of guilt to be drawn from the accused's failure or refusal to 'account for' suspicious objects, substances or marks, or presence at the scene of a crime, when questioned by the police. Complete silence clearly constitutes a failure to account for the circumstances. However, the statute does not specify how detailed or comprehensive an account must be before ss.36 or 37 will cease to apply.

In *Compton*,¹⁹ the Court of Appeal had to decide whether, for the purpose of s.36, the appellants had failed or refused to account for the presence of large sums of money contaminated with heroin which were found in their homes. Upon being cautioned, two of the appellants had stated that the money had come from legitimate means, with one also pointing out that he was a heroin addict. The third appellant, when interviewed before the heroin had been detected, said that his wife was a heroin addict and that the money had come from his father and the sale of a vehicle. When re-interviewed after the heroin had been detected he exercised his right to silence. The Court of Appeal held that the appellants had not accounted for the presence of the heroin-contaminated money. It was not enough to refer to other states of fact, from which it can be inferred what the account might be.²⁰ For example, in the case of the third appellant, it was insufficient that it could have been inferred from the earlier interview that the heroin came from his father who was a known drug dealer, his wife, or the purchaser of the vehicle. He had not accounted for a specific state of fact.

¹⁸ See A. Marks 'Evidence of Drug Traces: Relevance, Reliability and the Right to Silence' [2013] *Crim LR* 810, 821-823.

¹⁹ [2002] EWCA Crim 2835.

²⁰ *Compton* [2002] EWCA Crim 2835 at [34].

The implication of the Court of Appeal's approach is that the accused must not only co-operate with the police by offering a possible explanation, but must do so in a specific and detailed way. This can be contrasted with the intended definition in the equivalent Irish provision, under which any explanation, no matter how inadequate, would not amount to a 'failure or refusal' to account.²¹ Consequently, the English approach goes beyond allowing inferences to be drawn from silence; it allows inferences to be drawn from unsatisfactory explanations. Thus, ss.36 and 37 not only hinder the accused's freedom to choose whether or not to respond to questioning, but they also shape the response that he must give. Yet, in many cases, it may be unrealistic to expect a full account to be given in police interview, making it difficult to escape the possibility of adverse inferences. This is because of the stressful nature of police interrogation, during which the accused may be under a great deal of physical and psychological pressure, may be confused and uninformed, and, despite having been cautioned, may not fully understand the implications of his decisions. For example, an accused person who is arrested for the first time and asked to account for trace evidence of blood found on his clothing may be too nervous and intimidated to recall that his clothing had been borrowed by a friend. He will be even less likely to recall the surrounding circumstances, such as when it was borrowed, who borrowed it, and for what purpose. It may then be difficult to convince a jury that there was an explanation which could withstand scrutiny.

One reason why ss.36 and 37 may have escaped controversy is because adverse inferences can sometimes be drawn from silence in suspicious circumstances at common law. There is a general common law proposition that where suspicious circumstances appear to demand an explanation, and no explanation or an entirely incredible explanation is given, the lack of explanation may warrant an inference of guilty knowledge in the defendant. This, in turn, is part of a wider proposition that guilt may be inferred from the unreasonable behaviour of a defendant when confronted with facts which seem to accuse.²² This proposition led the Court of Appeal in *Raviraj*²³ to uphold a conviction of handling stolen goods after the trial judge had directed the jury that they could infer from the appellants' refusal to explain to the police the presence of stolen goods in their company warehouse that the appellants knew those goods were stolen. The Court noted that, 'One would expect innocent [company] directors in

²¹ A. Marks 'Evidence of Drug Traces: Relevance, Reliability and the Right to Silence' [2013] *Crim LR* 810, 822.

²² *Raviraj* (1987) 85 Cr. App. R. 93 at 103.

²³ (1987) 85 Cr. App. R. 93.

these circumstances to be most anxious to help police investigating stolen goods found on their premises.²⁴

The general common law proposition may have disguised the impact which ss.36 and 37 have had on the right to silence, leading one to believe that the provisions do no more than reinforce the common law. However, following *Compton*, an accused is likely to be required to provide a more detailed account to the police in order to avoid inferences being drawn under s.36 than he is to avoid inferences of guilty knowledge at common law. Furthermore, as explained below, at common law, inferences can only be drawn from silence as a response to police questioning before caution.²⁵ Sections 36 and 37, on the other hand, permit inferences to be drawn from silence and unsatisfactory accounts which are provided after arrest.

The defence case at trial

In *Compton*, it was held that the sole question under s.36 was whether the defendant did account for the presence of the substance, as put to him by the police officer.²⁶ It was immaterial that, during their trial, the appellants had given more specific accounts of the presence of heroin-contaminated money, stating the legitimate sources of the money. Thus, unlike s.34, ss.36 and 37 require no comparison between the account given to the police and the defence case put forward at trial.²⁷ Failure to adequately explain the circumstances when questioned by the police is sufficient to attract an inference of guilt. Yet, subjecting a defendant to an adverse inference direction in circumstances where he provides an insufficiently detailed account to the police, but goes on to provide a consistent and comprehensive account of the relevant circumstances at trial, can be problematic, not least because the narrower the gap between the account given to the police and the account given at trial, the less reliable any inferences of guilt are likely to be.

The purpose of the provisions seems to be to focus attention on the answers that are given at the time of questioning. However, it is submitted that, as a matter of principle, a defendant who provides an insufficiently detailed account to the police, but goes on to provide a consistent and more comprehensive account of the relevant circumstances at trial, should not be subject to an adverse

²⁴ *Raviraj* (1987) 85 Cr. App. R. 93 at 104.

²⁵ *Chandler* [1976] 1 W.L.R. 585.

²⁶ *Compton* [2002] EWCA Crim 2835 at [32].

²⁷ *Compton* [2002] EWCA Crim 2835 at [32].

inference direction under ss.36 or 37. This is because, as noted above, the physical and psychological pressures associated with police interrogations render it unrealistic to expect many accused persons to provide a sufficiently detailed account. There will also be instances where the accused does not have the requisite knowledge to provide a satisfactory account, such as cases in which not even experts can offer a definitive explanation for the presence of drugs traces.²⁸ Similarly, if the account given in court is accepted by the prosecution to be true, a direction under ss.36 or 37 should not be given, including where no account (as opposed to an unsatisfactory account) was provided to the police. This approach would be consistent with that taken to s.34.²⁹

In *Milford*,³⁰ it was submitted that s.36 should only apply when the defendant has given evidence at trial. It was argued that to give a direction under s.36 when he has not given evidence is unfair and a way of getting around the requirements of s.34. The Court of Appeal rejected this submission on the basis that had Parliament intended to limit s.36 in that way, provision would have been made in the section.³¹ This interpretation of Parliament's intention is undoubtedly correct. However, the consequence is that the inferences which may be drawn under ss.36 and 37 appear to relate directly to guilt rather than to the credibility of any defence put forward at trial. Since, as Pattenden points out, the applicability of the provisions are not dependent upon answers being offered at trial to questions which went unanswered during police questioning, there may be nothing for the evidence of these forms of silence to discredit.³²

By allowing evidential significance to be attached to silence itself, we can again see that ss.36 and 37 do more than merely reinforce the common law. At common law, silence in the face of accusations from other citizens could be treated as acceptance of those accusations, since the two are assumed to be on equal terms.³³ Silence in the face of accusations from police, before caution, could also be treated as acceptance, because the police and the accused are thought to be on equal terms, particularly when a solicitor is present.³⁴ These common law principles informed the decision in *Raviraj*. Silence as a response to police questioning after caution could never warrant comment from the prosecution, but

²⁸ A. Marks 'Evidence of Drug Traces: Relevance, Reliability and the Right to Silence' [2013] *Crim LR* 810, 823.

²⁹ *Wisdom and Sinclair* (Court of Appeal, 10 December 1999, unreported); *Webber* [2004] UKHL 1; *Smith* [2011] EWCA Crim 1098.

³⁰ [2002] EWCA Crim 1528.

³¹ *Milford* [2002] EWCA Crim 1528 at [18].

³² R. Pattenden, 'Silence: Lord Taylor's Legacy' (1998) 2 *E and P* 141, 145.

³³ *Christie* [1914] A.C. 545; *Parkes* [1976] 1 W.L.R. 1251.

³⁴ *Chandler* [1976] 1 W.L.R. 585.

sometimes could from the judge. However, the precise scope for judicial comment was uncertain. The fact of silence could sometimes be used by the jury to affect the weight which should be attached to a defence put forward at trial, but juries could not explicitly be invited to draw an inference of guilt from silence.³⁵

The JSB specimen direction now makes it clear that the jury 'may take [silence] into account as some additional support for the prosecution's case'.³⁶ The fact that inferences can be drawn by the court in determining whether there is a case to answer, before any evidence is adduced by the defence, also clarifies that silence can do more than merely affect the weight of other evidence. However, the distinction between silence as evidence in itself and silence as affecting the weight of other evidence is not always obvious. The latter may sometimes amount to no more than an indirect way of inferring the former.³⁷ Nonetheless, the CJPOA has made the position more explicit and, therefore, strengthened the link between silence and guilt. The implication may be that juries are now more willing to take silence into account when determining guilt than they were under the common law. The CJPOA has also increased the evidential significance of silence by allowing the prosecution, as well as the judge, to comment on silence. When evidence of silence falls outside of the scope of the CJPOA the common law still applies.³⁸ The principle that silence can be taken as an acceptance of accusations made by a person on an equal footing is, therefore, preserved.³⁹

Reasonableness

Sections 36 and 37 include no requirement that it be reasonable to expect the defendant to provide an account of the relevant circumstances to the police. As stated in *Roble*, reasonableness 'is not a concept which finds place in s.36'.⁴⁰ This can be contrasted with s.34, under which inferences can only be drawn if it would have been reasonable, in the circumstances, to expect the defendant to have mentioned to the police the fact later relied on at trial. When determining reasonableness for the purposes of s.34, all the circumstances relevant in relation to the particular accused, at the time he was questioned, can be

³⁵ *Ryan* (1966) 50 Cr. App. R. 144; *Sullivan* (1966) 51 Cr. App. R. 102; *Gilbert* (1977) 66 Cr. App. R. 237.

³⁶ The Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (JSB, 2010) p.393.

³⁷ See *Gilbert* (1977) 66 Cr. App. R. 237 at 244.

³⁸ ss.36(6) and 37(5). Arguably, if sections 36 and 37 were not intended to alter the common law, these provisions would be unnecessary.

³⁹ See, for example, *Collins* [2004] EWCA Crim 83.

⁴⁰ Per Rose LJ in *Roble* [1997] Crim LR 449 at 3.

taken into account. The broad nature of these circumstances include, inter alia, age, experience, mental capacity, sobriety, tiredness, knowledge, personality and legal advice.⁴¹ Presumably, these factors are not relevant in determining whether the jury should be invited to draw inferences under ss.36 or 37. There will, therefore, be situations in which it would be unreasonable to expect an accused to account for certain suspicious circumstances; yet, failure to do so can be construed as an indication of guilt. As previously noted, many accused persons may be unable to offer a sufficiently detailed account, due to the nature of police interrogations. A more specific example of unreasonableness arises where the accused lacks a sufficient understanding of English to deal with difficult legal concepts or would be unable to give a coherent account.⁴² Alternatively, the accused might suffer from a condition, such as Attention Deficit Hyperactivity Disorder (ADHD), which makes it difficult for him to concentrate or provide a comprehensive explanation.

In defence of the provisions, one might argue that the circumstances to which ss.36 and 37 apply are so suspicious that there is no need to require that it be reasonable to expect the accused to provide an account. Greenawalt has argued that adverse inferences can be a proper response to silence if substantial evidence of wrongdoing exists.⁴³ This is, in part, because the accused has a moral obligation to respond to criminal investigators in order to limit a crime's harmful effects and help protect the community against future harms.⁴⁴ However, even if one subscribes to this view, it is not obvious that being in possession of an object, substance or mark, or being at a place at or about the time an offence is alleged to have been committed will necessarily amount to substantial evidence of wrongdoing. Moreover, the applicability of the provisions does not appear to depend on the existence of evidence of wrongdoing beyond the circumstances themselves. Although the police must reasonably believe that the relevant circumstances are attributable to the accused's participation in an offence before ss.36 and 37 can apply, what constitutes a 'reasonable belief' has not been tested.

According to the current judicial directions, inferences should not be drawn unless the accused's silence can be attributed only to his having no answer to give or none that would withstand scrutiny.⁴⁵ On this basis, where the court or jury is aware of any particular hardships faced by the accused at the time of

⁴¹ *Argent* [1997] 2 Cr. App. R. 27 at 33.

⁴² This did not affect the applicability of s.36 in *Roble* [1997] Crim LR 449.

⁴³ K. Greenawalt, 'Silence as a Moral and Constitutional Right' (1981) 23 *William & Mary Law Review* 15, 43.

⁴⁴ K. Greenawalt, 'Silence as a Moral and Constitutional Right' (1981) 23 *William & Mary Law Review* 15, 36.

⁴⁵ The Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (JSB, 2010). See also, *Condon v UK* (2001) 31 E.H.R.R. 1.

police questioning, such as an insufficient understanding of English or ADHD, they would hopefully decide against drawing adverse inferences. However, the possibility of drawing inferences remains open and an unsympathetic jury may take advantage of this. By failing to take account of the circumstances at the time of questioning, the accused becomes more susceptible to pressure and coercion to co-operate at the police station and to wrongful conviction, based on unreliable confessions or tenuous inferences at trial.⁴⁶

Legal advice

The relationship between ss.36 and 37 and legal advice is a particular aspect of the applicability of the provisions which warrants consideration. Sections 36(4)(A) and 37(3)(A) prevent inferences from being drawn if the accused was questioned about the suspicious circumstances at an authorised place of detention prior to having an opportunity to consult a solicitor.⁴⁷ These provisions were added by s.58 of the Youth Justice and Criminal Evidence Act 1999, as a response to the decision of the European Court of Human Rights in *Murray v UK*.⁴⁸ However, it is unclear whether legal advice is also a prerequisite to the application of ss.36 and 37 outside of the police station. Although it is also unclear whether, in practice, the police utilise the provisions at this stage, it is conceivable that they are particularly useful outside of the police station, such as when the accused is arrested at the scene of a crime. In such cases, the threat of adverse inferences could be used to encourage the accused to offer an explanation, regardless of the fact that he may be largely ignorant of the circumstances surrounding the offence, his arrest, the criminal process, or his rights as a suspect.

There is nothing in the CJPOA which prevents adverse inferences from being drawn from a failure to account for suspicious circumstances when questioned outside of the police station. However, Code C 10.10 of the Police and Criminal Evidence Act 1984 (PACE) states that inferences can be drawn under ss.36 and 37 when a suspect is 'interviewed at a police station or authorised place of detention'. Furthermore, the effect of Code C 11.1A and C 11.1 is that questioning of an arrested suspect should normally take place in the police station. Yet, Code C does not prevent completely the questioning of an

⁴⁶ Amber Marks has also highlighted the dangers of disregarding the reasonableness of the accused's failure to account for the relevant circumstances, particularly in relation to a failure to account for expert evidence of drug traces. A. Marks 'Evidence of Drug Traces: Relevance, Reliability and the Right to Silence' [2013] *Crim LR* 810, 823-825.

⁴⁷ In accordance with s.38(2A), 'authorised place of detention' means a police station or any other place prescribed for the purposes of the relevant provision by order made by the Secretary of State.

⁴⁸ (1996) 22 E.H.R.R. 29.

accused outside of the police station.⁴⁹ If an accused is questioned upon arrest outside of the police station, the effect of Code C 11.4 is that, during formal interview at a police station, he must be asked if he wishes to confirm or deny any earlier significant silence. Although this could give the accused an opportunity to explain his earlier silence and to account for the relevant circumstances with the benefit of legal advice, it is not clear that doing so will prevent the application of ss.36 or 37.

The position as to the application of ss.36 and 37 outside of the police station requires clarification. Meanwhile, allowing inferences to be drawn from silence at this stage should be considered a breach of art.6 of the ECHR. This proposition is supported by the decision in *Murray v UK*, where it was held that access to a lawyer is of paramount importance for the rights of the defence at the initial stage of police interrogation, where the accused faces a fundamental dilemma relating to his defence.⁵⁰ Such a dilemma arises where exercising the right to silence may lead to adverse inferences. Failure to allow access to a lawyer was, thus, found to be incompatible with the rights of an accused under art.6.⁵¹ That the initial stage of police interrogation occurs outside of a police station is unlikely to diminish the magnitude of the dilemma faced by the accused. In *Cadder*,⁵² the Supreme Court, following the Strasbourg ruling in *Salduz v Turkey*,⁵³ held that, under art.6, the suspect must have access to legal advice before being subjected to police questioning, unless, in the particular circumstances, there are compelling reasons to restrict this right. This is, partly, because access to legal advice is necessary to protect against duress or pressure of any kind that might lead to self-incrimination.⁵⁴ Although the Court referred only to questioning in police custody, it is submitted that the same should apply to questioning outside of the police station, where the compulsion to speak might sometimes be greater; the accused is unlikely to have had an adequate opportunity to consider the situation in which he has found himself or the best course of action and, so, may be particularly susceptible to pressure or coercion.

When the accused is questioned in the police station and, so, has been afforded the opportunity to consult a solicitor, the fact of legal advice to remain silent may be of little significance at trial. In relation to s.34, if the jury believes that the defendant remained silent because he had no answer to give, rather

⁴⁹ See, for example, Police and Criminal Evidence Act 1984, Code C 11.1(a).

⁵⁰ *Murray v UK* (1996) 22 E.H.R.R. 29 at [66].

⁵¹ See also, *Condron v UK* (2001) 31 E.H.R.R. 1.

⁵² [2010] UKSC 43.

⁵³ (2008) 49 E.H.R.R. 421.

⁵⁴ *Cadder v HM Advocate* [2010] UKSC 43 at [33] - [35].

than because he genuinely and reasonably relied on the legal advice which he received, then they may take his silence into account in determining guilt.⁵⁵ Presumably, the same is true of ss.36 and 37,⁵⁶ though the reasonableness of the accused's decision to remain silent is not relevant in determining the applicability of these provisions. Consequently, it will ordinarily be open to juries to draw inferences of guilt under ss.36 and 37 in cases where the accused received legal advice to remain silent.

Conclusion and proposals

Sections 36 and 37 may have escaped serious academic and judicial scrutiny for a number of reasons, including an assumption that they do no more than reinforce the common law. However, the provisions have increased the evidential significance of silence. Although they apply only to specific circumstances, their applicability within those circumstances is broad. Where they apply, they impose a participatory burden on the accused, affecting not only the freedom to choose whether or not to respond to police questioning, but also shaping the response that should be given. At trial, they focus the attention of the fact-finder on whether, and how, the defendant responded to accusations, rather than the strength of the prosecution case. As a result, they have decreased the protection which the right to silence can provide against wrongful convictions, and increased the potential for abuse of power.

Whilst it would be preferable to repeal the silence provisions in the CJPOA and revert to the common law, in order to limit the negative effects of ss.36 and 37, the courts could take the following steps:

1. Where the jury are invited to draw adverse inferences, the judge should direct them that, during police interrogations, accused persons are often confronted with physical and psychological pressures which may affect their ability to provide an adequate account of the relevant circumstances.
2. Defendants who give unsatisfactory accounts during police questioning, but go on to give a full and consistent account in court, should not be subject to an adverse inference direction under ss.36 or 37. Likewise, adverse inference directions should not be given against those who, at trial, provide what is agreed to be a truthful account of the circumstances.

⁵⁵ *Hoare* [2004] EWCA Crim 784; *Beckles* [2004] EWCA Crim 2766.

⁵⁶ *Benn* [2004] EWCA Crim 2100.

3. If it would be unreasonable to have expected the accused to account for objects, substances or marks, or his presence at the scene of a crime, the judge should use the exclusionary discretion under s.78 of PACE to prevent the prosecution from relying on evidence of silence. Section 78 requires that the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. As a result, this is most likely to succeed in cases of clear unreasonableness, such as where the accused is unable to give a coherent account due to a mental impairment. However, ideally, the same broad spectrum of circumstances which can be taken into account in determining reasonableness for the purpose of s.34 would also be relevant to ss.36 and 37, including legal advice.
4. Evidence of silence as a response to police questioning outside of the police station should not be admitted against the defendant at trial. This could be achieved by applying s.3 of the Human Rights Act 1998 (HRA) which, so far as it is possible, requires legislation to be read and given effect in a way which is compatible with the ECHR. Following *Murray*, to admit such evidence should be considered a violation of art.6.