



26 October 2010

PRESS SUMMARY

Cadder (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2010] UKSC 43

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lord Brown, Lord Mance, Lord Kerr, Sir John Dyson SCJ.

BACKGROUND TO THE APPEAL

The question in this appeal is whether a person who has been detained by the police in Scotland on suspicion of having committed an offence has the right of access to a lawyer prior to being interviewed.

Sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 allow a police constable to detain a person whom he has reasonable grounds for suspecting has committed or is committing an offence punishable by imprisonment. Detention may last for up to six hours. During detention, the police may put questions to the detainee, although the detainee is under no obligation to answer them and is to be informed at the outset of the detention that he is under no such obligation. The detainee is entitled to have a solicitor informed of his detention. However, in terms of the statute, the detainee has no right of access to a solicitor. The question is whether that is a breach of the right to a fair trial, recognised in Article 6(1) and 6(3)(c) of the European Convention of Human Rights (“the ECHR”).

The Appellant was detained by the police on suspicion of serious assault and cautioned, in line with the statute, that he did not have to answer any question, beyond giving his name, address, date and place of birth and nationality. He was told that he was entitled to have a solicitor informed of his detention but he did not exercise that right. He was interviewed without a lawyer being present. During interview, the Appellant made a number of admissions. At trial the Crown led evidence of the police interview with the Appellant and relied on the admissions. The Appellant was convicted.

In *Salduz v Turkey* (2008) 49 EHRR 421 the Grand Chamber of the European Court of Human Rights unanimously held that there had been a violation of Articles 6(1) and 6(3)(c) ECHR because Salduz had not had the benefit of legal advice when he was in police custody. In *Her Majesty's Advocate v McLean* [2009] HCJAC 97, the High Court of Justiciary (sitting with seven judges) held that, notwithstanding the decision in *Salduz*, it was not a violation of Articles 6(1) & 6(3)(c) ECHR for the Crown to rely at trial on admissions made by a detainee while being interviewed without having had access to a solicitor. This was because the guarantees otherwise available in the Scottish legal system (and, in particular, the requirement that there be corroborated evidence in order to convict) were sufficient to provide for a fair trial. In the present case, relying on the decision in *McLean*, the appeal court refused the Appellant leave to appeal against his conviction. In effect, therefore, the present case is an appeal against the decision in *McLean*.

JUDGMENT

The Supreme Court unanimously grants leave to appeal and then goes on to allow the appeal. The ECHR requires that a person who has been detained by the police has the right to have access to a lawyer prior to being interviewed, unless in the particular circumstances of the case there are

compelling reasons to restrict that right. The Supreme Court remits the case to the High Court of Justiciary for further procedure. Lord Hope (Deputy President) delivers the leading judgment, with which Lord Mance agrees. Lord Rodger delivers a separate judgment, agreeing with Lord Hope but adding observations of his own. Lord Walker, Lord Brown, Lord Kerr and Sir John Dyson SCJ agree with the reasons given by both Lord Hope and Lord Rodger.

REASONS FOR THE JUDGMENT

The High Court of Justiciary's decision in *McLean* was entirely in line with previous domestic authority: [29] That authority cannot, however, survive in light of the European Court of Human Rights' decision in *Salduz* and in subsequent cases. Properly interpreted, *Salduz* requires a detainee to have had access to a lawyer from the time of the first interview unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right: [35], [36], [38] & [70]. The exception applies only if there are particular circumstances in the individual case and does not allow a systematic departure from the rule such as that set up by the 1995 Act: [41]. The rule in *Salduz* is based on the right not to incriminate oneself: [33] & [67].

This court should follow *Salduz*. Indeed, it has no real option but to do so: [93]. Previous cases have established that the court should follow any 'clear and consistent jurisprudence of the Strasbourg court': [45]. *Salduz* is a decision of the Grand Chamber, now firmly established in the European Court of Human Rights' case law: [48]. The majority of those member states which prior to *Salduz* did not afford a right to legal representation at interview (Belgium, France, the Netherlands and Ireland) are reforming their laws to bring them into line with the Convention's requirements: [49]. The guarantees otherwise offered by the Scottish legal system (in particular corroboration) are commendable but are beside the point. They do not address the European Court's concern, which is with self-incrimination: [50], [66] & [92]. The system of detention under section 14 and 15 of the 1995 Act was expressly designed to deny an individual, reasonably suspected of committing a crime, a right to obtain legal advice when questioned in the hope that, without legal advice, the individual would be more likely to incriminate himself during questioning: [91]. That view of where the balance is to be struck between the public interest and the rights of the accused is irreconcilable with Convention rights: [51]. There is not the remotest chance that the European Court would hold that, because of the other protections that Scots law provides for accused persons, the Scottish system could omit the safeguard of allowing legal advice prior to interview: [93].

The Lord Advocate could not rely upon section 57(3) of the Scotland Act 1998 to prevent her act of leading the evidence of the interview from being unlawful. Section 57(3) would apply where, because of another provision of legislation, the Lord Advocate could not have acted any differently or where she acted to give effect to another provision which could not be read in a way which complies with Convention rights. Neither applied here because of the drafting of section 14(7) of the 1995 Act: [54] & [55].

This decision does not permit closed cases to be re-opened. Although a judicial decision has retrospective effect, it does not affect cases which have been finally determined (namely, where an accused was convicted and did not appeal within the relevant time limits, or did appeal and the appeal has been finally disposed of). The decision will, however, affect cases which have not yet gone to trial, where the trial is still in progress or where an appeal has been brought in time and is not yet concluded. The Scottish Criminal Cases Review Commission, if it is asked to do so, will have to determine whether it is in the public interest for cases which have already been finally determined to be referred to the High Court, which will in turn have to decide how to deal with such cases, if a reference is made: [60] – [62]; [99] – [103].

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html