



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application nos. 19/11 and 36395/11  
John Paul LANG and Tracy HASTIE  
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 22 May 2012 as a Chamber composed of:

Lech Garlicki, *President*,  
David Thór Björgvinsson,  
Nicolas Bratza,  
George Nicolaou,  
Ledi Bianku,  
Nebojša Vučinić,  
Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*.

Having regard to the above applications lodged on 24 November 2010 and 15 June 2011,

Having deliberated, decides as follows:

THE FACTS

**A. Introduction**

1. These cases concern two applicants who in 2008 were convicted in separate, unrelated criminal proceedings in Scotland. The common complaint in the applications is that each applicant was interviewed by the police without access to a lawyer and the evidence obtained from that interviewed was relied on by the prosecution at trial.

2. The first applicant, Mr John Paul Lang, is a British national who was born in 1974. He is currently detained at HMP Glenochil. He is represented before the Court by Mrs Rosemary Cameron, a lawyer practising in Edinburgh with John Pryde & Co SSC.

3. The second applicant, Ms Tracey Hastie, is also a British national. She was born in 1970 and is currently detained at HMP Cornton Vale. She is represented by Jim Friel, a lawyer practising in Glasgow with Jim Friel & Co Solicitors.

## **B. The circumstances of each case**

### *1. The first applicant*

4. The facts of the case, as submitted by the first applicant, may be summarised as follows.

5. In the early hours of Saturday 21 April 2007, the first applicant had a sexual encounter with a woman who was spending the night at his flat. Later that morning the woman attended a police station where she made an allegation of rape against him. The first applicant was then detained by the police and interviewed by them without the presence of a lawyer. In the interview he made a statement that he and the woman had had consensual sex. He was subsequently charged with rape and tried on indictment at the High Court of Justiciary sitting at Paisley between 7 and 11 June 2008. At trial the prosecution relied on the statement the first applicant had given to the police. On 11 June 2008, he was convicted by a majority verdict of the jury. He did not appeal against his conviction.

6. On 22 October 2010, four days before the delivery of the judgment of the Supreme Court in *Cadder v. HM Advocate* [2010] UKSC 43 (see paragraphs 15–17 below), the first applicant applied to the High Court of Justiciary sitting as a court of criminal appeal (“the Appeal Court”) for an extension of time in which to lodge an appeal against conviction and sentence. In the Note of Appeal which accompanied the application for an extension of time, the first applicant submitted *inter alia* that his trial had been unfair because he had not been given access to a lawyer while in police custody and the prosecution had relied on the contents of his police interview at trial.

7. The application for an extension of time was initially refused by a Single Judge and then, following an oral hearing on 17 November 2010, by a bench of three judges.

### *2. The second applicant*

8. The facts of the case, as submitted by the second applicant, may be summarised as follows.

9. On 22 July 2008, after a trial at the High Court of Justiciary sitting at Glasgow, the second applicant was convicted of murder. In the course of the trial, the prosecution had relied on statements given by the second applicant in the course of a police interview, which took place on 3 November 2006 without the presence of a lawyer.

10. The second applicant was advised by her then legal representatives that she had no grounds for appealing against her conviction and accordingly did not do so within the statutory time-limit. However, it appears that, in September 2008 and again in January and February 2009, she was granted extensions of time in which to lodge a Note of Appeal, but failed to do so.

11. On 15 November 2010, on the basis of advice from new legal representatives, the second applicant lodged an application for extension of time in which to lodge an appeal against conviction. The application and an accompanying devolution minute alleged *inter alia* that the second applicant's trial had been unfair as a result of the admission of the statements she had given in her police interview.

12. The application was refused by a Single Judge on 26 November 2010. The second applicant appealed against that decision and a hearing was convened before three judges of the Appeal Court on 16 December 2010. Before the hearing senior counsel advised the second applicant that none of her grounds of appeal were arguable: in particular, he advised that the Supreme Court's finding in *Cadder* that its ruling should not apply to "closed cases" (see paragraph 17 below) meant that the second applicant's ground of appeal relating to the admission of her statements to the police could not succeed. Consequently, at the hearing on 16 December, the second applicant sought to withdraw her application for an extension of time. The Appeal Court allowed the application to be withdrawn on the same date.

### C. Relevant domestic law and practice

#### 1. *HM Advocate v. McLean* [2009] HCJAC 97

13. At the time of the above judgment (and the time of the present applicants' trial), sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provided that a person detained at a police station had the right to have the fact and place of his detention intimated to a solicitor, but did not have the automatic right of access to a solicitor either prior to or during a police interview.

14. The compatibility of sections 14 and 15 of the 1995 Act with this Court's judgment in *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008 was considered by the High Court of Justiciary sitting as a court of criminal appeal ("the Appeal Court") in *HM Advocate v. McLean*, judgment of

22 October 2009. The Appeal Court considered that it was not necessary to give effect to the *Salduz* judgment in Scotland, finding instead that the guarantees available under the Scottish system were sufficient to secure a fair trial of someone who was interviewed without access to a lawyer and whose responses were relied on by the prosecution.

2 *Cadder v. HM Advocate* [2010] UKSC 43

15. Peter Cadder was detained in May 2007 following an incident in which two men had been attacked by a group of youths. He was taken to a police station and interviewed, under caution but without the presence of a lawyer, by two police officers. During the interview he made a number of admissions with regard to the offences with which he was later charged. He was then arrested, cautioned and charged with assault and breach of the peace. At trial the audio tape recording of his police interview was played in full to the jury and they were given copies of the transcript. On 29 May 2009 he was convicted on all charges. He appealed against conviction *inter alia* on the ground that his interview had been relied on at trial. His appeals to the Appeal Court were refused on the papers at the first and second sift stages. He then submitted an application for special leave to appeal to the Supreme Court.

16. On 26 October 2010 the Supreme Court unanimously found that: (i) *McLean* had been incorrectly decided by the Appeal Court; (ii) Cadder's case should be remitted to the Appeal Court for further consideration; (iii) and its ruling should not apply retroactively.

17. On the third issue, both Lord Hope and Lord Rodger (with whom the other Justices agreed) held that, in the interests of legal certainty, the ruling should not permit the re-opening of closed cases, but rather only apply to cases which had not yet gone to trial, to cases where the trial was still in progress and to appeals that had been brought timeously. For all closed cases it was a matter for the Scottish Criminal Cases Review Commission to decide whether the cases should be referred back to the Appeal Court and for that court to decide what course it ought to take if a reference were to be made to it by the Commission.

3 *Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010*

18. Immediately after the *Cadder* ruling, the above Act ("the 2010 Act") was passed by the Scottish Parliament. It amends the Criminal Procedure (Scotland) Act 1995 to allow a suspect the right to have intimation sent to a solicitor *inter alia* that the solicitor's professional assistance is required by the suspect. It also provides for the right to a private consultation with a solicitor before any questioning begins and at any other time during such questioning. Consultation includes, for example, consultation by means of

telephone. The 2010 Act also provides that a suspect must be informed of these rights.

19. The Scottish Criminal Cases Review Commission is a public body with the task of reviewing and investigating cases where it is alleged a miscarriage of justice has occurred. The 2010 Act amends the provisions of the 1995 Act which give the Commission the power to refer cases to the Appeal Court. The 2010 Act directs the Commission, in determining whether or not it is in the interests of justice that a reference should be made, to have regard to the need for finality and certainty in the determination of criminal proceedings. The 2010 Act also gives the Appeal Court the power to reject a case which has been referred to it by the Commission if the court considers that it is not in the interests of justice that any appeal arising from the reference should proceed. The Act provides that, in determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the Appeal Court must have regard to the need for finality and certainty in the determination of criminal proceedings.

## COMPLAINTS

20. The first applicant complains first, under Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, that his trial was unfair because he was denied access to a lawyer during his detention and his statement to the police was subsequently relied on by the prosecution at trial. Second, he complains that the jury that convicted him was entitled to return a verdict by a simple majority and without giving reasons for its decision. Third, he complains that the refusal of the Appeal Court to apply this Court's ruling in *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008, both before and after the Supreme Court's ruling in *Cadder*, had deprived him of an effective remedy within the meaning of Article 13 of the Convention.

21. The second applicant, also relying on *Salduz*, complains that her trial was unfair because of the admission of her statements to the police. She submits that there was an ever greater imperative for providing access to a lawyer prior to her police interview given that she had a background of psychiatric disturbance and, moreover, she had been intoxicated at the time of the interview.

## THE LAW

22. Articles 6 and 13, where relevant, provide as follows:

### Article 6

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

...

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

### Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

23. The Court must first determine whether each applicant has complied with the admissibility requirements in Article 35 § 1 of the Convention, which stipulates:

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

### A. General principles

24. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against a State to use first the remedies provided by the national legal system, thus allowing States the opportunity to put matters right through their own legal systems before being required to answer for their acts before an international body. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged; there is no obligation to have recourse to remedies which are inadequate or ineffective.

25. The six-month rule stipulated in Article 35 § 1 is intended to promote security of the law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time. It protects the authorities and other persons concerned from uncertainty for a prolonged

period of time. Finally, it ensures that, insofar as possible, matters are examined while they are still fresh, before the passage of time makes it difficult to ascertain the pertinent facts and renders a fair examination of the question at issue almost impossible

26. In assessing whether an applicant has complied with Article 35 § 1, it is important to recall that the requirements contained in that Article concerning the exhaustion of domestic remedies and the six-month period are closely interrelated.

27. Thus where no effective remedy is available to an applicant, the time-limit expires six months after the date of the acts or measures about which he complains, or after the date of knowledge of that act or its effect or prejudice on the applicant.

28. The pursuit of remedies which do not satisfy the requirements of Article 35 § 1 will not be considered by the Court for the purposes of establishing the date of the “final decision” or calculating the starting point for the running of the six-month rule (see, as recent authorities, *Vaini v. Finland* (dec.), no. 62123/09, 3 May 2011; *Kolu v. Finland* (dec.), no. 56463/10, 3 May 2011; *Tucka v. the United Kingdom (no. 1)* (dec.), no. 34586/10, §§ 12 – 15, 18 January 2011, with further references therein).

## **B. The first applicant’s case**

29. The first applicant was convicted on 11 June 2008, and did not appeal. His subsequent application for an extension of time in which to lodge an appeal was lodged with the Appeal Court on 22 October 2010 (four days before *Cadder*). The final decision of the Appeal Court was given on 17 November 2010.

30. The question for the Court is whether the six-month period should run from the date of his conviction or the date of the Appeal Court’s decision.

31. The Court considers that it should be the former. The first applicant’s application for an extension of time, made so long after the original proceedings, meant that the remedy he sought could only be regarded as an extraordinary remedy, and not one that is effective for the purposes of Article 35.

32. Indeed, if the Court were to regard such an application for extension of time as an effective remedy, it would mean that any defendant in Scottish criminal proceedings who was deprived of legal assistance while in detention would, after the Supreme Court’s *Cadder* judgment, be able to lodge such an application with the Appeal Court, wait for it to be refused, and then lodge an application with this Court within six months of that refusal. They would be able to do so regardless of the date of their conviction and regardless of any steps they had taken – or had failed to take – to appeal against their conviction at the time. Such an approach would confer a right

of petition on a virtually unlimited number of defendants and would vitiate the legal certainty the Supreme Court properly sought to introduce when it limited the effect of its ruling in *Cadder*.

33. Admittedly, the present case is different in that the first applicant lodged his appeal just before *Cadder* was delivered. He could not, therefore, have known at that time what steps, if any, the Supreme Court would take to limit the effect of its ruling. However, the same might be said of any convicted person who, in October 2010, became aware the Supreme Court was about to deliver its judgment. It would render nugatory the six-month rule if any such defendant could, in anticipation of a favourable judgment from the Supreme Court, lodge an appeal with the Appeal Court and thereby obtain a new domestic decision for the purposes of calculating the six-month period.

34. The Court concludes, therefore, that the date of the final decision from which the six-month period began to run was 11 June 2008, the date of the first applicant's conviction. Since the present application was lodged by a letter dated 24 November 2010, it is out of time and must be rejected pursuant to Article 35 § 1 of the Convention.

### **C. The second applicant's case**

35. The above reasons apply with the same, if not greater, force to the second applicant's case. She was convicted on 2 September 2008 but failed properly to appeal against conviction until 15 November 2010, that is, some two weeks after the Supreme Court's judgment in *Cadder*. The Court considers that, as in the case of the first applicant, the second applicant's application for an extension of time should be regarded as an extraordinary remedy, and not one that is effective for the purposes of Article 35. The final decision in the second applicant's case is not, therefore, the Appeal Court's decision of 16 December 2010 but her original conviction of 2 September 2008. Accordingly, the application, having been lodged on 15 June 2011, is out of time and must be rejected pursuant to Article 35 § 1 of the Convention.

For these reasons, the Court unanimously

*Decides* to join the applications;

*Declares* the applications inadmissible.

Lawrence Early  
Registrar

Lech Garlicki  
President