

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

FOURTH SECTION

DECISION

Application no. 19923/10
Ryan PATERSON
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 application lodged on 29 March 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant Mr Ryan Paterson is a British national who was born in 1984. He is currently detained at HMP Peterhead. After lodging the application himself, the applicant has subsequently been represented before the Court by Mrs Rosemary Cameron, a lawyer practising in Edinburgh with John Pryde & Co SSC.

A. The circumstances of the case

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

3. On 12 March 2008 the applicant had sexual intercourse with a woman, W. W. subsequently alleged that the applicant had raped her.

4. The applicant was interviewed by the police without the presence of a lawyer. In the course of the taped interview he admitted having sexual intercourse with W. but maintained that it had been consensual.

5. The applicant was subsequently charged and tried for rape at the High Court of Justiciary at Glasgow. At the trial, the prosecution introduced the taped interview as evidence. On 12 May 2009, the applicant was convicted by a majority verdict of the jury and sentenced to five years' imprisonment.

6. The applicant applied to the High Court of Justiciary sitting as a court of criminal appeal ("the Appeal Court"), for leave to appeal against conviction and sentence, *inter alia* on the ground that it was incompatible with Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 for the prosecution to have introduced the police interview as evidence at trial.

7. By letter dated 19 November 2009 the applicant was informed that, on 19 November 2009, the single "sift" judge had refused leave to appeal. The judge stated that the applicant's grounds were based on this Court's judgment in *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008. However, the Appeal Court's judgment in *HM Advocate v. McLean* [2009] HCJAC 97 (which declined to apply *Salduz* to Scots law: see paragraphs 13-16 below) made clear that these grounds were unarguable

8. By letter dated 3 December 2009 the applicant's legal advisers intimated their intention to have the refusal of leave to appeal reviewed, and the case papers passed to the "second sift" (review by a panel of three judges). On 15 December 2009 the applicant was informed that the second sift judges had refused the applicant's appeal against the single sift judge's decision. They stated that the appeal against conviction was unarguable for the reasons given in *McLean*. Furthermore, even if the admission of the evidence regarding the interview was erroneous, they did not think it arguable that it had resulted in a miscarriage of justice, having regard to the content of the interview.

9. By letter of 24 December 2009, the applicant's legal advisers wrote to the High Court of Justiciary stating that the court's decision of 15 December 2009 represented the determination of a "devolution issue" in the case. (A devolution issue is a dispute as to whether the Scottish authorities, including the Lord Advocate as head of public prosecutions, have acted *ultra vires*. This includes whether they have acted incompatibly with their obligations under the Convention. A Scottish criminal case can only be appealed to the Supreme Court if a devolution issue arises in it). The letter

of 24 December 2009 asked for a procedural hearing to be arranged so that an application for leave to appeal to the Supreme Court could be made.

10. On 5 January 2010 the applicant was informed that the application for a procedural hearing had been considered and refused by the Criminal Appeals Administration Judge for the following reasons:

> "The refusal of leave brought this appeal to a conclusion. Contrary to what you maintain in your letter of 24 December, that refusal does not amount to the determination of a devolution issue from which an appeal may lie to the Supreme Court of the United Kingdom. There has been no such determination by the High Court. Quite the contrary, the appeal was not given leave to proceed. This case is at an end and no further procedure is competent."

B. Relevant domestic law and practice

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

11. At the time of the above judgment (and the time of the present applicant's 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.

12. Sections 14 and 15 of the 1995 Act gave legislative effect to the recommendations of the Thomson Committee on criminal procedure in Scotland. The Committee recommended the introduction of a limited or temporary form of arrest, arrest on suspicion, which should be given the separate name of "detention" (as distinct from arrest after a suspect is charged). Detention should not last longer than was necessary in the interests of justice, should be succeeded as soon as possible by either release or arrest, and should not exceed a fixed period of time at the end of which the detained person should either be released or arrested and charged. The Committee considered that while an arrestee should be entitled to an interview with a solicitor, it should be a matter of police discretion whether to allow a detainee an interview with his solicitor. In making this recommendation, the Committee noted that the purpose of interrogation of a suspect/detainee was to obtain from him such information as he might possess regarding the offence, and this purpose might be defeated by the participation of his solicitor.

13. 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*.

14. The Appeal Court considered that *Salduz* was open to interpretation. It could, on the one hand, be read as requiring that every jurisdiction have in

place a system where access to a lawyer was ordinarily provided as from the first interrogation of a person, whatever safeguards there may otherwise be for a fair trial. Alternatively, the Court could have required that access to legal advice be seen against the guarantees which were otherwise in place to secure a fair trial.

15. The Appeal Court favoured the latter interpretation. Proceeding on that basis, it was satisfied 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. The Appeal Court stated:

> "[27] In the first place it is important to notice that Scots law is particularly jealous to protect a person who has, in the domestic sense, been charged with a crime, that is a person who, having been cautioned that he need not respond, has had read to him by the police the charge or charges which they propose should be preferred against him. Such a person, if arrested, has the right to have a solicitor informed of what has happened and to a subsequent interview with him before his appearance in court. He may not, after caution and charge, be further questioned by the police. He may, if he chooses, make a voluntary statement but that is taken by officers not involved in the inquiry. Problems occasioned by these protections persuaded the Thomson Committee to recommend, and Parliament to endorse, a form of limited or temporary apprehension on suspicion - to which they gave the separate name of 'detention'. A number of safeguards apply to persons in detention. Before being questioned by the police the detainee must be cautioned that he need not answer any questions put - other than certain formal particulars (section 14(10) [of the 1995 Act]) - but that, if he does answer, his answers will be recorded and may be used in evidence. In all serious cases the interview is tape recorded - and in some cases, as in the present case, video recorded - with the tape or tapes sealed at the conclusion of the interview. While the police may question the detainee, and may do so persistently and robustly, they are not entitled to coerce him or otherwise to treat him unfairly. If they do so, that will render any incriminating answers which he gives inadmissible in evidence at his subsequent trial (*Lord Advocate's Reference (No.1 of 1983)* 1984 JC 52). Challenges to admissibility on such grounds may be made either in advance of the trial or in its course. The accused is entitled to give evidence as to the circumstances of the questioning during detention without being required to answer any questions as to the substance of the charge or charges; thus his right to silence at his trial is protected. The onus of proving that any admission made by the accused in the course of detention was fairly elicited is on the prosecution (*Thompson v Crowe* 2000 JC 173). The trial judge must forthwith rule on the challenge to admissibility by either excluding or admitting the answers in evidence. (It is noted that in *Salduz* the Izmir State Security Court did not 'take a stance' on the admissibility of the applicant's statements - para 57). Even where the judge admits the answers, the jury in solemn cases is entitled to take into account the circumstances in which any incriminating answers were given and, if they think fit, to give no or little weight to such answers. As explained in the caution, a suspect is entitled to decline to answer any of the questions (other than the formal questions) put by the police. That right when exercised is respected. The jury is expressly directed at the trial that it may not draw any inference adverse to the accused from any declinature to answer police questions. Even if the accused makes an admission during detention which is held to have been freely and voluntarily given in fair circumstances, he cannot be convicted on the basis of that admission alone. Scots law requires that there be corroboration by independent

> evidence (*Morton v HM Advocate* 1938 JC 50; *Sinclair v Clark* 1962 JC 57). A person may not be detained for more than six hours; it may be less (section 14(2) [of the 1995 Act]) - as it was in this case. He must be informed immediately upon the termination of his detention that his detention has been terminated (section 14(2)). He may not be further detained on the same grounds or on any ground arising out of the same circumstances (section 14(3)). Although a detained person has no right to have access to a lawyer before being questioned, he is entitled to have the fact of his detention and of the place where he is detained intimated without unreasonable delay to a solicitor and to one other person reasonably named by him (section 15(1)). Additionally, the police may, if they think fit, allow a lawyer or other person to be present during the detention. This discretion is likely to be exercised where the detainee is perceived to be a vulnerable person."

16. The Appeal Court added that, if it was wrong in its interpretation of *Salduz*, it had to consider the effect of that assumption. Ordinarily, as a result of the obligation to take account of Strasbourg jurisprudence under the Human Rights Act 1998, United Kingdom courts should not without good reason depart from the principles laid down in a carefully considered judgment of the European Court sitting as a Grand Chamber. However, there was no evidence that, in *Salduz*, the implications for the Scottish system had been "carefully considered" by the Grand Chamber. In those circumstances the Appeal Court was of opinion that, while the judgment in *Salduz* commanded great respect, it was not obliged to apply it directly in Scotland. Thus, even if *Salduz* amounted to the expounding of a principle that Article 6 required that access to a lawyer should be provided as from the first interrogation of a suspect by the police, the Appeal Court was satisfied that that principle could not and should not be applied without qualification in Scotland. In particular, if other safeguards to secure a fair trial of the kind which it had described were in place, there was, notwithstanding that a lawyer is not so provided, no violation of Article 6.

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

17. 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.

18. 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.

19. On the first issue, Lord Hope found that the Appeal Court had erred in its interpretation of *Salduz*. The Grand Chamber's judgment was to be understood as laying down two statements of principle: that access to a lawyer should be provided as from the first interrogation of suspect; and that the rights of the defence would be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction. There was room for a certain flexibility in the application of these requirements but they did not permit a systematic departure from it, which was what had occurred under the 1995 Act. As to whether *Salduz* should be followed, Lord Hope noted that the judgment had been given by a unanimous Grand Chamber, it had been repeatedly followed in subsequent cases and was now firmly established in the jurisprudence of this Court. Lord Hope also observed that the majority of those Contracting States which prior to *Salduz* did not afford a right of legal representation at interview (Belgium, France, the Netherlands and Ireland) had recognised that their legal systems were, in that respect, inadequate (see the decision of the Supreme Court of the Netherlands LJN Bh3079, 30 June 2009; decision no. 2010-14/22 QPC, 30 July 2010 of the Conseil Constitutionnel; and the Court of Cassation's judgments no. 5699, 5700 and 5701, 19 October 2010). If Scotland were not to follow the example of others it would be alone in not doing so, and would find no support in England and Wales or Northern Ireland, both of which allowed the right of access to a lawyer.

20. For Lord Hope there was also no room for finding that the guarantees otherwise available under the Scottish system were sufficient to secure a fair trial. Those guarantees were commendable but were, in truth, incapable of removing the disadvantage that a detainee would suffer if, not having access to a solicitor for advice before he was questioned by police, he made incriminating admissions or said something which enabled the police to obtain incriminating evidence from other sources which was then used against him at his trial.

21. Lord Rodger, concurring in judgment, stated that the many other safeguards which existed in Scots law for accused persons, and which the Appeal Court had relied upon, were "beside the point". This Court's reasoning in *Salduz* was based on the implied right of an accused person not to incriminate himself. This being so, the only safeguards in Scots law which could be relevant would be those which were designed to protect that right. The safeguards relied on by the Appeal Court, though admirable and going further than some other systems, could not, and did not, protect that right. Instead, it was clear from the recommendations of the Thomson

Committee that the purpose of sections 14 and 15 of the 1995 Act was intended to give the police and prosecution an enhanced possibility of obtained incriminating admissions from the suspect which could then be deployed in evidence at his trial. The procedure provided for in those sections was, therefore, the very converse of what the Grand Chamber held to be required in *Salduz*. For this reason, in Lord Rodger's view, there was "not the remotest chance" that this Court would find that, because of the other protections Scots law provided for accused persons, the Scottish system was compatible with Articles 6 §§ 1 and 3(c).

22. On the third issue, the effect of the Supreme Court's ruling, 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*

23. 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.

24. 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

25. The 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.

26. Second, the applicant complains that the presiding judge at his trial was a temporary judge who had "political affiliations". This, he submits, meant that he was not tried before an independent and impartial tribunal within the meaning of Article 6 § 1.

27. Third, the applicant complains that the presiding judge stated that the evidential position, brought about in part by the admission of the applicant's taped interview, gave rise to a necessity that he give evidence in order to escape conviction. This amounted to a breach of the presumption of innocence as guaranteed by Article 6 § 2.

28. Fourth, relying on the Court's judgment in *Taxquet*, cited above, he complains that the jury failed to provide reasons for their decision.

29. Fifth, he complains under Article 13 that he had no effective remedy at national level.

THE LAW

30. 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."

A. Lack of access to a lawyer during detention

31. The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of it to the respondent Government.

B. Other complaints

32. For the applicant's second and third complaints – concerning the independence and impartiality of the presiding judge and the alleged breach of the presumption of innocence – the Court notes that the applicant did not include these complaints in his appeal against conviction. As such, even assuming that these complaints are substantiated, he has failed to exhaust domestic remedies. These complaints must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

33. For the applicant's fourth complaint – the fact that the jury did not provide reasons for its verdict – the Court considers that this complaint is indistinguishable from that considered and rejected by it in *Judge v. the United Kingdom* (dec.), no. 35863/10, 8 February 2011. Accordingly, this part of the application must be rejected as manifestly ill founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

34. Finally, the applicant has relied on Article 13 when read in conjunction with his Article 6 complaints as to the independence and impartiality of the presiding judge, the alleged breach of the presumption of innocence, and the absence of reasons for the jury's verdict. The Court considers that, since these substantive complaints have been found to be inadmissible, his ancillary complaints under Article 13 must also be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint concerning his lack of access to a lawyer during detention;

Declares the remainder of the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President