The Supreme Court of the United Kingdom

A

ON APPEAL

FROM THE HIGH COURT OF JUSTICIARY

(SCOTLAND)

Between

B

HER MAJESTY'S ADVOCATE

Respondent

and

PETER CADDER

Appellant

INTERVENTION FOR JUSTICE

C

---

1. INTRODUCTION

1.1 The intervener, JUSTICE, intervenes in the present appeal with the permission of the UK Supreme Court dated 24 March 2010. JUSTICE was founded in 1957 as an independent human rights and law reform organisation. It is the British section of the International Commission of Jurists and has particular experience of issues relating to the rule of law and the criminal justice system. JUSTICE has over many years conducted research, produced briefings and advised on criminal justice matters. More recently, JUSTICE has been a joint partner in a research project which concludes in June 2010 entitled "Effective Criminal Defence Rights in Europe" which considers practical issues surrounding criminal defence in nine European countries. JUSTICE has a long

D

history of intervening in cases involving important matters of public interest, especially with respect to fundamental rights and in particular, fair trial rights.

A

1.2 In its judgment in *McLean v HM Advocate* [2009] HCJAC 97, 2010 SLT 73, 2010 SCCR 59 the Criminal Appeal Court ruled that the fact that a suspect had no right in domestic Scots law to have a legal representative at police interview did not, of itself, constitute a *systemic* violation of articles 6(1) and 6(3) of the European Convention on Human Rights ("ECHR"). Instead, the court was of the view that it would only be the *use* at the trial of any statement so obtained which might, depending on the particular circumstances of the case, result in a Convention rights violation

B

1.3 The intervener's submissions are limited to the substantive question as to whether the Criminal Appeal Court in *McLean* in fact correctly understood and applied the relevant provisions of the European Convention. The intervener submits that the answer to that question rests on the proper interpretation of Article 6(3)(c) ECHR taken with Article 6(1) ECHR as read in the light of the decision of 27 November 2008 of the Grand Chamber of the European Court of Human Rights in *Salduz v Turkey* (2009) 49 EHRR 19, (2008) 26 BHRC 223, ECtHR (GC) and subsequent Strasbourg case law applying the "*Salduz* principle".

1.4 The intervener's submissions will cover the following six areas:

C

(1) The decision of the Grand Chamber in *Salduz v. Turkey* and the subsequent applications of that decision by the European Court of Human Rights;

(2) A comparative survey of the position on the right to legal representation on police interview in the other Member States of the European Union prior to the decision in *Salduz*, and the changes which have occurred in the domestic law and practice of certain Member States subsequent to and in response to the judgment in *Salduz;*

(3) A comparative survey of the current position on the right to legal representation on police interview in other jurisdictions within the English speaking legal world;

D

(4) The position on the right to legal representation on police interview within the international legal order;

(5) The historical development of criminal justice legislation pertaining to police arrest and detention in Scotland and England and Wales, under particular reference to the Second Report of the Thompson Commission on Criminal Procedure in Scotland (Cmnd. 6218, October 1975) and to the work of the Royal Commission on Criminal Procedure in England and Wales (Cmnd. 8092, 1981);

(6) The remedies which would be open to this court in the event of a finding of Convention incompatibility of the current law and practice in Scotland.

2. *SALDUZ* AND ITS PROGENY IN STRASBOURG

2.1 *Salduz v Turkey* concerned a minor who had been taken into custody by police officers from the anti-terrorism branch and was interrogated by them in the absence of a lawyer. While in custody the applicant made admissions in a statement given to the police. When brought before the public prosecutor and subsequently the investigating judge the applicant retracted his statement, saying that it had been obtained from him under duress and threat of beatings by the police. The Grand Chamber were unanimous in finding that the applicant's lack of access to legal assistance while he was in police custody disclosed a *systemic* Convention violation, the majority opinion observing as follows:

> "[I]n order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction." (at 55)

2.2 The Court underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (at 54). The Court found that the restriction on access to a lawyer was systematic by virtue of the relevant legal provisions (at 56 and 61.) Further, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was relied on for his conviction. Neither the assistance provided subsequently by a lawyer nor the ability to challenge the statement during the ensuing proceedings could cure the defects which

had occurred during police custody (at 58), and as such irretrievably affected his defence rights (at 61). Violations of arts 6(1) and (3)(c) of the Convention were found (at 63).

A

2.3 The Grand Chamber decision in *Salduz* has been followed repeatedly in subsequent decisions of the European Court of Human Rights. The *Salduz* case law may be said to form a clear and constant line of jurisprudence of the Strasbourg court [1] to the effect that the police interviewing of suspects in the absence of their lawyers is, in principle, Convention incompatible. [2] In many of these post-*Salduz* cases, particularly against Turkey, the Court Sections have found there to be a Convention violation by no more than a reference to the "*Salduz* principle" and adding simply that no exceptional circumstances were present that could justify an exception to this jurisprudence,[3] nor could the subsequent assistance of a lawyer in properly adversarial proceedings cure the defect. [4]

B

---

[1] See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 313 at 26

[2] See, for example *Güveç v. Turkey* [2009] ECHR 70337/01 (20 January 2009) at 126; *Şükran Yıldız v. Turkey* [2009] ECHR 4661/02 (3 February 2009) at 36; *Soykan v. Turkey* [2009] ECHR 47368/99 (21 April 2009) at 57; *Halil Kaya v. Turkey* [2009] ECHR 22922/03 (22 September 2009) at 19; *Adamkiewicz v. Poland* [2010] ECHR 54729/00 (2 March 2010) at 89

[3] See for example *Güveç v. Turkey* [2009] ECHR 70337/01 (20 January 2009) at 126; *Aslan and Demir v. Turkey* [2009] ECHR 38940/02, 5197/03 (17 February 2009) at 9-11; *Ek and Şıktaş v. Turkey* [2009] ECHR 6058/02, 18074/03 (17 February 2009) at 11-2; *Aba v. Turkey* [2009] ECHR 7638/02, 24146/04 (3 March 2009) at 9; *Taşçıgil v. Turkey* [2009] ECHR 16943/03 (3 March 2009) at 36; *Böke and Kandemir v. Turkey* [2009] ECHR 71912/01, 26968/02, 36397/03 (10 March 2009) at 71; *Tağaç and Others v. Turkey* [2009] ECHR 71864/01 (7 July 2009) at 35-6; *Arzu v. Turkey* [2009] ECHR 1915/03 (15 September 2009) at 46; *Halil Kaya v. Turkey* [2009] ECHR 22922/03 (22 September 2009) at 18; *Gürova v. Turkey* [2009] ECHR 22088/03 (6 October 2009) at 13; *Mehmet Zeki Doğan v. Turkey* [2009] ECHR 38114/03 (6 October 2009) at 13; *Eraslan and others v Turkey* [2009] ECHR 59653/00 (6 October 2009) at 13; *Fatma Tunç v. Turkey (no. 2)* [2009] ECHR 18532/05 (13 October 2009) at 15; *Geçgel and Çelik v. Turkey* [2009] ECHR 8747/02, 34509/03 (13 October 2009) at 15; *Oğraş v. Turkey* [2009] ECHR 13918/03 (13 October 2009) at 19-20; *Bolukoç and Others v. Turkey* [2009] ECHR 35392/04 (10 November 2009) at 35; *Ayhan Işık v. Turkey* [2010] ECHR 33102/04 (30 March 2010) at 33-4

C

[4] *Amutgan v. Turkey* [2009] ECHR 5138/04 (3 February 2009) at 18. See to like effect *Şükran Yıldız v. Turkey* [2009] ECHR 4661/02 (3 February 2009) at 34-7; *Çimen v. Turkey* [2009] ECHR 19582/02 (3 February 2009) at 26; *Ibrahim Oztürk v. Turkey*, [2009] ECHR 16500/04 (17 February 2009) at 51-2; *Soykan v. Turkey* [2009] ECHR 47368/99 (21 April 2009) at 57; *Öngün v. Turkey* [2009] ECHR 15737/02 (23 June 2009) at 33-5; *Gök and Güler v. Turkey* [2009] ECHR 74307/01 (28 July 2009) at 57; *Ümit Gül v. Turkey* [2009] ECHR 7880/02 (29 September 2009) at 65-8; *Özcan Çolak v. Turkey* [2009] ECHR 30235/03 (6 October 2009) at 46; *Demirkaya v. Turkey* [2009] ECHR 31721/02 (13 October 2009) at 16-7; *Dayanan v Turkey* [2009] ECHR 7377/03 (13 October 2009) at 33; *Fikret Çetin v. Turkey* [2009] ECHR 24829/03 (13 October 2009) at 36 ; *Attı and Tedik v. Turkey* [2009] ECHR 32705/02 (20 October 2009) at 39-41; *Ballıktaş v. Turkey* [2009] ECHR 7070/03 (20 October 2009) at 42-5; *Çolakoğlu v. Turkey* [2009] ECHR 29503/03 (20 October 2009) at 37; *Yunus Aktaş and others v. Turkey* [2009] ECHR 24744/03 (20 October 2009) at 55; *Yusuf Gezer v. Turkey* [2009] ECHR 21790/04 (1 December 2009) at 44; *Savaş v. Turkey* [2009] ECHR 9762/03 (8 December 2009) at 69-70; *Musa Karataş v. Turkey* [2010] ECHR 63315/00 (5 January 2010) at 90; *Hakan Duman v. Turkey* [2010] ECHR 28439/03 (23 March 2010) at 52-3

D

2.4 But the court's application of the *Salduz* principle is *not* simply confined to Turkey.[5] Among the more significant post-*Salduz* cases are *Panovits v. Cyprus* (2008) 27 BHRC 464, (ECtHR, 11 December 2008) which concerned a 17 year old minor who was interviewed without a lawyer and outwith the presence of his father, who refused a police invitation to attend the interview. In the course of this interview he confessed to a crime which was relied upon in his subsequent prosecution. The trial court found that there had been clear, independent and persuasive evidence demonstrating the genuine nature of his confession to the police. Furthermore, it noted that apart from the free and voluntary confession, the conclusion about the applicant's guilt was supported by other strong and independent, albeit circumstantial, evidence and facts. At paragraph 75 the Strasbourg Court held that the national court's scrutiny did not compensate for the besetting unfairness of the proceedings overall standing the absence of any legal representation for the accused during the initial police interview.

2.5 In *Fatma Tunç v. Turkey (No. 2)* [2009] ECHR 18532/05 (13 October 2009) there was found to be a violation of the *Salduz* principle in a situation where the applicant's lawyer was able to see her for a period of some five minutes before a statement was taken from her by the police. In the statement she accepted the charges against her, which admission she repeated before the public prosecutor, albeit that when subsequently questioned by the investigating judge, the applicant denied the charges against her. At paragraph 14 the Court referred to its reasoning in *Salduz* and concluded that although the applicant had met her lawyer during police custody, this meeting could not be considered sufficient by Convention standards.

2.6 Furthermore, in *Dayanan v Turkey* [2009] ECHR 7377/03 (13 October 2009) the Second Section of the Strasbourg Court held that the systemic restriction on access to legal assistance amounted to a violation of Article 6, notwithstanding that the accused exercised his right to remain silent during his police interrogation. The applicant on his

---

[5] See, for example *Shabelnik v. Ukraine* [2009] ECHR 16404/03 (19 February 2009; *Plonka v. Poland* [2009] ECHR 20310/02 (31 March 2009); *Oleg Kolesnik v. Ukraine* [2009] ECHR *17551/02* (19 November 2009) at 37-8

> "[T]he applicant's self-incriminating statements, obtained in the absence of a lawyer and in circumstances that give rise to a suspicion that both the original waiver of the right to legal representation and the applicant's confessions were obtained in defiance of his will, served as a crucial element in his conviction. Accordingly, in this respect there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention."

arrest and detention in police custody was informed of his rights to remain silent and to have a lawyer present at the end of his police custody. He duly exercised his right to remain silent in the course of police interview. But since the accused had no right to the presence or assistance of a lawyer *immediately* on his arrest and detention, there was still a violation, This decision may therefore be seen as a development of the *Salduz* principle along the lines suggested by Judge Bratza in his concurring opinion in the *Salduz* decision when he stated:

> "It would be regrettable if the impression were to be left by the judgment that no issue could arise under art 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that art 6 was engaged only where the denial of access affected the fairness of the interrogation of the suspect. The denial of access to a lawyer from the outset of the detention of a suspect which, in a particular case, results in prejudice to the rights of the defence may violate art 6 of the convention *whether or not such prejudice stems from the interrogation of the suspect.*"

2.7 It is clear, then, that the Strasbourg Court will not consider the fact of mere intimation of arrest or police detention to a lawyer sufficient to avoid a finding of a violation of Article 6(3)(c) of the Convention, in conjunction with Article 6(1) where the State seeks to rely on a confession as evidence at trial.

Article 6(1) requirement for overall fairness

2.8 *Kuralic v. Croatia* [2009] ECHR 50700/07 (15 October 2009) is an indication that the Court has in mind the fairness of the proceedings as a whole, since it did not find an interference with art 6, notwithstanding that the applicant was not legally represented in police interviews. This was because the statement was excluded from the case-file and carried no weight in the subsequent proceedings (at para 45).

2.9 While in *Zaichenko v. Russia* [2010] ECHR 39660/02 (18 February 2010) the Court noted that the applicant was not formally arrested or interrogated in police custody but was simply stopped for a road check and answered questions relating to the search of his car. It concluded that there could not be said to be "significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings" (paragraph 48). The Court held by a six to one majority that the absence of legal representation did not violate the applicant's right to legal assistance under Article 6(3)(c) of the Convention (at 51) but, unanimously, that the subsequent use of the statement at trial violated the privilege

against self-incrimination and the right to remain silent contained in Article 6. The dissenting judgment of Judge Spielmann considered that there had also been a breach of the right to counsel on the basis that, as he states at paragraph 7:

A

> "nothing should have prevented the police officers from apprising the applicant *immediately* (that is, on 21 February and not on 2 March 2001) of his *right* to legal assistance and asking him to accompany them to the police station, *where the interview could have been conducted in conditions complying with the requirements of Article 6 § 3 (c)*."

2.10 Furthermore, in *Pavlenko v. Russia* [2010] ECHR 42371/02 (1 April 2010) a breach of Article 6(3)(c) was found by the First Section of the Court where the applicant had been denied immediate access to the counsel of his choice and was belatedly and for a period assigned by the authorities a legal aid lawyer who did not appear adequately to protect the applicant's right to silence and privilege against self-incrimination in the police interviews in which the assigned legal aid lawyer was present.

B

Waiver of the right to legal assistance

2.11 In *Pishchalnikov v Russia* [2009] ECHR 7025/04 (First Section, 24 September 2009) the applicant was interrogated in the absence of a lawyer notwithstanding that he had clearly indicated a defence counsel he wanted to represent him. During those interrogations the applicant made confessions. In holding that there had been a violation of art 6(1) and (3)(c) of the Convention the Court observed as follows:

> "[A]n accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.... Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination." (at 69)

C

2.12 During subsequent interrogations the applicant refused legal assistance, but thereafter was advised by a legal aid lawyer on a few occasions. In the Strasbourg Court's view a valid waiver by the suspect of his "right to counsel" was not established. It held that for a waiver to be effective it must be established in an unequivocal manner, made voluntarily and constitute a knowing and intelligent relinquishment of the right. Before an accused can be said to have waived this fundamental right under article 6, it must be

D

shown that he could reasonably have foreseen what the consequences of his conduct would be (at 77). The Court strongly indicated that these additional safeguards were necessary because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected (at 78).

2.13 In terms of where the Strasbourg case law may be leading, there is clearly some tension currently within the judges at the European Court of Human Rights on the question as to whether the right to counsel can be effectively waived by a person in detention or police custody. This is seen most clearly in the 4:3 decision in *Yoldaş v. Turkey* [2010] ECHR 27503/04 (23 February 2010) where Judges Tulkens, Zagrebelsky, and Popović produced a joint dissenting opinion. They questioned whether it was possible for a suspect in police custody to waive their right to counsel without tainting the subsequent proceedings, and whether such a waiver could ever be free and informed at that stage. They observed that the assistance of counsel enables the suspect to consider preparation of the defence case, identification of evidence and law favourable to them, advice on the conduct of the interview, as well as an emotional support and monitor of the conditions in custody. Their conclusion was that in police custody procedural fairness always requires the assistance of a lawyer.

Conclusion on the *Salduz* principle

2.14 In *R (Ullah)* v *Special Adjudicator* [2004] 2 AC 323, 350 Lord Bingham of Cornhill said:

> "In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court... This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time; no more, but certainly no less."

2.15 Since 2004, Lord Bingham's observations have been repeatedly quoted and re-affirmed in other cases at the highest level as confirming that national courts must follow any clear and constant jurisprudence of the Strasbourg Court. [6] Thus in the *Countryside Alliance* case [2008] 1 AC 718, 777, Baroness Hale said:

> "When we can make a good prediction of how Strasbourg would decide the matter, we cannot avoid doing so on the basis that it is a matter for Parliament." [7]

2.16 Importantly, unlike the Strasbourg case law considered by this court in *R v. Horncastle* [2010] 2 WLR 47, UKSC, the *Salduz* line of jurisprudence results from a *unanimous* decision of the Grand Chamber. It thus more resembles the situation faced by the nine judge Appellate committee of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2009] 3 WLR 74, HL [8] where the Appellate committee held itself bound to apply a clear statement of principle by the Grand Chamber in *A v. United Kingdom* (2009) EHRR 625 in respect of the precise issue that was before the committee. A recent useful analytical survey of the case law on this issue can be found in an article by the Intervener's Director of human rights policy, Eric Metcalfe, "Free to lead as well as to be led: Section 2 HRA and the relationship between the UK Courts and Strasbourg". [9]

2.17 Whilst recent cases before the Strasbourg Court on this issue have produced some difference of views, these differences relate only to the extent of the right to legal representation during police custody and interrogation not to the principle that there be such representation. There can be no doubt that the Strasbourg Court considers the

---

[6] See for example: *M* v *Secretary of State for Work and Pensions* [2006] 2 AC 91; *DS* v *HMA*, 2007 SC PC 1; *R (Clift)* v *SSHD* [2007] 1 AC 484; *R (Al-Skeini)* v *Secretary of State for Defence* [2008] 1 AC 153; *R (Animal Defenders International)* v *Culture Secretary* [2008] 1 AC 1312; *Whaley* v *Lord Advocate*, 2008 SC HL 107; *R (Black)* v *Justice Secretary* [2009] 1 AC 949; *R (James)* v *Justice Secretary* [2009] 2 WLR 1149, HL; and *R (Purdy)* v *DPP* [2009] 3 WLR 403, HL

[7] See to similar effect *In re G (Adoption: Unmarried Couple)* 2009 1 AC 173 *per* Lord Hoffmann at paragraphs. 27 and 29:

> "It … seems to me not at all unlikely that if the issue in this case were to go to Strasbourg, the court would hold that discrimination against a couple who wish to adopt a child on the ground that they are not married would violate article 14… I therefore do not think that your Lordships should be inhibited from declaring that article 14 of the 1987 Order is unlawful discrimination, contrary to articles 8 and 14 of the Convention, by the thought that you might be going further than the Strasbourg court. …"

[8] Per Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Carswell, and Lord Brown of Eaton-under-Heywood

[9] Eric Metcalfe "Free to lead as well as to be led: Section 2 HRA and the relationship between the UK Courts and Strasbourg" (2010) *JUSTICE Journal*, forthcoming.

right to representation a fundamental guarantee without which there will be a violation of arts 6(1) and 6(3)(c).

A

3. THE POSITION IN THE MEMBER STATES OF THE EUROPEAN UNION

3.1 Since the member states of the European Union are all signatories to the European Convention on Human Rights, their interpretation of the obligations of Article 6(3)(c) ECHR in conjunction with article 6(1) ECHR, both prior and subsequent to *Salduz* are instructive. Research has shown that the vast majority of twenty seven member states afford consultation with and representation by a solicitor in interview during police detention.[10] The jurisdictions which do not afford a right to legal representation in interview are: Belgium, France, the Netherlands, Ireland and Scotland. Within these

B

jurisdictions of the member states there are different rights in relation to consultation of a lawyer.

Belgium

3.2 The Belgian criminal justice system continues to reflect its roots in the Napoleonic project. The right to legal advice is constitutionally enshrined, though the right to communicate only arises after the first interrogation by the police, pursuant to Art 20(1) of the law on pre-trial custody (22/7/1990). Equally, there is no right to have a lawyer present for interrogation either at the police station or before the *juge d'instruction*,

C

though an amendment to the Criminal Procedure Code is pending in the Chamber of Representatives which would allow the presence of a lawyer once the first interrogation has taken place.

Post Salduz

3.3 The Court of Cassation of Belgium considered the issue on 11 March 2009 (Cass 11 March 2009, P 090304F/1), and held that there is no law requiring the presence of a lawyer during the first interrogation. Furthermore, an assumed violation of article 6

D

[10] T. Spronken et al, *EU Procedural Rights in Criminal Proceedings*, European Commission (Maklu-Publishers, 2009) available at http://arno.unimaas.nl/show.cgi?fid=16315 . The study considered all of the current Member States of the European Union with the sole exception of Malta since information was not received from the Maltese Ministry of Justice.

ECHR on this ground can be remedied by the subsequent proceedings. This decision appears to directly contradict the *ratio* in *Salduz*.

A

3.4 Despite this ruling on 24 December 2009 the Court of Appeal of Antwerp relied upon the ECtHR *Salduz* jurisprudence to rule as inadmissible a confession made in interview without the assistance of a lawyer. The prosecution has appealed and the case is pending before the Court of Cassation (unreported). The juvenile court in Antwerp recently acquitted a juvenile because he had made confessions during the first police interrogation without the assistance of a lawyer. The Court explicitly invoked *Salduz* (reported in Belgian newspapers on 15 and 16 March 2010.)

3.5 On 9 April 2009, the *Orde van Vlaamse Balies* (Flemish Bar Association) presented an

B

opinion to the Belgian Ministry of Justice to introduce the right to consult a lawyer and active assistance of a lawyer during interrogations.[11]

3.6 In March 2010, two Senators from the party *Open VLD* submitted a legislative proposal to introduce the right to assistance of a lawyer during interrogations. They emphasised that since each judge can autonomously interpret and implement the ECHR in Belgium, this can lead to legal uncertainty. They further asserted in the proposal that the amendment would bring Belgian law into compliance with the case law of the Strasbourg Court.[12]

C

France

3.7 The right to a lawyer has been held by the *Conseil Constitutionnel* of the French Republic to be a fundamental right.[13] Articles 63 and 64 of the Criminal Procedural Code allow 30 minutes of private consultation with a lawyer whilst in *garde à vue*. An extension can be sought for up to 72 hours. The lawyer cannot be present in interview and is not provided with any disclosure, other than the nature of the allegation. The purpose of the right to consult is to ensure that the detained person understands their right to silence and to

---

[11] The opinion is available in Flemish at: http://www.advocaat.be/UserFiles/Positions/advies%20OVB%20wetsvoorstel%204-1079%20voorzitter%2003%2004%2009%20VI%20%20pdf.pdf

D

[12] Press release available on the Open VLD website (in Flemish): http://www.vld.be/?type=nieuws&id=1&pageid=35154

[13] *Conseil Consitutionnel*, Decision No 86-225, D.C. of 23 January 1987, R.F.D.A, 1987, 301; *Cour de Cassation*, Cassation Assemblée plénière, 30 June 1995, Bull. no. 4, J.C.P., 1995-II.22478; *Van Pelt v France,* App. No. 31070/96, (Judgment 23rd May 2000) (ECtHR)

verify that their treatment is adequate. Once *garde à vue* has ended and the suspect is taken before the *juge d'instruction*, they are entitled to be represented by a lawyer (arts 114 and 116 CPC).

A

Post Salduz

3.8 On 28 January 2010 the *Tribunal de Grande Instance* in Paris nullified five *gardes à vue*, finding that the procedure was incompatible with the ECtHR jurisprudence.[14] Further, the *cour d'appel* of Nancy ruled on 19 January 2010 that statements made in *garde à vue* when suspects had not had access to a lawyer for 72 hours were inadmissible, again following the jurisprudence of the Strasbourg Court.[15]

3.9 On 1 March 2010, the *Tribunal Correctionnel* of Paris, acceded to the request of the National Bar Council (CBN) and submitted a reference to the *Cour de Cassation* asking it to consider the constitutionality of the *garde à vue*.[16] If deemed admissible, the Court must transmit the matter within three months to the *Conseil Constitutionnel*. The Council must then decide whether the procedure accords with the fundamental rights of the suspect.

B

3.10 An amendment to the Criminal Procedural Code has been brought, but this does not allow access to a lawyer in interview.[17]

The Netherlands

C

3.11 The system of criminal justice in the Netherlands is also based on the Napoleonic code. Art 28 of the Criminal Code of Procedure (CCP) provides the right to assistance of counsel. However, a suspect does not have the right to contact a lawyer following arrest, nor are they entitled to consult with a lawyer at the police station or to have a lawyer present in interview. They can be held at the police station for three days with a further extension of three days possible (art 58 Criminal Code of Procedure). The suspect may be represented once taken before the investigating judge (arts 59a(3) and 186a).

---

[14] http://www.maitre-eolas.fr/post/2010/02/06/Cinq-gardes-%C3%A0-vue-annul%C3%A9es-par-le-tribunal-correctionnel-de-Paris

[15] http://cnb.avocat.fr/Presence-de-l-avocat-des-le-debut-de-la-Garde-a-vue-la-Cour-d-appel-de-Nancy-dit-oui,-la-Cour-de-Cassation-devra-a-se_a796.html

D

[16] http://www.lepoint.fr/actualites-societe/2010-03-01/reforme-constitutionnalite-de-la-garde-a-vue-le-tgi-de-paris-saisit-la/920/0/429064

[17] 'France: justice proposals fall short', *Human Rights Watch*, 2 March 2010, available at http://www.hrw.org/es/news/2010/03/02/france-justice-proposals-fall-short

Post Salduz

3.12 In three conjoined appeals, the Supreme Court of the Netherlands has held that juvenile suspects have the right to the assistance of a lawyer in interview. [18] On 21 September 2009, interim measures were introduced to amend the *strafpiketregeling* (duty lawyers' regulation). The measures required that a suspect receive legal assistance within 4 hours of detention. On 1 April 2010 the law was again amended to provide that suspects are entitled to a phone call with a lawyer upon arrest. If necessary the lawyer must be allowed to attend the police station and interrogation must be delayed by two hours pending their arrival. The suspect will be entitled to 30 minutes private consultation. The lawyer will not be entitled to attend the police interrogation unless the suspect is a juvenile (as a result of the Supreme Court decision).[19] A pilot project to allow the assistance of a lawyer in interview in homicide cases commenced on 1 July 2008 in the districts of Amsterdam and Rotterdam and will remain in force until 1 July 2010.

Ireland

3.13 The constitutional right of access to counsel was read into article 38(1) of the Irish Constitution (due process clause) by the Supreme Court in *DPP v Healy* [1990] 2 IR 73. Per Finlay CJ, the right is directed towards the vital function of ensuring a person is aware of his rights and has the independent advice appropriate to reach a truly free decision as to his attitude to interrogation or to the making of any statement. The availability of advice from a lawyer must be seen as a contribution, at least, towards some measure of equality between the detained person and his interrogators (at 81). The Court did not extend the right to representation in interview.

3.14 Upon arrest a person can be detained at the *Garda Síochána* station for six hours, with an extension to a further six hours permissible. The arrested person must be informed without delay that he has a right to consult a solicitor and upon request the solicitor shall be notified as soon as practicable (s. 5(1) CJA) and Regulation 9 of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in *Garda Síochána* Stations) Regulations,

[18] LJN BH3079, BH3081, BH3084, 30th June 2009

[19] Guidance provided to Dutch public prosecutors regarding 'instruction of legal assistance during police interrogation' (*Aanwijzing rechtsbijstand politieverhoor*) Available in Dutch at: http://www.om.nl/organisatie/beleidsregels/overzicht/opsporing/@153073/aanwijzing_5/ . A (poor) English translation is also available.

1987, S.I. No. 119/1987. As a general rule, confessions are not admitted in evidence where they have been obtained in breach of constitutional rights (*Healy)*.

A

3.15 There is as yet no decision on the effects of *Salduz* in Ireland.

Conclusion on EU Member States

3.16 Save for Ireland, it is apparent that all other member states, be it through the judiciary or legislature, are recognising their legal systems are inadequate in light of the clear line of jurisprudence from the Strasbourg Court that article 6 ECHR requires representation from the first moment of police detention and during interrogation.

B

4. THE POSITION IN OTHER JURISDICTIONS WITHIN THE ENGLISH SPEAKING LEGAL WORLD

4.1 Representation by a lawyer in criminal proceedings can hold much more significance in adversarial systems than in the European Union member states where there is an investigating judge. The position on representation by a lawyer in interview differs among the common law jurisdictions, but all, save for Scotland, require the possibility of consultation with a lawyer in police detention.

C

England, Wales and Northern Ireland

4.2 Access to legal advice was described by the Court of Appeal of England and Wales in *R v. Samuel* [1988] QB 615, EWCA as a "fundamental right". Section 58(1) of the Police and Criminal Evidence Act 1984 (PACE) (and section 59(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 No. 1341 (N.I. 12)) provides that a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor (or, in practice, legal adviser) privately at any time. This right is limited in certain specified circumstances set out under the section and under the Terrorism Act 2000 (as amended), Schedule 8, para 8. As soon as the reason for delayed access has ceased to persist, access must be granted.

D

4.3 Annex B to Codes C (detention, treatment and questioning) and H (detention, treatment and questioning in terrorism cases) of the Codes of Practice to PACE set out the circumstances in which access to a lawyer may be denied. Note B3 to both Codes provides that a decision to delay access to a specific solicitor is likely to be a rare occurrence. It should only be exercised when it can be shown that the suspect is capable of misleading that particular solicitor and there is more than a substantial risk that the suspect will succeed in causing information to be conveyed which will lead to one or more of the specified consequences. The police officer must have a reasonable belief that one of the grounds applies and he must believe that the consequence will very probably occur if access is granted (*Samuel*).

4.4 Paragraph 6.6 provides that should a person request legal advice, they must not be interviewed until they have received that advice, subject to Annex B. Paragraph 6.8 provides that where a person has been permitted to consult a solicitor, on request they shall be entitled to have the solicitor present when they are interviewed, unless one of the exceptions applies.

4.5 A violation of a suspect's entitlement to legal advice may lead to the exclusion of evidence pursuant to s 78 PACE. In *R. v. Walsh* (1989) 91 Cr App R 161, 163 the Court of Appeal of England and Wales observed

> "The main object of section 58 of the Act and indeed of the Codes of Practice is to achieve fairness – to an accused or suspected person, so as, among other things, to preserve and protect his legal rights; but also fairness to the Crown and its officers so that again, among other things, there might be reduced the incidence or effectiveness of unfounded allegations of malpractice."

4.6 The Court further held that significant and substantial breaches would mean that the standards of fairness will not have been met and to admit evidence obtained in these circumstances cannot but have an adverse effect on the fairness of the proceedings. The court must consider in each case whether there would be such an adverse effect that justice requires the evidence to be excluded. On the facts, the interview was conducted in a cell, was not contemporaneously recorded and Walsh challenged that he had made admissions. Once he had eventually seen a solicitor, he exercised his right not to answer questions. [20]

[20] cf *R v. Alladice* (1988) Cr App R 380, *R v. Dunford* (1990) 91 Cr App R 150 and *R v. Olphant* [1992] Crim LR 40 where the appellants were all found to have fully understood their rights and freely made admissions in

Canada

4.7 Section 10(b) of the 1982 Canadian Charter of Rights and Freedoms provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

4.8 In *R v Manninen* [1987] 1 SCR 1233, the Canadian Supreme Court unanimously held that the right under section 10(b) had been breached in circumstances where the arrested person had been informed of his right to counsel, but was nonetheless denied the opportunity to speak to his lawyer by telephone before being questioned by police. As Lamer J. explained section 10(b):

> "The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence." (at 23)

4.9 In *R v Bartle* [1994] 3 SCR 173, Lamer CJ said a person who is detained 'is in *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty'. In the subsequent decision of *R v Prosper* [1994] 3 SCR 236, the Supreme Court held that, in the absence of duty counsel, the right under section 10(b) requires police to refrain from questioning a suspect until he has been given a reasonable opportunity to contact counsel.

4.10 In 2009, the Supreme Court heard argument in *Trent Terrence Sinclair v Her Majesty the Queen*, as to whether section 10(b) requires police to accede to an arrested person's request to have his lawyer present in interview. Judgment is pending.

New Zealand

4.11 Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 closely follows the Canadian Charter and provides that everyone arrested and detained shall have a right to consult and instruct a lawyer without delay, subject to section 5 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Section 215(1)(f) of the Children, Young Persons and their Families Act 1989 (as

---

circumstances where a solicitor would have made no difference. These findings may need to be revisited following the Strasbourg decisions in *Salduz* and in *Pischalnakov*.

amended) provides that a detained child or young person is entitled to consult with, and make or give any statement in the presence of a barrister or solicitor. There is no equivalent provision for adults.

A

4.12 The right to consult a lawyer was considered in detail by the New Zealand Court of Appeal in the seminal case of *Ministry of Transport and Noort Police v Curran* [1992] 3 NZLR 260 where Richardson J observed that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State. The right to a lawyer therefore acts as a means of ensuring fair treatment. It also facilitates access to knowledge, allowing the suspect to make informed decisions about their rights in detention, to silence and with respect to abuse of power by the detaining officers, and also the ingredients of the particular law at issue (at 279).

B

Furthermore, few citizens have the knowledge, training and skill required to effectively represent their own interests. The lawyer can serve a vital role and the right must be exercisable without delay before the suspect's interests are irretrievably jeopardised (at 280).

4.13 The Court referred favourably to a report of an empirical study conducted by Professor David Dixon (then a doctoral student) reviewing the impact of PACE in England and Wales. The cited conclusion is that whilst common sense may suggest that legal advisers obstruct police work by asserting rights and demanding due process, the study in fact shows that officers often see benefits from the legal advice which suspects receive. Apart from leading to earlier confessions, legal advisers can explain the situation to the suspect and improve communication with the police. [21] Despite relying on this study, which considered representation in interview as well as consultation, the Court did not extend the right this far. The Court did however clearly assert the importance of consultation.

C

4.14 In a series of subsequent cases, the New Zealand Court of Appeal has affirmed that confessions obtained in breach of section 23 are *prima facie* inadmissible. [22]

D

[21] Dixon "Common Sense, Legal Advice and the Right of Silence" [1991] *Public Law* 233, 239-240

[22] *Reg. v. Goodwin* [1993] 2 N.Z.L.R. 153; *Reg. v. Te Kira* [1993] 3 N.Z.L.R. 257; *Reg. v. H.* [1994] 2 N.Z.L.R. 143, 150.

Commonwealth Caribbean

4.15 Following independence, a number of Commonwealth Caribbean nations sought to enshrine the right to private consultation with a lawyer following arrest in their constitutions. [23] The Judicial Committee of the Privy Council acknowledged in *Mohammed v State* [1999] 2 AC 111, 124, *per* Lord Steyn, that the stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right.

4.16 The Judicial Committee considered the right to consult with counsel in *Thornhill v AG of Trinidad and Tobago* [1981] AC 61 and observed that the constitution, notwithstanding the specific rights set out therein, preserved pre existing rights and freedoms. It was settled practice under the *Judges' Rules*[24] that at any stage of investigation a person is entitled to communicate and consult privately with a solicitor. For all jurisdictions, such as Jamaica, which do not provide a constitutional right to consult with counsel but in which the constitution preserves existing law, the case confirmed a valuable right at common law.

4.17 In *Simmons v. The Queen* [2006] UKPC 19 [2006] 4 LRC 686, 696 on appeal from the Bahamas, the Judicial Committee made the following important observation about treatment of confession evidence:

> "25. .... Their Lordships respectfully question the judge's conclusion that Simmons would still have confessed even if he had been permitted to communicate with his attorney and that there was therefore 'no causal link between the conduct of the police and his decision to make the confession'. One simply cannot know whether or not Simmons would have been advised by his attorney to confess and still less the precise terms in which any confession statement would have been made."

4.18 Where the right to consult a lawyer is breached, the trial judge has a discretion to exclude the confession, on similar grounds to section 78 of PACE. Breach of a constitutional right is a cogent factor weighing in favour of exclusion, and generally it would not be right to admit a confession where the police have deliberately frustrated a suspect's constitutional rights, but the circumstances of each case must be considered and competing interests balanced to ensure a fair trial: *Mohammed.* Whilst there is a (non-

[23] See for example: s5(2) of the Constitution of St Christopher and Nevis 1983; s 13(2) of the Constitution of Barbados; and s 5(2)(c)(ii) of the (Republican) Constitution of Trinidad and Tobago 1976

[24] Home Office Circular 31/1964 and adopted in 1965 by the judges of Trinidad and Tobago and all other Crown dependencies or newly independent nations

absolute) right to consultation, there is no right to have an attorney present in interview in the Commonwealth Caribbean.

A

India

4.19 The right of the accused to know the grounds of his arrest and to consult and be defended by a lawyer of his choice is guaranteed under Article 22 of the Constitution of India 1950.

4.20 In *Basu v State of West Bengal* [1997] 2 LRC 1 the Supreme Court of India directed that "the arrestee might be permitted to meet his lawyer during interrogation, though not throughout the interrogation" (at 19). The measure was justified "with a view to bringing in transparency" in the context of systemic torture and deaths in police custody. It was

B

held that the presence of counsel at some point during the interrogation may deter the police from using third-degree methods (at 16), though no further guidance was given as to when the arrestee might become entitled to consult a lawyer, or for how long. Halsbury's *Laws of India* (Vol Criminal Procedure I at para 106.316) suggests that "the accused has a right to be represented by a lawyer from the moment he is in custody."

4.21 The direction was given legislative force in section 41(D) of the Code of Criminal Procedure (Amendment Act) 2008 which guarantees the right of the arrested person to "meet an advocate of his choice during interrogation, though not throughout interrogation". The provision came into force on 31 December 2009 and has not received

C

any further interpretation as yet.

4.22 It is significant that it is the role of the magistrate to take a confession, should an accused wish to make one, and not the police officer (s 164 Code of Criminal Procedure). Also as a result of the 2008 amendment, if a person wishes to make a confession before a magistrate he is entitled to the assistance of counsel (s164(1)).

United States of America

4.23 The right to the assistance of counsel at trial is enshrined in the Sixth Amendment to the US Constitution. The Fifth Amendment guarantees due process and protects against

D

double jeopardy and self-incrimination.

4.24 The right to counsel in police detention was settled in 1966 by the US Supreme Court in *Miranda v. Arizona* 384 U.S. 436, (1966) (Harlan, J. dissenting). The Court considered the inherently coercive atmosphere of custodial interrogation; '[i]t is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner' (at 456-57). The Court concluded that '[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice' (at 457-58). Further,

> "[w]ithout the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony...would become empty formalities in a procedure where the most compelling evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police'." (at 466)

4.25 The presence of counsel during interrogation was held to improve the integrity of the investigative process and to be indispensible to the protection of the Fifth Amendment (at 466). Notably, the Court adopted *Miranda* over Justice Harlan's concern that the rule would discourage confessions and hamper the investigation of crime.

4.26 These protections may be limited in certain extraordinary and compelling circumstances.[25] A suspect may also waive his *Miranda* rights, but the State bears the heavy burden of proving that the waiver was knowing and intelligent, and that it was a product of a free and deliberate choice, rather than intimidation, coercion, or deception (at 44; *Fare v. Michael*, 442 U.S. 707 (1979)).

Australia

4.27 Australia has a federal system of government and there are differences between its six States, two self-governing territories and the Commonwealth jurisdiction, both as to the statutory protections afforded to criminal suspects and the consequences of any failure to uphold those protections. Nevertheless, in all jurisdictions except the Northern Territory, a suspect (subject to certain exceptions) has the right to communicate with a solicitor (or legal practitioner) before being interrogated by the police.

[25] See generally, *New York v. Quarles*, 467 U.S. 649 (1984); *Harris v. New York*, 401 U.S. 222 (1971)

New South Wales, South Australia, Queensland, Tasmania, the Australian Capital Territory and the Commonwealth

A

4.28 In these jurisdictions, before any interrogation may commence, a suspect must be given the right to communicate, or attempt to communicate, with a solicitor, the interrogation must be deferred until the suspect has had the opportunity to exercise this right, and the suspect is entitled to have the solicitor present during interrogation.[26]

4.29 Generally, the interrogation need only be deferred for a reasonable period to allow such communication.[27] There are exceptions to the general principle that a solicitor is entitled to be present during interrogation (except in New South Wales and South Australia), on

B similar grounds to those available in England, Wales and Northern Ireland.[28] The grounds for and length of delay in allowing access vary.

Victoria, Western Australia and Northern Territory

4.30 In these jurisdictions, there is no statutory right to have a solicitor present during interrogation. In Victoria and Western Australia, the suspect has the right to consult with a solicitor before any interrogation begins.[29] The right may be refused on similar grounds to the other states.[30]

4.31 However, in the High Court of Australia in *Pollard v The Queen* (1992) 176 CLR 177,

C 230 – in an appeal from Victoria – McHugh J favourably observed that, independently of the effect of any relevant legislation, the courts appeared to have recognised a common

---

[26] Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) ("NSW Act"), section 123(1) & (3); Police Powers and Responsibilities Act 2000 (Q) ("Qld Act"), section 418(2); Criminal Law (Detention and Interrogation) Act 1995 (Tas) ("Tas Act"), section 6(2); Crimes Act 1914 (Cth) ("Cth Act"), section 23G(1). The Cth Act provisions apply (in addition to protections under other Commonwealth, state or territory laws) where Commonwealth offences are being investigated, whether by the Australian Federal police or state or territory police forces (Cth Act, s 3ZQA, ss 23A – 23AA). The Cth Act also applies in the Australian Capital Territory (Cth Act, s 23A(6); Crimes Act 1900 (ACT), s 187). In South Australia, there is only a right to have a solicitor present "*during any interrogation or investigation to which [the suspect] is subjected whilst in custody*" (Summary Offences Act 1953 (SA) ("SA Act"), section 79A(1)(b)). There is no express right to communicate with the solicitor before the interrogation, although the suspect must be informed of his right to have a solicitor present as soon as reasonably practicable after apprehension: SA Act, section 79A(3).

[27] NSW Act, section 123(3), Qld Act, section 418(3), (4) & (5), Tas Act, section 6(2), Crimes Act 1914 (Cth), s

D 23G(1)

[28] Qld Act, section 441; Tas Act, section 6; Cth Act, section 23L

[29] Crimes Act 1958 (Vic) ('Vic Act'), section 464C(1)(b); Criminal Investigation Act 2006 (WA) ("WA Act"), section 138(2) & (3).

[30] WA Act, section 138(4), The Vic Act, section 464(1)

law right for a solicitor to be present while a client is being questioned by police officers.[31]

A

4.32 The Court of Criminal Appeal of the Supreme Court of Western Australia considered the nature of any such common law right in *Mackenzie v The Queen* [2004] WASCA 146. Citing the discussion in *Pollard*, Wheeler, J. observed that:

> "Experience with such interviews over a long period of time has revealed that many – perhaps most – accused persons do not know which lawyer they would wish to contact, and police, of course, cannot advise them in that respect. Even where they do know of a lawyer whom they would wish to attend, the hour at which the interview is conducted may make contact impracticable, or the lawyer may be otherwise engaged, or a lawyer may be unwilling to attend unless some arrangement as to fees has been concluded. It would be necessary, in establishing such a right, to deal with some care with what course should be taken where these practical difficulties presented themselves. That is a task which should be undertaken by the legislature, rather than by the Court." (at 64)

B

After considering the case-law, Wheeler J (with whom Malcolm CJ and McLure J agreed) rejected the submitted contention that there was a right to a lawyer, the violation of which would necessarily render any subsequent interview inadmissible. Nevertheless, the learned judge went on to acknowledge that the authorities make clear that disregarding a request for a lawyer will often mean that it will be unfair to an accused person to admit in evidence an interview which has taken place in the absence of a legal practitioner (at 65).

4.33 The evidence in any Australian jurisdiction will not automatically be excluded where a request to have a lawyer present is not observed. The decision is one within the discretion of the judge, to be made on the grounds of unfairness to the accused.[32]

C

South Africa

4.34 The right to legal representation from the point of detention is a fundamental right enshrined in the Constitution of the Republic of South Africa Act 108 of 1996. Detainees, accused and arrested persons have the right "to choose, and consult with a legal practitioner and to be informed of this right promptly" (sections 35(2)(b) and 35(3)(f) of the Constitution). The Constitutional right to legal representation is reflected

D

[31] Following: *R v. Dugan* (1970) 92 WN (NSW) 767, at p 767; *Driscoll v. The Queen* [1977] HCA 43; (1977) 137 CLR 517, at p 539 (NSW); and *Reg. v. Hart* (1979) Qd R 8, at p 13)

[32] Evidence Act 1995 (NSW), Evidence Act 2001 (Vic), Evidence Act 2001 (Tas), Evidence Act 1995 (Cth). South Australia, Queensland, Western Australia and the Northern Territory follow common law jurisprudence, McDermott v The King (1948) 76 CLR 501.

in section 73 of the Criminal Procedure Act 51 of 1977 (as amended). Section 73 provides that from the time of arrest a person is entitled to have access to a legal representative.

A

4.35 In *S v Du Preez* 1991 (2) SACR 372 (Ck) it was held that the refusal of the police to allow an arrested person the opportunity to make contact with and be assisted by his attorney was not only contrary to s 73(1), but also an abuse of power. In *S v Melani & Others* 1996 (1) SACR 335 (E) it was held that the right to consult a legal representative during pre-trial procedure, and especially the right to be informed of this right, is not only closely connected to, but also protects, the presumption of innocence, the right to silence and the proscription of compelled confessions.

4.36 Once it has been established that a right has unjustifiably been infringed a court must

B

exclude the evidence obtained if its admission would: (a) render the trial unfair; or (b) otherwise be detrimental to the administration of justice (s 35(5) of the Constitution).

Conclusion on other English speaking jurisdictions

4.37 Despite the differing approaches, there is a coherent theme amongst these nations that the right of access to a lawyer on being taken into police custody is fundamental and if not observed can lead to the exclusion of evidence. It has emerged in recent times that the right to consult is equally imperative in interview, for most jurisdictions, though some have stopped short of declaring the right to extend this far.

C

5. OTHER RELEVANT INTERNATIONAL LAW MATERIALS

European Convention for the Prevention of Torture

5.1 The European Convention for the Prevention of Torture[33] provides the Committee for the Prevention of Torture with an investigatory obligation. Pursuant to art 2, the states parties to the CPT must allow it to carry out visits to any place where persons are deprived of liberty by a public authority. The reports provide reliable and unimpeachable evidence through teams of relevant experts. Art 1 provides that its aims are to strengthen, if necessary, the protection of persons from torture, inhuman or

D

[33] European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, adopted 26 November 1987, ETS No. 126.

degrading treatment or punishment. The findings have both evidential and jurisprudential impact upon the determination of legal claims before the Strasbourg Court - as referred to in *Salduz* at paras 39 and 40 - and can effect an improvement in conditions. [34]

A

5.2 Since its inception the Committee has issued a number of General Reports designed to assist states parties by providing a measure of acceptable standards, conditions and practices. In its Second General Report (CPT/Inf) 92(3)) it set out that a fundamental safeguard against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty was access to a lawyer, which should include the right to contact and be visited by the lawyer as well as, in principle, to have the lawyer present during interrogation (paras 36 and 37).

B

5.3 The Committee has in each country and general report repeated the importance of these conditions. In its 2002 Report ((CPT/Inf) 2002(15)) the Committee observes that many states do recognise these rights. However, there continued to be states that did not and the Committee explained that:

> "The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs" (at 41)

C

5.4 The Committee has made several visits to the UK. In its most recent report to the UK Government (CPT/Inf (2009) 30) it observes that in England, Wales and Northern Ireland, the safeguards are applied on the whole in a satisfactory manner, though there have been historical problems with access in Northern Ireland as a result of the counter-terrorism legislation (following visit 29 November to 8 December 1999, and reported in 2001, CPT/Inf (2001) 6), and more recently in England and Wales under the Anti-Terrorism, Crime and Security Act 2001 (Reports CPT/Inf (2005) 10 and CPT/Inf (2006) 28) and with respect to the ability to delay access, to which the Committee has recommended that the UK amend its legislation (Report CPT/Inf (2006) 28 at para 34).

D

---

[34] M Evans and R Morgan, 'Torture: Prevention Versus Punishment', in C Scott ed. *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart Publishing (Oxford and Portland, Oregon, 2001), p. 135, at 146.

5.5 However, in 1994 and 2003 the Committee visited Scotland. In its 1994 report the CPT Commission noted (at paragraph 290) that "the delegation was told that, in the absence of an express legal provision to that effect, it was not usual for persons detained under section 2 of the Criminal Justice (Scotland) Act to be permitted to speak with a lawyer. As regards the right of arrested persons to have a private interview with a lawyer before their first court appearance, it appeared that normally this right could be exercised once the person concerned had been charged with an offence; however, there was no legal obligation to permit such an interview until such time as the person was due to be taken to court.". They recommended (at paragraph 291) that "all persons taken into police custody be entitled to have access to a lawyer from the very outset of their custody" and "the right of the person concerned to have the lawyer present during interrogation." In its 2003 report (CPT/Inf (2005) 1) it noted that legislation still did not allow for contact and visitation with a lawyer or presence of a lawyer in interview, and reiterated that this was essential to prevent ill treatment, as explained in the general reports (at para. 53).

5.6 In the Government's response (CPT/Inf (2005) 2, para 138) it was asserted that '[w]here a person has been *detained* as a suspect, rather than *arrested*, they are also permitted access to a solicitor unless there are justifiable reasons to deny access. These circumstances would routinely attract independent scrutiny and be recorded' (at para 138) and further '[t]he Scottish Executive accepts in principle that if a detained person requests access to a lawyer, or *vice versa,* this should be allowed, unless there is good reason to deny such access' (at para. 141).

International Covenant on Civil and Political Rights 1966

5.7 The ICCPR is a multilateral treaty adopted by the United Nations General Assembly with 72 signatories and 165 parties. Arts 14(1)-(3) largely replicate art 6 ECHR, in particular art 14(3)(d) directly replicates art 6(3)(c) ECHR with which we are concerned.

United Nations Human Rights Committee

5.8 Art 28(1) ICCPR establishes the UN Human Rights Committee. Pursuant to art 40, states parties to the ICCPR must submit reports on the measures taken to give effect to the rights recognised in the covenant. The HRC is tasked with considering the reports received and transmit its reports and comments to the states parties. The HRC interprets

all the articles of the ICCPR through general comments. In 1992 General Comment 20 (Forty-fourth session, 1992) revisited art 7 (Torture or cruel, inhuman or degrading
A treatment or punishment). At para 11 the HRC stated that the protection of the detainee also requires that prompt and regular access be given to lawyers.

5.9 In recent years, the reports to the UK have raised concerns about the ability to delay access to legal assistance for up to 48 hours pursuant to the Terrorism Act 2000. In the UK's 2007 response to these concerns (CCPR/C/GBR/6 18 May 2007) it was explained that the powers can only be authorised by an officer of Superintendent rank, and for the specified circumstances in Schedule 8 (as indicated above, para 4.2). It was equally asserted that although the measure is strong, the powers are designed to be used only in
B exceptional circumstances.

United Nations Human Rights Council

5.10 The UN Human Rights Council was created by the UN General Assembly in 2006 to replace the Human Rights Commission (UNGA A/RES/60/251). It is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms. Under this mandate it is to undertake a universal periodic review of the fulfilment by each state of its human rights obligations, through an interactive dialogue (para. 5(3)) every four years.

C 5.11 The most recent universal periodic review concerning the UK (UNGA A/HRC/8/25, 23 May 2008, adopted at the 8th session of the Human Rights Council on 10th June 2008, decision 8/107), touched on the delay of access to a lawyer, particularly under the counter-terrorism provisions. A recommendation from the Russian Federation following the interactive dialogue stage stated that the UK should enshrine in legislation the right of access of detainees to a lawyer immediately after detention, and not after 48 hours. In its response (A/HRC/8/25/Add.1, 13 August 2008), the UK asserted that it accepted the recommendation and that an immediate right of access to a lawyer is already provided for in UK legislation. It then went on to set out the provisions under PACE and reiterated the response at para 5.7 above to the HRC.

D

Conclusion on international obligations

5.12 No mention was made of the differing practice in Scotland in the universal periodic review. Equally the replies to the CPT on access to a lawyer are not borne out in practice. The UK has therefore asserted that it complies with this essential protection, but this is not the case. The process illustrates that, whilst the UK attempts to present a united front in its international obligations, there is confusion as to what protections UK citizens do actually have within the Union. More importantly, the presentations mislead international treaty bodies into believing that standards are met by the UK, save for in exceptional circumstances, which are in fact not met at all in Scotland.

6. THE HISTORICAL DEVELOPMENT OF CRIMINAL JUSTICE LEGISLATION PERTAINING TO POLICE ARREST AND DETENTION IN SCOTLAND

6.1 Whilst it is not ordinarily appropriate to refer to the legislative process which leads to the adoption of a provision, in this instance it is worth considering why the Scottish system is different to that of England, Wales and Northern Ireland on this issue. It otherwise could be assumed that there is a historical reason for the difference in the provisions. This is not the case.

6.2 At common law in England and Wales a person in custody was entitled to consult a solicitor at an early stage of the investigation unless this would cause unreasonable delay or hindrance to the investigation or the administration of justice. There was no common law right to insist on the presence of the suspect's solicitor during a police interview. Section 62 of the Criminal Law Act 1977 - a provision which did not apply in Scotland - embodied the right of intimation to a solicitor in statute as follows:

> "[W]here any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him, without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary."

6.3 The common law position in Scotland was set out in a 1975 article by Lord Cameron.[35] The Thompson Committee was then set up to consider the prevention of crime and the

[35] Lord Cameron "Scottish Practice in relation to admissions and confession by persons suspected or accused of crime" 1975 SLT (News) 265. See too Peter W. Ferguson "The right of access to a lawyer" 2009 *Scots Law Times (News)* 107-14

fairness to the accused, and whether any changes in law or practice in Scotland were required. The Committee held 122 meetings, heard oral evidence from 52 witnesses of 17 interested bodies as well as individuals, visited penal institutions, spoke with prisoners and also with the Director of Public Prosecutions, New Scotland Yard, Bow Street Magistrates Court, the Judicial Office of the House of Lords, the Central Criminal Court and the Royal Courts of Justice. It reported in 1975. [36]

6.4 The Thompson Committee noted, in particular, that the practice of "voluntary attendance" at a police station to assist police inquiries highlighted a tension between the need to detect and prevent crime, and the interest of the citizen in freedom from interference. This tension had been recognised by Lord Justice General, Lord Cooper of Culross in *Lawrie v Muir* 1950 JC 19 at 26-27 and by Lord Wheatley in *Miln v Cullen* 1967 JC 21, at 29-30. At para 2.03 of the report, the Committee indicated that their own view was finely balanced. They felt that there should not be undue interference with citizens, but equally that criminals should not be able to render the investigation of their crimes difficult or even impossible *merely by standing on their rights*. The Committee was of the view that the law must recognise the realities of investigation, taking into account police practices which are accepted as fair by the public although they may be technically illegal or at least of doubtful legality. Their concern was to avoid the situation which many police officers claimed existed in which strict adherence to the rules hampered their efficiency and reduced the detection rate.

6.5 The compromise reached by the Thompson Committee was to suggest the creation of a period of lawful detention by the police for a maximum of six hours prior to arrest, when the suspect would not be required to 'voluntarily' give evidence, but would also not have the right of access to a lawyer that an arrested person had. Detention would be to isolate the suspect whilst enquiries were carried out. The suspect would then be released or arrested, upon which their right to a solicitor would arise (para 3.24).

6.6 The Thompson Committee suggested that the suspect so detained be given a right simply to having a solicitor advised that they had been detained (para 5.08). The reasons for this were not considered in any detail, but a review of the case law (in particular the cautionary approach to police questioning in *Chalmers v HMA* 1954 JC 66 and the more

[36] Thompson Committee *Criminal Procedure in Scotland*, 2nd report, Session 1974-75, Cmnd 6218 XV (October 1975

apparently "prosecution friendly" approach in *Thompson v HMA* [1968] JC 6) led to their conclusion that:

A

> "[A] solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor."

6.7 The recommendation of the Thompson Committee was followed and became law as sections 2 and 3 of the Criminal Justice (Scotland) Act 1980. Section 3 provides:

> "A person who...(b) is being detained under section 2 of this Act in a police station or other premises, shall be entitled to have intimation of his detention and of the place where he is being detained sent, to a solicitor and to one other person reasonably named by him, without
>
B
>
> delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary."

As is evident the new section largely picked up and replicated for Scotland the wording of the existing provisions of section 62 of the Criminal Law Act 1977 noted above.

6.8 While the Criminal Justice (Scotland) Bill was before the UK Parliament in 1980, the Royal Commission report on criminal procedure in England and Wales [37] was nearing its completion. Over the course of three years the Commission received and considered some 447 written submissions, commissioned its own original research and carried out

C

visits to among others every police force in England and Wales and to public prosecution departments in: Northern Ireland; Scotland; the Republic of Ireland; the Netherlands, Denmark and Sweden; the United States of America; Canada and Australia - and held twenty full or half day sessions to take oral evidence, covering a representative range of views. This was known to the Members of Parliament debating the Bill. The Secretary of State indicated that its recommendations would be examined in their context. [38] Some concern was raised in both the Houses of Parliament that the Royal Commission had undertaken considerable research on matters directly relevant to the Scottish Bill, which were absent from the Thomson Committee. [39]

D

[37] Royal Commission *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-I 12/01/81))

[38] HC Hansard: Deb 14 April 1980 vol 982 c815

[39] Per Lord Gifford, Hansard HL Deb 15 January 1980 vol 404 c 65, and Mr David Steel, Hansard HC Deb 14 April 1980 vol 982 c851

6.9 Yet the evidence and findings of the Royal Commission were *not* considered in the debate for the Criminal Justice (Scotland) Bill. The proposal for detention received a great deal of opposition in the House. The argument in favour was the clarification of the law so that citizens would *know* their rights, but the Opposition saw the measure to be taking an unlawful practice (that of 'voluntary' statements at the police station) and attempting to make it lawful by putting it onto the statute books. Members saw the move as an encroachment on the privilege against self-incrimination, the only point of the power being to extract a confession from the suspect. Much focus was spent on the period of 6 hours detention and how the police would exercise the powers without check. Nevertheless, these provisions of the Criminal Justice (Scotland) Act were passed into law. As Lord Foot observed on the Scottish Bill debate,

> "If this were a Bill which was being passed through a Scottish Parliament under a devolved system of Government, that might not matter very much; but, because devolution has been lost, this Bill must come through this Parliament at Westminster. I do not know of any peculiarity or of any particularity in the Scottish situation which makes the proposals contained in this Bill for Scotland inappropriate to England and Wales; and it would be quite illogical to carry through these changes, if they are proper, appropriate and good things to do in Scotland and then not go on and introduce the same changes in the criminal procedure in England and Wales." [40]

6.10 Very shortly thereafter the Royal Commission reported. The Royal Commission had been established to examine the pre-trial criminal process in England and Wales and in so doing to have regard "to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime" (para 1.1).

6.11 With respect to police questioning, the Royal Commission report observed that section 62 of the Criminal Law Act 1977 does not recognise the right of a solicitor to be present when a person is being questioned (Vol. II, para 89). Much evidence was submitted to the Commission (amongst others, by JUSTICE), with which it was impressed, that a solicitor should be *entitled* to attend the interview. The argument was formulated by the Commission as follows (at para 4.89):

[40] HL Deb 15 January 1980 vol 404 c41

"Many people are inarticulate or illiterate and there are particular problems for the ethnic minorities. Furthermore, a person being questioned by the police is in a position of disadvantage. He is unlikely to be properly aware of the legal intricacies of the situation, to understand, for example, the legal concept of intent or the desirability of exercising his right to silence, or to know what the penalty is likely to be for the offence of which he is suspected. Only an experienced lawyer can give him this kind of information and advise him how best to proceed. In the interests of justice he should always have that advice, unless he chooses to forgo it."

6.12 The Commission concluded that all suspects other than those suspected of grave offences (for which there would be circumstances to justify the refusal, such as where there is an urgent need to solve the crime, or inadvertently evidence could be lost) should have an unrestricted right to consult and communicate privately with a solicitor at any stage of an investigation. For the restricted group, the circumstances in which the right may be withheld should be limited and the subject of record and review (para 4.93). Whether a suspect wished to have a solicitor present in interview was a matter for them to decide, but the Commission suggested that the practice should be encouraged (para 4.88). The conclusions formed PACE and the accompanying codes of practice.

Conclusion on historical development

6.13 It is submitted that there was and is no proper reason for the discrepancy between the two approaches as between Scotland and the rest of the United Kingdom in relation to safeguards for suspects during police questioning. Devolution of power to Scotland did not take place for a further eighteen years. When the Criminal Justice (Scotland) Act 1995, containing the now applicable provisions sections14 and 15, was passed, the UK Parliament could have, in the light of PACE and of the Royal Commission findings, revisited the question of detention and amended Scottish procedure, but it neglected to do so. There appears to have been little debate on these issues, with the 1995 Act being presented as largely a consolidating measure of the now established practice in Scotland.

7. REMEDIES

7.1 The intervener submits that in failing to provide for the presence of a solicitor at police interview *as of right*, section 14 constitutes a *systemic* violation of the requirements of the A ECHR, in particular Article 6(3)(c) in conjunction with Article 6(1).

Convention rights and the limits on the power of the devolved institutions

7.2 Under and in terms of the Scotland Act 1998 ("SA") the regulation of criminal procedure in Scotland falls within the legislative competence of the Scottish Parliament (Section 29 SA and of the devolved competence of the Scottish Ministers (Section 53 SA).

7.3 Section 44(1) SA provides that the "members of the Scottish Executive" shall be the First Minister, such Ministers as the First Ministers may appoint under Section 47 SA, and the Lord Advocate and the Solicitor General for Scotland – they are referred to collectively as B "the Scottish Ministers". Section 48(5) SA provides that "any decision of the Lord Advocate in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by her independently of any other person". Otherwise, Section 52 SA provides that statutory function conferred on "the Scottish Ministers" shall be exercisable by *any* member of the Scottish Executive and that, except for "retained function" specifically conferred upon the Lord Advocate alone, "any act or omission of, or in relation to, any member of the Scottish Executive shall be treated as an act or omission of, or in relation to each of them".

7.4 Statutory functions and functions derived from the royal prerogative may be conferred C upon and exercised by the Scottish Ministers insofar as the exercise of these functions are compatible with the limits imposed on the legislative competence of the Scottish Parliament: see Section 53 SA. It follows from this that it falls outside the Scottish Ministers' devolved competence to confirm, approve , make *or maintain* any provision by subordinate legislation which would be incompatible with Convention rights: see Section 54 SA. Although Section 63 SA on its face allows for the transfer (by Order in Council) to the Scottish Ministers of further powers or functions which may exceed the legislative competence of the Scottish Parliament, this transfer cannot be used as a means of allowing the Scottish Ministers to act incompatibly with Convention rights. This is confirmed by the provisions of Section 57(2) SA which states that "a member of the D Scottish Executive has no power to make any subordinate legislation or to do any other

act, so far as the legislation or act is incompatible with any of the Convention rights." As Lord Rodger of Earlsferry observed in *H.M. Advocate v. R*, 2003 SC (PC) 21, 24:

A

> "[W]henever a member of the Scottish Executive does an act which is incompatible with Convention rights, the result produced by all the relevant legislation is not just that his act is unlawful under section 6(1) of the Human Rights Act. That would be the position if the Scotland Act did not apply. When section 57(2) [SA] is taken into account, however, the result is that, so far as his act is incompatible with Convention rights, the member of the Executive is doing something which he has no power to do: his act is, to that extent, merely a purported act and is invalid, a nullity. In this respect Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown."

7.5 But where positive duties are created under and in terms of the Convention, and the regulation of this area as a matter of domestic law falls within the legislative competence of the Scottish Parliament and the devolved competence of the Scottish Ministers, the provisions of the Scotland Act allow the court to pronounce a remedy - at least against the

B

Scottish Ministers collectively - in respect of their failure to act in a manner otherwise required under the Convention. In this way, the Scotland Act provisions have unequivocally placed the ultimate responsibility for ensuring compliance with the Convention in Scotland with the judges, rather than with the democratically elected Scottish Parliament or the publicly accountable Scottish Ministers.

7.6 In summary the Scotland Act provides for the following remedial schema in respect of Convention incompatible action or inaction within the area of devolved competence:

C

(1) An Article 34 ECHR "victim" (such as the present appellant) may bring - or rely in – proceedings, on claims that a purported or proposed exercise of a function by a member of the Scottish Executive is incompatible with his Convention rights: Section 100(1)(a)/(b) SA and Paragraph 1(d) of Schedule 6 SA

(2) An Article 34 ECHR victim may also bring proceedings - or rely upon his Convention rights in proceedings already brought - in respect of any Convention incompatible *failure to act* on the part of a member of the Scottish Executive: Section 100(4)(b) SA and Paragraph 1(e) of Schedule 6 SA

D

(3) A Convention incompatible "failure to act" by the Scottish Ministers which might be subject to challenge under the Scotland Act could, in principle, include:

(a) a failure or refusal on the part by the Scottish Ministers to introduce or lay before the Scottish Parliament a proposal for Scottish legislation, if such legislation may otherwise be said to be required by the Convention; or

(b) insofar as they are otherwise empowered to do so, [41] a failure or refusal on the part by the Scottish Ministers to make such Section 10 HRA remedial order making such amendments to primary Westminster legislation as they consider to be necessary to remove the incompatibility of any of the legislation's provisions with an obligation of the United Kingdom arising from the Convention; or

(c) a failure or refusal on the part by the Scottish Ministers to make a remedial order under and in terms of Part 6 (section 12-14) of the Convention Rights (Compliance) (Scotland) Act 2001, if such legislative amendment may be said to be required by the Convention

Prospective over-ruling and suspension of judgments at common law

7.7 Within the legal order of the European Union, in general, judgments of the Court of Justice are said to be declaratory of existing EU rights; they do not create new rights. Accordingly, the ECJ's decisions, for example as to the direct effect or the invalidity of a particular EU provision, generally have retrospective effect and apply to all legal relationships arising and established before the judgment.[42] In exceptional circumstances, however, - "in application of a general principle of legal certainty which is inherent in the Community legal order" - the ECJ has limited its rulings so they can be immediately relied upon only by the party who had brought the case before it (and any others who, prior to the date of delivery of this judgment, had already brought legal proceedings or made an equivalent complaint in relation to the matter under challenge). [43]

[41] The Scottish Ministers have power to make remedial orders under s10 HRA in devolved matters by virtue of section 53(2)(c) SA which transfers to them functions (such as the making of s10 orders) conferred on a Minister of the Crown by any pre-commencement enactment

[42] *Amministrazione delle Finanze dello Stato v Denkavit* [1980] ECR 1205 at 1223 and Case C-209/03 *R (Bidar) v Ealing London Borough Council* [2005] ECR I-2119

[43] See, for example, Case 43/75 *Defrenne v Sabena (No. 2)* [1976] ECR 455; Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, [1991] 1 QB 344.

7.8 The principal justification for assuming a jurisdiction to overrule prospectively is that the retrospective effect of overruling can be to disturb transactions carried out, and expectations formed, while the old view of the law prevailed. [44] In Case C-333/07 *Societe Regie Networks v Direction de Controle Fiscal Rhone-Alpes Bourgogne* [2008] ECR I-10807 at para 126, the Grand Chamber of the European Court of Justice further developed its case law by not only limiting the temporal effect of its decision but also *prospectively suspending* the effects of its declaration that a Commission contested decision was invalid until such time as a new decision was adopted by the Commission, so that it could remedy the illegality established in the judgment. [45]

7.9 The issue of limiting the retrospective nature of judgments on Constitutional incompatibility arose before the Irish Supreme Court in the criminal appeal *A. v The Governor of Arbour Hill Prison* [2006] 4 IR88. The Irish Supreme Court there ruled that its earlier decision in *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1 (which had declared the Criminal Law Amendment Act 1935 making it an offence to have unlawful carnal knowledge with a girl under the age of consent to be inconsistent with the Irish Constitution) should *not* be accorded unlimited retrospective effect. Instead, the Supreme court in *A* decided that because the State relied in good faith on a statute in force at the time and the accused had not sought to impugn the bringing or conduct of the prosecution on any grounds that might in law have been open to him - including the constitutionality of the statute - the final decision in the case would be deemed to be and to remain lawful, notwithstanding any subsequent ruling that the statute, or a provision of it, was unconstitutional.

7.10 In a UK context, if and insofar as any Act of the *Scottish Parliament* is found by the court to be outwith its legislative competence - or where the court has found that the Scottish Ministers do not have the power to make, confirm or approve a provision of *subordinate* legislation which they purport to have done - Section 102 SA gives the court

---

[44] See generally Mary Arden *Prospective Overruling* (2004) 120 LQR 7

[45] In Case C-475/03 *Banca Popolare di Cremona v Agenzia Entrate Ufficio Cremona* [2006] ECR I-9373 Advocate General Jacobs had first suggested in his Opinion of 17 March 2005 that the retrospective *and prospective* effect of a ruling of the European Court of Justice might be subject to a temporal limitation that the ruling should not take effect until a future date, namely, when the State had had a reasonable opportunity to introduce new legislation. This case was subsequently put out for a re-hearing by the Court and Advocate General Stix-Hackl delivered a further Opinion on the issue on 14 March 2006 at paragraph 130 ff. In the event the challenge to the State legislation at issue was unsuccessful and so the Court did not have to consider the issue of limiting its ruling prospectively.

power to remove or limit any retrospective effect of the decision, or to suspend the effect of that decision for any period and on any conditions to allow the defect to be corrected by the Scottish Parliament *et separatim* by the Scottish Ministers. The power did not extend to other acts, which were simply invalid: Lord Rodger of Earslferry in *R* at 63, para 23.

7.11 In a classic instance of constitutional "spill over" from Community law and of the specifics of the devolutionary settlement into the general constitutional law of the United Kingdom, *In re Spectrum Plus Ltd* [2005] 2 AC 280 a seven judge House of Lords bench relied upon the fact that the UK courts had been given the express power under the devolution statutes to remove or limit the retrospective effect of their decisions regarding the *vires* of devolved legislation. They held the courts now had a general inherent power at common law to vary the retrospectivity of their decisions. The earlier observations of Lord Goff of Chievely to the effect that a system of prospective overruling has no place in our legal system, [46] no longer accurately reflected the actual constitutional position post-devolution. As Lord Hope recently observed in *Ahmed and others v. HM Treasury (No. 2)* [2010] UKSC 5, [2010] 2 WLR 378, 468, para 17:

> "The question whether there was power to place temporal limitations on the effect of its judgments was considered by the House of Lords in *In re Spectrum Plus Ltd* [2005] 2 AC 680. The focus in that case was on the prospective overruling of decisions on points of law. The House held that it had jurisdiction to make such an order, although it declined to do so on the facts of that case. In 'A Time for Everything under the Law: Some Reflections on Retrospectivity' (2005) 121 LQR 57, 77 Lord Rodger of Earlsferry acknowledged that prospective overruling might be particularly useful in cases involving the application of Convention rights."

7.12 The issue of this Court suspending the effect of its judgment may be thought however more problematic, insofar as the judgment concerns the *vires* of the positive acts of the prosecutor in leading and relying at trial upon evidence obtained in the course of police interviews carried out on a suspect in detention in the absence of a lawyer, where the interests of justice are finely balanced, and primary legislation is in issue. Section 57(2) does not specify a remedy but it makes clear that the act is rendered void and of no effect (Lord Clyde in *R*, at 49-50, para 2). But insofar as the Court is considering a remedy in respect of a Convention incompatible *omission* – namely the failure by the Scottish Ministers (among whom are numbered the Lord Advocate) to introduce legislation entitling a detained suspect as a matter of right to have a solicitor present during police

[46] *Kleinwort Benson Ltd. v. Lincoln County Council* [1999] 2 AC 349 per Lord Goff of Chieveley at 379

interview - it is conceptually difficult to describe such a failure to act as the Ministers acting *beyond their powers.* [47] Any positive order made by the court to remedy such an omission could competently be suspended by the court when making it.

A

7.13 It would appear, then, to be competent at common law for any judgment from this Court to be made with prospective effect only, or suspended to allow time for the legislature to respond in order to avoid the disturbance of the administration of justice by the reopening of convictions based on confession evidence obtained in the absence of a lawyer. But it is by no means wholly clear that such a course is necessary in the present case.

7.14 But the present appeal post-dates the decision in *Salduz.* There is no question, therefore, of this Court having to determine upon the retrospective effect of *Salduz.* If and insofar as the judgment of this Court has normal retrospective effect it would clearly apply to any current on-going appeals. Any appeals not yet brought may be barred by reason of acquiescence (*Robertson v Higson*, 2006 SC (PC) 22). Given the terms both of Section 124(2) of the Criminal Procedure (Scotland) Act 1995 on the finality of interlocutors and sentences pronounced by the High Court, and of the five judge decision of the criminal appeal court in *Beck & Ors, Petitioners* [48] any concluded appeal could not

B

---

[47] *H.M. Advocate v. R*, 2003 SC (PC) 21 per Lord Rodger of Earlsferry at 62-63 paragraph 20

> "Significantly, where Parliament wishes to include failure to act in the term "act" in section 100, it does so expressly: section 100(4)(b). In section 52(4) Parliament also speaks of an "act or omission" of any member of the Scottish Executive. Although that subsection does not apply to the Lord Advocate's retained functions, it does again suggest that, generally, the word "act" refers only to positive acts and not to omissions or failures to act. Although the matter does not arise for determination in this case, I would therefore conclude that the term "act" in section 57(2) does not include a failure to act. So section 57(2) does not apply to any failure by a member of the Scottish Executive to carry out one of his functions. This does not mean, of course, that such a failure has no legal consequences under the Scotland Act: on the contrary, both section 100 and paragraph 1(e) of schedule 6 show that it does. But the consequences do not flow from the operation of section 57(2).

C

[48] *Beck & Ors, Petitioners* [2010] HCJAC 8 (Lord Justice General, Lord Kingarth, Lord Eassie, Lord Reed and Lady Dorrian) at paragraphs 28-31:

> "[28] The principal thrust of Mr Shead's submission was to seek to persuade us that, if a decision of the High Court in its appellate capacity, *ex facie* final, was taken in a way which was incompatible with a Convention right, it was unlawful under section 6 of the Human Rights Act and consequently amenable to being set aside by the exercise of the nobile officium.
>
> [29] The Human Rights Act makes express and detailed provision as to how Convention rights may be vindicated. Section 7(1)(a) provides that a victim of an unlawful act may "bring proceedings" under that Act against the public authority in question in the "appropriate court ...". But, in relation to judicial acts, such proceedings may be brought only in one of the three ways specified in section 9(1). An application to the nobile officium of the High Court is clearly not a petition for judicial review (a civil procedure). The High Court is not a forum prescribed for this purpose by rules; the Scottish Ministers have specified only the Court of Session, a civil court, for that purpose (the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000, para 4). Nor, in our view, is an application to the nobile officium

D

be re-opened. The only possible avenue which might be open in the case of already concluded cases would be an application to the Scottish Criminal Cases Review Commission in terms of Section 194A-L of the Criminal Procedure (Scotland) Act 1995. The Commission has a discretion to refer an applicant's case back to the Court of Criminal Appeal in terms of s.194C. It is not obliged to refer a case to the High Court simply because an appeal would succeed; the Commission has also to be of the view that it would be in the interests of justice that the case be referred to the High Court for its reconsideration.[49] Each case which sought to raise the validity of a conviction based on confession evidence obtained without a lawyer would have to turn on its merits.

Declarations of Convention incompatibility and the Human Rights Act

7.15 Section 3(1) HRA obliges public authorities, so far as it is possible to do so, to read legislation in a way which is compatible with Convention rights and to give effect to that legislation in a way which is compatible with those rights (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 595 per Lord Rodger of Earlsferry). Where it is not possible to read or apply an Act of the Westminster Parliament in a manner which is compatible with Convention rights, Section 3(2)(b) HRA provides that the legislative provisions in question remain fully valid, operative and enforceable: in contrast to the situation where there is an incompatibility with Community law, national courts are not empowered even

---

of the High Court the exercise of a right of appeal; rather it is an application to the equitable jurisdiction of the court in circumstances where there is no right of appeal. It has been judicially observed (*R* v *Kansal (No.2)* [2002] 2 AC 69 per Lord Hope at para 63) that the "free-standing proceedings" envisaged by section 7(1)(a) are civil proceedings. This is confirmed by para 3 of the 2000 Rules which prescribes the appropriate court as "any civil court ... which has jurisdiction to grant the remedy sought". Mr Shead only faintly, and as a subsidiary argument, relied upon section 7(1)(a).

[30] He principally relied upon section 7(1)(b). That, however, is limited by the definition in section 7(6) of the expression "legal proceedings". These include (a) proceedings by or at the instigation of a public authority and (b) an appeal against a decision of a court or tribunal - neither of which encompasses a petition by an alleged victim of a violation of Convention rights. The definition is, admittedly, inclusive rather than exhaustive but the terms of section 7(6)(a) and the expression "rely on ... in any legal proceedings" suggest that what is envisaged under section 7(1)(b) is reliance defensively in proceedings brought by another (see *R* v *Kansal (No.2)*, per Lord Hope at para 64). Reliance offensively in proceedings invoking the nobile officium does not fit within the relative concept. It matters not that such proceedings stem from or are consequential upon other (criminal) proceedings brought by the Lord Advocate.

[31] It follows from this analysis that this aspect of the Human Rights Act does not avail any of the petitioners."

[49]See *Cochrane v. HM Advocate*, 2006 JC 135 and *M. v. Scottish Criminal Cases Review Commission*. 2006 SLT 907, OH. Compare with *Akram v. HM Advocate*, 2010 SCCR 30, HCJAC

after incorporation of the Convention to "dis-apply" or suspend primary statutory provisions which contravene human rights.

A

7.16 Section 4 HRA sets up a mechanism for dialogue between the courts and the legislature in the event of an unavoidable conflict between the Convention rights and an Act of Parliament by giving the courts the power to make a declaration as to the incompatibility of this provision with the requirements of the European Convention. But any such declaration of incompatibility by the courts has, by virtue of Section 4(6)(a) HRA, no effect on the validity, continuing operation or enforceability of the offending legislative provision. Further, Section 4(6)(b) HRA provides that any declaration of incompatibility is not binding on the parties to the proceedings in which it is made.

B 7.17 A final declaration of incompatibility - that is one against which no right of appeal exists or is being exercised - gives Ministers of the Crown the power to order under Section 10(1) HRA such amendment to, or repeal of, the primary or secondary legislation in question as they think is appropriate to remove the incompatibility. Any such remedial order will require the approval of Parliament under the affirmative resolution procedure, all as set out in Schedule 2 to the Act. The principle of ultimate Westminster Parliamentary sovereignty is said thereby to be maintained.

7.18 Crucial to any understanding of the constitutional position under the Human Rights Act, Section 6(2) HRA allows for public authorities to act in a way which is incompatible

C with Convention rights and yet still be acting "lawfully". Such lawful Convention incompatible action may result either (a) if the public authority is *obliged* by one or more provisions of primary legislation so to act or (b) if the public authority is acting so as to give effect to or enforce one or more Convention incompatible provisions of, or made under, primary legislation. The Section 6(2) HRA defence is the corollary of the Section 4 HRA procedure. It, too, is founded on the constitutional concept of the UK legislature being able to authorise public authorities to act in a manner which is Convention non-complaint (*R v. Kansal (No. 2)* [2002] 2 AC 69, 113 HL per Lord Hope at paragraph 88).

7.19 The competency of using the Section 4 HRA declaration of incompatibility procedure

D in respect of breaches of positive rights under the Convention where a provision of primary legislation is defective by omission has been doubted. In *Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 322 Lord Nicholls considered a potential

breach of the right of access to the court under Article 6 in relation to the Children Act where, for example, a child was unable to bring proceedings because there was no parent or guardian willing and able to question the local authority's care decision. He pointed out:

> "The Convention violation now under consideration consists of a failure to provide access to a court as guaranteed by article 6(1). The absence of such provision means that English law may be incompatible with article 6(1). The United Kingdom may be in breach of its treaty obligations regarding this article. But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with article 6(1). Rather, this signifies at most the existence of a lacuna in the statute ... This is the position so far as the failure to comply with article 6(1) lies in the absence of effective machinery for protecting the civil rights of young children who have no parent or guardian able and willing to act for them. In such cases there is a statutory lacuna, not a statutory incompatibility." (at 85-86)

7.20 Further, in *R (J) v Enfield LBC* [2002] 2 FLR 1, Elias J. - as he then was - also took the view that the procedure for making a declaration of incompatibility could not be invoked where there was a breach of a positive right by omission. But it would still be for the legislature to decide how to fill the gap (at 69).

The Scotland Act and declarations of Convention incompatibility

7.21 Perhaps the centrally important feature in the scheme of the Scotland Act – and the manner in which it differs fundamentally from the other devolution statutes - is that the Scottish Ministers are not given the Section 6(2) HRA defence which is otherwise available to public authorities. No provision is made for the possibility of any 'lawful' breach of Convention rights by the Scottish devolved authorities relying upon, or seeking to enforce, Convention incompatible provisions of Westminster legislation. [50]

7.22 Section 57(3) SA is the only provision of the Scotland Act which allows for the possibility of one member of the Scottish Executive – namely the Lord Advocate when

---

[50] As the First Division acknowledged in *Somerville v The Scottish Ministers*, 2007 SC 140 at 166:

> "[50] There are, of course, differences between the Human Rights Act and the Scotland Act. As already noticed, the control provided by the former statute is one of rendering unlawful acts which infringe Convention rights; the control provided by the latter is by way of *vires*, rendering null and void infringing acts. A further related difference is that by s 6(2) of the Human Rights Act, subs (1) of that section (which renders unlawful incompatible acts of a public authority) is disapplied where, as a result of one or more provisions of primary legislation, the authority could not have acted differently; a similar disapplication applies to subordinate legislation where the authority is acting so as to give effect to or enforce primary legislation. *By contrast the existence of primary legislation having such results does not save acts amenable to the control of the Scotland Act.* This difference, however, is simply an aspect of the different mechanisms which the United Kingdom Parliament has provided for control under the different statutory regimes."

prosecuting any offence or acting in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland – to act in a manner which is incompatible with any of the Convention rights. [51]

7.23 To date it has rarely been prayed in aid by the Lord Advocate, [52] and only once successfully.[53] But it is clear from the Parliamentary history that this failure to allow for *any* Convention incompatible activity on the part of the Scottish Parliament and other members of the Scottish Executive was not a matter of inadvertence or oversight. The fact that no similar amendment was made in respect of the other Scottish Ministers – or for the Lord Advocate when not prosecuting or when acting other than as head of Scotland's criminal prosecution service - shows it was intended by the UK Parliament that the Convention based limits imposed on the powers of the Scottish devolved government would be subject to no exception. The Scottish Ministers then, unlike any other public body or devolved authority – are bound absolutely as a matter of *vires* by the requirements of the Convention. Thus, because the Scottish Ministers and Parliament

---

[51] See HL Deb 28 October 1998 cc041-2042 per the then Lord Advocate, Lord Hardie:

> "Amendment No. 145F ensures that the Lord Advocate is able to rely on the protection afforded by Clause 6(2) of the Human Rights Bill when he is prosecuting an offence or acting in his capacity as head of the systems of criminal prosecution and investigation of deaths. Clause 6 of the Human Rights Bill provides that it is unlawful for a public authority which would include the Lord Advocate to act in a way that is incompatible with a convention right. Clause 6(2) provides that it is not unlawful if the act of the public authority was because it could not have acted differently as a result of primary legislation or the public authority was acting to give effect to provisions made under primary legislation. This is intended to protect a public authority where a Westminster Act required it to breach a convention right. *The amendment ensures that this protection is also afforded to the Lord Advocate where it is alleged that he has breached Clause 53(2) of the Scotland Bill [now Section 57(2) SA] which requires him to act compatibly with the convention rights. This ensures that the Lord Advocate could prosecute an offence contained in a UK Act even if it were in contravention of a convention right. Without the amendment the offence could be prosecuted by the Crown Prosecution Service in England but not by the Lord Advocate. The amendment also allows him to act in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland if he is acting as required by a provision of the UK Act. Without the amendment disapplying Clause 53(2) he could not act in this way.* ... What is being contemplated - I am not sure that I can think of a specific example - is United Kingdom legislation which creates an offence but which itself was contrary to the convention. .... If an offence were created across the United Kingdom under a UK statute it would be appropriate that one of the considerations for the Lord Advocate would be whether he or she wished to prosecute in Scotland for that offence. Just as the Crown Prosecution Service in England could prosecute, it would be invidious if the Lord Advocate were precluded from prosecuting for the statutory offence under the United Kingdom Act simply because it contravened the convention right. At this stage, I am unable to think of specific examples."

[52] See: *Starrs v Ruxton* 2000 JC 208 per the Lord Justice-Clerk Cullen at p 231B–C; Lord Reed at p 256A ; *Brown v. Stott*, 2000 JC 328 per the Lord Justice General, Lord Rodger of Earlsferry at 334; and *Millar v. Dickson*, 2002 SC (PC) 30 per Lord Bingham at 43D–E, Lord Hope at 55A–D, per Lord Clyde at 60H

[53] See *Dickson v. HM Advocate*, 2008 JC 181. It is perhaps difficult to reconcile the analysis taken of Section 57(3) SA in this decision with the position adopted on the provision by the First Division in *XY v. Scottish Ministers and others*, 2007 SC 631 and by the Judicial Committee of the Privy Council in *Millar v. Dickson*, 2002 SC (PC) 30.

have no section 6(2) HRA defence open to them, a declarator by a court (whether under section 4 HRA or at common law) that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering *ultra vires* any act or omission of the Scottish Ministers or the Scottish Parliament which relies upon or seeks to give effect to the Westminster provision in question.

7.24 While section 57(3) SA might protect a positive act by the Lord Advocate *qua* public prosecutor when prosecuting an offence, it does not protect a Convention incompatible failure by the Lord Advocate qua Scottish Minister to introduce domestic legislation to remedy a systemic defect in national law such as *Salduz* identifies.

7.25 Furthermore, since all those who hold office by virtue of their effective appointment by the Scottish Ministers within areas of devolved competence are governed by the *vires* controls of Section 57(2) SA – rather than by the lawfulness controls of Section 6 HRA - a declaration of incompatibility made under Section 4 HRA has the effect of actually setting specific and particular limits on the power of those Scottish officials. It is also to be noted in this regard that Section 57(2) SA refers to limitations on the powers of the Scottish Ministers under reference to both European Community law and Convention rights. Thus any Convention incompatible provision of a Westminster statute effectively falls to be "disapplied" as regards the Scottish Ministers, just as any Community law incompatible provision of a Westminster statute is to be disapplied as regards acts of emanations of the UK State. [54]

Conclusion on remedy

7.26 Article 4(2)(b)(ii) of the Judicial Committee (Powers in Devolution Cases) Order 1999 [55] provides that in determining devolution appeals before it in criminal matters the UK Supreme Court - exercises the same powers that would be available in a criminal appeal to the High Court of Justiciary (including, therefore, the power to quash a conviction in terms of section 118 of Criminal Procedure (Scotland) Act 1995 and also, insofar as otherwise competent, to make a declaration of incompatibility under Section 4 HRA). Rule 29 of the Supreme Court Rules 2009 (SI 2009/1603) states that the court

[54] See *R v. Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603
[55] Judicial Committee (Powers in Devolution Cases) Order 1999, SI 1999/1320

has all the powers of the court below, and section 40(5) of the Constitutional Reform Act 2005 gives the court power to determine any question necessary to be determined for the purposes of doing justice in an appeal.

7.27 There are difficulties with this Court pronouncing a section 4 HRA declaration of incompatibility in the present case in that:

(1) Quite apart from the question as to whether the Lord Advocate is indeed "giving effect" to Section 14 of the Criminal Procedure Scotland Act 1995 when leading evidence obtained in police detention in the absence of a lawyer, the competency of declaring a statutory provision to be formally "incompatible" with a Convention right because of what it *fails* to say (in this case by failing to give an express right to counsel) rather than because of what it says (in this case by making provision only for intimation of detention to a solicitor) is doubtful.

(2) Further, "section 3(1) HRA *requires* public authorities of all kinds to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to them in a way which is compatible with the Convention rights of the people concerned" (per Lord Rodger in *Ghaidan* at 594, para 106). Accordingly the police are obliged to "give effect" to Section 14 of the 1995 Act in a Convention compatible way by treating it as giving the detainee a right to have a solicitor present during police interview, and so no question of a Section 4 HRA declarator need arise. In any event, on any reading, section 14 allows the police if so advised to admit a solicitor to an interview with a detainee;

(3) Finally, a section 4 HRA declaration of incompatibility would not allow the Scottish Ministers (including the Lord Advocate when *not* prosecuting or acting as head of the systems of criminal prosecution and investigation of deaths in Scotland) to continue to act in reliance upon these provisions since they have no power to act incompatibly with Convention rights.

7.28 It is also to be noted that the European Court of Human Rights does *not* consider a declaration of incompatibility to be an effective remedy for the purpose of Article 13 ECHR. This is particularly evident in the face of the failure of the UK Government to act on the declaration of incompatibility pronounced by the Court of Session in *Smith v.*

Scott [56] in January 2007 regarding the Convention incompatibility of blanket prisoner disenfranchisement. As the Strasbourg Court has noted in *M.W. against the United Kingdom,* Application 11313/02, (decision on admissibility) (23 June 2009):

A

> "On the question of the exhaustion of domestic remedies the Court recalls the Grand Chamber's position in the *Burden* judgment that, *while it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility may be so certain as to indicate that Section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation, such a situation had not yet come about. (ibid., §§ 43-44). There is no evidence before the Court to indicate that that stage has been reached. It follows that the application cannot be declared inadmissible for non-exhaustion.*"

7.29 Accordingly, whilst it is necessary to read section 14 so that the police may give effect to it in accordance with arts 6(1) and 6(3)(c), in the interests of legal certainty, the better solution would be for this court to pronounce orders seeking to remedy the

B

systemic defect which is now evident in the existing provisions of the Criminal Procedure (Scotland) Act 1995. Such an order might be made along the following lines:

> "declarator that the Scottish Ministers are obliged under and in terms of Article 6(3)(c) and 6(1) ECHR to make legislative provision to the following effect:
>
> (i) for an individual to be entitled to request and, unless exceptionally justified by compelling reasons of the public interest, to obtain effective access to a solicitor when detained in police custody in Scotland
>
> (ii) for such solicitor to be entitled to be present when questions are put by the police to an individual so detained in relation to suspected offence,
>
> and that within 3 months of the date of this order."

C

CONCLUSION

7.30 The Justices are therefore respectfully requested to uphold the appeal for the following reasons: -

D

[56] See for example *Smith v. Scott*, 2007 SC 345 in which the Registration Appeal Court pronounced a declaration of incompatibility in relation to the maintenance of blanket ban on voting by convicted prisoners set out in Section 3 of the Representation of the People Act 1983 and the review of unremedied declarations of incompatibility by the Joint Committee on Human Rights. *Report* of 26 March 2010 at paragraphs 144-5, 156, 158

REASONS

7.31 The Lord Advocate *qua* public prosecutor has acted incompatibly with arts 6(1) and 6(3)(c) ECHR in this case in relying on evidence obtained in a Convention incompatible manner *et separatim* the Lord Advocate *qua* Scottish Minister has failed to act in a Convention compatible manner in this case by ensuring Convention compatible legislation in Scotland enshrining the right to a solicitor during police detention, because:

(1) The reasoning of the European Court of Human Rights in clarifying that article 6(3)(c) requires the right to legal representation as from the first interrogation is clear and constant from the Grand Chamber decision in *Salduz* and all the subsequent Section decisions;

(2) The common law and English speaking jurisdictions world-wide *at least* recognise a fundamental right to legal representation during police detention;

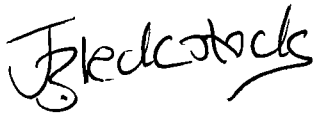
(3) The international obligations of the United Kingdom require, in the UK's own words, the provision of legal representation in police detention and, unless in exceptional circumstances, representation during police interview;

(4) There is no historical reason for the jurisdictions of England, Wales, and Northern Ireland to have a separate provision on legal assistance during police detention to Scotland, save for greater scrutiny on the issue in the Royal Commission report 1980 than in the Thomson Committee report 1975;

(5) Sections 14 and 15 of the Criminal Justice (Scotland) Act 1995 are silent on such access and accordingly the Lord Advocate is obliged to give effect to the sections in accordance with the Convention;

(6) Legal certainty favours the provision of clear guidance so as to enable the Scottish Ministers and their officers to fulfil their obligations under the Scotland Act and give effect to the right compatibly with the Convention.

AIDAN O'NEILL QC



JODIE BLACKSTOCK

30th April 2010

The Supreme Court of the United Kingdom

ON APPEAL

FROM THE HIGH COURT OF JUSTICIARY (SCOTLAND)

Between

HER MAJESTY'S ADVOCATE

Respondent

and

PETER CADDER

Appellant

INTERVENTION FOR JUSTICE

Taylor & Kelly

3 Main Street

Coatbridge

Lanarkshire ML5 3AJ

Herbert Smith LLP, London

Solicitor/Agents for Justice