UCL
Université catholique de Louvain

INTERNATIONAL HUMAN RIGHTS

LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL

Related to: section 1, sub-section 5, unit 1: *The Jus Commune of Human Rights* (ex. 4)

Supreme Court of the United Kingdom, *Cadder (Appellant) v Her Majesty's Advocate (Scotland) (Respondent)* [2010] UKSC 43 (judgment of 26 October 2010)

Lord Hope (with whom Lord Mance agrees) (leading judgment)

1. This is, in effect, an appeal against the decision of the High Court of Justiciary in *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73 ... The ... minuter in that case and the appellant, Peter Cadder, in this were both detained under section 14 of the Criminal Procedure (Scotland) Act 1995, as amended ("the 1995 Act"). This has given rise, in both cases, to the question whether the Crown's reliance on admissions made by a detainee during his detention while being interviewed by the police without access to legal advice before the interview begins is incompatible with his right to a fair trial.

2. The minuter and the appellant were both interviewed by the police while they were being detained under section 14. They made admissions on which, in *McLean*, the Crown intended to rely at trial and which, in Peter Cadder's case, it did rely in obtaining a conviction. In neither case did they have access to legal advice while they were in detention. Nor was a solicitor present while they were being interviewed. McLean had requested that intimation of the fact and place of his detention should be made to a solicitor. But he was not offered an opportunity to have legal advice before he was interviewed, nor did he request this. Cadder was asked whether he wished a solicitor to be contacted, and he replied that he did not. At no time while he was being questioned did he request access to a solicitor.

3. In *Salduz v Turkey* (2008) 49 EHRR 421 the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of article 6(3)(c) of the European Convention on Human Rights, in conjunction with article 6(1), because the applicant did not have the benefit of legal assistance while he was in police custody. In *McLean* the Appeal Court held, notwithstanding the decision in Salduz, that the fact that legal representation was not available to the minuter did not of itself constitute a violation of articles 6(1) and 6(3)(c) read in conjunction. In its opinion the guarantees otherwise available under the Scottish system were sufficient to avoid the risk of any unfairness. ...

The Grand Chamber's decision in Salduz

30. The applicant, who was a Turkish national and was then 17 years old, was taken into custody at about 10.15 pm by police officers of the anti-terrorism branch of the Izmir Security Directorate on

suspicion of having taken part in an unlawful demonstration in support of an illegal organisation and of hanging an illegal banner from a bridge. At 1 am the next day he was reminded of his right to remain silent and was then interrogated by the anti-terrorism branch. No lawyer was present during his interrogation. He made various admissions in the course of which he confessed to the suspected offences, and samples were taken of his handwriting. Later that day he was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor he denied involvement in the offences. He told the investigating judge, retracting the statement that he made to the police, that it had been extracted under duress. It was only after all this questioning was over that he was allowed access to a lawyer. At 11.45 pm the same day he was examined by a doctor, who stated that there was no sign of ill-treatment on his body. He was subsequently tried on indictment before the state security court. Although he again sought to retract his police statement, alleging that it had been extracted from him under duress, he was convicted as charged. He was sentenced to four years and six months imprisonment, reduced to two and a half years as he was a minor at the time of the offence.

31. It appears from the circumstances as described in the report that there are some significant differences between the way the applicant's case was handled and that of the appellant. The applicant was not told that he had a right to have intimation of his detention sent to a lawyer. The time that had elapsed between his being taken into custody and his being interviewed is not recorded. His suggestion that he confessed under duress is not matched by anything in this case, there being no suggestion that the appellant was coerced while he was being interviewed. The questioning of the applicant does not appear to have been tape recorded. On the other hand, the applicant was not convicted on his own admissions. The court had before it evidence from his co-accused before the public prosecutor that the applicant had urged them to participate in the demonstration and that he had been in charge of organising it. His handwriting was also compared with that on the banner. There is, of course, common ground between the two cases in that both interviews were carried out without the assistance of a lawyer either before they began or during the process of questioning. Like the applicant in *Salduz*, the appellant was a minor when he was taken into detention. He was born on 4 June 1990 and was 16 years old.

32. The Grand Chamber began its assessment of the applicable principles by making some general observations ... Having noted in para 50 that the right set out in article 6(3)(c) of the Convention is one element, among others, of the concept of a fair trial in

criminal proceedings in article 6(1) (see *Imbrioscia v Switzerland* (1993) 17 EHRR 441 and *Brennan v United Kingdom* (2001) 34 EHRR 18), it stated in para 51:

> "The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. Nevertheless, article 6(3)(c) does not specify the manner of exercising this right. It thus leaves to the contracting states the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial."

In para 52, having stated that article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation, it said: "However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances." [emphasis added]

33. The more one reads on through the judgment, however, the clearer it becomes that the Grand Chamber was determined to tighten up the approach that must be taken to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself. ... In para 53 the Grand Chamber asserts that the principles which it outlined in para 52 are consistent with generally recognised international standards which are at the heart of the concept of a fair trial, whose rationale relates in particular to the need to protect the accused against abusive coercion on the part of the

authorities. Reference is made to aims pursued by article 6, notably equality of arms between the investigating or prosecuting authorities and the accused. In para 54 reference is made to the particularly vulnerable position that the accused finds himself in at the investigation stage of the proceedings. The point is made that in the majority of cases this vulnerability can only be adequately compensated for by the presence of a lawyer whose task it is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected. Early access to a lawyer is said to be part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has or has not extinguished the very essence of the law against self-incrimination. Reference is made to the numerous recommendations by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which underline the point that the right of any detainee to have access to legal advice is a fundamental safeguard against ill-treatment.

34. There is perhaps an indication here that the primary concern of the Grand Chamber was to eliminate the risk of ill-treatment or other forms of physical or psychological pressure as a means of coercing the detainee to incriminate himself. If that was the aim, it might have been thought that the use of techniques such as tape-recording would meet the need to monitor the need for fairness and that, as cases where there are real grounds for suspecting that abusive methods were used can be dealt with appropriately by the trial judge under Scots procedure, there would be no reason to doubt the essential fairness of the Scottish system. But the way the Grand Chamber then went on to express itself removes the possibility of resorting to such an analysis.

35. In para 55 the Grand Chamber expressed the conclusion which it drew from what it had said in the previous paragraphs as follows: "Against this background, the Court finds that in 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."

The emphasis throughout is on the presence of a lawyer as necessary to ensure respect for the right of the detainee not to incriminate himself. The last sentence of paragraph 55 could hardly be more clearly expressed.

...

39. In para 24 of his judgment in *HM Advocate v McLean* the Lord Justice General said that the first sentence of what the Grand Chamber said in that paragraph was open to interpretation. He said that the requirement for a solicitor to be present was subject to exception and applied only "as a rule". He said that it was open to two alternative interpretations. One was that the court was laying down that every jurisdiction must, to be compliant with the Convention, have in place a system under which access to a solicitor was ordinarily provided as from the first interrogation, whatever safeguards there may otherwise be for a fair trial. The other was that, while this is what the court would generally expect, it was recognising that the issue as to whether or not there has been a fair trial will depend on the circumstances of the case, including what arrangements the jurisdiction in question has made for access to legal advice, seen against the guarantees which are otherwise in play in that jurisdiction to secure a fair trial. On this approach there would be room for, as he put it, a certain flexibility in its application. In para 25 he said that the court was inclined to favour the alternative interpretation. ...

40. I do not think, with respect, that the alternative interpretation is tenable. It has, of course, often been said by the Strasbourg court that it leaves to the contracting states the choice as to the means by which the manner of exercising the right to a fair trial is secured in their judicial systems. Indeed the Grand Chamber said as much in para 51 of *Salduz*. The admissibility of evidence, for example, is primarily a matter for the domestic legal systems of the contracting states. But there is no hint anywhere in its judgment that it had in mind that the question whether or not a detainee who was

interrogated without access to a lawyer has had a fair trial will depend on the arrangements the particular jurisdiction has made, including any guarantees otherwise in place there. Distinctions of that kind would be entirely out of keeping with the Strasbourg court's approach to problems posed by the Convention, which is to provide principled solutions that are universally applicable in all the contracting states. It aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other.

41. The statement in para 55 that article 6(1) requires that, "as a rule", access to a lawyer should be provided as from the first interrogation of a suspect must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will "in principle" otherwise be irretrievably prejudiced must be understood in the same way. It is true that the use of such expressions indicates that there is room for a certain flexibility in the application of the requirement, as the Lord Justice General said in *HM Advocate v McLean*, para 24. But they do not permit a systematic departure from it, which is what has occurred in this case under the regime provided for by the statute. The area within which there is room for flexibility is much narrower. It permits a departure from the requirement only if the facts of the case make it impracticable to adhere to it. The reference in that paragraph to its being demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict the right reinforces this interpretation. It is the particular circumstances of the case, not other guarantees that are available in the jurisdiction generally, that will justify such a restriction.

...

Should this court follow Salduz?

45. The starting point is section 2(1) of the Human Rights Act 1998, which provides that a court which is determining a question which has arisen in connection with a Convention right must "take into account" any decision of the Strasbourg court. The United Kingdom was not a party to the decision in *Salduz* nor did it seek to intervene in the proceedings. As the Lord Justice General observed in *McLean*, para 29, the implications for the Scottish system cannot be said to have been carefully considered. But in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26, Lord Slynn of Hadley said that the court should follow any clear and constant jurisprudence of the Strasbourg court. And in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, para 18, Lord Bingham of Cornhill said the court will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber. In *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, on the other hand, the House refused to apply a decision of the Third Section because, as Lord Bingham explained in para 12, they concluded that the Strasbourg court had materially misunderstood the domestic legal context in which courts martial were held under United Kingdom law. And in *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47 this court declined to follow a line of cases in the Strasbourg court culminating in a decision of the Fourth Section because, as Lord Phillips explained in para 107, its case law appeared to have been developed largely in cases relating to the civil law without full consideration of the safeguards against an unfair trial that exist under the common law procedure.

46. In this case the court is faced with a unanimous decision of the Grand Chamber. This, in itself, is a formidable reason for thinking that we should follow it. In its judgment in *Panovits v Cyprus*, application no 4268/04, 11 December 2008, the Strasbourg court considered the question whether an applicant, aged 17 at the time, who confessed his guilt when he was subjected to police questioning for about 30-40 minutes without legal advice was deprived of his right to a fair trial. His confession was decisive for the prospects of his defence and constituted a significant element on which his conviction was based. Having reviewed its previous jurisprudence on the right not to incriminate oneself, albeit without the benefit of the Grand Chamber's observations in *Salduz* which came too late for them to be take into account, it held in para 77 that there had been a violation of article 6(3)(c) in conjunction with article 6(1) on account of the lack of legal assistance to the applicant during the initial stages of

police questioning. This decision is entirely consistent with *Salduz*.

47. As for the question whether Salduz has given rise to a clear and constant jurisprudence, the case law shows that it has been followed repeatedly in subsequent cases. A full list was provided in its helpful written intervention by JUSTICE. ...

48. In my opinion the Strasbourg court has shown by its consistent line of case law since *Salduz* that the Grand Chamber's finding in para 55 is now firmly established in its jurisprudence. ...

49. As JUSTICE has shown by the materials referred to in its written intervention, the majority of those member states which prior to *Salduz* did not afford a right to legal representation at interview (Belgium, France, the Netherlands and Ireland) are now recognising that their legal systems are, in this respect, inadequate. In the Netherlands the Supreme Court has held that a suspect arrested by the police must be offered the opportunity to consult a lawyer before being interviewed and that an arrested minor was entitled to have the assistance of a lawyer while being interviewed: LJN BH3079, 30 June 2009. In France the Conseil Constitutionnel has held that articles 62 and 63 of the Code of Criminal Procedure, which authorise the questioning of a person remanded in police custody (the process known as la garde à vue) but do not allow the person held against his will to have the benefit of legal assistance while undergoing questioning, are unconstitutional because they could not be reconciled with articles 9 and 16 of the Déclaration of 1789 des droits de l'homme et du citoyen: Décision No 2010-14/22 QPC, 30 July 2010. It postponed the effect of its decision until 1 July 2011 to allow the legislature to remedy the unconstitutionality. The Criminal Chamber of the Cour de Cassation has applied the law as declared by the Conseil Constitutionnel but postponing the effect of its decision, and has set aside two rulings of lower courts which pre-empted the postponement: arrêt no 5699 and arrêts nos 5700 and 5701, 19 October 2010. The Conseil d'Etat in its turn has drawn the government's attention to the fragility, in the light of article 6 of the Convention, of article 706-88 of the code de procédure pénale, which prevents access to legal assistance at this stage: Section de l'intérieur, Projet de loi relatif à la garde à vue, 7 October 2010 (No 384.505). There has, as yet, been no decision as to the effect of *Salduz* in Ireland. But if Scotland were not to follow the example of the others it would be almost alone among all the member states in not doing so. It would not be able to find support for that position from England and Wales or Northern Ireland. Access to legal advice was described in R v Samuel [1988] QB 615 as a fundamental right, and section 58(1) of the Police and Criminal Evidence Act 1984 provides that a person arrested and held in custody in a police station or other premises shall be entitled, if he so requires, to consult a solicitor privately at any time: see also section 59(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).

50. I should add for completeness that I see no room for any escape from the *Salduz* ruling on the ground that the guarantees otherwise available under the Scottish system are sufficient to secure a fair trial. The appeal court made much of this point in *HM Advocate v McLean*, para 27, as did the Lord Advocate in her address to this court. As I have already said, the ruling in para 55 of *Salduz* must be read as applicable equally in all the contracting states. There is room for a restriction of the right of access to a solicitor during the police interrogation, but only if there are compelling reasons in the light of the particular circumstances of the case which make the presence of a solicitor impracticable. The guarantees otherwise available are entirely commendable. But they are, in truth, incapable of removing the disadvantage that a detainee will suffer if, not having had access to a solicitor for advice before he is questioned by the police, he makes incriminating admissions or says something which enables the police to obtain incriminating evidence from other sources which is then used against him at his trial. Much was made, of course, of the rule of Scots law that there must be corroboration of a confession by independent evidence. But there was independent evidence in *Salduz*. The reasoning in that case offers no prospect of its ruling being held not to apply because any confession must under Scots law be corroborated.

...

Conclusion

63. ... I would hold that the decisions of the High Court of Justiciary in ... *HM Advocate v McLean*

2010 SLT 73 are no longer good law in the light of the Grand

Chamber's ruling in *Salduz* and that they should be overruled. ...