Michaelmas Term
[2010] UKSC 43

JUDGMENT

Cadder (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Brown
Lord Mance
Lord Kerr
Sir John Dyson, SCJ

JUDGMENT GIVEN ON

26 October 2010

Heard on 24, 25 and 26 May 2010

Appellant
Christopher Shead

Martin Richardson
Anthony J McGlennan

(Instructed by The Barony Law Practice)

Respondent
Elish Angiolini QC, the Lord Advocate
W James Wolffe QC
Simon Collins
Gordon Balfour
(Instructed by The Crown Agent)

2nd Respondent & Intervener
Alan Summers QC
Eugene Creally
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

Intervener (JUSTICE)

Aidan O'Neill QC
Jodie Blackstock
(Instructed by Herbert Smith LLP who were assisted by Taylor & Kelly)

LORD HOPE (with whom Lord Mance agrees)

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, which was heard by a bench of seven judges. The link between that case and the appeal is that 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. It approved its decisions in *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203 (by a court of five judges) that the Crown's reliance on admissions made by a detainee while being interviewed in the absence of a solicitor was not incompatible with the right to a fair trial. The appellant seeks to challenge the decision in *McLean*. He submits that the decision in *Salduz* requires this court to hold that there has been a violation of those articles.

4. It is remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure. Ever since the statutory power to question a suspect prior to charge was introduced by sections 1 to 3 of the Criminal Justice (Scotland) Act 1980, the system of criminal justice in Scotland has proceeded on the basis that admissions made by a detainee without access to legal advice during his detention are admissible. Countless cases have gone through the courts, and decades have passed, without any challenge having been made to that assumption. Many more are ongoing or awaiting trial - figures were provided to the court which indicate there are about 76,000 such cases - or are being held in the system pending the hearing of an appeal although not all of them may be affected by the decision in this case. There is no doubt that a ruling that the assumption was erroneous will have profound consequences. But there is no room, in the situation which confronts this court, for a decision that favours the status quo simply on grounds of expediency. The issue is one of law, as the court appreciated in *McLean*. It must be faced up to, whatever the consequences.

The facts of this case

5. At around 14.30 hours on 13 May 2007 the appellant was detained by the police at his home in Glasgow under section 14(1) of the 1995 Act following an incident in which Liam Tracey and his father John Tracey had been attacked by a group of youths. In accordance with section 14(6) he was informed that he was being detained on suspicion of serious assault, and he was cautioned in accordance with section 14(9). He made no comment, and was conveyed to London Road Police Office. He arrived there at about 14.45 hours. On arrival he was again cautioned in accordance with section 14(9). At about 14.49 he was informed in accordance with section 15 of the 1995 Act that he was entitled to have intimation of his detention sent to a solicitor, but he declined to have a solicitor contacted on his behalf. Thereafter, for a period of approximately 27 minutes commencing at about 15.03 hours, he was interviewed under caution by two police officers. During this interview he made a number of admissions with regard to the offences with which he was later charged. At 15.30 he was informed that he was no longer a detained person under section 14, and he was placed under arrest. At 15.35 hours he was cautioned and charged with various offences in regard to the incident. He made no reply to any of these charges.

6. On 27 August 2008 an identification parade was held at London Road Police Office. A DVD compilation showing an image of the appellant and images of other individuals was shown to potential witnesses. The complainer Liam Tracey identified the image of the appellant as that of his assailant. The complainer John Tracey failed to identify anyone. On 24 December 2008 an indictment was served on the appellant and two co-accused charging them with assaulting Liam Tracey to his severe injury and permanent disfigurement, assaulting John Tracey to his injury and breach of the peace.

7. The appellant went to trial in the Sheriff Court at Glasgow on 26 May 2009. On 27 May 2009 the procurator fiscal depute intimated that the Crown did not seek a conviction against the co-accused and the trial proceeded against the appellant alone. During the course of the trial the procurator fiscal depute led evidence from Liam Tracey, who identified the appellant as one of those involved in assaulting both him and his father John Tracey. He also led evidence from John Tracey who identified the appellant in court as one of those involved in the assaults. Evidence was led of the content of the interview of the appellant while he was in detention. An audio tape recording of it was played in full to the jury, and the jury were given copies of the transcript. In his charge to the jury the sheriff made reference both to the contents of the interview and to the dock identification of the appellant by John Tracey. On 29 May 2009 the appellant was convicted on all charges and on 26 June 2009 he was sentenced to 250 hours Community Service. The sheriff also imposed a compensation order for £500.

8. On 9 July 2009 the appellant lodged intimation of his intention to appeal against his conviction. On 12 October 2009 he lodged a note of appeal in which he sought leave to challenge his conviction on four grounds. Grounds 1 and 2 referred to the reliance by the procurator fiscal depute on the contents of his interview. Ground 3 was concerned with the sheriff's directions in relation to the crime of breach of the peace. Ground 4 was concerned with the reliance by the procurator fiscal depute on dock identification evidence. In relation to grounds 1, 2 and 4 the appellant relied on article 6 of the Convention and section 57(2) of the Scotland Act 1998, and he gave notice that he intended to raise a devolution issue with respect to the issues raised in each of them.

9. By letter dated 10 November 2009 the Depute Clerk of Justiciary informed the appellant that the judge who was conducting the first sift had considered his application for leave to appeal and that it had been refused. On 19 November 2009 the appellant appealed against this refusal, supported by an opinion provided by his counsel, Mr Shead. By letter dated 27 November 2009 the Depute Clerk of Justiciary informed the appellant that his appeal had been considered by three judges at the second sift stage, and that it also had been refused. The following reasons were given:

> "Although we have had regard to counsel's opinion, grounds 1 and 2 are not arguable, standing the 7 judge decision in *McLean*. As to ground 3 it is not arguable, having regard to the particular circumstances of the alleged offence and the judge's charge as a whole, that his directions were apt to confuse or that any miscarriage of justice could be said to have resulted. As to ground 4, it is not arguable, having regard inter alia to *Holland v HM Advocate* 2005 1 SC (PC) 3, that it would have been incompatible with the appellant's

> Article 6 rights for the Crown to seek to rely on dock identification in the circumstances of the case."

On 15 December 2009 the appellant's solicitors wrote to the Depute Clerk of Justiciary asking for the case to be put out for a procedural hearing so that an application could be made for leave to appeal to the Supreme Court. By letter dated 23 December 2009 the Appeals Manager replied that this request had been considered by the Criminal Appeals Administration Judge and had been refused on the basis that, as the refusal of leave to appeal at the second sift did not amount to a determination of a devolution issue from which an appeal might lie to the Supreme Court, no further procedure was competent. The appellant then submitted an application for special leave to appeal to the Supreme Court under para 13 of Schedule 6 to the Scotland Act 1998.

The issues

10. The first three issues relate to the question whether it is open to this court to give permission to appeal. In the statement of facts and issues they are set out in these terms:

> "1. Whether the decision dated 25 November 2009 by three judges of the High Court of Justiciary to refuse the appeal against the refusal to grant leave to appeal was the determination of a devolution issue.
>
> 2. Whether the Court below has refused to grant permission to appeal to the Supreme Court of the United Kingdom.
>
> 3. Whether, in all the circumstances, permission to appeal should be granted by the Supreme Court in whole or in part."

The remaining issues are the substantive issues in the appeal. They can be stated, in simplified terms, as follows:

> "4. Whether the Crown's reliance on the content of the appellant's interview was incompatible with his rights under articles 6(1) and 6(3)(c), having regard to the decision in *Salduz*.
>
> 5. Whether the act of the Lord Advocate in leading and relying on that evidence was ultra vires, having regard to sections 57(2) and (3)

of the Scotland Act 1998 and section 6(2) of the Human Rights Act 1998.

6. Whether the act of the Lord Advocate in leading and relying on evidence of the dock identification of the appellant was incompatible with his rights under article 6(1) and thereby ultra vires in terms of section 57(2) of the Scotland Act 1998.

7. Whether the acts of the Lord Advocate referred to in issues 5 and 6, taken together, were incompatible with the appellant's rights under article 6(1) and thereby ultra vires in terms of section 57(2) of the Scotland Act 1998.

8. Whether, if issue 5 is answered in the affirmative, the decisions in *Paton v Ritchie* and *HM Advocate v McLean* should be overruled with prospective effect only or with any other limit on the temporal effect of the decision."

Permission to appeal: issues 1-3

11. As the history which I have narrated in para 9 shows, the appellant's appeal to the High Court of Justiciary never reached the stage of a full hearing by the appeal court. It was dealt with on paper by means of the sift procedure under section 107(5) and (6) of the 1995 Act. But there is no doubt that this resulted in the refusal of the appeal and that, for the reasons that were explained in *McDonald v HM Advocate* [2008] UKPC 46, 2008 SLT 993, it amounted to the determination of a devolution issue for the purposes of para 13 of Schedule 6 to the Scotland Act 1998; see also *Allison v HM Advocate* [2010] UKSC 6, 2010 SLT 261, para 6, per Lord Rodger of Earlsferry.

12. As I said in para 16 of *McDonald*, the word "determination" in para 13 of Schedule 6 to the Scotland Act 1998 can include any decision which disposes of the issue in the lower court, including a refusal to consider the issue. I do not think that it would be right to say that the judges who conducted the second sift refused to consider the devolution issues which the appellant was seeking to raise. But they certainly did dispose of them when, for the reasons given, they refused his application for leave to appeal. Nor does the fact that the appellant's application for leave to appeal was dealt with on paper by the Criminal Appeals Administration Judge create a procedural obstacle to his application to this court for special leave to appeal. His decision that the application for leave to appeal was incompetent, as communicated by the Appeals Manager to the appellant's

solicitors, was based on the view that the refusal of leave by the sifting judges did not amount to a determination of the devolution issues. This, for the reasons I have given, was a misconception of the effect of what the sifting judges had done. It falls to be treated for the purposes of para 13 of the Schedule as amounting to a refusal of leave by the lower court. That being so, it is open to this court to decide whether it has jurisdiction to entertain the application for special leave.

Dock identification: issues 6 and 7

13. At the outset of the hearing the parties were informed that the court was satisfied that special leave to appeal should be given with regard to the devolution issues identified as issues 4, 5 and 8 in the statement of facts and issues. They are directed to the question as to the effect of the decision of the Grand Chamber in *Salduz* and whether the view of that case which was taken in *HM Advocate v McLean* can be sustained. Issue 6, on the other hand, is directed to the appellant's complaint about the Crown's reliance at his trial on the dock identification of him by John Tracey, who failed to identify him at the identification parade.

14. In *Holland v HM Advocate* 2005 SC 1 (PC) 3 the Board rejected the argument that the use of dock identification evidence in solemn proceedings must always be regarded as incompatible with the accused's right under article 6(1) of the Convention to a fair trial. Lord Rodger said in para 57 that, except perhaps in an extreme case, there was no basis either in domestic law or in the Convention for regarding evidence of dock identification as inadmissible *per se*. There is nothing more to be said on that question. But the appellant's complaint, as presented in his written case, is not that the evidence of the dock identification as such was inadmissible. His complaint is that the sheriff's directions to the jury were inadequate, as he did not tell the jury that, standing John Tracey's failure to identify the appellant at the identification parade, they had to consider whether they accepted his dock identification as reliable. In other words, his complaint is directed to the way this issue was dealt with by the sheriff when he was delivering his charge to the jury, not to the act of the Lord Advocate in leading and relying upon this evidence. The question as to the adequacy or otherwise of the sheriff's charge is a matter that lies exclusively within the jurisdiction of the High Court of Justiciary. It does not raise a devolution issue which is open to consideration by this court. The application for special leave to appeal on issues 6 and 7 is refused.

15. This leaves for more detailed consideration issues 4, 5 and 8.

Salduz: issue 4

16. As already mentioned, the question whether reliance on admissions made by an accused without access to legal advice when detained under section 14 of the 1995 Act gives rise to a breach of his article 6 Convention right to a fair trial was considered by a bench of seven judges in the High Court of Justiciary in *HM Advocate v McLean* 2010 SLT 73. Its decision that the fact that legal representation was not available at the time of the interview did not of itself constitute a violation of the appellant's rights under article 6(3)(c) read in conjunction with article 6(1) was based on the view that in *Salduz v Turkey* (2008) 49 EHRR 421 the Grand Chamber recognised a certain flexibility in the requirement that access to a lawyer should be provided (see the last sentence of para 24), and on the proposition that the guarantees otherwise available under the Scottish system are sufficient to secure a fair trial for a person who, while detained, is interviewed by police officers without access to a lawyer (see the first sentence of para 26). In this court Mr Shead for the appellant submitted that in both respects the decision in *McLean* was unsound and that, together with the decisions in *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203, it should be disapproved.

17. This argument can, perhaps, most helpfully be approached in three stages: first, by examining the decision of the Grand Chamber in *Salduz*; second, by considering whether this court should follow *Salduz*, having regard to subsequent decisions in Strasbourg; and third, by considering whether the guarantees otherwise available under the Scottish system provide a sound basis for holding that, whatever the Grand Chamber may have said in *Salduz*, for the Crown to rely on admissions made by an accused person while being interviewed in detention without access to a solicitor does not constitute a violation of his rights under article 6(3)(c) read with article 6(1).

18. Article 6(1) provides:

> "(1) In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law …"

Article 6(3) provides:

> "(3) Everyone charged with a criminal offence has the following minimum rights: …

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

19. The effect of these provisions, taken in conjunction, was the subject of the decision in *Salduz*. But first it is necessary to say something about the procedure that has been laid down for Scots law by the statute.

The statutory procedure

20. The practice of removing persons to and detaining them at police stations for the purpose of questioning them in relation to allegations of criminal conduct is regulated by sections 14 and 15 of the 1995 Act, into which the provisions of the 1980 Act were consolidated. Section 14(1) provides that, where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, he may for the purpose of facilitating the carrying out of investigations into the offence and as to whether criminal proceedings should be instigated against the person, detain him and take him as quickly as is reasonably practicable to a police station or other premises. Section 14(2) provides that detention under subsection (1) must be terminated not more than six hours after it begins or, if earlier, when the person is arrested or is detained in pursuance of any other enactment or where there are no longer grounds for his detention. Among the subsections that then follow are the following:

"(7) Where a person is detained under subsection (1) above, a constable may –

(a) without prejudice to any relevant rule of law as regards the admissibility in evidence of any answer given, put questions to him in relation to the suspected offence;

(b) exercise the same powers of search as are available following an arrest…

(9) A person detained under subsection (1) above shall be under no obligation to answer any question other than to give the information mentioned in subsection (10) below, and a constable shall so inform him both on so detaining him and on arrival at the police station or other premises."

The information mentioned in section 14(10) comprises the person's name, his address, his date and place of birth and his nationality.

21. Section 15(1) provides, so far as relevant, as follows:

> "(1) Without prejudice to section 17 of this Act [right of accused to have access to a solicitor immediately upon arrest], a person who
>
> …
>
> (a) has been arrested and is in custody in a police station or other premises, shall be entitled to have intimation of his custody and of the place where he is being held sent to a person reasonably named by him;
>
> (b) is being detained under section 14 of this Act and has been taken to a police station or other premises or place, shall be entitled to have intimation of his detention and of the police station or other premises or place sent to a solicitor and to one other person reasonably named by him,
>
> without delay or, where some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is so necessary.
>
> (2) A person shall be informed of his entitlement under subsection (1) above –
>
> (a) on arrival at the police station or other premises; or
>
> (b) where he is not arrested, or as the case may be detained, until after such arrival, on such arrest or detention."

Subsection (3) provides that where the person requests such information to be sent a record must be made of the time at which such request was made and complied with. Special arrangements are made under subsection (4) for intimation to a parent where the person detained appears to be under the age of 16 years.

22. The procedure that these provisions regulate was based on the recommendations of the Thomson Committee: *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218) (October 1975). Among the problems with which it was confronted were the absence of any clear statement of the law of arrest, the rule of law that had been laid down in *Chalmers v HM Advocate* 1954 JC 66 that it was not competent for the police to detain a person on suspicion without formally charging him and uncertainties about the extent to which statements made by a suspect in answer to police questioning were admissible: see *Hartley v HM Advocate* 1979 SLT 26. Lord Cameron described this as an extremely difficult and delicate topic on which the police lacked adequate guidance: *Scottish practice in relation to admissions and confessions by persons suspected or accused of crime*, 1975 SLT (News) 265, 266. In para 2.01 the Committee noted that in these and certain other areas of law there was a conflict between the public interest in the detection and suppression of crime on the one hand and the interest of the individual in freedom from interference by the police on the other. In para 2.03, recognising that any solution to the problems under consideration must necessarily be a compromise between these two interests, it said that such a solution:

> "… must safeguard the individual's right to go about his lawful business free from unreasonable police interference, and his right to have his personality and human dignity respected when he is in the hands of the police, without creating a situation in which criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights. It must recognise the realities of the situation, and take account of those police practices which are accepted as fair by the public including criminals although they may be technically illegal or at least of doubtful legality."

In paras 2.04 it said that the protection afforded to accused persons must not be so strong as to restrict the collection and presentation to the court of such evidence against an accused person as was, in accordance with the then current ideas of fairness and propriety, considered admissible.

23. In Chapter 7 the Committee dealt with the law of interrogation by police officers and the admissibility of statements made to them by the accused. Having noted the lack of clarity in the law as to the questioning of suspects, it recommended in para 7.13 that it should be competent for the Crown to lead evidence of statements made by a suspect before arrest in answer to police questioning. As regards the presence of a solicitor, it said in para 7.16:

> "Although a person who has been charged with an offence is entitled to an interview with a solicitor, we *recommend* that 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. It is for this reason that we recommend in chapter 5.08 that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor."

There was a clear signal here that in the Committee's view the public interest in the detection and suppression of crime outweighed any disadvantage to the detainee in being subjected to police questioning in the absence of his solicitor. It did not rule out the possibility of his being given legal advice before he was questioned. But this was to be at the discretion of the police. The rights of the detainee were to take second place to the public interest in allowing the police to question him without being deflected from their task by the presence of a solicitor. The statutory procedure was framed on this basis. There is a right to have intimation of his detention sent to a solicitor. But there is no right of access to legal advice before he is interviewed.

24. In *Paton v Ritchie* 2000 JC 271, 276 Lord Justice Clerk Cullen, delivering the opinion of the appeal court, said that neither the common law nor the Convention requires that in all cases the person who is detained should be afforded the opportunity to have his solicitor present, and that the question whether a fair trial can be achieved depends not simply on what happened during the preliminary investigation but on the whole proceedings. In *Dickson v HM Advocate* 2001 JC 203, which was heard by a court of five judges, the appellant was detained under sections 24 and 25 of the Criminal Law (Consolidation) (Scotland) Act 1995, which conferred on customs officers the same powers as those given to the police by sections 2 and 3 of the Criminal Justice (Scotland) Act 1980. She made repeated requests during her interview to have a solicitor present, but this was refused. It was submitted that the right to have a solicitor present was implicit in the right to a fair trial under article 6(1) of the Convention where such a request was made. Reference was made to *Murray v United Kingdom* (1996) 22 EHRR 29 and *Averill v United Kingdom* (2000) 31 EHRR 839. The court held, affirming *Paton v Ritchie*, that the question whether a fair trial can be achieved depends on the whole proceedings: p 218, per Lord Cameron of Lochbroom. At p 225 Lord Macfadyen said that the cases of *Murray* and *Averill* were clearly distinguishable, as the appellant had been cautioned, clearly understood the caution and declined, for the most part, to answer the questions that were put to her. He rejected the submission that the evidence of the interview was inadmissible simply because it was conducted in the face of her requests for a solicitor to be present.

25. In an affidavit that was prepared for the appeal to this court D Sgt Paul Carruthers said that in his experience requests for a solicitor to be contacted are made by detained persons fairly frequently. The response will depend on the circumstances of the case, in particular the time constraints imposed by section 14 which limits the period of detention to six hours. If it is feasible within the time limit for a solicitor to attend and give advice then, in the vast majority of cases, the solicitor is allowed to confer with his client before the interview commences. He would also be allowed to sit in during the interview, but he would not be allowed to take an active role. For that he gave this explanation:

> "By this I mean that the solicitor would not normally interrupt the interview, unless he had a concern over its fairness. Any advice he had to give would be given prior to the interview commencing. It is the suspect who is there to be interviewed, not the solicitor."

26. The situation in this appeal however, as it was in *HM Advocate v McLean* 2010 SLT 73, is that no solicitor was present at any stage either before or during the interview. In *McLean*, having examined the decision of the Grand Chamber in *Salduz*, the appeal court took the view that it permitted "a certain flexibility in the application of the requirement": para 24, last sentence. It saw no reason to depart from the approach that had been laid down in *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203. In para 31 the Lord Justice General (Hamilton), delivering the opinion of the court, said:

> "Even if, contrary to our view, the decision of the Grand Chamber in *Salduz* amounts to the expounding of a principle that article 6 requires that access to a lawyer should be provided as from the first interrogation of a suspect by the police, we are satisfied that that principle cannot and should not be applied without qualification in this jurisdiction. In particular, if other safeguards to secure a fair trial of the kind which we have described are in place, there is, notwithstanding that a lawyer is not so provided, no violation, in our view, of article 6. The decisions and reasoning in *Paton v Ritchie* and *Dickson v HM Advocate* are approved."

27. The other safeguards to secure a fair trial to which the Lord Justice General referred in para 31 are described in para 27 of his opinion in *McLean*. Detention is a form of limited or temporary apprehension on suspicion. The safeguards against its abuse include the detainee's right to be cautioned on his detention and on arrival at the police station; the right, if arrested, to have a solicitor informed of what has happened and to a subsequent interview with him before his appearance in court; the fact that he may not, after caution and charge, be further questioned by the police; the fact that in all serious cases the interview is tape recorded and in

some cases recorded on video; the fact that police are not entitled to coerce the detainee or otherwise to treat him unfairly, and that if they do any incriminating answers will be rendered inadmissible; the fact that the accused has an absolute right to silence, and that the jury is expressly directed that it may not draw any inference adverse to the accused from the fact that he declined to answer police questions; the fact that an accused cannot be convicted on the basis of his own admission alone, as Scots law requires that there be corroboration by independent evidence; and the fact that a person may not be detained for more than six hours from the moment of his detention.

28. In para 28 of his opinion in *McLean* the Lord Justice General referred to my observations in *Brown v Stott* 2001 SC (PC) 43 at 73, where I said that the statutory rules to be found in sections 14 and 15 of the 1995 Act had been framed in such a way as to provide appropriate checks and balances in the interests of fairness to the accused. He referred also to a comment to the same effect by Lord Rodger of Earlsferry in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763, para 87, where he said, with reference to the different rights of detainees in Northern Ireland and England and Wales on the one hand and in Scotland on the other:

> "This difference may well be explicable by reference to the much more restricted powers that are given to the police in Scotland to detain people for questioning…. As it is entitled to do, Parliament has thus struck the balance differently and established two distinct systems of powers and rights within the same overall constitutional framework of the United Kingdom."

In para 88 Lord Rodger went on to say that, since detainees have no right to consult a solicitor in Scotland, it followed that at trial the Crown regularly leads evidence of incriminating statements made by the accused while he was detained and before he consulted a solicitor. The Lord Justice General said that by his remarks in that paragraph Lord Rodger implicitly approved of the decisions of the High Court of Justiciary in *Paton v Ritchie* and *Dickson v HM Advocate*.

29. There is no doubt that the appeal court's decision in *McLean* was entirely in line with, and fully supported by, previous authority. The question, however, is whether it can survive scrutiny in the light of what the Grand Chamber said in *Salduz v Turkey* (2008) 49 EHRR 421.

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 which appear to be in line with the view that was taken in *Paton v Ritchie* and *Dickson v HM Advocate* of the effect of the Convention right. 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. As Peter W Ferguson QC has observed, it marks an apparent change in approach: *The right of access to a lawyer*, 2009 SLT (News) 107, 108. 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.

36. In a concurring opinion the President of the Grand Chamber, Judge Bratza, was at pains to emphasise the importance that was to be attached to the need for a lawyer to be present during the course of police interrogation. Like Judge Zagrebelsky, who was joined by two other judges, he thought that the Grand Chamber had not gone far enough. Referring to the general principle stated in paragraph 55 of the Court's judgment, he said in para O-I2:

> "This principle is consistent with the Court's earlier case law and is clearly sufficient to enable the Court to reach a finding of a violation of article 6 on the facts of the present case. However, I share the doubts of Judge Zagrebelsky as to whether in appearing to hold that the right of access to a lawyer only arises at the moment of first interrogation, the statement of principle goes far enough. Like Judge Zagrebelsky, I consider that the Court should have used the opportunity to state in clear terms that the fairness of criminal proceedings under article 6 requires that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. It would be regrettable if the impression were to be left by the judgment that no issue could arise under article 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that article 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 article 6 of the Convention whether or not such prejudice stems from the interrogation of the suspect."

37. I have the greatest respect for Judge Bratza, who has made an outstanding contribution during his time as the United Kingdom's judge on the Strasbourg court. But I cannot help thinking that there is an air of unreality about his insistence that a detainee should have access to legal advice from the moment that he is taken into police custody, otherwise there will be a violation of article 6. Peter W Ferguson QC has described it, not entirely unreasonably, as a staggering proposition because of its absolutist nature: 2009 SLT (News) 107, 109. Under the Scottish system, a person is taken into police custody as soon as he is detained under section 14(1) of the 1995 Act. This could happen anywhere, and at any time of the day or night. Inevitably there will be an interval of time between the taking of this step and the arrival of a solicitor in response to intimation that the person has been detained. The best that is likely to be achievable is the presence of a solicitor within a short time of the detainee's arrival at the police station. Despite the present rigorous time limit of six hours that is imposed by section 14(2), the police will have to defer any questioning of the detainee until an enrolled solicitor is actually present in the police station. To go further and require the solicitor to be present from the very moment when the person is detained would in most cases make use of the power of detention under section 14 practically impossible.

38. It may be that Judge Bratza had in mind the arrival at the place where the person was to be held as marking the point at which his being taken into police custody began. Even then, practical considerations such as other demands on solicitors' time and the time of day or night of the arrival would be likely to make

it difficult to adhere to the rule that he was advocating in all cases. The public interest in the detection and suppression of crime would not be well served if the police had in all cases to delay resort to the detention of a suspect until the person concerned had contacted a solicitor and to ensure that he had his solicitor with him from the moment when he was detained. A more generous interpretation, as Lord Rodger suggests, is that Judge Bratza was assuming that legal assistance was actually available when the suspect was detained in which case it could not be denied to him, and that he was not intending to assert that there was a positive duty to ensure its availability whatever the circumstances. That all having been said, there is no doubt that the effect of Judge Bratza's remarks is to underline the importance of the rule that was expressed in para 55 of the Court's judgment.

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. Were that not what the court intended, it would be departing from its previous case law, contrary to Judge Bratza's statement that the principle being enunciated was entirely consistent with it.

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.

42. The appeal court's view that if that interpretation were not what the court intended it would be departing from its previous case law might seem, at first sight, to have more to commend it. In *Windsor v United Kingdom*, application no 13081/87, 14 December 1988, the Commission observed that the applicant had not established that the initial period of six hours of his detention was of crucial relevance to the preparation of his defence or to the fairness of his trial or that he was prejudiced in any material way by the refusal of access to his solicitor during this period. The court has indicated in cases such as *Imbrioscia v Switzerland* (1993) 17 EHRR 441 and *Brennan v United Kingdom* (2001) 34 EHRR 18 that the absence of a lawyer during the preliminary investigation is not necessarily incompatible with the accused's right to a fair trial. In *Imbrioscia*, para 38, the court said that the manner in which article 6(3)(c) was to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In *Brennan* the fact that a lawyer was not present during police questioning was not treated as creating irretrievable prejudice to the right to a fair trial. In *Murray v United Kingdom* (1996) 22 EHRR 29, para 63, it said that, while 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, that right might be subject to restrictions for good cause and that the question in each case is whether, in the light of the entirety of the proceedings, it has deprived the accused of a fair hearing.

43. There are, however, passages in the court's judgment in *Murray v United Kingdom* which come very close to saying what the Grand Chamber said in *Salduz*, and it cannot be overlooked that there is no indication anywhere in its judgment that it was intended to be a departure from previous case law. As Lord Rodger points out in para 67, recognition of the implied right of the accused not to incriminate himself can be traced back to the decision of the Grand Chamber in *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68. In *Murray*, para 66, the court said the scheme contained in the Criminal Evidence (Northern Ireland) Order 1988 was such that it was of paramount importance for the rights of the defence that an accused had access to a lawyer at the initial stages of police interrogation as at that stage the accused was confronted with a fundamental dilemma relating to his defence. Similar observations are to be found in paras 52 and 54 of *Salduz*. Later in the same paragraph in *Murray* the court said that to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence might be irretrievably prejudiced, was – whatever the justification for such denial – incompatible with the rights of the accused under article 6. The last sentence of para 55 in *Salduz* is a reiteration of the same point.

44. It may well be, as the appeal court suggested in *HM Advocate v McLean*, para 25, that the Grand Chamber was particularly influenced by what was said in *Jalloh v Germany* (2006) 44 EHRR 32, para 101, to which reference is made in a footnote to para 54 of its judgment in *Salduz*. In *Jalloh* where the applicant had been forced to regurgitate a bag of cocaine, there was a complaint that article 3 had been violated as well as article 6. In para 101 the court said that in examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, it will have regard, in particular, to the following elements: the nature and degree of compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained will be put. This passage was referred to by the Grand Chamber in support of its observation in para 54 of *Salduz* that 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. It plainly had in mind that there was a consensus across Europe that the presence of a lawyer was a safeguard against ill-treatment, as can be seen from its reference in para 54 to the recommendations of the European Committee for the Prevention of Torture. But it is just as plain that the risk of irretrievable prejudice to the accused because of a lack of respect of his right to remain silent was at the forefront of its mind too: see para 110 of *Jalloh*, where the court observed that the privilege against self-incrimination is commonly understood in the contracting states and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. Its reasoning cannot be confined to cases where a violation of article 3 is in issue.

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. There are far too many for them all to be mentioned in this judgment. The following selection is sufficient to show that the court has consistently applied the ruling in *Salduz*, holding that 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: *Şükran Yildiz v Turkey*, application no 4661/02, 3 February 2009; *Amutgan v Turkey*, application no 5138/04, 3 February 2009, paras 17-18; *Plonka v Poland*, application no 20310/02, 31 March 2009, para 35; *Pishchalnikov v Russia*, application no 7025/04, 24 September 2009, para 70; *Dayanan v Turkey*, application no 7377/03, 13 October 2009, paras 32-33; *Fatma Tunç v Turkey*, application no 18532/05, 13 October 2009, paras 14-15. It was applied in *Amutgan v Turkey* although the applicant had confirmed to the trial judge the accuracy of his confession and admitted that he had carried out a number of armed activities: para 7; and in *Dayanan v Turkey* notwithstanding the fact that the applicant made use of his right to remain silent whilst in custody: para 29. It was not applied in *Zaichenko v Russia*, application no 39660/02, but in that case the applicant was not formally arrested or interrogated in police custody but stopped for a road check: para 47. Nor was it applied in *Yoldaş v Turkey*, application no 27503/04, 23 February 2010, but in that case the applicant had the right to legal assistance during his custody but he refused it and his decision to waive assistance was considered to have been freely and voluntarily made: para 52.

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. There are two other recent judgments which should be noted. In *Gäfgen v Germany*, application no 22978/05, 1 June 2010, the applicant was subjected while being interrogated to threats of deliberate and imminent ill-treatment within the scope of article 3 and he complained that his right to a fair trial had been violated. The court said that it was not its function to lay down any rules on the admissibility of evidence as such, which was primarily a matter for regulation under national law: para 162. Having regard to the particular circumstances of the case it held that the failure to exclude evidence secured as a result of the interrogation did not have a bearing on his conviction and sentence, and that there had been no violation of articles 6(1) and 6(3): paras 187-188. In para 5 of their partly dissenting opinion Judge Rozakis and five others indicated that in their opinion this approach was very difficult to reconcile with the absolutist position that the Grand Chamber adopted in *Salduz* that events that occurred subsequently could not cure the defects which had occurred during the time spent in police custody. This was a pragmatic decision which proceeded on the basis that the evidence obtained in breach of article 3 was, on the facts, irrelevant to the applicant's conviction. I do not think that it can be regarded as raising any doubt as to the decision in *Salduz*, which was mentioned with approval in para 177. But it serves as a warning that the *Salduz* principle cannot be confined to admissions made during police questioning. It extends to incriminating evidence obtained from elsewhere as a result of lines of inquiry that the detainee's answers

have given rise to. In *Brusco v France,* application no 1466/07, 14 October 2010, the reasoning in *Salduz* was applied by the court in finding that there had been a violation of article 6(1) in circumstances where the applicant had been subjected to a police interrogation without access to a lawyer. The conclusion that I would draw as to the effect of *Salduz* is that the contracting states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning.

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.

51. The fact is that the system of detention under sections 14 and 15 of the 1995 Act was devised, on the advice of the Thomson Committee, on a view of where the balance is to be struck between the public interest and the rights of the accused which is irreconcilable with the Convention rights. It was also out of keeping with current thinking in the rest of the United Kingdom. There is no sign in its report of any attempt at comparative jurisprudence on this issue. The Royal Commission on Criminal Procedure (the Philips Commission), on the other hand, concluded that all suspects other than those suspected of grave offences should have an unrestricted right to consult and communicate privately with a solicitor at any stage of the investigation, and even for the restricted group the circumstances in which that right might be withheld should be limited and the subject of record and review: Report of the Commission, Cmnd 8092 (January 1981), para 4.93. Subsequent research showed that the presence of a solicitor or other legal adviser had relatively little effect on the behaviour of detainees when they were being questioned by the police: David Dixon, *Common sense, legal advice and the right of silence* (1991) Public Law 233, 252. Of course, Parliament was entitled to establish two different systems within the same overall constitutional framework of the United Kingdom, as Lord Rodger observed in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, para 87. But, by preferring to go their own way, those who were promoting the legislation that gave effect to the Thomson Committee's recommendations were shutting their eyes to the way thinking elsewhere was developing. Now, sadly, 30 years on the Scottish criminal justice system must reap the consequences.

Section 6(2) of the Human Rights Act 1998: issue 5

52. The Lord Advocate submitted that her reliance on the evidence of the police interview was protected by section 57(3) of the Scotland Act 1998, even if that act was incompatible with the appellant's article 6 Convention rights. This was because she was giving effect to provisions in sections 14 and 15 of the 1995 Act which could not be read or given effect in a way that was compatible with them. I can dispose of this issue quite shortly.

53. Section 57(2) of the Scotland Act provides that a member of the 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 the Convention rights. Section 57(3) provides:

> "(3) Subsection (2) does not apply to an act of the Lord Advocate –
>
> (a) in prosecuting any offence, or
>
> (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland,
>
> which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section."

Subsections (1) and (2) of section 6 of the Human Rights Act are in these terms:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if –
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is

> compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

54. The Lord Advocate did not seek to rely on the exception provided by subsection (2)(a) of section 6. She could not, of course, do so as there is nothing in sections 14 or 15 of the 1995 Act which prohibits access by the detainee to legal advice prior to or during a police interview or directs that the answers given must be led in evidence. Everything therefore depends on whether she can bring herself within the exception provided by subsection (2)(b). It seems to me however that, as Lord Rodger pointed out during the argument, she faces an insuperable obstacle, having regard to what section 14(7) of the 1995 provides. So far as relevant, it states:

> "(7) Where a person is detained under subsection (1) above, a constable may –
>
> (a) *without prejudice to any relevant rule of law as regards the admissibility in evidence of any answer given*, put questions to him in relation to the suspected offence…." [emphasis added]

The question is whether the phrase which I have identified can or cannot be read or given effect in a way which is compatible with the detainee's article 6 Convention rights.

55. There can, I think, be only one answer to this question. It is plain that the phrase which I have emphasised can be read and given effect so as to preclude the admission in evidence of any incriminating answers obtained by the police from a detainee who is subjected to questioning without access to legal advice. The consequence of *Salduz* is that, as a general rule, such evidence is inadmissible. Allowance must be made, as the Grand Chamber acknowledged in para 55, for the possibility that in the light of the particular circumstances of the case there are compelling reasons to restrict the right of access. But nothing of that kind has been suggested in this case. As section 14(7) can be read and given effect in a way that would preclude leading and relying on the evidence of the police interview, the act of the Lord Advocate in leading and relying on that evidence is not exempted from challenge by section 57(3) of the Scotland Act. The conclusion must be that, in terms of section 57(2), she had no power to lead and rely on that evidence.

Prospective overruling: issue 8

56. This is, perhaps, the most difficult and anxious of all the issues that the court faces in this case. As is well known, the decision in *Salduz* caused a considerable disruption to criminal business in Scotland. It led to preliminary objections being taken in many cases, and associated devolution issue minutes being lodged, on the basis that the Crown's proposed reliance on incriminating statements made by suspects while detained would render the trial unfair. This has disrupted and delayed the progress of criminal trials throughout Scotland. Numerous appeals by persons wishing to take that point are awaiting hearing in the High Court of Justiciary. That disruption, which is likely to impose a severe burden on an already overburdened appeal court, is continuing and is likely to continue. If it were open to the court to provide a solution to this problem, there would be compelling reasons why it should do so.

57. The court has power under section 102(2) of the Scotland Act 1998 to make an order removing or limiting any retrospective effect of a decision that an Act of the Scottish Parliament is not within the legislative competence of the Scottish Parliament. But we are not dealing in this case with the effect of legislation which is incompatible with a Convention right. The issue is directed to the powers of the Lord Advocate as one of the Scottish Ministers. Section 102 does not give the court power to remove or limit the effect of a decision that an act of the Lord Advocate was one that, in terms of section 57(2) she had no power to make. The absence of such a power in the statute, at the very least, is a considerable obstacle, on the *inclusio unius est exclusio alterius* principle. The legislation could have included such a power, but it did not do so. In its absence, the statutory declaration that the Lord Advocate had no power to do what she did must be given effect. Her act, whenever it occurred, must simply be held to have been invalid. It is hard to see how, under this statutory regime, there can be any room for limiting the effect of that decision by holding that it is not to have retrospective effect.

58. There are now a considerable number of dicta to the effect that the court has a general inherent power to limit the retrospective effect of its decisions: see, for example, *In re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680; *Ahmed v HM Treasury (no 2)* [2010] UKSC 5, [2010] 2 WLR 378, para 17. The principle of legal certainty, which the Strasbourg court in *Marckx v Belgium* (1979) 2 EHRR 330, para 58, said was inherent in the Convention as in Community law, suggests that there would be no objection to this on Convention grounds. In that case the court dispensed the Belgian state from re-opening legal acts or situations that antedated the delivery of its judgment. It followed the same approach in *Walden v Liechtenstein*, application no 33916/96, 16 March 2000. The court said that it had also been accepted that, in view of the principle of legal certainty, a constitutional court may set a time-limit for the legislator to enact new legislation with the effect

that an unconstitutional provision remains applicable for a transitional period. Section 102 of the Scotland Act gives effect to that principle.

59. Had it been open to us to do so, I would have wished to exercise the inherent power in this case. But I have come to the conclusion that the statutory regime that applies to this case precludes our doing so. Furthermore, it would not be right to deny the appellant, and other appellants like him who have taken the point timeously, an appropriate remedy for breach of the Convention right. I would have felt less inhibited if the Grand Chamber had made it clear in *Salduz* that it was departing from its previous case law and that it was laying down a new principle. But, as I have already observed, there is no indication anywhere in its judgment that it was its intention to do so. Far from making a ruling that was not applicable to acts or situations that pre-dated its judgment, it ruled that the applicant's Convention rights were violated in 2001 when the relevant events took place.

60. That is not to say that the principle of legal certainty has no application. On the contrary, I think that there are strong grounds for ruling today, on the basis of this principle and bearing in mind the fact that the *Salduz* objection could have been raised at any time after the right of challenge on Convention grounds became available, that the decision in this case does not permit the re-opening of closed cases. Cases which have not yet gone to trial, cases where the trial is still in progress and appeals that have been brought timeously (see section 100(3B) of the Scotland Act 1998, as amended by the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 to which Lord Rodger refers in paras 105 and 106) but have not yet been concluded will have to be dealt with on the basis that a person who is detained must have had access to an enrolled solicitor before being questioned by the police, unless in the particular circumstances of the case there were compelling reasons for restricting this right. As for the rest, I would apply Murray CJ's dictum that the retrospective effect of a judicial decision is excluded from cases that have been finally determined: *A v The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, para 36.

61. That was a case where the statutory provision under which the applicant was convicted was later declared by the Irish Supreme Court to be unconstitutional. In paras 125-126 the Chief Justice set out the general principle in these terms:

> "125 In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or

> otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.
>
> 126 I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand."

In para 127 he observed that the applicant, like all persons in his position, could have sought to prohibit prosecution on several grounds including that the section was inconsistent with the Constitution and that, not having done so, they were tried and either convicted or acquitted under due process of law. Once finality is reached in these circumstances, he said, the general principle should apply.

62. The same approach was recently adopted by the Court of Appeal in England in a case where the statute under which the appellants were convicted had not been notified as required by EU law: *R v Budimir* [2010] EWCA Crim 1486. Reference was made in that case to *Marckx v Belgium* and *Walden v Liechtenstein*, as well as to Murray CJ's observations in *A v Governor of Arbour Hill Prison*. In the light of these authorities I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission.

Conclusion

63. I agree with Lord Rodger's judgment. For the reasons he gives, and these reasons of my own, I would hold that the decisions of the High Court of Justiciary in *Paton v Ritchie* 2000 JC 271, *Dickson v HM Advocate* 2001 JC 203 and *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. I would allow the

appeal on the ground that leading and relying on the evidence of the appellant's interview by the police was a violation of his rights under article 6(3)(c) read in conjunction with article 6(1) of the Convention.

64. Mr Shead invited the court simply to allow the appeal and quash the conviction. But that would only be appropriate if it was clear that there was insufficient evidence for a conviction without the evidence of the police interview or that, taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict had they not had that evidence before them: *McInnes v HM Advocate* [2010] UKSC 7, 2010 SLT 266. This court is not in a position to make that assessment. It is a matter that must be for determination by the High Court of Justiciary. So I would remit the case to that court for further procedure.

LORD RODGER

65. I have had the advantage of considering Lord Hope's judgment in draft. I agree with it and, for the reasons which he gives, I too would allow the appeal. In doing so, the Court will be overruling the unanimous decision of the seven-member appeal court in *HM Advocate v McLean* 2010 SLT 73, the written judgment in which was issued on 15 December 2009. Because of this, and because of the obvious importance of the appeal, I add some observations of my own. In doing so, I gratefully adopt Lord Hope's account of the facts and issues.

66. Understandably, both the appeal court and the Lord Advocate in her submissions to this Court were at pains to describe the many safeguards that the criminal law of Scotland provides for accused persons. They pointed out that sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") were to be seen in that overall context. I agree with that general approach – which I indeed adopted when briefly referring to the Scottish position in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, 1790-1791, para 87. But, in a very real sense, for present purposes these safeguards are beside the point.

67. The European Court's reasoning in *Salduz v Turkey* (2008) 49 EHRR 421 starts from the implied right of an accused person under article 6(1) and (3)(c) of the European Convention not to incriminate himself. The recognition of this right under the Convention can be traced back to the decision of the Grand Chamber in *Saunders v United Kingdom* (1996) 23 EHRR 313, 337, para 68:

> "The Court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6…. The right not to incriminate oneself, in particular, 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. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention" (internal citations omitted).

This reasoning is reflected in *Salduz*, 49 EHRR 421, 436, para 54. To avoid the risk that the police may use coercion or oppression to obtain evidence from a suspect, the Grand Chamber goes on to derive a further implied right, viz the right to early access to a lawyer. Again, the court is building on its existing case law. It cites, inter alia, *Murray v United Kingdom* (1996) 22 EHRR 29, 66, para 63:

> "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."

68. When referring to *Murray* and two other cases, the English text of para 52 of the judgment in *Salduz*, 49 EHRR 421, 436, says that the right to legal assistance at the initial stages of police interrogation "has *so far* been considered capable of being subject to restrictions for good cause" (emphasis added) and that the question in each case "has therefore been" whether the restriction was justified. The language might seem to suggest that in *Salduz* the Grand Chamber was innovating and laying down a rule under which restrictions for good cause would now be treated differently. The language of the French text of para 52 is different and gives no support for any such inference, however. Referring to the right to legal assistance at the initial stage of police questioning, the court says:

> "Ce droit, que la Convention n'énonce pas expressément, peut toutefois être soumis à des restrictions pour des raisons valables. Il s'agit donc, dans chaque cas, de savoir si la restriction litigieuse est justifiée et, dans l'affirmative, si, considérée à la lumière de la procédure dans son ensemble, elle a ou non privé l'accusé d'un procès équitable, car même une restriction justifiée peut avoir pareil effet dans certaines circonstances."

69. Moreover, the court finds, 49 EHRR 421, 437, para 55, that, for the right to a fair trial to remain sufficiently "practical and effective", article 6(1) requires that, as a rule ("en règle générale"), 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 then, any restriction must not unduly prejudice the rights of the accused under article 6. The law remains the same in this respect.

70. The narrow base – the need to protect the right against self-incrimination – from which the Grand Chamber in *Salduz* derives this right of access to a lawyer explains why, in its view, access is to be provided from the first interrogation of the suspect, rather than from the time when he is taken into police custody. As his concurring opinion shows, 49 EHRR 421, 441, para OI1, like Judge Zagrebelsky, the President, Judge Bratza, would have preferred to go further and to affirm that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. A right to legal advice from that earlier stage could not, of course, be derived from the implied right against self-incrimination, but would have to be derived from the need for legal assistance for other purposes – for example, to support the accused in distress, to check his conditions of detention etc. See p 446, para O-III5. It is unnecessary to express any view on the merits of that argument since the point does not arise in this case. But, as I see it, if a suspect had the right to access to legal assistance from the time of his detention, as envisaged by Judge Bratza, it would mean that he could not be refused such assistance if it were available. But the State would not be under a positive obligation to ensure the availability of legal assistance in all circumstances. So there would be no violation of the right simply because, due, say, to the time of night or the remoteness of the police station, no legal assistance was actually available when the suspect was detained. Cf *Brennan v United Kingdom* (2001) 34 EHRR 507, 521, para 47. I would read Judge Bratza's opinion in that sense.

71. The fact that the European Court derives the suspect's right to legal assistance at the initial stages of police questioning from his right not to incriminate himself has two significant consequences for present purposes.

72. First, in *HM Advocate v McLean* 2010 SLT 73, 84, para 29, the appeal court noted that the European Commission of Human Rights had made no adverse comment on the Scottish system of police questioning in *Windsor v United Kingdom* (Application No 13081/87), 14 December 1988 (unreported), and *Robson v United Kingdom* (Application No 25648/94), 15 May 1996 (unreported). These decisions cannot be regarded as authoritative today, however, since they antedate the Grand Chamber decision in *Saunders* on the right not to incriminate oneself.

73. Secondly, the derivation of the right to legal advice before questioning explains why many of the established safeguards for accused persons in Scots law are really beside the point in the present context. Since this implied right is based on the need to protect the right of the person concerned not to incriminate himself, the only safeguards in Scots domestic law which could be relevant would be those which were designed to protect that right. Those safeguards have evolved over time. So, while the precise issue in the present case is relatively new, it is important to notice that the issue of whether legal advice should be available to suspects being questioned about an offence is by no means new: on the contrary, it has a long pedigree in Scottish criminal law. In sketching the twists and turns, I acknowledge the assistance which I have derived from Sir Gerald Gordon's article, "The Admissibility of Answers to Police Questioning in Scotland", in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (1978), pp 317-343.

74. Originally, the official charged with investigating crime was usually the sheriff-substitute ("the sheriff") of the district, who would appoint a procurator fiscal to assist him. (The link between sheriffs and procurators fiscal was not broken until section 2 of the Sheriff Courts and Legal Officers (Scotland) Act 1927 transferred the right to appoint procurators fiscal to the Lord Advocate.) If presented with information about an apparently serious crime, the sheriff would grant warrant to officers of law to search for and apprehend the suspect and to bring him to court for examination. (The wording of the warrant remains essentially the same today.) It was then the duty of the sheriff to examine the suspect about the crime. It appears that, originally at least, that examination could be fairly vigorous. While practice seems to have varied from district to district, by the middle of the nineteenth century, except in the gravest cases, many sheriffs left the questioning to the procurator fiscal. Again, the practice of procurators fiscal varied, but by the 1860s the predominant view appears to have been that, if the suspect did not wish to say anything, he should not be pressed to do so. Eventually, section 77 of the Summary Jurisdiction (Scotland) Act 1908 provided that, if the accused or his agent intimated that he did not desire to emit a declaration, it was to be unnecessary to take one. By that time, the system of judicial declarations had largely fallen into desuetude, however.

75. While the judicial examination system was still active, the position was that, once the suspect had made his declaration or had declined to do so, he would be committed for further examination. The procurator fiscal would then either continue, or begin, precognoscing the witnesses to the alleged crime. When that had been done, the suspect could be further examined in the light of the additional evidence. It was then the sheriff's duty to decide, in the light of all the available material, whether the suspect should be released or committed until liberated in course of law. If he was committed, the papers would be sent to Crown Office for Crown counsel to decide whether proceedings should be taken. If Crown counsel decided against prosecution, the proceedings would come to an end and, if still in custody, the suspect would be released. Otherwise, he would be indicted for trial or, if Crown counsel thought that the offence was relatively minor, he would be tried summarily.

76. Under this system it was essential for the sheriff to be present during the examination of the suspect, "as it is his duty to protect him from any unfair or oppressive examination (the prisoner not being permitted to have legal advice)…": Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (first edition, 1867), p 290. In particular, since anything said by the suspect was evidence against him only if it was emitted of his own free will, it was the duty of the sheriff to inform the prisoner of this, because he "may not always know, or may sometimes be afraid to assert his privilege…": Hume, *Commentaries on the Law of Scotland respecting Crimes* (third edition by B R B Bell, 1844) vol 2, pp 80-81; Alison, *Practice of the Criminal Law of Scotland* (1833), p 131. The lack of legal advice, in a procedure which was apparently designed to obtain admissions to be used against the suspect, struck a distinguished German observer, Carl Mittermaier, when he visited Scotland in 1850: C J A Mittermaier, *Das englische, schottische und nordamerikanische Strafverfahren* (1851), pp 193-194. Plainly, the theory was that the presiding sheriff would ensure that the prisoner's rights, including his right against self-incrimination, were protected. To be effective, this system depended on the sheriff and the procurator fiscal acting conscientiously. Since the whole procedure took place in private, however, it was hard to be sure that they always actually did so. See, for instance, R C, "On the Investigation of Crime in Scotland" (1864) 8 Journal of Jurisprudence 473-484, at p 480; F Russell, "On the Procedure in Criminal Prosecutions in Scotland Preliminary to Trial" (1870) 14 Journal of Jurisprudence 259-268.

77. The system was examined by the Royal Commission on the Courts of Law in Scotland chaired by Lord Colonsay. A number of witnesses thought that suspects should have a right to legal advice before being examined. For instance, Mr Macdonald, advocate, the author of the recently published book on criminal law, had never been able to reconcile himself to the practice of taking a declaration from a prisoner before he was allowed to have any legal advice: the Commission's Third Report (C 36, 1870), p 679, Q 16,895. The majority of the Commission

recommended against the introduction of a right to legal advice before the declaration: Fifth Report (C 260, 1871), p 6. They may have been influenced by Macdonald's evidence that persons "in the better rank" who were legally advised usually then declined to answer questions at their examination: Third Report, p 680, Q 16,906. Notable among the minority who favoured introducing a right for the suspect to consult a lawyer were Lord Advocate Young and the future Lord Shand.

78. No legislation on this matter followed the Commission's report. But Mr Macdonald bided his time and eventually, as Lord Advocate, he promoted the Bill which became the Criminal Procedure (Scotland) Act 1887 ("the 1887 Act"). Section 17 provided that any person who was arrested on a criminal charge was to be entitled "immediately upon such arrest" to have intimation sent to a lawyer that his assistance was needed. The lawyer was to be told the place to which the person was to be taken for examination and the lawyer was to "be entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination, which shall be conducted according to the existing practice…". The sheriff could delay the examination for up to 48 hours from the time of arrest, in order to allow the lawyer to attend. It was soon held that, at least in serious cases, it was the duty of the sheriff, before taking the declaration, to inform the accused that he had the right to confer with a lawyer: *HM Advocate v Goodall* (1888) 2 White 1.

79. Therefore, once the 1887 Act was in force, an accused's right not to incriminate himself at his judicial examination was protected by the right to a private interview with his lawyer before the examination. At first sight, the Scottish system would have gone at least some way towards meeting the relevant requirement of article 6(1) and (3)(c) of the Convention.

80. In practice, things were rather different. In the course of the nineteenth century police forces were set up in burghs under the Burghs Police (Scotland) Act 1833 and in counties under the Police (Scotland) Act 1857. Therefore, by the time the 1887 Act was passed, the reality was that police officers, rather than the sheriff and his procurator fiscal, had come to shoulder the main burden of investigating offences, though they worked under the supervision of the local procurator fiscal. So, instead of simply applying for, and executing, warrants to take those suspected of committing crimes to be examined before the sheriff, police officers would conduct enquiries of their own. In particular, they would look for witnesses and take statements from them. In itself, that was not problematic. But, when suspicion came to focus on an individual, a significant problem did emerge. Could the police question that individual or should they take him to the sheriff so that he could be examined in court where he would enjoy the protections afforded by the right to consult a lawyer beforehand, by the presence of the lawyer at his examination and by the supervision of a judicial figure?

81. In practice, it was accepted that, once the police had arrested and charged a suspect, they could not question him further: he had a right to legal advice and any further questioning had to take place in the context of his subsequent judicial examination. But, as noted already, by 1909, the system of judicial examination was in decline. The changes made by the Summary Procedure (Scotland) Act 1908 completed that decline. See Renton and Brown, *Criminal Procedure according to the Law of Scotland* (second edition, 1928), p 33. So the position came to be simply that the police could not question someone whom they had arrested. The prevailing view was, however, that police officers could take any voluntary statement that he chose to make – even though he had not enjoyed the protections of a judicial examination.

82. Obviously, the police could not avoid the bar on questioning after arrest by choosing to postpone arresting and charging someone against whom they already had sufficient evidence ("the chargeable suspect"). But, short of that, could police officers question someone whom they already suspected of committing the offence, in the hope of obtaining enough evidence to charge him? There were two very real difficulties.

83. In practice, the police would question suspects at a police station. But it was hard to find any legal basis for the police detaining such a person whom they had not arrested. Since someone in that position had no right to legal advice (*Thompson v HM Advocate* 1968 JC 61, 65, per Lord Justice General Clyde), in practice, most people acquiesced in the questioning. See, for instance, the remarks of Lord Justice General Cooper in *Chalmers v HM Advocate* 1954 JC 66, 75. In this connexion, in their second report on *Criminal Procedure in Scotland* (Cmnd 6218, 1975), para 2.03, the Thomson Committee elegantly referred to police practices which were accepted by the public, including criminals, as fair "although they may be technically illegal or at least of doubtful legality."

84. But, assuming that the suspect stayed to be questioned, were his answers admissible in evidence against him? The views of the judges fluctuated considerably over a long period. Eventually, however, a consensus emerged that questioning of a person in that position was permissible and the answers were admissible in evidence against him, provided only that the questioning was fair. See, for instance, *Hartley v HM Advocate* 1979 SLT 26.

85. The very real difficulty for police officers – and for courts – was to determine at what point someone passed, from being a suspect who could be questioned, to being a suspect who could no longer be questioned since there was enough evidence to charge him. In *Chalmers v HM Advocate* 1954 JC 66, 81-82, Lord Justice Clerk Thomson referred to the ordinary routine investigation by the police of a crime and continued:

> "In the course of such an investigation the man ultimately accused may be interviewed. It would unduly hamper the investigation of crime if the threat of inadmissibility were to tie the hands of the police in asking questions. It would help to defeat the ends of justice if what the person so questioned said in answer to ordinary and legitimate questions were not admissible in evidence against him. I am assuming throughout that the questioning is not tainted by bullying, pressure, third degree methods and so forth. Evidence obtained by such methods can never be admissible in our courts, whatever stage the investigation has reached. But there comes a point of time in ordinary police investigation when the law intervenes to render inadmissible as evidence answers even to questions which are not tainted by such methods. After the point is reached, further interrogation is incompatible with the answers being regarded as a voluntary statement, and the law intervenes to safeguard the party questioned from possible self-incrimination. Just when that point of time is reached is in any particular case extremely difficult to define – or even for an experienced police official to realise its arrival. There does come a time, however, when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement."

In summary, at the stage of routine investigation, the right to protection against self-incrimination was not in play because the individuals were being questioned as potential witnesses rather than as suspects. But, once the police officer realised, or should have realised, that a particular individual was under serious consideration as the perpetrator of the crime, the common law intervened to safeguard him from possible self-incrimination and the only admissible evidence was his own voluntary statement. Admittedly, the intervention of the common law did not go so far as to secure him the right to consult a lawyer.

86. This was the background against which the Thomson Committee made their recommendations in 1975. One aim was to put an end to the doubts about the legal basis for holding suspects for questioning when they had not been arrested. Another was to clarify the law as to the power of the police to question suspects and as to the admissibility of any answers that the suspects gave to such questions.

87. The upshot, in relation to the legal basis for holding a suspect, was section 2 of the Criminal Justice (Scotland) Act 1980 ("the 1980 Act"), which was

consolidated as section 14 of the 1995 Act. The section gives a constable a right to detain a person for questioning where he "has reasonable grounds for suspecting" that the person has committed or is committing an offence punishable by imprisonment. In other words, anyone who is detained under the section is, by definition, already reasonably suspected of committing the offence about which he is being questioned. The authorised period of detention under the section is six hours, after which the police must arrest and charge him or else release him. In this way the legislation successfully resolved the doubts about the legal basis for detaining suspects for questioning.

88. Section 3 of the 1980 Act, now section 15 of the 1995 Act, deals with legal assistance for those detained under the legislation. It is noticeably weaker than section 17 of the 1887 Act: it does not confer any right for the suspect to consult a lawyer before being questioned or, a fortiori, to have the questioning delayed until a lawyer can be consulted. The suspect is simply entitled to have intimation of his detention, and of the place of his detention, sent to a solicitor without delay or, where some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is so necessary.

89. Section 6 of the 1980 Act tried to breathe new life into the procedure for judicial examination. The reformed system is now to be found in sections 35-39 of the 1995 Act. Notably, section 36(6) gives the accused a right to consult his solicitor before answering any of the procurator fiscal's questions. Although judicial examination forms a recognised step in solemn cases, the truth is that only rarely does the accused make use of it to give an account of his position. Having usually said all that he wished to say when questioned by the police before his arrest, the accused tends to decline to say more "on the advice of his solicitor". The re-introduction of the procedure cannot therefore be accounted a real success from the point of view of either the Crown or accused persons.

90. Since the maximum period of detention under section 14 of the 1995 Act is six hours, it is obvious that, in the absence of any power to postpone the running of the six-hour period, a right to consult a lawyer before the questioning began would, in many cases, be unworkable. So the denial of a right for a suspect to consult a lawyer before being questioned might, in theory, have been devised merely as a necessary trade-off for restricting the permissible period of detention to six hours. That is indeed how I tended to see the position in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, 1790-1791, para 87. But the investigations of counsel in the present case show beyond doubt that the thinking behind section 15 was very different.

91. The reasoning behind the section is to be found in para 7.16 of the second report of the Thomson Committee:

> "Although a person who has been charged with an offence is entitled to an interview with a solicitor, we *recommend* that 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. It is for this reason that we recommend in chapter 5.08 that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor."

Following this recommendation, section 3 of the 1980 Act (now section 15 of the 1995 Act) was designed to deny an individual, who was already reasonably suspected of committing the crime, a right to obtain legal advice when he was to be questioned. This was done because of a fear that allowing him to take legal advice beforehand would tend to frustrate the police in their efforts to obtain information from him about the crime. In short, section 15 of the 1995 Act deliberately deprives the suspect of any right to take legal advice before being questioned by the police, in the hope that, without it, he will be more likely to incriminate himself during questioning.

92. As already mentioned, in *HM Advocate v McLean* 2010 SLT 73, 83, para 27, the appeal court listed many features of Scots criminal law that provide protection to an accused person. They are indeed admirable and, in certain respects, go further than the protections offered by some other systems. But these protections cannot, and do not, make up for the lack of any right for the suspect to take legal advice before being questioned. For example, a modern recording of a police interview shows how it was conducted, what answers the suspect gave and what his attitude was. It therefore eliminates many of the doubts that used to surround police questioning but it does nothing to diminish the fact that the questioning takes place without the suspect having any right to legal advice as to whether he should say anything at all and, if so, how far he should go. It is significant that, in the 1887 Act, Parliament introduced a right to take legal advice before a suspect was judicially examined, even though the questioning was to be overseen by a sheriff and the administration of a form of caution and the doctrine of corroboration were recognised elements of Scottish criminal law at the time. By withholding the right to take legal advice, section 15 of the 1995 Act is intended to give the police – and therefore the prosecution – an enhanced possibility of obtaining incriminating admissions from the suspect which can then be deployed in evidence at his trial. The Lord Advocate did not suggest that – whether due to the existence of the various protections or for any other reason – the legislation had failed to fulfil this intention. The only possible conclusion is that section 15 creates a procedure under which, as a rule, access to a lawyer is denied at the stage when a suspect is questioned by the police – even though the aim of the questioning is to obtain admissions from him which may later be used against him at trial. The

present case, where the Crown suggested to the jury that the appellant's answers to the police were "a very significant part of the evidence", is fairly typical.

93. The procedure under sections 14 and 15 of the 1995 Act is therefore, in this respect, the very converse of what the Grand Chamber holds is required by article 6(1) and (3)(c) of the Convention: *Salduz v Turkey* (2008) 49 EHRR 421, 437, para 55. Moreover, the Grand Chamber long since declared that "the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6": *Saunders v United Kingdom* (1996) 23 EHRR 313, 337, para 68. Cf *Murray v United Kingdom* (1996) 22 EHRR 29, 60, para 45. A right of access to a lawyer, which is implied in order to protect a right at the heart of the notion of a fair procedure under article 6, must itself lie near that heart. For this reason, in my view there is not the remotest chance that the European Court would find that, because of the other protections that Scots law provides for accused persons, it is compatible with article 6(1) and (3)(c) for the Scottish system to omit this safeguard – which the Committee for the Prevention of Torture regards as "fundamental" – and for suspects to be routinely questioned without having the right to consult a lawyer first. On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down.

94. Two points are perhaps worth adding.

95. First, as the European Court recognises, 49 EHRR 421, 437, para 55, since the right to legal assistance at the stage when a suspect is to be questioned is an implied right, it is not absolute and must be subject to exceptions when, in the particular circumstances, there are compelling reasons to restrict it. It is not suggested that there would have been any such reasons in this case. But the circumstances in which section 15 of the 1995 Act envisages delaying intimation to a solicitor (the interest of the investigation or the prevention of crime or the apprehension of offenders) could perhaps constitute compelling reasons to restrict the right of access in an appropriate case. It has to be remembered, however, that even a justified restriction may deprive an accused of a fair hearing and so lead to a violation of article 6: 49 EHRR 421, 436, para 52.

96. Secondly, although the Court has deliberately refrained from entering into the circumstances of this particular case, which is still to be considered by the appeal court, it is common ground that the appellant actually declined to have intimation of his detention sent to any solicitor. It might therefore be that, had he had a right to consult a solicitor, he would have waived that right. It is, indeed, quite common for those who have been arrested to decide to make a voluntary statement to the police and not to exercise their right to obtain legal advice before doing so. See, for instance, the famous example in *Manuel v HM Advocate* 1958

JC 41, 49. Similarly, if a suspect had a right to legal advice before being questioned, but declined to exercise it, a court might have to consider whether, having regard to all the circumstances, he had effectively waived his relevant article 6 Convention right so that no violation would arise.

97. To return to the main point. Assume that, up to now, the system for questioning suspects under the 1995 Act has assisted the police in obtaining incriminating information from suspects. It must follow that the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution. Although inescapable, that consequence is one that many of those who are familiar with the way the present system operates may well find unpalatable. The change will, however, have the effect of putting the police and prosecution in Scotland in the same position in this respect as the police and prosecution in the rest of the United Kingdom – and, indeed, in other countries which are members of the Council of Europe. Lord Hope has mentioned that a number of States have taken steps to alter their law to bring it into line with the approach laid down by the European Court in *Salduz.* In particular, as he explains, since the hearing there has been a series of developments in France. These culminated in the decision of the European Court in *Brusco v France* (Application no 1466/07), 14 October 2010, paras 45 and 54, confirming the law as laid down in *Salduz*, followed by the three decisions of the Chambre Criminelle of the Cour de Cassation of 19 October 2010 applying that law, but postponing the effect of doing so. The need for legislation to deal with the new situation has been recognised in France. Equally, there will need to be changes in both legislation and police and prosecution practice to bring the Scottish system of police questioning into line with the requirements of Strasbourg and to ensure that, overall, any revised scheme is properly balanced and makes for a workable criminal justice system. At the hearing before this Court the Lord Advocate indicated that, despite the judgment in *HM Advocate v McLean* 2010 SLT 73, steps had already been taken to allow for the possibility that, at some point, section 15 of the 1995 Act might be found to be incompatible with article 6. Reports in the media since the hearing indicate that further steps are being taken by various groups in anticipation of a change. The necessary reforms are, however, matters for the Scottish Executive and Parliament, not for this Court. The interval between the hearing of the appeal and the announcement of the Court's decision should, however, have given the responsible authorities time to prepare appropriate legislation for the consideration of the Parliament.

98. Any changes in the relevant legislation or practices will, of course, apply only to future cases. At the hearing of the appeal the Lord Advocate submitted that, if the Court were to decide against the Crown, it should make a ruling with only prospective effect. As she pointed out, since 1999 the Scottish courts have dealt with many thousands of cases in which the Crown obtained convictions by relying, to a greater or lesser extent, on answers to questioning under section 14 of

the 1995 Act. The Court should not make a ruling that would throw these convictions into doubt.

99. The Lord Advocate's submission appeared to be based on an apprehension that, unless the Court took some exceptional step, a decision to allow this appeal would operate retroactively to undermine any convictions which had been obtained in reliance on evidence from police questioning in cases completed since May 1999. That would, however, be to adopt an extreme version of the accepted doctrine that courts declare not only what the law is, but what it has always been. And it would be to adopt a theory which has never been applied to other well-known appellate decisions that were perceived to alter the law as it had previously been understood.

100. The effect of a decision which develops the law was examined by the Supreme Court of Ireland in *A v The Governor of Arbour Hill Prison* [2006] 4 IR 88. In June 2004 A pleaded guilty to, and was convicted of, unlawful carnal knowledge, contrary to section 1(1) of the Irish Criminal Law (Amendment) Act 1935. Then, on 23 May 2006, in *CC v Ireland* [2006] 4 IR 66, the Supreme Court declared that section 1(1) was inconsistent with the Irish Constitution. Three days later, A applied for an order for his release on the ground that his detention, by virtue of a sentence of imprisonment following his conviction in 2004 under section 1(1), was unlawful because that provision had now been declared to be unconstitutional. The Supreme Court rejected that argument and held that the declaration of inconsistency in *CC v Ireland* applied to the parties in that case, or in related litigation, and prospectively, but that it did not apply retrospectively, unless there were wholly exceptional circumstances.

101. The very full judgments in *A v The Governor of Arbour Hill Prison* repay study. But for present purposes guidance can be derived from the judgment of Murray CJ, [2006] 4 IR 88, 117, paras 36-38:

> "36. Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a

judicial decision is excluded from cases already finally determined. This is the common law position.

37. Only a narrow approach based on absolute and abstract formalism could suggest that all previous cases should be capable of being reopened or relitigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a court of appeal should be set aside or, where possible, retried in the light of subsequent decisions where such subsequent decision could be claimed to provide a potential advantage to a party in such a retrial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.

38. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

102. Murray CJ's description of the effect of a decision which alters the law as previously understood can be applied to Scots law. For instance, in *Smith v Lees* 1997 JC 73 the Court of Five Judges overruled *Stobo v HM Advocate* 1994 JC 28 and thereby laid down a more restrictive test for corroboration in cases of sexual assault. The new test applied to the appellant's case and to other cases that were still live. But it could never have been suggested that the decision meant that convictions in completed cases, which had been obtained on the basis of the law as laid down in *Stobo*, were ipso facto undermined or invalidated. Similarly, in *Thompson v Crowe* 2000 JC 173, the Full Bench overruled *Balloch v HM Advocate* 1977 JC 23 and re-established the need to use the procedure of a trial within a trial when the admissibility of statements by the accused is in issue. But, again, this had no effect on the countless completed cases where convictions had been obtained on the basis of evidence of such statements by the accused which judges had admitted in evidence without going through that procedure. So, here, the Court's decision as to the implications of article 6(1) and (3)(c) of the Convention for the use of evidence of answers to police questioning has no direct effect on convictions in proceedings that have been completed. To hold otherwise would be to create uncertainty and, as Murray CJ rightly observes, cause widespread injustices. And the Strasbourg court has pointed out that the principle

of legal certainty is necessarily inherent in the law of the European Convention: *Marckx v Belgium* (1979) 2 EHRR 330, 353, para 58. In the Irish case Geoghegan J said, [2006] 4 IR 88, 200, para 286, that he was "satisfied … that it would be wholly against good order if convictions and sentences which were deemed to be lawful at the time they were decided had to be reopened." I emphatically agree. And that policy is, of course, embodied in section 124 of the 1995 Act which makes interlocutors and sentences pronounced by the appeal court "final and conclusive and not subject to review by any court whatsoever", except in proceedings on a reference by the Scottish Criminal Cases Review Commission.

103. The only way, therefore, in which the Court's decision in this case could have any effect on completed cases would be, indirectly, through the mechanism of such a reference by the Review Commission. It is, however, no part of this Court's function, in an appeal to which the Commission is not a party, to comment on the approach that it should adopt in handling any application for such a reference. It is for the Commission to consider where the public interest lies if an application is made to it for a reference to the High Court in a case that was properly conducted according to the law as understood at the time. A fortiori, it is no part of this Court's function on this occasion to comment on the approach to be adopted by the appeal court if the Commission should make a reference in such a case. That would be a matter for the appeal court to determine in the light of the arguments presented to it.

104. I would not wish, however, to part with this case without drawing attention to a matter which was not mentioned by any of the counsel who appeared.

105. In *Somerville v Scottish Ministers* 2008 SC (HL) 45 the House of Lords held that the time limit in section 7(5) of the Human Rights Act 1998 did not apply to proceedings in relation to Convention rights brought by reference to the Scotland Act 1998. It followed that, subject to any common law limitations or any specific statutory time limit, such proceedings could be brought at any time. The Scottish Parliament eventually responded to that decision by passing the Convention Rights Proceedings (Amendment) (Scotland) Act 2009, which amended section 100 of the Scotland Act so as to introduce a one-year time limit like the one in section 7(5) of the Human Rights Act. In its present (amended) form section 100 provides:

> "(1) This Act does not enable a person—
>
> (a) to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights, or
>
> (b) to rely on any of the Convention rights in any such proceedings,

unless he would be a victim for the purposes of Article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights.

(2) Subsection (1) does not apply to the Lord Advocate, the Advocate General, the Attorney General, the Advocate General for Northern Ireland or the Attorney General for Northern Ireland.

(3) This Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act 1998 applied.

(3A) Subsection (3B) applies to any proceedings brought on or after 2 November 2009 by virtue of this Act against the Scottish Ministers or a member of the Scottish Executive in a court or tribunal on the ground that an act of the Scottish Ministers or a member of the Scottish Executive is incompatible with the Convention rights.

(3B) Proceedings to which this subsection applies must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place, or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(3C) Subsection (3B) does not apply to proceedings brought by the Lord Advocate, the Advocate General, the Attorney General, the Attorney General for Northern Ireland or the Advocate General for Northern Ireland.

(3D) In subsections (3A) and (3B) ‘act’ does not include the making of any legislation but it does include any other act or failure to act (including a failure to make legislation).

(3E) The reference in subsection (3A) to proceedings brought on or after 2 November 2009 includes proceedings relating to an act done before that date.

(4) Subject to subsection (3D), in this section ‘act’ means—

(a) making any legislation,

(b) any other act or failure to act, if it is the act or failure of a member of the Scottish Executive.”

106. The present proceedings are proceedings brought on the ground that it is incompatible with article 6(1) and (3)(c) for the Lord Advocate to lead evidence of answers to questions elicited by the police under section 14 of the 1995 Act when the accused had no right to legal advice and had not had legal advice. The leading of such evidence is an "act" for the purposes of the section: subsections (3D) and (4). Any fresh proceedings which sought to raise the same point in other cases would be brought on the same ground. If those proceedings were brought on or after 2 November 2009, they would fall within section 100(3A) of the Scotland Act as amended. Subsection (3E) makes it clear that subsection (3A) applies to proceedings relating to an act done before 2 November 2009. It follows that, by reason of subsection (3B), to be competent, any such proceedings would need to have been commenced before the end of a year beginning with the date on which the Crown led the evidence, or within such longer period as the court considered equitable having regard to all the circumstances.

LORD WALKER

107. I agree with the judgments of Lord Hope and Lord Rodger (between which I can discern no significant difference on any point of principle).

LORD BROWN

108. I have had the advantage of reading in draft the judgments of Lord Hope and Lord Rodger. I agree with both of them and for the reasons they give I too would allow this appeal. The critical point can, I think, be comparatively shortly made. The Strasbourg jurisprudence makes plain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence and is safeguarded (perhaps most obviously by the video recording of any interviews) against any possibility that by threats or promises of one sort or another he may nonetheless be induced against his will to speak and thereby incriminate himself. It is imperative too that before being questioned he has the opportunity to consult a solicitor so that he may be advised not merely of his right to silence (the police will already have informed him of that) but also whether in fact it is in his own best interests to exercise it: by saying nothing at all or by making some limited statement. He must in short have the opportunity to be advised by a solicitor not to make incriminating statements despite whatever inclination he might otherwise have to do so. It is clearly Strasbourg's judgment that whatever in the result may be lost in the way of convicting the guilty as a result (wholly or partly) of their voluntary admissions is more than compensated for by the reinforcement thereby given to the principle

against self-incrimination and the guarantees this principle provides against any inadequacies of police investigation or any exploitation of vulnerable suspects.

LORD KERR

109. For the reasons given by Lord Hope and Lord Rodger, with which I am in full agreement, I too would allow the appeal.

SIR JOHN DYSON SCJ

110. For the reasons given by Lord Hope and Lord Rodger, with which I am in full agreement, I too would allow the appeal.