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PRESS SUMMARY

Ambrose v Harris (Procurator Fiscal, Oban) (Scotland)
Her Majesty's Advocate v G (Scotland)
Her Majesty's Advocate v M (Scotland) [2011] UKSC 43

References from the Appeal Court of the High Court of Justiciary, at the request of the Lord Advocate

JUSTICES: Lord Hope (Deputy President), Lord Brown, Lord Kerr, Lord Dyson, Lord Matthew Clarke

BACKGROUND TO THE APPEALS

In *Cadder v HM Advocate* [2010] UKSC 43, the Supreme Court held, having regard to the decision of the European Court of Human Rights in *Salduz v Turkey* (2008) 49 EHRR 421, that the Crown's reliance on admissions made by an accused who had no access to a lawyer while he was being questioned as a detainee at a police station was a violation of his rights under Article 6(3)(c), read with Article 6(1) of the European Convention on Human Rights. The issues in these cases are whether the right of access to a lawyer prior to police questioning, which was established by *Salduz*, applies only to questioning which takes place when the person has been taken into police custody; and, if the rule applies at some earlier stage, from what moment does it apply.

The accused in the first case, John Paul Ambrose, was prosecuted on a charge of contravening section 5(1)(b) of the Road Traffic Act 1988 as being in charge of a motor vehicle while over the alcohol limit. He was questioned by two police officers by the roadside, who cautioned him but did not give him any specification about the offence he was suspected of having committed. In response to their questions, he confirmed that he was in possession of the car keys, and that he might be intending to drive the car. Breath tests indicated that he was substantially over the prescribed limit. In his trial the Crown led evidence of the questions and answers at the roadside.

In *M*, the accused was charged with assault to severe injury, permanent disfigurement and permanent impairment. A few days after the incident, the police visited him at his home, cautioned him, and asked him a number of questions, in response to which he confirmed his attendance at the locus on the night in question and his involvement in the fight. He was detained the following day, and questioned further while he was in custody. At trial, he objected to the Crown's reliance upon the admissions he had made in his home, on the basis that he had not had access to legal advice prior to interview.

In *G*, the accused was indicted with offences including the possession of controlled drugs under the Misuse of Drugs Act 1971 and possession of prohibited firearms and ammunition under the Firearms Act 1968. The police had obtained a warrant to search the accused's flat. They forced entry and found him there. He struggled, and was handcuffed and cautioned. He admitted to having drugs in his pocket, and responded to a number of questions about items found in the flat. He was subsequently arrested and taken to a police station where he answered further questions. He objected to the Crown's reliance at trial on the statements he made during the course of the search of the flat.

In each of the three cases, the Appeal Court of the High Court of Justiciary referred to this Court the question whether the act of the Lord Advocate in leading and relying on the evidence in question would be incompatible with the appellant's rights under Article 6(1) and (3)(c) of the European Convention on Human Rights.

JUDGMENT

The Supreme Court, by a majority of 4 to 1, finds that, in the cases of *Ambrose and M*, the act of the Lord Advocate in leading and relying at the trial on the evidence that was obtained from them in response to police questioning without having had access to legal advice was not incompatible with the Article 6(1) and (3)(c) right; and in the case of *G* that it was incompatible. In *Ambrose and M*, the question whether, taking all the circumstances into account, it would be fair to admit this evidence, is left open for decision by the Appeal Court and Sheriff Court respectively. Lord Hope gives the leading judgment. Lord Kerr gives a separate dissenting judgment finding in all three cases that the evidence would be inadmissible.

REASONS FOR THE JUDGMENT

In each of these three cases, the circumstances differ from those before the Supreme Court in *Cadder* and before the Grand Chamber in *Salduz*, in that the evidence in question was obtained through police questioning before the individuals were detained at a police station. The Supreme Court notes, firstly, that the jurisdiction of this court is limited to a consideration of the devolution issue which is raised by each of these references, and does not extend to ruling on how the circumstances referred to in each case would fall to be dealt with under domestic law. Secondly, it notes that a decision by this court that there is a rule that a person who is suspected of an offence but is not yet in custody has a right of access to a lawyer before being questioned by the police would have far-reaching consequences for the investigation of crime by the authorities. Therefore, if Strasbourg has not yet spoken clearly on this issue, the court would be wise to wait until it has done so [14-15].

The duty of the domestic court in interpreting the Convention is to keep pace with the Strasbourg case law as it evolves over time. There is no obligation upon domestic courts to do more than that (*R (Ullah) v Special Adjudicator* [2004] UKHL 26, para 20 *per* Lord Bingham of Cornhill) [17]. The court's task in this case is to identify where the Strasbourg court stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies [20].

In domestic law, where an individual has not yet been detained under section 14 of the Criminal Procedure (Scotland) Act 1995, the test for the admissibility of answers given to questions put by police is whether or not there was unfairness on the part of the police. The fact that the person did not have access to legal advice when being questioned is a circumstance to which the court may have regard in applying the test of fairness, but it carries no more weight than that. There is no rule in domestic law that provides that police questioning of a person without access to legal advice who is suspected of an offence but is not in police custody must always be regarded as unfair. The question is whether a rule to that effect is to be clearly found in the jurisprudence of the Strasbourg court [25].

The Grand Chamber in *Salduz* had in mind the need to protect an accused against abusive coercion while in custody. The judgment appears to have been concerned only with establishing a rule that there was a right of access to a lawyer where the person being interrogated was in police custody [33]. That assessment is supported by subsequent Strasbourg case law, in particular *Zaichenko v Russia* (Application no.39660/02), the only case to date in which the complaint was of lack of legal assistance during police questioning when the applicant was not in custody [46]. If the *Salduz* judgment were to apply to statements made by a person in response to police questioning before being taken into custody, the court would have had to have said so expressly. It did not do so [35].

The privilege against self-incrimination is not an absolute right (*Murray v United Kingdom* (1996) 22 EHRR 29, para 47). It is primarily concerned with respecting the will of the person to remain silent (*Saunders v United Kingdom* (1996) 23 EHRR 313, para 68), and a person is free to confess if he is willing to do so. Police custody or its equivalent creates a need for protection of the accused against abusive coercion. The same is not the case for questioning at the locus or in a person's home [54]. In principle, the line as to when access to legal advice must be provided before the person is questioned should be drawn as from the moment that he has been taken into police custody, or his freedom of action has been significantly curtailed [55].

The correct starting point when considering whether the person's Convention rights have been breached is to identify the moment at which he is 'charged' for the purposes of Article 6(1); that is whether his situation is substantially affected (*Deweert v Belgium* (1980) 2 EHRR 439, para 46; *Eckle v Germany* (1982) 5 EHRR 1, para 73). That will be the case as soon as the suspicion against him is being seriously investigated and the prosecution case compiled [62]. The fact that a person who has become a suspect and is not in

custody is questioned without access to legal advice will be a relevant factor in the assessment whether the accused was deprived of a fair hearing, but it will be no more than that.

In *Ambrose and M*, the question is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning, conducted under common law at the roadside or at the accused's home, without the accused having had access to legal advice, was incompatible with Article 6(1) and (3)(c). This is answered in the negative. *Ambrose* was 'charged' for the purposes of Article 6 when he was cautioned. Suspicion that he was committing an offence fell on him as soon as he told the police that the keys were in his pocket [67]. *M* was 'charged' when he was cautioned by the police officer at his home [69]. But it would be to go further than *Strasbourg* has gone to hold that the appellants are entitled to a finding that this evidence is inadmissible because, as a rule, access to a lawyer should have been provided to him when he was being subjected to questioning at the roadside [68 & 70]. The question whether, taking all the circumstances into account, it would be fair to admit this evidence, is left open for the Appeal Court and Sheriff Court respectively.

In *G*, the question whether it is incompatible with his Convention rights for the Lord Advocate to lead evidence of his statements made during the course of the search is answered in the affirmative. He was 'charged' for the purposes of Article 6 by the time the police began their search. The difference with this case was that there was a significant curtailment of *G*'s freedom of action. He was detained and had been handcuffed, and was, in effect, in police custody from that moment onwards. The circumstances were, therefore, sufficiently coercive for the incriminating answers that he gave to the questions that were put to him without access to legal advice to be inadmissible [71]. The same result need not, however, follow in every case where questions are put during a police search to a person who is to be taken to have been charged for the purposes of Article 6; that, again, would be going further than *Strasbourg* has gone [72].

Lord Kerr would have found the evidence in question to be inadmissible in all three cases. It is not open to courts of this country to refrain from recognising a claim to a Convention right simply because *Strasbourg* has not spoken clearly on the matter [128]. In practice, it is inevitable that many claims to Convention rights will have to be determined by the UK courts without the benefit of unequivocal jurisprudence from *Strasbourg*. It is the duty of every domestic court to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the *Strasbourg* court does not disclose a clear current view [129]. As regards the right of access to a lawyer, the selection of the moment of being taken into custody as the first occasion on which legal representation becomes necessary is both arbitrary and illogical. The judgment in *Salduz* indicates that the need to have a lawyer is not to be determined on a geographical or temporal basis but according to the significance of what is taking place when the admissions in question are made [136]. The essential question is: when the questioning is taking place, is the suspect in a position where the advice of a lawyer is essential if a fair trial is to occur. If he is liable to incriminate himself at that time, a lawyer's presence is required [145]. The judgment in *Zaichenko* is not clear, but does not indicate that formal arrest and interrogation in custody are essential prerequisites to the invocation of the right to legal assistance [158].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at:

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