



University
of Glasgow

Leverick, F. (2010) *The right to legal advice during detention: HM Advocate v McLean*. Edinburgh Law Review, 14 (2). pp. 300-305. ISSN 1364-9809

<http://eprints.gla.ac.uk/37953/>

Deposited on: 03 April 2012

The question must be approached as one of principle. If guidance as to the exercise of prosecutorial discretion is required by article 8(2) of the ECHR, then the relevant source of guidance is that found in the Crown Office *Prosecution Code*.³¹ Like the English *Code for Crown Prosecutors*, it sets out a list of general public interest factors to be taken into account both for and against prosecution.³² While a detailed comparison of the two Codes is outwith the scope of this note, it is fair to say that they adopt a broadly similar approach in this respect, and it is difficult to see how an application of the Scottish code in the case of Daniel James would have provided any more helpful guidance than of which the DPP was able to avail himself.

There is a more interesting general point, of course, which is the extent to which article 8(2) may require specific prosecutorial guidelines to be issued in other areas. It seems unlikely that assisted suicide is *sui generis* to the extent that the general provisions of the *Code for Crown Prosecutors* suffice for every offence but that one.³³ That point, however, is for the future. For the meantime, the only relevant difference between the position in England and Scotland is that the Director of Public Prosecutions has been obliged by a court order to produce guidelines on the prosecution of assisted suicide, and the Lord Advocate has not. Given that the order made by the House of Lords was a consequence of the application of the ECHR, it should be self-evident that this difference cannot and does not justify the absence of such guidelines in Scotland.

James Chalmers
University of Edinburgh

EdinLR Vol 14 pp 300-305
DOI: 10.3366/E1364980910001381

The Right to Legal Advice During Detention: *HM Advocate v McLean*

It may come as a surprise to those not well versed in Scottish criminal procedure that a suspect who has been detained for police questioning has no right to legal advice during this period. In *HM Advocate v McLean*,¹ the ECHR compatibility of this position was considered by a Full Bench of seven judges.

³¹ Crown Office and Procurator Fiscal Service, *Prosecution Code* (2001) (available at www.copfs.gov.uk/Publications/2001/05/prosecutioncode).

³² At 6-8.

³³ The CPS does, however, publish more detailed guidance on many offences: see www.cps.gov.uk/legal/. In Scotland, the Crown Office is rather more circumspect, with exceptions: see e.g. the (undated) "Crown Office and Procurator Fiscal Service Policy on Causing Death by Driving", available at www.copfs.gov.uk/Publications/Driving.

¹ [2009] HCJAC 97, 2010 SLT 73.

A. BACKGROUND

In Scots law, a distinction exists between “detention” and “arrest”. A suspect may be detained for police questioning for up to six hours.² He does not have the right to have a solicitor present, although he can have a solicitor informed of his detention.³ Other than being obliged to give his name and address,⁴ the suspect has the right to remain silent. No adverse inferences may be drawn from his silence⁵ but any answers he does give can be used in evidence. Once a suspect is arrested and charged, however, any statements he makes to the police (other than a reply to the charge itself) cannot be used as evidence⁶ and he gains the right to a private interview with a solicitor prior to his first court appearance or judicial examination.⁷

The ECHR compatibility of leading evidence of admissions made during detention and in the absence of legal advice had already been unsuccessfully challenged in *Paton v Ritchie*,⁸ but the issue was potentially re-opened by *Salduz v Turkey*,⁹ a decision of the Grand Chamber of the European Court of Human Rights. In *Salduz*, the applicant was convicted of aiding and abetting a terrorist organisation on the evidence of statements he made in custody without legal advice. The Grand Chamber held unanimously that article 6(1) had been violated, as it requires that:¹⁰

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 the 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 . . . 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.

In the light of this statement, there was much speculation about the potential consequences for Scottish criminal practice,¹¹ a question that has now been answered in *McLean*.

2 Criminal Procedure (Scotland) Act 1995 s 14(2).

3 Section 15(1).

4 And other information necessary to establish identity: s 14(9).

5 *Larkin v HM Advocate* 2005 SLT 1087.

6 The position is more complex where a suspect has been arrested but *not* charged, as it was held in *Johnston v HM Advocate* 1993 JC 187 that in such circumstances it is possible for the police to continue to question him and for any answers he provides to be used in evidence, subject to the general test of fairness. More importantly for present purposes, however, *Johnston* confirmed that the suspect does gain the right to legal advice upon arrest, even if he has not been charged (at 195 per the Lord Justice Clerk (Ross)).

7 Criminal Procedure (Scotland) Act 1995 s 17(2).

8 2000 JC 271, endorsed by a Full Bench in *Dickson v HM Advocate* 2001 JC 203.

9 (2009) 49 EHRR 19.

10 Para 55 (emphasis added).

11 See e.g. P W Ferguson, “The right of access to a lawyer” 2009 SLT (News) 107 at 109-111.

B. HM ADVOCATE v McLEAN

In *McLean*, the minuter had been detained in relation to the theft of a motor vehicle and wilful fire-raising. He had asked that a solicitor be informed of his detention but did not request legal advice prior to or during the interview and was not offered it. He made admissions during questioning that the Crown wished to rely on at his trial. A devolution minute was lodged claiming that the use of these admissions would violate article 6. In the light of *Dickson v HM Advocate*,¹² the issue was referred to a bench of seven judges.

In an opinion delivered by the Lord Justice General (Hamilton), the court held that reliance by the prosecutor on statements obtained in the absence of legal advice would not automatically render the proceedings unfair and remitted the case for trial. It offered two alternative lines of argument in support of its decision.

The first was based on its reading of *Salduz*. The court noted two possible interpretations of the statement set out above.¹³ One was that the European Court intended to lay down an absolute rule that any statements made by the accused in the absence of legal advice cannot be used in evidence, regardless of any other safeguards present in the system. Alternatively, the court stated, *Salduz* could be interpreted to mean that:¹⁴

whether or not there has been a fair trial will depend on the particular 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 place in that jurisdiction to secure a fair trial.

The court chose to favour the second interpretation.¹⁵ In doing so, it relied on Judge Bratza's concurring opinion in *Salduz* in which he commented that the principle being enunciated was "consistent with the court's earlier case law".¹⁶ In earlier cases,¹⁷ the High Court noted, the European Court had not definitively stated that lack of access to a lawyer would, *in itself*, render incriminating statements inadmissible and therefore it had not intended to do so in *Salduz*.

Having settled on this interpretation of *Salduz*, the High Court had then to consider whether Scots law contained sufficient guarantees to ensure a fair trial, even in the absence of legal advice during detention. The court concluded that it did, pointing to a number of protections¹⁸ including: (1) the caution given to suspects that they need not answer questions¹⁹ but that any answers given may be used as evidence; (2) the tape-recording of interviews; (3) the inadmissibility of statements obtained

¹² 2001 JC 203.

¹³ See text accompanying n 10.

¹⁴ *McLean* at para 24.

¹⁵ Para 25.

¹⁶ Para 25 of *McLean*, citing para O-12 of *Salduz*.

¹⁷ Such as *Murray v United Kingdom* (1996) 22 EHRR 29 and *Brennan v United Kingdom* (2002) 34 EHRR 18.

¹⁸ *McLean* at para 27.

¹⁹ Other than those concerning identity (see n 4).

through coercion; (4) the corroboration requirement, which ensures that a conviction cannot be based on a confession alone; (5) the fact that adverse inferences cannot be drawn at trial from silence during police questioning; (6) the limited duration of detention (six hours); and (7) the police's discretion to allow a lawyer to be present which is "likely to be exercised where the detainee is perceived to be a vulnerable person".²⁰

The court's second line of argument was that, even if the Grand Chamber did intend to set out an absolute rule that statements made without access to legal advice are always inadmissible, this principle "cannot and should not"²¹ be applied in Scotland. Section 2(1)(a) of the Human Rights Act 1998 only requires that judgments of the European Court are taken "into account" and as such the Grand Chamber's judgment was not binding. Against this, the court noted²² the House of Lords' statement in *R (Anderson) v Home Secretary*²³ that it "will not without good reason depart from the principles laid down in a carefully considered judgment of the [European] court sitting as a Grand Chamber".²⁴ But as *Salduz* did not involve the United Kingdom or examine any of the features of the Scottish criminal justice system then it could not be said to have been "carefully considered" and although it "commands great respect, we are not obliged to apply it".²⁵

C. DISCUSSION

Given the mayhem that could have resulted for prosecutions if the opposite conclusion had been reached, there may be many on the side of the Crown who are breathing a sigh of relief. Whether the court was correct in its interpretation of *Salduz* may not be known until a subsequent case arises, but it is surely not the most obvious interpretation. The statement in *Salduz* that rights "will in principle be irretrievably prejudiced"²⁶ when admissions made without access to a lawyer are used in evidence seems pretty conclusive and the fact that the High Court did not rely on this argument alone suggests that it recognised that it might be open to criticism on this front. The court's assertion that its "balancing process" interpretation is "consistent with the [European] Court's earlier case law"²⁷ is not especially persuasive; the "absolute rule" interpretation could equally be read as consistent with prior case law. The court's second line of argument—that it is entitled to disregard a decision of the Grand Chamber of the European Court—might also be questioned. In *Secretary of State for the Home Department v F*,²⁸ a more recent case than *Anderson*, Lord Hoffmann

²⁰ *McLean* at para 27.

²¹ Para 31.

²² Para 29.

²³ [2002] UKHL 46, [2003] 1 AC 837.

²⁴ At para 18 per Lord Bingham of Cornhill.

²⁵ Para 29.

²⁶ *Salduz* at para 55.

²⁷ *McLean* at para 25.

²⁸ [2009] UKHL 28, [2009] 3 WLR 74.

suggested that to reject such a decision “would almost certainly put [the UK] in breach of the international obligation which it accepted when it acceded to the Convention”.²⁹

Issues of interpretation aside, the question remains of whether suspects are, in fact, sufficiently protected by the present arrangements. It is true that there are a number of protections that make the need for legal advice less pressing. This can be contrasted to the situation in England and Wales, where suspects do have a right to legal advice during police questioning,³⁰ but where the maximum detention period is longer³¹ and adverse inferences can be drawn at trial from a failure to answer questions.³² Nonetheless, there are reasons for concern. First, although suspects have a right to silence, how effective the caution is in informing them of this is debateable, given that it is only mentioned once, at the start of the interview, when the suspect may be overwhelmed and confused, and there is no solicitor present to remind him of it as questioning progresses.³³ Secondly, much was made of the fact that confessions obtained as a result of coercion are inadmissible, and while, by and large, this rule does seem to have operated protectively, this has not always been the case.³⁴ Thirdly, one might question the court’s confidence that the police’s discretion to admit legal representation where the circumstances demand it provides sufficient protection to vulnerable persons. It will not always be obvious that a suspect is vulnerable³⁵ and the fact that people do make false confessions³⁶ shows that we should not be too complacent.³⁷ On the other hand, even if one accepts these concerns, it is perhaps simplistic to conclude that providing legal advice during police questioning will prevent miscarriages of justice occurring.³⁸ It might also be said that even if a right to legal advice was established, there is no guarantee it would be taken up by those who need it most.³⁹

29 Para 70. See also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 at para 37 per Lord Bingham of Cornhill.

30 Police and Criminal Evidence Act 1984 s 58.

31 Up to 36 hours under section 41 of the 1984 Act.

32 Criminal Justice and Public Order Act 1994 s 34.

33 A point made in prior European cases (see those cited in F P Davidson, *Evidence* (2007) para 9.51) and indeed alluded to in *Salduz* itself (at para 54).

34 See e.g. *Stewart v Hingston* 1997 SLT 442.

35 J Pearse, “Police interviewing: the identification of vulnerabilities” (2006) 5 *Journal of Community and Applied Social Psychology* 147; G H Gudjonsson et al, *Persons at Risk during Interviews in Police Custody: The Identification of Vulnerabilities* (1994).

36 See e.g. the cases cited in part 3 of G H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (2003).

37 Admittedly the corroboration requirement provides additional protection, but this has been watered down considerably where confessions are concerned: see Davidson, *Evidence* (n 33) paras 15.64-15.71.

38 D Dixon, “Common sense, legal advice and the right of silence” [1991] PL 233 at 242; J Baldwin, *The Role of Legal Representatives at the Police Station* (1993).

39 Although in the English context, requests for legal advice did increase after the right was legislated for: see T Bucke and D Brown, *Police Custody: Police Powers and Suspects’ Rights under the Revised PACE Codes of Practice* (1997) 19.

As a final point, *McLean* might not represent the end of the matter as it has been reported that the case will be appealed to the Supreme Court.⁴⁰ The High Court has once before found itself overruled by London in a significant case concerning article 6 and the use of statements made by the accused (albeit that the High Court's ruling there was in the accused's favour).⁴¹ It remains to be seen whether the High Court's decision in *McLean* will withstand the Supreme Court's scrutiny.

Fiona Leverick
University of Glasgow

⁴⁰ "Judges reject police questioning human rights challenge", *Scottish Legal News* 23 Oct 2009.

⁴¹ *Brown v Stott* 2001 SC (PC) 43.