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process would have made it clear that, just as in *Horncastle*, the two Scottish cases[51] were properly distinguishable on the ground that the material facts were different.

On these grounds, including the lack of clarity in *Salduz*, the Supreme Court should have refused the appeal.

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The Supreme Court Strikes Back

On 26 October 2010, the Supreme Court released its judgment in *Cadder v HM Advocate*.[1] As Lord Hope stated,[2] *Cadder* was, in effect, an appeal against the Full Bench decision of the High Court of Justiciary in *HM Advocate v McLean*.[3] Both cases concerned admissions against interest made during police questioning where the suspect had not been offered access to legal advice. As the law stood, suspects could have a solicitor informed of their detention, but had no right to legal advice prior to or during questioning.[4] In *McLean*, the High Court held that the use at trial of admissions obtained in these circumstances did not violate article 6, despite the Grand Chamber of the European Court of Human Rights' unanimous holding in *Salduz v Turkey*[5] to the contrary.

A. *CADDER v HM ADVOCATE*

The appellant had been detained in connection with an alleged assault. As required by section 15(1)(b) of the 1995 Act, he was told he could inform a solicitor of his detention, but was not offered (nor did he request) legal advice. He made admissions which the Crown relied on at trial. He was convicted and appealed on, *inter alia*, the ground that relying on these was incompatible with article 6. He was refused leave to appeal, but applied to the Supreme Court for special leave, which was granted.[6] The case was heard by seven justices, who held unanimously that *McLean* was no longer good law in the light of *Salduz*,[7] and remitted the case back to the High Court for further procedure.[8] The leading speeches were delivered by the two Scottish justices, Lords Hope and Rodger.

51 That is, *McLean* and *Cadder*.
1 [2010] UKSC 43, 2010 SLT 1125.
2 Para 1.
3 [2009] HCJAC 97, 2010 SLT 73.
4 Criminal Procedure Scotland Act 1995 ss 14(6) and 15(1)(b).
5 (2009) 49 EHRR 19.
6 This note deals only with the substantive issues. See paras 11-12 on the Supreme Court's reasons for granting special leave to appeal.
7 Para 63.
8 Para 64.

B. THE COURT'S REASONING

Lord Hope approached the issue in three stages:

(1) What did the European Court say in *Salduz*?

The key passage is paragraph 55, where the Grand Chamber explained that 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 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.

The question was precisely what the European Court meant by "as a rule". In *McLean*, the High Court interpreted it to encompass the possibility that, if sufficient alternative guarantees were present, access to legal advice was not an absolute requirement of article 6. Lord Hope described this interpretation as untenable.[9] *Salduz* meant that "every jurisdiction must, to be compliant with the Convention, have in place a system under which access to a solicitor was ordinary provided as from the first interrogation".[10] While this did not mean a failure to provide legal advice in any individual case would automatically violate article 6 – restrictions are possible for "compelling reasons"[11] – "systematic departure"[12] from it was not permitted.

(2) Does a Scottish court have to follow it?

In *McLean*, the High Court argued that, even if even if their interpretation of *Salduz* was incorrect, they did not have to follow it.[13] The Supreme Court disagreed. Lord Hope pointed to several cases[14] decided by the (then) House of Lords which had held that a UK court should follow any clear and consistent jurisprudence of the European Court and should not, without good reason, depart from a carefully considered judgment of the Grand Chamber. *Salduz* was a unanimous decision of the Grand Chamber – a "formidable reason for thinking we should follow it"[15] – and had been "followed repeatedly"[16] in subsequent cases. Thus contracting states are under a duty to give effect to it.[17]

9 Para 40. Cf J McCluskey, "Supreme error" (2011) 15 EdinLR 276.
10 Para 39.
11 What might constitute "compelling reasons" is dealt with in the legislation passed following *Cadder*: see F Stark, "The consequences of *Cadder*" (2011) 15 EdinLR 293.
12 Para 41.
13 Para 31.
14 Cited at para 45 of *Cadder*.
15 Para 46.
16 Para 47, where Lord Hope cites numerous examples.
17 Para 48. Cf. Lord McCluskey (n 9).

(3) Do the other guarantees mean article 6 is not violated?

In *McLean*, it was suggested by the High Court that Scots law contained sufficient guarantees to ensure a fair trial, even in the absence of legal advice during detention.[18] These included recording interviews; the inadmissibility of statements obtained through coercion; the corroboration requirement; the fact that adverse inferences cannot be drawn from silence; and the limited duration of detention (a maximum of six hours).[19] For Lord Hope, however, these guarantees were "incapable of removing the disadvantage that a detainee will suffer".[20] Lord Rodger described such guarantees as "beside the point".[21] The main purpose of legal advice is to assist the suspect in understanding and enforcing his right not to incriminate himself.[22] The provisions in sections 14 and 15 were deliberately designed to deny access to a lawyer in the hope that suspects would be more likely to incriminate themselves[23] and thus are "the very converse of what the Grand Chamber holds is required".[24] For this reason, "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]".[25]

C. RELATED ISSUES

A number of supplementary issues arose in *Cadder*.[26] The first was whether *Salduz* applies to 'fruits of the poisoned tree': "incriminating evidence obtained from elsewhere as a result of lines of inquiry that the detainee's answers have given rise to".[27] Lord Hope answered in the affirmative,[28] relying on *Gäfgen v Germany*.[29] But in *Gäfgen* the use of real evidence recovered as a result of an unlawful interrogation (here one which breached article 3) was held *not* to violate article 6 because it did not have "a bearing on the outcome of proceedings".[30] The main evidence against the applicant was a later confession, obtained in a procedurally proper manner, and the real evidence was used "only to test the veracity of his confession".[31] This seems

18 Para 26.
19 Para 27.
20 Para 50.
21 Para 66.
22 Para 70.
23 See the Thomson Committee's report: *Criminal Procedure in Scotland: Second Report* (Cmnd 6218: 1975) para 7.16.
24 Para 93.
25 Para 93.
26 One omitted here is the role of the Scottish Criminal Cases Review Commission. On this, see Stark (n 11) 297.
27 Para 48.
28 Para 48.
29 (2011) 52 EHRR 1.
30 Para 178.
31 Para 179.

to suggest that fruits of the poisoned tree *could* be used as corroborating evidence without necessarily breaching article 6.[32]

The second was *Cadder's* retrospective application. The Supreme Court held that it applies to "cases that have not yet gone to trial, cases where the trial is still in progress, and appeals that have been brought timeously but not yet concluded",[33] but closed cases cannot be re-opened. Closed cases are "convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of".[34] This seems to exclude the possibility that an extension to the two week period in which an appeal must be lodged[35] could be granted on the basis that *Cadder* has altered the law. It did, however, leave open the question of ongoing appeals raised timeously, but without a *Cadder* ground, given that permission can be granted for grounds to be added "on cause shown".[36] This has now been addressed in *Birnie v HM Advocate*,[37] where the appellant was allowed to add such a ground on the basis that (a) it was "arguable"[38] and (b) cause could be shown for doing so.[39] In *Birnie*, the possibility of a *Cadder* argument was actually identified by the court at the first calling of the appeal on 16 November 2010. Nonetheless the High Court permitted its insertion because "[a]lthough a significant period of time had elapsed since the trial … the decision [in *Cadder*] had only recently been pronounced".[40] This does, however, leave open the possibility of a different outcome where more time has passed between the judgment and the motion to amend the note of appeal.

The third was whether admissions made where the suspect has waived his right to legal advice are admissible under article 6. This was left open by Lord Rodger,[41] but it must be the case that the right can be waived. The European Court in *Salduz* referred only to "access to a lawyer" not to a requirement that legal advice must be forced upon a suspect if, in full knowledge of his rights and the consequences of doing so, he has waived it (and he has the capacity to make that decision).

One further issue remains unresolved. It is unclear whether article 6 supports a right to legal advice not only prior to but also *during* police questioning.[42] *Cadder* seems to suggest only the former.[43] *Salduz* is more equivocal, referring to access

32 The issue is likely to be resolved by the Supreme Court as the Crown has sought to refer this and several other collateral issues for determination. See "Angiolini to seek further Cadder rulings", *Scottish Legal News* 14 Feb 2011.

33 *Cadder* at para 60.

34 Para 62.

35 Criminal Procedure (Scotland) Act 1995 ss 109(1) and s 111(2).

36 s 110(4).

37 [2011] HCJAC 4.

38 Para 14.

39 Para 16.

40 Para 16.

41 *Cadder* at para 96.

42 A point which has been of particular significance in the Netherlands: see C Brants, "The reluctant Dutch response to *Salduz*" (2011) 15 EdinLR 298.

43 Para 48.

"from the first interrogation".[44] Nonetheless, the subsequent legislation confers a right to legal advice "during... questioning"[45] as well as prior to it. The equivalent English provisions allow a solicitor to be *present* during the interview,[46] although this no longer applies to certain minor offences where advice can be provided by telephone.[47] Both sets of legislative provisions go further than the Canadian equivalent, where the Supreme Court has declined to interpret the Canadian Charter as supporting a right to legal advice during interrogation itself.[48]

Finally, although not explicitly dealt with in *Cadder*, the general principle enunciated has relevance beyond detention under sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995. In *HM Advocate v Wilson*,[49] it was held that the Crown could not reply on admissions made without access to legal advice by a suspect questioned during a search of her home under section 23(2)(a) the Misuse of Drugs Act 1971. The sheriff is surely correct. If the rationale of *Cadder/Salduz* is protection of the privilege against self-incrimination, the fact that interrogation took place in the suspect's home rather than a police station is irrelevant.[50]

D. DISCUSSION

The actual decision in *Cadder* is probably the least interesting aspect of the case and is certainly less controversial than the emergency legislation that followed. It is difficult to see how *Cadder* could have been decided differently, given *Salduz* and the obligation for member states to follow unanimous decisions of the Grand Chamber.[51] But even setting this aside, the Supreme Court's reasoning is persuasive. Lord Rodger derives the right of access to legal advice from the more fundamental privilege against self-incrimination.[52] He argues that legal advice is necessary to assist suspects in understanding their rights and whether it is in their own best interest to enforce them.

44 Para 55.

45 Criminal Procedure (Scotland) Act 1995 s 15A(3)(b), as inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s 1(4).

46 Police and Criminal Evidence Act 1984 Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) para 6.8.

47 Code C, Notes for Guidance 6B2.

48 *R v Sinclair* [2010] 2 SCR 310.

49 Glasgow Sheriff Court, 1 Dec 2010, unreported, available at *www.glasgowbarassociation.co.uk/media/24514/devolution_minute1.pdf*.

50 The Supreme Court is likely to rule on this – and several related issues – in due course (see n 32 above).

51 Lord McCluskey attempts to make a case otherwise based, at least in part, on *R v Horncastle* 2009 UKSC 14, [2010] 2 WLR 47: see n 9 at 285-287. But even if one finds his argument persuasive, the court in *Horncastle* was considering *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1, which was only a decision of the Fourth Section, albeit a unanimous one. Space precludes detailed discussion of Lord McCluskey's reasoning here but see n 54 below.

52 Para 70.

This is not the only rationale for a right to legal advice during detention,[53] but if we accept Lord Rodger's analysis, it is difficult to see how effective enforcement can be achieved in any other way. The current practice – of simply reading the caution at the start of police questioning – does nothing to ensure suspects understand it, remember it and make decisions about their best interests accordingly. Neither do any of the other guarantees mentioned in *McLean*.[54] What is more interesting than the substance of the decision is the fact that it took so long to happen. As Lord Hope said, "[i]t is remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure".[55] It is especially remarkable given that shortly after the Scottish provisions came into force, a Royal Commission was critical of similar provisions in England and Wales,[56] leading to a right to legal advice being introduced there over 25 years ago.[57]

While the decision should be applauded, a note of caution might be sounded. In England and Wales, restrictions have been placed on the right to silence, allowing adverse inferences to be drawn from silence at police questioning stage in certain circumstances.[58] This was justified, at least in part, by the increased protection given by legal advisers.[59] Lord Carloway's review, set up by the Scottish Government in the wake of *Cadder*, includes in its remit the right to silence, suggesting that similar changes might be recommended for Scotland.[60] Yet research in England and Wales has found that only 45 per cent of suspects take up the offer of legal advice.[61] If Scotland follows a similar pattern, we may end up with a criminal justice system in which suspects are less well protected following *Cadder* than they were before it.

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(The author is grateful to Findlay Stark for comments on an earlier draft.)

53 Space precludes discussion here, but it might be justified by reasons such as offering emotional support (I Dennis, *The Law of Evidence*, 4th edn (2010) 244).

54 Cf McCluskey (n 9). With respect, none of the other guarantees mentioned in *McLean* do address the fundamental issue that, without the benefit of legal advice, suspects may not understand the nature of their right to silence well enough to make an informed choice about whether or not to assert it. It is for this reason that many other common law jurisdictions – including those that recognize the right to silence – have extricably linked it with the right to legal advice. See e.g. *R v Hebert* [1990] 2 SCR 151 at 176-177; *R v Manninen* [1987] 1 SCR 1233 at 1242-1243 (Canadian Supreme Court); *Miranda v Arizona* 384 US 436 (1966) at 469 (US Supreme Court).

55 Para 4.

56 Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092: 1981) paras 4.81-4.93.

57 Police and Criminal Evidence Act 1984 s 58(1).

58 Criminal Justice and Public Order Act 1994 ss 34-35.

59 See e.g. Home Office, *Report of the Working Group on the Right to Silence* (1989) para 57.

60 Scottish Government news release, "Review of law and practice", available at *www.scotland.gov.uk/News/Releases/2010/11/18123816*.

61 P Pleasance, V Kemp and N J Balmer, "The justice lottery? Police station advice 25 years on from PACE" [2011] Crim LR 3 at 10.