Michaelmas Term
[2011] UKSC 43

JUDGMENT

REFERENCE - Ambrose *v* Harris (Procurator Fiscal, Oban) (Scotland)

REFERENCE - Her Majesty's Advocate *v* G (Scotland)

REFERENCE - Her Majesty's Advocate *v* M (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson
Lord Matthew Clarke

JUDGMENT GIVEN ON

6 October 2011

Heard on 28, 29 and 30 June 2011

Appellant
Frank Mulholland QC,
Lord Advocate
Gordon Balfour
(Instructed by the Crown Agent, Crown Office)

Respondent (Ambrose)
John Dominic Scott

Andrew Mason
(Instructed by DM MacKinnon Solicitors)

Appellant
Frank Mulholland QC,
Lord Advocate
Gordon Balfour
(Instructed by the Crown Agent, Crown Office)

Respondent (G)
Gordon Jackson QC

Claire Madison Mitchell
(Instructed by Paterson Bell)

Appellant
Frank Mulholland QC,
Lord Advocate
Gordon Balfour
(Instructed by the Crown Agent, Crown Office)

Respondent (M)
Christopher Shead

Moira MacKenzie
(Instructed by G Keenan & Co)

LORD HOPE

1. On 26 October 2010 this Court issued its judgment in *Cadder v HM Advocate* [2010] UKSC 43, 2010 SLT 1125. It held that the Crown's reliance on admissions made by an accused without legal advice when detained under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial, having regard to the decision of the European Court of Human Rights in *Salduz v Turkey* (2008) 49 EHRR 421. This was because the 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 European Convention on Human Rights: see *Cadder v HM Advocate*, para 63.

2. The evidence that was in question in *Cadder* had been obtained when the appellant was being questioned while in detention at a police station. The applicant in *Salduz* too had been taken into custody before he was interrogated during his detention by police officers of the anti-terrorism branch of the Izmir Security Directorate. But the facts of those cases by no means exhaust the situations in which the prosecution may seek to rely on answers to questions that have been put to the accused by the police. The Court now has before it four references by judges of the High Court of Justiciary which have been required by the Lord Advocate under paragraph 33 of Schedule 6 to the Scotland Act 1998. Common to them all is the fact that incriminating answers were given to questions put by the police when the accused did not have access to legal advice. In three of them the evidence that is objected to was obtained by the police otherwise than by questioning at a police station following detention under section 14 of the 1995 Act. They can be grouped together and are the subject of this judgment. The fourth is concerned with the question whether the ratio of the decision in *Salduz* extends to lines of enquiry to which the accused's answers to questions while in detention have given rise. That reference is dealt with in a separate judgment: *P v HM Advocate* [2011] UKSC 44.

3. The issues that the first three references raise are (1) 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 (2) if the rule applies at some earlier stage, from what moment does it apply. The first reference is of a case which is the subject of an appeal against conviction. The second is of a case which is before the Appeal Court in an appeal against a ruling by a sheriff on the admissibility of evidence. The third is of case which is the subject of a devolution minute which was referred by the trial judge to the Appeal Court under paragraph 9 of Schedule 6 to the Scotland Act 1998. The cases that are the subject of the second and third references that have

not yet gone to trial, so the names of the parties involved have been anonymised. In each case the reference has been made by the Appeal Court at the request of the Lord Advocate.

The first reference

4. The appellant in the first case, John Paul Ambrose, was prosecuted on summary complaint at Oban Sheriff Court on a charge of contravening section 5(1)(b) of the Road Traffic Act 1988 as being in charge of a motor vehicle whilst having consumed a level of alcohol in excess of the prescribed limit. He had been found by two police officers sitting in the passenger seat of a car parked by the roadside. A female was sitting in the driver's seat. A member of the public had expressed concerns to the police about them because they were thought to be drunk. As there was vomit beside the driver's door and the female was seen to be upset, the police officers decided to speak to the appellant. Having formed the view that he had been drinking, one of the police officers cautioned the appellant but did not give him any specification about the offence which he was suspected of having committed. The appellant made no reply when cautioned. He was then asked three questions, to which he gave answers, by the police. They were as follows:

> "Q – Where are the keys for the vehicle?
>
> A – In my pocket.
>
> Q – Do you drive the car?
>
> A – Yes.
>
> Q – Are you going to drive the car?
>
> A – Ah, well she wisnae well *or* Aye, well she wisnae well."

The appellant then removed the car keys from his trouser pocket. He was asked whether he had anything to drink in the last 20 minutes and replied that he had not. He was then given a roadside breath test which he failed. He was taken to Oban police station where he gave a breath/alcohol reading that was well in excess of the prescribed limit.

5. The appellant pled not guilty to the complaint. He went to trial before a Sheriff on 31 May 2001 and 2 July 2010. The evidence of the questions and answers was led without objection from his solicitor. After the Crown had closed its case the appellant's solicitor challenged the admissibility of this evidence on the ground that the police had not informed the appellant of the offence of which he was suspected before he was questioned. The sheriff repelled this submission. After hearing evidence from the appellant and a defence witness, he found the appellant guilty. He was fined £375, was disqualified from driving for two years and had his licence endorsed. The appellant then lodged an appeal against his conviction. Among the grounds on which he applied for a stated case was the submission that the act of the Lord Advocate in seeking a conviction in reliance on the evidence of the police interview was incompatible with his right to a fair trial under article 6(1). Leave to appeal having been refused at the first sift, he appealed to the second sift and then lodged a devolution minute in which it was stated that for the Lord Advocate to support the conviction would be incompatible with his rights under article 6(1) and article 6(3)(c). In a note which he lodged on 12 October 2010 in support of the appeal he submitted, with reference to the decision in *Salduz*, that the use of the evidence of the interview was unfair as he did not have access to legal representation before or during the police interview. On 3 November 2010 leave to appeal was granted at the second sift.

6. Following a procedural hearing on 26 January 2011 and at the request of the Lord Advocate, the Appeal Court referred the following question to this court:

> "Whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellant's rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v HM Advocate* 2010 SLT 1125."

The second reference

7. The accused in the second case, referred to as M, has been indicted in the sheriff court on a charge of assault to severe injury, permanent disfigurement and permanent impairment. Shortly after the assault took place on 30 August 2008, in the course of initial inquiries, the police took the accused's details from him but allowed him to leave the locus. On 4 September 2008 however he was traced to his home address where, after administering a common law caution to the effect that he was not required to say anything but that anything he did say might be used in

evidence, a police officer asked a total of seven questions, each of which was answered by the accused. They were as follows:

> "Q – I am investigating a serious assault which happened on Saturday night there, within a bar named [X]. There was a large disturbance in there too. Were you there?
>
> A – Yes, aye.
>
> Q – Were you involved in the fight?
>
> A – Aye.
>
> Q – Who were you with?
>
> A – My dad and just boys fae [Y] where I used to work.
>
> Q – Were they involved too?
>
> A – I think so, the other boys started it. I got punched a couple of times on the eyebrow. It's still sair.
>
> Q – OK, what were you wearing?
>
> A – Pale blue t-shirt, jeans, trainers.
>
> Q – OK [M], I will stop there. I need to speak to you further except it will be recorded in a taped interview format. Can you be at [Z] Police Office tomorrow night at 8 pm?
>
> A – Yes.
>
> Q – I need to take your t-shirt you had on, is that OK?
>
> A – Aye."

At this point the police officer concluded his questions because he felt that it had become obvious that the accused had some involvement on the incident and that it was not appropriate to carry out an interview there. The accused attended the police office the next day. He was then detained and interviewed under section 14 of the 1995 Act, in the course of which he made further admissions.

8. The accused was indicted for trial, and after sundry procedure he lodged a minute raising the issue whether the Crown had power to lead evidence of the admissions which he had made. When the minute was argued before the sheriff on 9 November 2010 the Crown conceded that the evidence of the admissions made during the section 14 interview was inadmissible. But the sheriff ruled that evidence relating to the questions and answers at the accused's home on 4 September 2008 was admissible. The accused appealed against that decision to the High Court of Justiciary, contending that by failing to allow him access to legal advice prior to interview and there being no compelling reasons to justify this, his admissions allegedly obtained under caution had been unfairly obtained and were therefore inadmissible.

9. Following a procedural hearing on 26 January 2011 and at the request of the Lord Advocate, the Appeal Court referred the following question to this court:

> "Whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the accused, conducted under common law caution at his home address and without the accused having had access to legal advice would be incompatible with the accused's rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v HM Advocate* 2010 SLT 1125."

The third reference

10. The accused in the third case, referred to as G, has been indicted in the High Court of Justiciary 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 search warrant under the 1971 Act for the search of a flat where on 4 June 2008, having forced entry, they found the accused. Before commencing the search in terms of the warrant the accused, who had been handcuffed following a struggle, was cautioned in these terms:

> "A systematic search will be carried out in your presence. I must caution that you are not obliged to say anything or make any comment regarding any article that may be found, but anything you do say will be noted and may be used in evidence."

The accused was then detained and searched. Prior to being searched he admitted to having drugs in his jeans pocket, from which a bag of brown powder was recovered that was later found to be heroin. He was then arrested for contravention of section 23(4) of the 1971 Act. He was not arrested or charged with any other offence in the course of the search of the premises. During the search he was asked questions about the items which were found. He was not offered access to legal advice or to a solicitor before being asked these questions. After the search was concluded he was removed to a police station where he was detained under section 14 of the 1995 Act and again interviewed by the police in connection with alleged offences involving controlled drugs and firearms. He was not allowed access to legal advice before or during this interview.

11. The Crown does not seek to rely on answers which the accused gave while he was being interviewed in the police station, but it seeks to rely on the statements and answers which he made at the premises in the course of the search. They are set out in a schedule which was completed as the search of the flat was carried out. Without that evidence there would not be sufficient evidence to convict the accused. The accused has lodged a devolution minute in which he contends that the leading of evidence of the statements and answers which he made at the premises would be incompatible with his Convention right to a fair trial. The trial judge decided to refer this issue to the Appeal Court under paragraph 9 of Schedule 6 to the Scotland Act 1998. On 18 January 2011 at the request of the Lord Advocate the Appeal Court referred the following question to this court:

> "Is it incompatible with the Panel's Convention rights for the Lord Advocate to lead evidence of his statements and answers made during the course of the search conducted under warrant granted in terms of section 23(3) of the Misuse of Drugs Act 1971 as recorded in the Search Production Schedule?"

12. In each of these three cases the circumstances differ from those that were before the court in *Cadder* and before the Grand Chamber in *Salduz*. The evidence that is objected to was obtained, in Ambrose's case before he was taken to the police station for further procedures to be carried out under section 7 of the Road Traffic Act 1988 following his failure of a road-side breath test, and in the cases of M and G before they were detained and questioned at a police station under section 14 of the 1995 Act. It is precisely because the issue that the references raise was

not the subject of decision in either case that the court's guidance is now sought by the Lord Advocate.

13. His position is that three features determine whether an individual has a right to legal advice under article 6 in accordance with the principle in *Salduz*. These features are all taken from words used by the Grand Chamber's judgment in that case: see paras 55 and 56. First, he must be a "suspect". Second, he must be "in police custody". Third, he must be the subject of "police interrogation". Unless all three features are present, he has no right of access to legal advice under article 6. These propositions all assume, of course, that the court finds that article 6(1) was engaged when the incriminating statements were made. This is because the protection of articles 6(1) and 6(3)(c) is afforded only to those who have been "charged", as that word has been interpreted by the Strasbourg court. Each of these expressions will need to be analysed in the discussion that follows.

Background

14. Two very important points need, however, to be made at the outset. The first is that the jurisdiction of this court is limited to a consideration of the devolution issue which is raised by each of these references. That is plain from the wording of paragraph 33 of Schedule 6 to the Scotland Act 1998 under which the references have been made, but it needs to be emphasised yet again. The High Court of Justiciary is the court of last resort in all criminal matters in Scotland: see section 124(2) of the Criminal Procedure (Scotland) Act 1995; *McInnes v HM Advocate* [2010] UKSC 7, 2010 SLT 266, para 5, *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515, para 11. It is not our function to rule on how the circumstances referred to in each case would fall to be dealt with under domestic law, although this does form part of the background.

15. The second point is 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 unless there are compelling reasons to restrict that right would have far-reaching consequences. There is no such rule in domestic law: see para 22, below. If that is what Strasbourg requires, then it would be difficult for us to avoid holding that to deny such a person access to a lawyer would be a breach of his rights under articles 6(1) and 6(3)(c) of the Convention. But the consequences of such a ruling would be profound, as the answers to police questioning in such circumstances would always have to be held – in the absence of compelling reasons for restricting access to a lawyer – to be inadmissible. The effect of section 57(2) of the Scotland Act 1998 would be that the Lord Advocate would have no power to lead that evidence. I agree with Lord Matthew Clarke that this would have serious implications for the investigation of crime by the authorities: see para 116, below.

This suggests that a judgment pointing unequivocally to that conclusion would be required to justify taking that step. If Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so.

16. Section 126(1) of the Scotland Act 1998 provides that "the Convention rights" has the same meaning as in the Human Rights Act 1998. Section 2(1) of the Human Rights Act requires this court in determining any question which has arisen in connection with a Convention right to take into account any relevant Strasbourg case law. 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, although the Human Rights Act did not provide that a national court is bound by these decisions, it is obliged to take account of them so far as they are relevant:

> "In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence."

17. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 Lord Bingham of Cornhill said that Lord Slynn's observations in that case reflected the fact that the Convention is an international instrument, the correct interpretation of which can be expounded only by the Strasbourg court. From that it followed that a national court should not without strong reason dilute or weaken the effect of the Strasbourg case law. It was its duty to keep pace with it as it evolved over time. There is, on the other hand, no obligation on the national court to do more than that. As Lord Bingham observed, it is open to member states to provide for rights more generous than those guaranteed by the Convention. But such provision should not be the product of interpretation of the Convention by national courts.

18. Lord Kerr says that it would be wrong to shelter behind the fact that Strasbourg has not so far spoken and use that as a pretext for refusing to give effect to a right if the right in question is otherwise undeniable: para 130, below. For reasons that I shall explain later, I do not think that it is undeniable that Strasbourg would hold that any questions put to a person by the police from the moment he becomes a suspect constitute interrogation which cannot lawfully be carried out unless he has access to a lawyer, which is the principle that Lord Kerr derives from his consideration of the mainstream jurisprudence: see para 146, below. But his suggestion that there is something wrong with what he calls an *Ullah*-type reticence raises an important issue of principle.

19. It is worth recalling that Lord Bingham's observations in *Ullah* were not his first pronouncements on the approach which he believed should be taken to the Convention. In *Brown v Stott* 2001 SC (PC) 43, 59 he said:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* ([1930] AC 124) at p 136 per Lord Sankey LC), but those limits will often call for very careful consideration."

The consistency between this passage and what he said in *Ullah* shows that Lord Bingham saw this as fundamental to a proper understanding of the extent of the jurisdiction given to the domestic courts by Parliament. Lord Kerr doubts whether Lord Bingham intended that his discussion of the issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they had been pronounced upon by Strasbourg: para 128, below. I, for my part, would hesitate to attribute to him an approach to the issue which he did not himself ever express and which, moreover, would be at variance with what he himself actually said. Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.

20. That is why, the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it 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.

The background in domestic law

21. The powers of the police to detain a person and to subject him to questioning depend on the category into which the person falls at the time these powers are being exercised. They differ according to whether the person is a witness, a suspect or an accused. Where a person is not under suspicion, the police have no power to take him into custody or to compel him to submit to police questioning. Such a person is classified, at most, as a witness. A person who is in that category can be asked to provide personal information, such as his name and address. Further questions may be put as part of a routine investigation into the events that have happened. So long as he is being questioned as a potential witness rather than as a suspect, the right to protection against self-incrimination is not in play. There is no obligation to advise him of his rights, such as the right to silence or his right to seek legal advice. As Lord Justice Clerk Thomson said in *Chalmers v HM Advocate* 1954 JC 66, 81, a person ultimately accused may be interviewed as part of the ordinary routine investigation of the police into the circumstances of the crime. It would unduly hamper the investigation of crime if the threat of inadmissibility were to tie the hands of the police in asking questions at this stage.

22. The position changes if the stage is reached when suspicion begins to fall on the person who is being questioned. Once suspicion has begun to fall on him the need to protect him against self-incrimination comes into play. As Lord Justice General Cooper explained in *Chalmers v HM Advocate* 1954 JC 66, 78:

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, eg to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded."

It was for a time thought that this passage was to be taken to establish that answers by suspects to police questioning were inadmissible by virtue of the person's position as a person under serious consideration as the perpetrator of the crime. But, as the law has developed, the position is less easy to define: see Renton and Brown, *Criminal Procedure*, 6th ed looseleaf (1996), para 24-38. In *Miln v Cullen*

1967 JC 21 it was held that the incriminating answers which the driver of a car gave when questioned by police officers who had formed the opinion that he was under the influence of drink were admissible in evidence. Lord Justice Clerk Grant said at p 25 that the constable, in asking the simple question whether he was the driver, was not merely acting reasonably, properly and fairly but was acting in accordance with the duties incumbent upon him. Lord Wheatley said at pp 30-31 that it was difficult to define with exactitude when a person becomes a suspect in the eyes of a police officer, as it may vary from a very slight suspicion to a clearly informed one, and that what happened after that had to be judged by the test of fairness.

23. In *Lord Advocate's Reference (No 1 of 1983)* 1984 JC 52, 58 Lord Justice General Emslie said that Lord Wheatley's statement in *Miln v Cullen*, at p 31 that in each case the issue is whether the question was in the circumstances a fair one was a sound statement of the law:

> "A suspect's self-incriminating answers to police questioning will indeed be admissible in evidence unless it can be affirmed that they have been extracted from him by unfair means. The simple and intelligible test which has worked well in practice is whether what has taken place has been fair or not? (see the opinion of the Lord Justice General (Clyde) in *Brown v HM Advocate* 1966 SLT 105 at 107). In each case where the admissibility of answers by a suspect to police questioning becomes an issue it will be necessary to consider the whole relevant circumstances in order to discover whether or not there has been unfairness on the part of the police resulting in the extraction from the suspect of the answers in question."

He went on to say that, where the words "interrogation" and "cross-examination" were used in the decided cases in discussing unfair tactics on the part of the police, they were to be understood to refer only to improper forms of questioning tainted with an element of bullying or pressure designed to break the will of the suspect or to force from him a confession against his will. The current position as described in Renton and Brown, para 24-39 is therefore that the fact that the accused was at the time under suspicion or even under arrest is not in itself crucial. It is merely a circumstance like any other to be taken into account in assessing the fairness of the police questioning.

24. The legal basis for detaining and questioning a suspect was clarified by section 2 of the Criminal Justice (Scotland) Act 1980 which was consolidated as section 14 of the Criminal Procedure (Scotland) Act 1995. The background to the legislation was described with characteristic skill and attention to detail by Lord Rodger in *Cadder*, para 74-86. As he explained in para 86, 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. A person may be detained for the purpose of carrying out investigations where a constable has reasonable grounds for suspecting that he has committed or is committing an offence punishable by imprisonment: section 14(1). Where a person has been detained under section 14(1) a constable may, 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: section 14(7). The effect of the decision in *Cadder* is that the Lord Advocate has no power to lead and rely on answers by a detainee who was subjected to questioning by the police while he was without access to legal advice.

25. In none of the situations described in each of the references was the person who was being questioned a detainee under section 14 of the 1995 Act. The domestic law test for the admissibility of the answers that were given to the questions put by the 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 is no more than that. There is no rule in domestic law that says that police questioning of a person without access to legal advice who is suspected of an offence but is not in custody must always be regarded as unfair. The question is whether a rule to that effect is to be found, with a sufficient degree of clarity, in the jurisprudence of the Strasbourg court.

The reasoning in Salduz

26. The starting point for an examination of this question must be the reasoning of the Grand Chamber in *Salduz*. Some of the propositions that are set out in its judgment are expressed in a way that might suggest that the right of access to a lawyer is not confined to persons who are subjected to police questioning while they are in custody. Para 55 of the judgment is in these terms:

> "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."

Read on its own, and without taking full account of the context in which these sentences were written, that paragraph suggests that the features which determine whether access to legal advice is to be provided are (a) that the person is a suspect, and (b) that he is subject to police interrogation. No mention is made in this paragraph of his being in police custody. The fact is, however, that the applicant was in police custody when he was interrogated by the police. The narrative of the facts in paras 12-14 shows that it was not until after he had been taken into custody by police officers from the Anti-Terrorism Branch of the Izmir Security Directorate that he was interrogated. That being so, it is necessary to look elsewhere in the judgment to see whether the court was contemplating anything other than an interrogation in police custody when it came to set out what it did in para 55 of the judgment.

27. In Part II A of the judgment, under the heading "Domestic law", the court referred to legislation in force at the time of the application which provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment they were taken into police custody. The reason why this had not been provided to the applicant was that the legislation did not apply to persons accused of offences falling within the jurisdiction of the state security courts, which his offence did. The challenge, therefore, was to a systematic departure from the right of access to a lawyer which the law gave to everyone else. In its examination of recent amendments in paras 29-31 of the judgment too its focus was on provisions that deal with juveniles taken into police custody.

28. That continued to be its focus in its examination of the relevant international law materials in Part IIB. Chapter 1 of that Part refers to materials from the Council of Europe and the United Nations dealing with procedure in juvenile cases where the child had been deprived of his liberty by means of pre-trial detention. The heading of Chapter 2 is "Right of access to a lawyer during police custody". Reference is made in para 37 of the judgment to rule 93 of the Standard Minimum Rules for the Treatment of Prisoners adopted by the Council of Europe Ministers, which states that an untried prisoner shall be entitled as soon as he is imprisoned to choose his legal representatives and to receive visits from his legal adviser, and, in para 38, to a recommendation of the Committee of Ministers to Member States of the Council of Europe dealing with the right of prisoners to legal advice. There is no sign here or in its examination of the United Nations materials in paras 41-42 that the Grand Chamber was interested in the position of suspects who were questioned by the police when not in custody. Nor is there any sign of an international consensus that there is a right of access to a lawyer at that stage.

29. The part of the judgment which deals with the alleged violation of article 6 of the Convention begins at para 45. The first section, which is headed "Access to a lawyer during police custody", continues to para 63. It includes para 55, which I have already quoted: see para 26, above. In para 45 it is stated that the applicant's allegation was that his defence rights had been violated as he had been denied access to a lawyer during his police custody. The parties' submissions, as narrated in paras 47-49 were directed to this issue. There then follows a discussion of the general principles which were applicable to the case: paras 50-55. In this passage, to which I will return, the court does not, at least in so many words, limit its scrutiny of the principles to what they require in cases where the person concerned is in police custody. But in the next section, where it applies the principles to the case of applicant, the fact that he was in police custody lies at the heart of the discussion; paras 56-62. The holding in para 80 states that there had been a violation of the applicant's rights under article 6(1) in conjunction with article 6(3)(c) on account of the lack of legal assistance while he was in police custody.

30. But for the discussion of the relevant principles in paras 50-55, which is not so limited, there would be no doubt at all that the Grand Chamber's declaration in the last sentence of para 55 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 was directed to the situation where that interrogation took place while the person was in police custody. That is the conclusion that one would naturally draw from the context. The concurring opinions of Judge Bratza and Judge Zagrebelsky lend further support to this conclusion. Judge Bratza said in para O-I2 that, like Judge Zagrebelsky, he thought that the court should have used the opportunity to state in clear terms that the fairness of criminal proceedings under article 6 required that, as a rule, a suspect should be granted legal advice "from the moment he is taken into police custody or pre-trial detention." No mention is made in either of these opinions of any rule to the effect that the suspect should be granted legal advice at any earlier stage. It may be, as Lord Rodger suggested in *Cadder*, para 70, that what these judges were contemplating was legal assistance for other purposes such as support for an accused who was distressed or to check on the conditions of detention. Whatever the reason, they were plainly not addressing their remarks to situations such as those described in the references where the questioning took place before the suspect was taken into police custody.

31. The discussion of the general principles in paras 50-55 is not limited in this way. As para 50 makes clear, the fact that the applicant's case was concerned with pre-trial proceedings did not mean that article 6 had no application. The point is made that the fairness of a trial may be seriously prejudiced by an initial failure to comply with its provisions. In para 51 reference is made to the right of everyone charged with a criminal offence to be effectively defended by a lawyer, the choice of means of ensuring this being left to the contracting states. The paragraph ends

with a warning that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused. So far there is nothing to suggest that the Grand Chamber was searching for a basis for a ruling that the right of access to a lawyer arose at a stage before the suspect was taken into police custody. In para 52 reference is made for the first time to the attitude of the accused at the initial stages of police interrogation and to the fact that article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer at this stage. No mention is made of where he was assumed to be when he is being questioned, but the cases referred to in the footnote to this paragraph are all cases where the applicant was in custody when he was subjected to interrogation by the police: *Murray v United Kingdom* (1996) 22 EHRR 29, *Brennan v United Kingdom* (2001) 34 EHRR 507 and *Magee v United Kingdom* (2000) 31 EHRR 822.

32. In para 53 it is stated that the principles outlined in the previous paragraph are also in line with the generally accepted international human rights standards which, as the footnote to this paragraph indicates, are those set out in Part B of the judgment: see para 28, above. These are said to be at the core of the concept of a fair trial. Their rationale relates in particular to the protection of an accused against abusive coercion on the part of the authorities. The language used and the international materials referred to suggest that what the Grand Chamber had in mind here was the need for protection of the accused against abusive coercion while he was in custody. In para 54 it underlined the importance of the investigation stage for the preparation of criminal proceedings and referred to the fact that the accused often finds himself in a particularly vulnerable position "at that stage of the proceedings" and to the fact that early access to a lawyer was part of the procedural safeguards to which the court will have particular regard. The stage in the proceedings that the court had in mind is not specified other than by reference to the accused's vulnerability. This is said to be amplified by the fact that legislation in criminal procedure tends to become increasingly complex. It seems that what the Grand Chamber had in mind here was a stage when the accused was being subjected to detailed questioning of the kind that, under the inquisitorial systems, will invariably take place after the accused has been taken into custody. This impression is reinforced by the reference in the third last sentence of the paragraph to the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment about the right of a detainee to have access to legal advice as a fundamental safeguard against ill-treatment to which, I would infer, it was thought a detainee might be vulnerable.

33. This analysis of the reasoning of the Grand Chamber in *Salduz* suggests that the judgment was 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. The alternative view is that in para 55 it recognised a broader principle that the rule applies as soon as the person has been charged so that article 6 is engaged. This alternative has a certain logical appeal for the reasons that Lord Kerr has

identified. The prejudice suffered by the accused is the same irrespective of the stage at which an incriminating statement is made in answer to questions put by the police.

34. But the base on which this proposition rests is not that the Convention prohibits absolutely any reliance on incriminating statements. 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. Everyone is entitled to respect for the right not to incriminate himself, irrespective of whether or not he is in police custody. Nevertheless a person can confess if he is willing to do so, and his confession will be admissible if it is truly voluntary. The underlying principle therefore is that there is a right against self-incrimination which in some circumstances must be protected by special measures to protect the person against the risk that a confession may be obtained from him against his will by unfair tactics by the police. That is why the court recognised in its application of those principles to Salduz's case, as it had already done in para 54, that an interview which takes place in police custody has particular features which require the provision of an especially strong protection to protect the rights of the defence against a forced confession. It is that aspect of Salduz's case which seems to have informed the whole of the court's judgment.

35. It seems to me that the Grand Chamber's judgment, when taken as a whole, does not indicate with a sufficient degree of clarity – or indeed, I would suggest, in any way at all – that the ruling in para 55 about incriminating statements made without access to a lawyer applies to questions put by the police before the accused is taken into custody. The context would have required this to be stated expressly if it was what was intended, as the rule which the judgment laid down can be departed from only where there are compelling reasons to justify its restriction. It would have had to have been stated precisely to what situations outside police custody the rule was to apply, and it was not.

The jurisprudence since Salduz

36. The Grand Chamber's judgment has, not surprisingly, been referred to many times by the Strasbourg court since the judgment in that case was delivered. The question is whether there is an indication in any of the cases that the right of access to a lawyer arises, as a rule, as soon as a person whose rights under article 6 are engaged is subject to questioning by the police.

37. There are passages in some of the cases which indicate that *Salduz* is regarded as having been concerned only with the need for legal advice while the

person was in custody. In *Dayanan v Turkey* (application no 7377/03) (unreported) given on 13 October 2009, which is a decision of the Second Section and is available only in French, the applicant was arrested and detained as part of an operation against the Hizbullah. He was informed of his right to silence and exercised it, as he refused to answer the questions put to him by the police. It was held nevertheless that there had been a breach of article 6(3)(c) in conjunction with article 6(1) because he did not have access to a lawyer while he was being interrogated. The court said:

> "31. Elle estime que l'équité d'une procédure pénale requiert d'une manière générale, aux fins de l'article 6 de la Convention, que le suspect jouisse de la possibilité de se faire assister par un avocat dès le moment de son placement en garde à vue ou en détention provisoire.
>
> 32. Comme le souligne les normes internationales généralement reconnues, que la Cour accepte et qui encadrent sa jurisprudence, un accusé doit, dès qu'il est privé de liberté, pouvoir bénéficier de l'assistance d'un avocat et cela indépendamment des interrogatoires qu'il subit (pour les textes de droit international pertinents en la matière, voir *Salduz*, précité, paras 37-44)…"

The proposition in para 32 that an accused must have access to a lawyer from the moment he is deprived of his liberty ("un accusé doit, dès qu'il est privé de liberté, pouvoir bénéficier de l'assistance d'un avocat") seems to go further than what the Grand Chamber itself said in *Salduz*. It is more in keeping with the concurring opinions of Judge Bratza and Judge Zagrebelesky. However that may be, the passages which I have quoted indicate the importance that appears to have been attached by Strasbourg to the fact that the person was in police custody when he was being interrogated. It is especially significant that this is what the court saw the international consensus ("les normes internationales généralement reconnues") to be on this issue.

38. Three other cases from Turkey are to the same effect. In *Arzu v Turkey* (application no 1915/03) (unreported) given on 15 September 2009 the applicant, who was arrested and placed in custody, complained that he had been denied access to a lawyer during the initial stages of the criminal proceedings against him. The court said that *Salduz* had considered the grievance of a lack of access to a lawyer whilst in police custody: para 46. In *Duman v Turkey* (application no 28439/03) (unreported) given on 23 March 2010 the court said in para 46 that the use of statements obtained at the stage of the police inquiry and the judicial investigation is not inconsistent with article 6(1), provided that the rights of the defence are respected. On that point the court said that it relied on the basic

principles laid down in its judgments, including *Salduz*, para 55, concerning the notion of a fair procedure. In *Taşkin v Turkey* (application no 5289/06) (unreported) given on 1 February 2011 the applicant complained that he had had no legal assistance before he made his police statement or during his interrogation before the public prosecutor while in custody. The court observed that it had already examined the issue concerning the lack of legal assistance in police custody in *Salduz*, paras 56-62. In all these cases, as in *Salduz* itself, there was a systemic restriction on access to legal advice by anyone held in police custody in connection with proceedings that were to be taken in the state security courts.

39. In *Pishchalnikov v Russia* (application no 7025/04) (unreported) given on 24 September 2009 the applicant, who had been arrested, was interrogated while he was in police custody. The pattern of the First Section's judgment followed that of the Grand Chamber in *Salduz.* It repeated many of the propositions in paras 50-55 of *Salduz* in its assessment of the case under the heading "Restrictions on access to a lawyer in the police custody", and referred in para 71 to the fact that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of a fair procedure under article 6. But, as it was a custody case, it does not examine the question whether these propositions require access to a lawyer at any earlier stage. In *Sharkunov and Mezentsev v Russia* (application no 75330/01) (unreported) given on 10 June 2010 the question before the court was again directed to the lack of legal assistance while in police custody and the use at the trial of incriminating statements that had been made at that stage. In para 97 the court repeated the proposition that was first stated in *Salduz*, para 55 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. But once again the police interrogation in the course of which these statements were made took place while the applicant was in police custody.

40. In *Borotyuk v Ukraine* (application no 33579/04) (unreported) given on 16 December 2010 the applicant was, once again, in police custody during the pre-trial investigation. Here too the propositions on which the court based its judgment are closely modelled on what the Grand Chamber said in para 55 of *Salduz*. In para 79 it summarised the general principles that are to be found there. It stated that, as a rule, access to a lawyer must be provided as from the first questioning of a suspect by the police, unless it can be demonstrated in the light of the particular circumstances that there are compelling reasons to restrict that right. As in para 55 of *Salduz*, no indication is given that the principles are restricted to cases where the accused was in police custody. But, as in *Salduz*, that was the background against which the case was heard. Once again it is unclear whether the general propositions on which the judgment was based must equally be applied, as a rule, to cases where the accused was not in custody when the questioning took place.

Zaichenko v Russia

41. The First Section had the opportunity to clarify where the court stood on this issue in *Zaichenko v Russia* (application no 39660/02) (unreported) given on 18 February 2010. This appears to have been the only case to date in which the complaint was of lack of legal assistance during questioning by the police when the applicant was not in custody. He was stopped while he was driving home from work and his car was inspected by the police as there had been reports of workers stealing diesel from their service vehicles. Two cans of diesel were discovered in the car. The applicant made self-incriminating statements in reply to questions put to him by the police at the roadside. He was charged with stealing the cans, and he was convicted. His complaint was that he had not been advised of the privilege against self-incrimination when he made his admission to the police. His position at the trial was that he had purchased the diesel at a petrol station and that he did not give this explanation to the police because he felt intimidated and did not have a receipt to prove the purchase.

42. In its assessment the court set out the general principles that are relevant to a consideration of whether there has been a violation of the right to a fair trial. It noted that article 6(3)(c) especially might be relevant before a case is sent to trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by a initial failure to comply with its requirements. In para 36 it recalled, as the Grand Chamber did in *Salduz*, the proposition that the court set out in *Imbrioscia v Switzerland* (1993) 17 EHRR 441, para 38 that the manner in which articles 6(1) and 6(3)(c) were to be applied during the preliminary investigation depended on the special features of the proceedings and on the circumstances of the case. Account was taken in para 37 of the principles set out in *Salduz*, para 55 and in para 38 of the fact that the right to silence and the right not to incriminate oneself are generally recognised standards which lie at the heart of the notion of a fair procedure.

43. Para 38 then contains these important propositions which did not receive the same attention in *Salduz*:

> "The right not to incriminate oneself 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 (see, inter alia, *J B v Switzerland*, no 31827/96, para 64, ECHR 2001-III). In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court must examine the

> nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (ibid)."

44. Applying these propositions to the applicant's case, the court noted in para 42 that in criminal matters article 6 comes into play as soon as a person is "charged" and that this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened. *Eckle v Germany* (1982) 5 EHRR 1, para 73 was referred to, which includes the proposition taken from cases such as *Deweer v Belgium* (1980) 2 EHRR 439, para 46 that the test as to whether a person has been "charged" for the purposes of article 6(1) is whether the situation of the person has been substantially affected. The court concluded that, given the context of the road check and the applicant's inability to produce any proof of the diesel purchase at the moment of his questioning by the police, there was a suspicion of theft against him from that moment and that, although he was not yet accused of any criminal offence, his situation in the proceedings at the roadside was substantially affected. So article 6(1) was engaged at that point.

45. But the fact that article 6(1) was engaged did not mean that a right of access to a lawyer arose at that point. The court observed in para 47 that the case was different from previous cases concerning the right to legal assistance in pre-trial proceedings. This was because the applicant was not formally arrested or in police custody but was stopped for a roadside check which was carried out in the presence of two attesting witnesses. In para 48 it said:

> "Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings."

In para 49 it noted that the role of the police in such a situation was to draw up an inspection record and receive the applicant's explanation as to the origin of the cans in his car. Having done so, the police transferred the documents to the inquirer who submitted a report to his superior which prompted him to open a criminal case against the applicant. In para 51 it held that the absence of legal representation at the roadside check did not violate his right to legal assistance under article 6(3)(c). In a partly dissenting opinion Judge Spielmann said that the interview took place in circumstances that could in no way be compared to those normally observed during routine road checks and he could not agree that the

circumstances of the case disclosed no significant curtailment of the applicant's freedom of action such as to require legal assistance. He did not take issue with the principle formulated in para 48. His dissent was as to its application to the facts of the case.

46. Mr Scott for Ambrose submitted that it was wrong to look at the court's reasoning in *Salduz* through what it decided in *Zaichenko*. Mr Shead for M submitted that *Zaichenko* was so out of line with the other cases, and so hard to reconcile with the basic principles that were stated in *Salduz,* that it should be regarded as having been wrongly decided. I would reject these arguments. The President of the Court, Judge Rozakis, was a member of the Grand Chamber in *Salduz*, as was Judge Spielmann. The importance of the question that the case raised, which was whether the ruling in *Salduz* applied to questioning where the applicant was not in police custody, would not have been overlooked. The reasoning shows that the reasoning in *Salduz* was fully taken into account. The finding in para 48 that the circumstances did not disclose a sufficient curtailment of the applicant's freedom of action which could be sufficient for activating a requirement for legal assistance indicates that the court was well aware that it had to give reasons for reaching a different result. That it did so in the way that it did shows that this is a judgment which must be taken into account in the search for an answer to the question where the jurisprudence of the Strasbourg court stands on the question we have to decide.

Abdurahman v United Kingdom

47. The question whether the right of access to a lawyer applies at a stage before the person is taken into custody is now before the Strasbourg court in an application by Ismail Abdurahman, application no 40351/09. He was questioned by the police as a witness in connection with the attempt to detonate four bombs at separate points in the London public transport system two weeks after the bombings that took place on 7 July 2005. He had been approached by two police officers who took him to a police station. According to their evidence at the voir dire at the applicant's trial, this was with a view to his assisting the police as a potential witness. They began interviewing him, but after about 45 minutes of questioning they considered that, as a result of the answers that he was giving, he was in danger of incriminating himself and should be cautioned. On instructions from a senior officer they continued nevertheless to interview him as if he were a witness. It was not until after he had completed and signed his witness statement, which contained statements that were incriminating and was made without access to legal assistance, that they were told to arrest him and he was then taken into custody.

48. This case is still awaiting a hearing in Strasbourg. It has reached the stage of the court posing questions to the parties, which are whether there has been a violation of article 6(1) together with article 6(3)(c) arising from

> "(a) the failure to caution the applicant before he gave his witness statement (*Aleksandr Zaichenko v Russia*, no 39660/02, 18 February 2010); and/or
>
> (b) the failure to provide him with legal assistance before he gave the witness statement? In particular, were the rights of the defence irretrievably prejudiced by the use of the witness statement at trial (*Salduz v Turkey* [GC], no 36391/02, para 55, 27 November 2008)?"

It is, of course, too early to say what view will be taken of this case when the facts have been assessed by the court in the light of the relevant principles. But it is at least likely that its judgment will provide some useful guidance as to the approach that is to be taken to a person's rights under article 6(1) together with article 6(3)(c) where the prosecution seeks to rely on answers given to questions by the police before he is formally taken into custody. The key issue, so far as the references that are before the court in this case are concerned, is whether, as a rule, access to a lawyer must always be provided when a person is questioned at any stage in the proceedings after he has become a suspect and must be taken to have been charged for the purposes of article 6 (see paras 62-63, below), or whether access to a lawyer is required, as a rule, only where the person has been taken into custody or his freedom of action has been significantly curtailed.

49. The fact that this application is still pending suggests that, if there was any doubt as to where the jurisprudence of the Strasbourg court stands, it would have been wise to wait for its judgment in *Abdurahman* before holding that there is a rule that access must be provided in any situation that is not analogous on its facts to that which was before the court in *Salduz*. But that is for another day, as the delivery of the judgment in that case cannot be taken to be imminent.

Miranda v Arizona

50. The Lord Advocate placed considerable weight in support of his argument on the judgment of the Supreme Court of the United States in *Miranda v Arizona* 384 US 436 (1966). In that case the Supreme Court held that the prosecution may not use statements, whether incriminatory or exculpatory, stemming from custodial interrogation of a defendant unless it demonstrated the use of procedural safeguards which were sufficient to secure the privilege against self-incrimination.

These safeguards require that, unless other fully effective means are devised to inform the accused person of the right to silence and to assure continuous opportunity to exercise it, he must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, that he has the right to consult with an attorney and that, if he cannot afford one, a lawyer will be appointed to represent him. "Custodial interrogation" for the purposes of this rule means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way: p 444.

51. *Miranda* has been referred to in a number of individual opinions given by judges of the Strasbourg court. Judge De Meyer referred to it in his dissenting opinion in *Imbrioscia v Switzerland* (1993) 17 EHRR 441. The applicant in *Imbrioscia* had been questioned several times without access to a lawyer while he was in police custody but the court held, considering the proceedings as a whole, that there had been no breach of article 6(1) read with article 6(3)(c). Judge De Meyer said that the court had failed to recognise the rules governing the right to legal advice during custodial interrogation which the Supreme Court has summarised in its *Miranda* judgment and which he said belonged to the very essence of fair trial. In *Murray v United Kingdom* (1996) 22 EHRR 29 the applicant had been denied legal advice for 48 hours after he had been taken into custody. The court held that there had been a violation of article 6(1) read with article 6(3)(c). The partly dissenting judges, Judge Pettiti, joined by Judge Valticos, and Judge Walsh, joined by Judges Makarczyk and Löhmus, also referred to the *Miranda* judgment in this context. Judge Walsh pointed out that the Supreme Court had affirmed that the constitutional protection against self-incrimination contained in the Fifth Amendment

> "guarantees to the individual the 'right to remain silent unless he chooses to speak in the unfettered exercise of his own free will' whether during custodial interrogation or in court."

Much more recently, but prior to the Grand Chamber's decision in *Salduz*, Judge Fura-Sandström joined by Judge Zupančič referred to *Miranda* in *Galstyan v Armenia* (2007) 50 EHRR 618 when, in para 0-I5, she described the right to be assisted by a lawyer as a bright line rule which nobody should cross and said that its purpose was to neutralise the distinct psychological disadvantage that suspects are under while dealing with the police.

52. The Strasbourg court has not referred to *Miranda* in any of its judgments, and *Imbrioscia*, *Murray* and *Galstyan* are the only cases where it has been referred to in a dissenting opinion in the context of what is described in *Miranda* as custodial interrogation. But it can be assumed that the court will not have

overlooked it in its search for generally accepted international human rights standards. The dissenting judgments in *Imbrioscia* and *Murray* which drew attention to it were given before the Grand Chamber considered the issue in *Salduz*, and those cases were cited to it in that case. As T A H M van der Laar and R L de Graaf, "Salduz and Miranda: is the US Supreme Court pointing the way?" [2011] 3 EHRLR 304, 315 have pointed out, the test that the Strasbourg court described in paras 47 and 48 of *Zaichenko* when it considered that the applicant was neither "formally arrested" nor "interrogated in police custody" and that there was no "significant curtailment of his freedom of action" echoes the statement in *Miranda*, p 477 that the rule of access to a lawyer that it describes applies when the suspect is subjected to police interrogation while in custody or otherwise deprived of his freedom of action in any significant way.

53. It is not unreasonable to think that *Miranda* and subsequent cases that the ruling in that case have given rise to in the United States will influence the thinking of the Strasbourg court as it develops the principles described in *Salduz*. The significance of *Miranda* is that it follows the custodial approach to the question as to when access to a lawyer is required. The core of that decision, as der Laar and de Graaf have described it in [2011] EHRLR 304, 310, is that a suspect's statement made as a result of interrogation initiated by the interrogating authorities while he is in custody cannot be used in evidence unless the prosecutor can prove that the procedural safeguards that were used were effective enough to secure the suspect's right not to incriminate himself. The underlying reason is that the circumstances in which such an interrogation takes place are inherently intimidating. As Chief Justice Warren explained at p 445, an understanding of the nature and setting of the in-custody interrogation was essential to the court's decision: incommunicado interrogation in a police-dominated atmosphere. But it was noted that an interpretation of the requirement that the right to legal advice arose at an earlier stage would hamper the traditional function of the police in investigating crime. General on-the-scene questioning as to facts surrounding the crime or other general questioning of citizens was not affected. The right to legal advice was held not to extend that far because the compelling atmosphere inherent in the process of in-custody interrogation was not necessarily present: *Miranda*, pp 477-478. The accused in that position is protected by the rule that only statements voluntarily made are admissible.

54. I think that there is an indication here about the way the Strasbourg court's jurisprudence may develop, if there are doubts as to the significance of the court's decision in *Zaichenko*. *Miranda* shows that reasons can be given which, at the very least, the court has not yet said are irrelevant for thinking that it would be going too far to hold that there is a rule that there must be access to a lawyer irrespective of whether the person who is being questioned by the police is being held in custody. The basis for the ruling in *Miranda* is that police custody or its equivalent creates particular pressures which mean that the person's will is more likely to be

overcome when he is being questioned under conditions of that kind. The observation in *Salduz*, para 53 that the rationale of the generally recognised international human rights standards relates in particular to the protection of the accused against abusive coercion on the part of the authorities fits in with this line of reasoning. This feature is likely to be absent when questions are being put at the locus or in the person's home simply with a view to deciding whether the person being questioned is to be treated as a suspect and, as such, to be subjected to further procedures.

The case for police custody or its equivalent

55. I should like, before stating my conclusions, to say a bit more about why I would hold that 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 as it was put in *Zaichenko*, para 48.

56. I return to the points I made in para 34, above. The privilege against self-incrimination is not an absolute right: *Murray v United Kingdom* (1996) 22 EHRR 29, para 47; *Brown v Stott* 2001 SC (PC) 43, 64, per Lord Steyn. At p 60 Lord Bingham said that while it could not be doubted that such a right must be implied, there is no treaty provision which expressly governs the effect or extent of what is to be implied. At p 74 I said that implied rights are open, in principle, to modification or restriction so long as this is not incompatible with the right to a fair trial. We do know however that the right is primarily concerned with respecting the will of the person to remain silent: see *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68. A person is therefore free to speak to the police and to answer questions if he is willing to do so, even after he has been cautioned. He can provide them with self-incriminating answers if he is willing to do this, and his answers will be admissible if they are truly voluntary. This approach to the problem is familiar in domestic law: see para 22, above. So long as it is applied the fundamental right under article 6 to a fair trial will be guaranteed. The test is whether the will of the person to remain silent, if that is his will, has been respected. Answers cannot be extracted from him by unfair means, and he must be protected against the risk that they may be forced out of him.

57. It is well understood that in some circumstances merely to caution the person that he has the right to remain silent will not be enough to protect him against the risk of a forced confession. The paradigm case is where he is in police custody. In such a situation the circumstances surrounding his questioning are likely to be oppressive and intimidating. The questioning is likely to be prolonged, and the atmosphere is likely to be coercive. In such circumstances it is reasonable to assume that he will be vulnerable to having a confession extracted from him

against his will and to insist that special measures are needed to ensure that his rights are respected.

58. As Lord Kerr points out, common experience tells us that a coercive atmosphere can exist independently of custody: para 147, below. That is why it was recognised in *Miranda* and in *Zaichenko* that a person's freedom of action to act as he wishes may be significantly impaired in other circumstances. But it does not follow that this will be so in every case when the police engage in conversation with a suspect. Circumstances will vary, and questioning which may become objectionable as the process continues may not be so during its initial stages. That is why I believe that a more flexible approach to the problem is called for than the rigid principle that Lord Kerr would adopt, which would involve laying down a rule that access to lawyer must always be provided before any police questioning can take place: see para 146, below.

59. Lord Kerr says in para 148 that there is no reason to suppose that a person questioned by the police while not in detention would not experience the same need to acquiesce in the power of the police to require answers to potentially highly incriminating questions. The important question, he says, is whether the questions asked are liable to be productive of incriminating answers, not the circumstances in which they are being asked. That leads him to say that whenever questions of that kind are being put to a suspect they must be asked in the presence of a lawyer. I do not think that there is any support in the Strasbourg cases, or in such international authorities as we have been shown, for that proposition.

60. The point that was being made in the Canadian case of *R v Grant* 2009 SCC 32; [2009] 2 SCR 353 to which he refers in para 147 was that there are *situations* in which psychological constraint amounting to detention have been recognised: the majority judgment of McLachlin CJ and LeBel, Fish, Abella and Charron JJ at para 30. These are where the subject is legally required to comply with a direction or command and where there is no such obligation but a reasonable person in the subject's position would feel so obligated. Not every conversation that takes place between the police and a suspect in which questions are asked is of that character. A demand or direction by a police officer is one thing. Questioning under caution is another. It is understandable that a person who is confronted by a direction or a demand by a police officer to provide information will feel that he has to comply with it. It is understandable too if the circumstances are such that he feels that he has no real choice in the matter. That is why the law requires that before questions are put to him by the police the suspect must be cautioned. In that way a fair balance is struck between the interests of the individual and the public interest in the detection and suppression of crime. The search for that balance is inherent in the whole of the Convention: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69. The whole point of the caution is to make it clear to the person that he is under no obligation to answer the questions that are being put to him. The

requirement would be pointless if it is to be assumed that he will nevertheless feel, whatever the circumstances, that he has no alternative but to answer them. Whether the caution is enough to ensure that the person will have a fair trial will depend on the circumstances.

Conclusion

61. I return to the Lord Advocate's submission that three features determine whether an individual has a right to legal advice under article 6 in accordance with the principle in *Salduz*. First, he must be a "suspect". Second, he must be "in police custody". Third, he must be the subject of "police interrogation". The submission is that, unless all three features are present, he has no right of access to legal advice under article 6.

62. The correct starting point, when one is considering whether the person's Convention rights have been breached, is to identify the moment as from which he was charged for the purposes of article 6(1). The guidance as to when this occurs is well known. The test is whether the situation of the individual was substantially affected: *Deweer v Belgium* (1980) 2 EHRR 439, para 46; *Eckle v Germany* (1982) 5 EHRR 1, para 73. His position will have been substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled: *Shabelnik v Ukraine* (application no 16404/03) (unreported) given on 19 February 2009, para 57. In *Corigliano v Italy* (1982) 5 EHRR 334, para 34 the court said that, whilst "charge" for the purposes of article 6(1) might in general be defined as the official notification given to the individual by the competent authority of an allegation that he has committed an criminal offence, as it was put in *Eckle*, para 73, it may in some instances take the form of other measures which carry the implication of such an allegation. In *Šubinski v Slovenia* (application no 19611/04) (unreported) given on 18 January 2007, paras 62-63 the court said that a substantive approach, rather than a formal approach, should be adopted. It should look behind the appearances and investigate the realities of the procedure in question. This suggests that the words "official notification" should not be taken literally, and that events that happened after the moment when the test is to be taken to have been satisfied may inform the answer to the question whether the position of the individual has been substantially affected.

63. It is obvious that the test will have been satisfied when the individual has been detained and taken into custody. It must be taken to have been satisfied too where he is subjected to what *Salduz*, para 52 refers to as the initial stages of police interrogation. This is because an initial failure to comply with the provisions of article 6 at that stage may seriously prejudice his right to a fair trial. The moment at which article 6 is engaged when the individual is questioned by the police requires very sensitive handling if protection is to be given to the right not

to incriminate oneself. The mere fact that the individual has been cautioned will not carry the necessary implication. But, when the surrounding circumstances or the actions that follow immediately afterwards are taken into account, it may well do so. The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of article 6(1): *Shabelnik v Ukraine*, para 57. The Lord Advocate submitted that the protection of article 6(3)(c) was not engaged until the individual was actually taken into custody. But this cannot withstand the emphasis that the Strasbourg court puts on the consequences of an initial failure to comply with its provisions, as in *Salduz*, para 50; see also *Zaichenko v Russia*, para 42.

64. As for the requirement that the individual must be in police custody, I would hold that the Strasbourg court has not said, or at least has not said with a sufficient degree of clarity, that a person who has become a suspect and is not in custody must, as a rule, have access to a lawyer while he is being questioned. I would attach particular importance to the judgment in *Zaichenko v Russia*, for the reasons given in para 46, above. That is not to say that the fact that the individual had no access to legal advice in that situation is of no consequence. If it was practicable for access to legal advice to be offered, this will be one of the circumstances that should be taken into account in the assessment as to whether the accused was deprived of a fair hearing, as he is entitled to respect for the right not to incriminate himself. But it is no more than that. The fact that the incriminating statements were made without access to a lawyer does not of itself mean that the rights of the defence are irretrievably prejudiced, as was held to be the case in *Salduz* on account of the lack of legal assistance while the applicant was in custody.

65. The phrase "police interrogation" appears frequently in the cases where the applicant was detained in custody. It was suggested that, for the purposes of the rule about access to a lawyer, it means something more than just asking questions of an individual. These words are, however, extremely fact sensitive. Any questioning of an individual who has been detained in custody by persons who are referred to in the Strasbourg cases as representing the investigating authorities with the aim of extracting admissions on which proceedings could be founded will amount to interrogation for the purposes of the rule: for a statement to that effect in England, see *R v Absolam* (1989) 88 Cr App R 332, 336, per Bingham LJ. The same could be said of questioning that takes place at the roadside or in the person's home, depending on the circumstances. It is not necessary, if access to a lawyer is needed for the right to a fair trial to remain practical and effective (see *Salduz*, para 55), that the questioning should amount to an "interrogation" in the formal sense. It need not be a detailed and sustained course of questioning. Questions that the police need to put simply in order to decide what action to take with respect to the person whom they are interviewing are unlikely to fall into this category. But they

are likely to do so when the police have reason to think that they may well elicit an incriminating response from him.

66. With that introduction, I now turn to the questions that have been referred to this court. As I understand them, they invite us not only to deal with the situations that they describe as raising issues of principle but also to express our own view as to the answers that the Appeal Court should give on the facts as presented to us in each case.

The answers to the questions referred

67. The question in Ambrose's case is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellant's rights under article 6(1) and 6(3)(c). I would answer this question in the negative. Applying the test that I have described in para 62, above, I would hold that Ambrose was charged for the purposes of article 6 when he was cautioned and that the police officer had reason to think that the second and third questions were likely to elicit an incriminating response from him. This conclusion is supported by the way the question whether the applicant was charged was dealt with in *Zaichenko v Russia*, para 41, where the court said that, given the context of the road check and the applicant's inability to produce proof that he had purchased the diesel, there should have been a suspicion of theft against the applicant at the moment of his questioning by the police. The context in Ambrose's case was that, when he was approached by the police, he was drunk and sitting in the car. Suspicion that he was committing an offence fell on him as soon as he told the police that the keys were in his pocket.

68. But I would hold it would be to go further than Strasbourg has gone to hold that the appellant is 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 this form of questioning at the roadside. This leaves open the question whether taking all the circumstances into account it was fair to admit the whole or any part of this evidence. There may, perhaps, still be room for argument on this point. So I would leave the decision as to how that question should be answered to the Appeal Court.

69. The question in M's case is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the accused, conducted under common law caution at his home address and without the accused having had access to legal advice was incompatible with the accused's rights under

article 6(1) and 6(3)(c). I would hold that M was charged for the purposes of article 6 when he was cautioned by the police officer at his home address. Although he did yet not have enough information as that stage to detain him as a suspect under section 14 of the 1995 Act, his actions were sufficient to carry the implication that the purpose of his visit was to establish whether M was in that category. Even if that was not so at the moment when M was cautioned, the first question which the police officer put to him carried that implication. I also think that the police officer had reason to think that the second question that he asked ("Were you involved in the fight?") was likely to elicit an incriminating response from him.

70. But I would answer the question in this reference also in the negative, as it would be to go further than Strasbourg has gone to hold that the accused is entitled to a ruling that this evidence is inadmissible because, as a rule, access to a lawyer should have been provided to him when he was being asked these preliminary questions in his own home with a view to determining what further steps should be taken to deal with him in connection with the offence. As in Ambrose's case, this leaves open the question whether, taking all the circumstances into account, it would be fair to admit the whole or any part of this evidence. I would leave it to the sheriff to answer that question.

71. The question in G's case is whether it is incompatible with the Panel's Convention rights for the Lord Advocate to lead evidence of his statements and answers made during the course of the search conducted under warrant granted in terms of section 23(3) of the Misuse of Drugs Act 1971 as recorded in the Search Production Schedule. The Lord Advocate conceded that G was a suspect from the time of his first admission to possession of a quantity of heroin in his jeans. In must follow that he had been charged for the purposes of article 6 by the time the police began their search. The feature of this case which distinguishes it from the other two is that, although G had not yet been formally arrested and or taken into police custody, there was a significant curtailment of his freedom of action. He was detained and he had been handcuffed. He was, in effect, in police custody from that moment onwards. So I would answer the question in the affirmative. The circumstances were sufficiently coercive for the incriminating answers that he gave to the questions that were put to him without access to legal advice about the items to be found to be inadmissible.

72. I would hold however that the same result need not 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. It would be to go further than Strasbourg has gone to hold that a person has, as a rule, a Convention right of access to a lawyer before answering any questions put to him in the course of a police search. It is not because there is a rule to this effect that I would answer the question in the affirmative. Rather it is because it is plain from the particular

circumstances of the case that G was, in effect, a detainee when he was being questioned by the police. In the absence of such indications of coercion the question, as in the other cases, will be whether, taking all the circumstances into account, it would be fair to admit the whole or any part of the evidence.

LORD BROWN

73. I am in full agreement with Lord Hope's judgment in this case and there is comparatively little that I want to say in addition.

74. *Cadder* is authority for an absolute rule, derived from the European Court of Human Rights's decision in *Salduz v Turkey* (2008) 49 EHRR 421, that the Crown cannot lead and rely upon evidence of anything said by an accused without the benefit of legal advice during questioning under detention at a police station. For convenience I call this the *Cadder* rule and refer to it as absolute notwithstanding the Court's recognition in *Salduz* itself (at para 55) that "compelling reasons may exceptionally justify denial of access to a lawyer" (providing always that such a restriction does not unduly prejudice the defence) since for present purposes those possible exceptional cases can safely be ignored. The critical issue arising for our determination on these references is whether the *Cadder* rule applies equally to anything said by an accused in answer to police questioning even *before* he is detained at a police station, providing only that at the time of such questioning he is already a suspect and "charged" within the meaning of article 6(1) of the Convention (his situation "substantially affected" as explained by Lord Hope at para 39).

75. Although these are, of course, Scottish references and, rather to my regret, we have not had the benefit of any intervention on behalf of English and Welsh prosecuting authorities to assist us as to the legal position south of the border, I cannot but notice that on their face the statutory provisions governing the position in England and Wales sit a little uneasily even with the absolute rule in *Cadder*, let alone with the substantial extension to that rule now proposed by the respective accused in these references.

76. Section 76(2) of the Police and Criminal Evidence Act 1984 (PACE) provides:

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained - (a) by oppression of the person who made it; or (b) in consequence of

> anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

77. By section 82(1) of PACE, "confession" is defined to include "any statement wholly or partly adverse to the person who made it" and by section 76(8) "oppression" is defined to include "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)".

78. The only absolute statutory rule, therefore, is that confessions are inadmissible under PACE if obtained by oppression or in consequence of anything said or done likely to render them unreliable. Generally speaking the court would not regard a confession elicited during questioning under detention at a police station as unreliable merely because the suspect had not at the time had the benefit of legal advice (unless, of course, by reason of youth or mental frailty or for any other reason the suspect may be regarded as having been particularly vulnerable to such questioning – see, for example, *R v McGovern* (1990) 92 Cr App R 228). Nevertheless the principle established in *Salduz* that underlies the *Cadder* rule is, I apprehend, properly given effect in England and Wales by the appropriate application of sections 58 and 78 of PACE which provide respectively:

> "58(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.
>
> 78(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Consistently, therefore, with the operation of the *Cadder* rule in Scotland, the discretion to exclude evidence under section 78(1) is, I apprehend, routinely exercised in England and Wales in the case of significant and substantial breaches of the right to legal advice conferred by section 58 and the related rights arising under Code C of the Codes of Practice established under PACE.

79. In England and Wales, however, suspects do not, as I understand it, have a right to free legal advice before their arrest and admission into custody. The police's only obligation at this earlier stage is to caution the suspect before questioning begins. Once, however, a decision to arrest is made – and once grounds for arrest exist it cannot then be delayed so as to defer the suspect's right to legal advice – the police are required to stop the questioning and to resume it only at the police station. On arrival at the police station the detainee must be advised about his right to free legal advice, including a right to speak to a solicitor on the telephone, and he must be asked if he wishes to do so. Once the interview begins he must again be reminded of his right to free legal advice. So much for the position obtaining under English law.

80. Somewhat to my surprise, my own brief judgment in *Cadder* is sought to be prayed in aid in support of the respondents' contention on these references that the principle against self-incrimination requires a suspect to be given access to legal advice before he is first questioned whatever may be the circumstances of that questioning providing only that article 6(1) is engaged (as indeed it was held to be engaged even in the situation that arose in *Zaichenko v Russia* (application no 39660/02) (unreported) (judgment given 18 February 2010) – see paras 41-44 of Lord Hope's judgment). With the best will in the world, however, I cannot recognise my judgment in *Cadder* as offering the least support for any such contention. On the contrary, the whole context of that judgment was interrogation in a police station and in the last sentence I was endeavouring to explain the principal considerations which seem to me to underlie the principle against self-incrimination, namely the importance of guarding against both inadequate police investigation and the exploitation of vulnerable suspects. Strasbourg's evident core concern in *Salduz* (see in particular para 53 of the Court's judgment) is that suspects should be protected against "abusive coercion" and that miscarriages of justice should be prevented. Quintessentially such risks arise in the very situation under consideration in *Salduz*: the interrogation of a terrorist suspect in police custody. Small wonder that the court (at para 53) saw its decision as "in line with the generally recognised international human rights standards", standards which may be seen from the instruments referred to in the footnotes to relate specifically to rights of access to a lawyer during, rather than before, suspects are taken into police custody.

81. Another decision relied upon by the respondents is that of the Supreme Court of Canada in *R v Grant* [2009] 2 SCR 353 and true it is that the court there, having given a wide meaning to the concept of detention, concluded on the particular facts of that case (which involved the kerbside questioning of a suspect leading to his being searched and found to be carrying a loaded firearm) that the police had breached section 10(b) of the Canadian Charter of Rights and Freedoms by failing before questioning the suspect to advise him of his right to speak to a lawyer. Section 10(b) provides:

> "Everyone has the right on arrest or detention . . . (b) to retain and instruct counsel without delay and to be informed of that right . . ."

Importantly, however, the Supreme Court concluded that, the breach of section 10(b) notwithstanding, the trial judge had been entitled pursuant to section 24(2) of the Charter to admit the incriminating evidence and in the result upheld the conviction. Section 24(2) provides:

> "Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

For present purposes, two paragraphs only from the head note to the court's immensely long judgments must suffice:

> "When faced with an application for exclusion under section 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

> Here, the gun was discovered as a result of the accused's statements taken in breach of the *Charter*. When the three-stage inquiry is applied to the facts of this case, a balancing of the factors favours the admission of the derivative evidence. The *Charter*-infringing police conduct was neither deliberate nor egregious and there was no suggestion that the accused was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions, but the point at which an encounter becomes a detention is not always clear and the officers' mistake in this case was an understandable one. Although the impact of the *Charter* breach on the accused's protected interests was significant, it was not at the most serious end of the scale. Finally, the gun was highly reliable evidence and was essential to a determination on the merits. The balancing mandated by section 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, when all these concerns are weighed, the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on the accused's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. However, the police officers were operating in circumstances of considerable legal uncertainty, and this tips the balance in favour of admission."

In short, the position in Canada, just as in England and Wales, is that no absolute rule applies to exclude incriminating evidence obtained in breach of a constitutional right to legal advice – although it may be supposed that in flagrant cases equivalent to those where the *Cadder* rule itself would apply directly (where a suspect in police custody is denied access to a lawyer during interrogation) the Canadian courts would invariably strike the section 24(2) balance in the accused's favour.

82. It follows from all this that I share Lord Hope's view that the court in *Salduz* ought not to be understood to be laying down an absolute rule of exclusion with regard to admissions made without the opportunity to take legal advice irrespective of whether or not the suspect was at the time actually in police custody. The contention that *Salduz* requires the *Cadder* rule to be extended in this way to my mind founders on a proper understanding both of what the Strasbourg Court was there saying in the particular factual context of that case, and of the recognised international human rights standards underlying that decision. It also seems to me inconsistent both with the terms of Judge Bratza's concurring opinion in that case (implicit in which was a recognition that under the majority judgment

the very earliest time at which a suspect could be found entitled to legal advice is when "he is taken into police custody or pre-trial detention") and with Strasbourg's post-*Salduz* jurisprudence (helpfully analysed by Lord Hope in great detail), most notably the judgment in *Zaichenko v Russia* itself.

83. Also like Lord Hope (see paras 50-53 above) I find some assistance here in the decision of the Supreme Court of the United States in *Miranda v Arizona* 384 US 436 (1966). As Lord Hope observes (at para 53), the significance of *Miranda* is that it adopts a custodial approach to the question as to when access to a lawyer is required, the fundamental reason being that it is at that point that "the circumstances in which [the suspect's] interrogation takes place are inherently intimidating", "because [of] the compelling atmosphere inherent in the process of in-custody interrogation". As, however, Lord Hope also observes: "It was noted that an interpretation of the requirement that the right to legal advice arose at an earlier stage would hamper the traditional function of the police in investigating crime".

84. I have already indicated (at para 80 above) my own understanding of the central considerations underlying the principle against self-incrimination: the importance of guarding against the exploitation of vulnerable suspects and also against inadequate police investigation. In the intimidating circumstances of custodial interrogation there are undoubtedly some suspects who confess to crimes of which in truth they are innocent. And undoubtedly too, once a suspect has confessed, the police are likely to become less inclined to pursue other useful avenues of investigation that may identify the actual offender. Thus it is that miscarriages of justice can occur. As *Miranda* suggests, however, the introduction of a right to legal advice (and what, of course, is being contended for here is an *absolute* right to *free* legal advice) at some pre-custodial stage, so far from encouraging proper police investigation into crime, would in fact tend to inhibit it.

85. It is, in short, one thing to require of the police that they caution a suspect before questioning him, quite another to require that he be provided with legal assistance as a precondition of any self-incriminating answers later becoming admissible in evidence against him. This is the critical distinction which *Zaichenko v Russia* so clearly illustrates. The Court there considered quite separately the applicant's article 6 complaints as to (i) legal assistance and (ii) the privilege against self-incrimination and the right to remain silent and in the event it found no violation of article 6 (3)(c) in respect of the former but a violation of article 6(1) in respect of the latter (the applicant's self-incriminatory answers to the police's roadside questioning having been elicited without his first being cautioned).

86. Like Lord Hope, I too would in the present context give full weight to what has come to be known as the *Ullah* principle – see para 20 of Lord Bingham's

judgment in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. It would seem to me quite wrong for this court now to interpret article 6 of the Convention as laying down an absolute exclusory rule of evidence that goes any wider than Strasbourg has already clearly decided to be the case. And whatever else one may say about the Strasbourg jurisprudence, it can hardly be regarded as deciding the present issue clearly in the respondent's favour.

87. In the result I agree with the answers proposed by Lord Hope to the questions posed in the respective references. Essentially it comes to this. In the cases of *Ambrose* and *M* there is no absolute rule such as that laid down in *Cadder* which precludes reliance on the evidence in question. Rather it must be for the trial court to decide – just as an English court must decide under section 78(1) of PACE – whether the evidence ought fairly to be admitted or excluded. In G's case, however, because he was, as Lord Hope puts it (para 71), "in effect, in police custody" from the time when, following his arrest, he was handcuffed and detained, the *Cadder* rule should be held to apply to his questioning during the subsequent search. That said, I also agree with Lord Hope (para 72) that the *Cadder* rule would by no means routinely apply to exclude answers to questions put to a suspect without his having been given the opportunity to seek legal advice during a search. That too would be to go further than Strasbourg has yet gone.

LORD DYSON

88. I agree with the answers proposed by Lord Hope for the reasons that he gives as well as those given by Lord Brown. In *Salduz v Turkey* (2008) 49 EHRR 421 (applied by this court in *Cadder v HM Advocate* [2010] UKSC 43, [2010] SLT 1125), the ECtHR decided that article 6 of the European Convention on Human Rights ("the Convention") requires that, as a rule, access to a lawyer should be provided to a suspect when he is interrogated by the police while he is in detention; and that there will usually be a violation of article 6 if incriminating statements made by a suspect during a police interrogation in such circumstances are relied on to secure a conviction. I shall refer to this as "the *Salduz* principle". The central question that arises in the present proceedings is whether the *Salduz* principle also applies to interrogations of a suspect that are conducted before he is placed in detention. Lord Hope says that there is no sufficiently clear indication in the Strasbourg jurisprudence of how the ECtHR would resolve this question and that we should not apply the *Salduz* principle to situations to which the ECtHR has not clearly stated that it applies.

89. Lord Kerr says that (i) even if the ECtHR has not clearly decided whether article 6 requires the *Salduz* principle to be applied to statements obtained from a suspect when he is not in detention, that is not a sufficient reason for this court to

refuse to do so (paras 126 to 130); (ii) to draw a distinction between evidence obtained before and after a suspect is detained is "not only arbitrary, it is illogical" (para 136); and (iii) in any event, an analysis of the Strasbourg jurisprudence clearly shows that it draws no distinction between the two cases (paras 146 and 148).

90. It is convenient to start with explaining why I cannot accept Lord Kerr's third proposition, since, if it is clear from the Strasbourg jurisprudence that the *Salduz* principle applies whether or not the evidence is obtained from the suspect while he is in detention, then the premise on which the judgments of Lord Hope and Lord Brown are based falls away.

91. As Lord Hope explains at paras 26 to 33, the judgment in *Salduz* was concerned with whether there was or should be a rule that there was a right of access to a lawyer where the person being interrogated was in police custody. On its facts, it was a case about a suspect who had been interrogated by the police while he was in custody. The references in para 53 to "generally recognised international human rights standards" (which are concerned with the position of suspects who are in custody) and to "abusive coercion" strongly suggest that the court was only considering the position of suspects who are in custody. Paras 37 to 44 contains a discussion of the international law materials relating to a suspect's right of access to a lawyer during police custody. Unsurprisingly, the judgment says nothing explicitly about the position of a suspect who is *not* in custody. I agree with Lord Hope that the concurring opinions of Judge Bratza and Judge Zagrebelski lend further support to the conclusion that the court was only considering the position of suspects who are in custody.

92. Lord Kerr says that *Salduz* is authority for the broad proposition that a suspect is entitled to have access to a lawyer at the "investigation stage" (because he is in a particularly vulnerable position at that stage of the proceedings) and that there is nothing in the reasoning of the decision to indicate that the investigation stage only begins after the suspect has been detained. But the judgment should be read as a whole. In my view, the better interpretation is that, for the reasons I have already given, the court was only addressing the issue of police interrogation of a suspect in custody. It was making the point that for such a suspect the "investigation stage" takes place while he is in custody, where there is the risk of "abusive coercion" and he is in a "particularly vulnerable position" of making self-incriminating statements.

93. Further, the decision of the First Section in *Zaichenko* provides clear support for the view that the Strasbourg jurisprudence draws a distinction between the fruits of police questioning of a suspect who is in detention and one who is not. I agree with the reasons given by Lord Hope at para 46 for rejecting the arguments

that *Zaichenko* was wrongly decided. I note that Lord Kerr does not suggest that it was wrongly decided. He analyses the reasoning of *Zaichenko* closely at paras 24 to 40. He says that the basis for the court's decision that there had not been a violation of article 6(3)(c) is the cumulative effect of a number of factors (which he identifies at para 33) and that none of them, if taken in isolation, would have been sufficient to support the court's conclusion.

94. I cannot accept this interpretation of the court's reasoning in *Zaichenko*. It is true that at para 46, the court "notes at the outset" that the applicant waived his right to a lawyer. But the court went on to give other reasons for its decision at para 47. It said that the present case "is different from previous cases concerning the right to legal assistance in pre-trial proceedings (see *Salduz*.....) *because the applicant was not formally arrested or interrogated in police custody. He was stopped for a roadcheck*...." (emphasis added). The court was, therefore, fully alive to the difference between police questioning of a suspect at the roadside and police questioning of a suspect who has been taken into custody. It was in the context of this difference that the court made express reference to *Salduz*. Plainly and explicitly it did not apply the *Salduz* principle and it gave its reasons for not doing so. The principal reason was given at para 48 which Lord Kerr has set out at para 160 below. I agree with Lord Kerr that this paragraph is not easy to follow. But what is clear is that the court considered that, whatever restrictions faced the suspect when he was being questioned at the roadside, they did not amount to a "significant curtailment of [his] freedom of action" sufficient to entitle him to legal assistance at this early stage of the proceedings. This is an essential part of the court's reasoning. It is clear that the court considered that the fact that the questioning took place before the suspect had been formally arrested or detained was critical.

95. I conclude, therefore, that the Strasbourg jurisprudence does not clearly show that the *Salduz* principle applies to statements made by a suspect who is not in detention when he is questioned by the police. The only case to which our attention has been drawn in which the *Salduz* principle has been considered in relation to statements made by a suspect who is not in detention is *Zaichenko*. For the reasons that I have given, *Zaichenko* strongly suggests that the *Salduz* principle does not apply in that situation.

96. I turn to Lord Kerr's second proposition. He says that the "animation of the right under article 6(1) cannot be determined in terms of geography" (para 133) and that it is arbitrary and illogical to hold that a suspect has no right to access to a lawyer if he is questioned by the police until he is taken into custody: the suspect is as likely to make incriminating statements outside as inside a police station and is therefore in equal need of the protection of article 6(3)(c) in both situations.

97. The essential question is at what stage of the proceedings access to a lawyer should be provided in order to ensure that the right to a fair trial is sufficiently "practical and effective" for the purposes of article 6(1). What fairness requires is, to some extent, a matter of judgment. I accept that opinions may reasonably differ on whether the line for providing a suspect with access to a lawyer should be drawn at the point when the person being questioned becomes a suspect or at the point when he is taken into custody. I do not doubt that being interrogated by the police anywhere can be an intimidating experience and that a person may make incriminating statements to the police wherever the interrogation takes place. This can occur in a situation of what the majority of the Canadian Supreme Court described as "psychological detention" in *R v Grant* 2009 SCC 32 ; [2009] 2 SCR 353, at para 30.

98. On the other hand, the arresting of a suspect and placing him in custody is a highly significant step in a criminal investigation. The suspect cannot now simply walk away from the interrogator. For most suspects, being questioned after arrest and detention is more intimidating than being questioned in their home or at the roadside. The weight of the power of the police is more keenly felt inside than outside the police station. As was said in *Miranda v Arizona* 384 US 436 (1966) at p 478, there is a "compelling atmosphere inherent in the process of in-custody interrogation". No doubt, it is also present to the mind of the suspect that the possibility of "abusive coercion" is greater inside than outside the police station. Whether the difference between interrogation inside and outside the police station is sufficient to justify according the suspect access to a lawyer in one situation but not the other is a matter on which opinions may differ. But I do not see how it can be said to be arbitrary or illogical to recognise that there is a material difference between the two situations. I can agree with Lord Kerr (para 167) that one should be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence. But this counsel of caution is hardly consistent with the assertion that the adoption of the distinction made in *Miranda* is arbitrary and illogical.

99. So what should this court do in these circumstances? This brings me to Lord Kerr's first proposition. As I have said, to the extent that the ECtHR has spoken on the question at all, *Zaichenko* contains a clear statement that the *Salduz* principle does not apply to statements made by a suspect during police questioning while the suspect (i) is not in custody or (ii) is not deprived of his freedom of action in any significant way. I derive (ii) from para 48. That paragraph echoes the language of p 477 of *Miranda*: "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station *or otherwise deprived of his freedom of action in any significant way"* (emphasis added).

100. I accept, however, that there is no "clear and constant" Strasbourg jurisprudence on the point. So the obligation in section 2 of the Human Rights Act 1998 to take account of judgments of the ECtHR does not compel a decision one way or the other: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 para 26. Nor is this a case where, although Strasbourg has not expressly decided the point, it can nevertheless clearly be deduced or inferred from decisions of the ECtHR how the court will decide the point if and when it falls to be determined.

101. Lord Kerr has referred to para 20 of Lord Bingham's speech in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 and the dictum that "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less". Lord Brown extended this in *R (Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153 at para 106 by saying that Lord Bingham's dictum could as well have ended: "no less, but certainly no more". At para 107 Lord Brown said that the Convention should not be construed as "reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach". Lady Hale said much the same at para 90. This approach was explicitly endorsed in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 AC 1 by Lord Phillips at para 60, Lord Hope at para 93 and Lord Brown at para 147.

102. But these statements are not entirely apposite where Strasbourg has spoken on an issue, but there is no clear and constant line of authority. That is the case here because there is only one case in which the ECtHR has expressly decided that the *Salduz* principle does not apply in relation to the interrogation of a suspect who is not in detention (*Zaichenko*). Moreover, despite the view I have expressed earlier in this judgment**,** I accept that it is *arguable* that **t**he language of para 55 of the judgment in *Salduz* can and should be interpreted as holding that the *Salduz* principle does apply in such circumstances.

103. So what should a domestic court do in this situation? Recognising that it is our duty to give effect to the domestically enacted Convention rights, I think that the correct approach was suggested at para 199 of the judgment of Lord Mance in *Smith*:

> "However, it is our duty to give effect to the domestically enacted Convention rights, while taking account of Strasbourg jurisprudence, although caution is particularly apposite where Strasbourg has decided a case directly in point or, perhaps, where there are mixed messages in the existing Strasbourg case law and, as a result, a real judicial choice to be made there about the scope or application of the Convention."

104. The position here is that Strasbourg has decided a case which is directly in point (*Zaichenko*). The most that can be said on behalf of the accused in these three cases is that by reason of (i) the broad terms in which para 55 of the judgment in *Salduz* is expressed and (ii) the decision in *Zaichenko,* it is *arguable* that there are mixed messages in the Strasbourg case law as to whether the *Salduz* principle applies to evidence obtained from a suspect who has been interrogated without access to a lawyer outside the police station. To use the words of Lord Mance, it follows that there is a real judicial choice to be made. Whether fairness requires the *Salduz* principle to apply in both situations raises questions of policy and judgment on which opinions may reasonably differ and as to which there is no inevitable answer. To demonstrate this, it is sufficient to contrast the approach of the US Supreme Court in *Miranda* with that of the Canadian Supreme Court in *Grant.*

105. In these circumstances, I consider that caution is particularly apposite and that the domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. If it were clear, whether from a consideration of the Strasbourg jurisprudence or otherwise, that the *Salduz* principle applies to statements made by suspects who are not detained or otherwise deprived of their freedom of action in any significant way, then it would be our duty so to hold. But for the reasons that I have given, it is not clear that this is the case. In these circumstances, we should hold that the *Salduz* principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way.

LORD MATTHEW CLARKE

106. I refer to Lord Hope's judgment for his detailed description of the references and the background to them which I gratefully adopt.

107. In *R v Samuel* [1988] QB 615 at p 630 Hodgson J, delivering the judgment of the Court of Appeal, described the right of a suspect to consult and instruct a lawyer "as one of the most important and fundamental rights of a citizen". His Lordship did so in the context of section 58(1) of the Police and Criminal Evidence Act 1984 ("PACE"). The present references have raised the question as to when, and in what circumstances, such a right emerges as part of Scots law by virtue of the application of Article 6 ECHR. The Grand Chamber of the European Court of Human Rights in *Salduz v Turkey* (2008) 49 EHRR 421 held 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" (para 55). In *Cadder v HM Advocate* 2010 SLT 1125 this court applied that decision to the existing law of Scotland and, in particular, to the operation of

the powers of detention of persons then contained in sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995. As a result of the court's decision in *Cadder* the Scottish Parliament enacted certain provisions in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. In particular a new section 15A to the 1995 Act was enacted which is in the following terms:

"15A

Right of suspects to have access to a solicitor

(1) This section applies to a person ("the suspect") who –

(a) is detained under section 14 of this Act,

(b) attends voluntarily at a police station or other premises or place for the purpose of being questioned by a constable on suspicion of having committed an offence, or

(c) is –

(i) arrested (but not charged) in connection with an offence, and

(ii) being detained at a police station or other premises or place for the purpose of being questioned by a constable in connection with the offence.

(2) The suspect has the right to have intimation sent to a solicitor of any or all of the following –

(a) the fact of the suspect's –

(i) detention

(ii) attendance at the police station or other premises or place, or

(iii) arrest (as the case may be),

(b) the police station or other premises or place where the suspect is being detained or is attending, and

(c) that the solicitor's professional assistance is required by the suspect.

(3) The suspect also has the right to have a private consultation with a solicitor –

(a) before any questioning of the suspect by a constable begins, and

(b) at any other time during such questioning.

(4) Subsection (3) is subject to subsections (8) and (9).

(5) In subsection (3), "consultation" means consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.

(6) The suspect must be informed of the rights under subsections (2) and (3) –

(a) on arrival at the police station or other premises or place, and

(b) in the case where the suspect is detained as mentioned in subsection (1)(a), or arrested as mentioned in subsection (1)(c), after such arrival on detention or arrest, (whether or not, in either case, the suspect has previously been informed of the rights by virtue of this subsection).

(7) Where the suspect wishes to exercise a right to have intimation sent under subsection (2), the intimation must be sent by a constable –

(a) without delay, or

(b) if 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 necessary.

(8) In exceptional circumstances, a constable may delay the suspect's exercise of the right under subsection (3) so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.

(9) Subsection (3) does not apply in relation to the questioning of the suspect by a constable for the purpose of obtaining the information mentioned in section 14(10) of this Act."

108. Prior to that enactment, and the decision in *Cadder*, the position was that the courts in Scotland had never recognised a suspect's right to have access to a solicitor before or during questioning of him by the police. The position was, as stated in pre-*Cadder* versions of *Renton and Brown's Criminal Procedure*, 6th edition at para 24-39 as follows:

> "…any statement by a suspect in answer to police questions will be inadmissible in evidence at the subsequent trial of that suspect unless it has been obtained fairly, and that all the circumstances of the questioning (apart from whether or not a caution was given to a person accused of a crime) are relevant in so far, and only in so far, as they indicate the presence or absence of unfairness…."

That passage continued later:

> "The current situation is that the fact that the accused was at the same time under suspicion or even under arrest is not in itself crucial, but is merely a circumstance like any other to be taken into account in assessing the fairness of the police, in the same way as the fact that he….did not have the services of a solicitor"

Reference was made to, *inter alia*, *Law* v *McNicol* 1965 JC 32, *HM Advocate* v *Whitelaw* 1980 SLT (Notes) 25 and *HM Advocate* v *Anderson* 1980 SLT (Notes) 104.

109. As was also noted in Renton and Brown at para 24-39 "There are no legal rules in Scotland governing the questioning of a suspect such as the Judges' Rules and Administrative Directions issued by the Home Office…". Nor were there, until the 2010 Act, any provisions similar to those provided in England and Wales under PACE. In *HM Advocate* v *Cunningham* 1939 JC 61 Lord Moncrieff at page 65 noted that after the accused "had been charged and had replied, he subsequently received an incidental intimation that he might, if he so desired, require and obtain the assistance of a law agent." His Lordship continued:

> "I think it would have been desirable that that intimation should have been made formally and should have been made at the very outset before the making of any charge, but I am satisfied that, in not making it, the police officers followed their usual practice and acted with an intention of complete fairness. Nonetheless, any such practice, in my opinion, ought to be reformed"

The later full bench decision in *Chalmers* v *HM Advocate* 1954 JC 66 gave some support for the view that all answers given by a suspect to a police officer were inadmissible and nothing was said about a suspect's right to have a solicitor present when he was being questioned. Although that decision was never over-ruled its influence was considered to have been virtually removed by subsequent case law, concerned, it seems, with rising crime rates, which made the criterion of admissibility, fairness - see Lord Advocate's Reference (No. 1 of 1983), 1984 JC 52. The decision in the case of *Cadder*, in applying the law as set out in *Salduz*, can be seen as truly innovative as regards what had been understood to be the domestic law of Scotland up until that time.

110. The present references raise, in the first place, the question as to how far the innovation goes having regard to the relevant Strasbourg jurisprudence. The focus of the hearing before this court was concerned, to a significant extent, with how the suspect's right to access to a lawyer has been defined to date by the Strasbourg

court, either expressly, or by necessary implication, whatever other arguments there may be in principle, or policy, for defining it otherwise.

111. The defence in the cases before us sought to take from the language of the ECtHR, in discussing the right in the decided cases on the topic, a broad approach to its nature and its extent. They had some basis for doing so having regard to how the court expressed itself in *Salduz* at para 55 where the Grand Chamber was to the effect "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". At para 52 of the judgment one finds the following "…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." That language, it was submitted, focused on the status of the person as a suspect when determining his rights rather than his position being that of a person in custody. Similar language can be seen in previous judgments of the Court. For example in *Panovits* v *Cyprus* (Application No 4268/04) (unreported) given 11 December 2008 the Court, at para 66, observed that "…the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation" - see also *Borotyuk* v *Ukraine* (Application No 33579/04) (unreported) given 16 December 2010 at para 79. It should, however, be noted that *Panovits* was a case which concerned the questioning of a child when the child had gone to the police station with his father, as requested by the police, and was thereafter arrested. *Borotyuk* was also a custody case.

112. In *Panovits*, at para 65, the court, having said that it was reiterating that the right to silence and the right not to incriminate oneself were generally recognised international standards, which lay at the heart of the notion of a fair procedure under Article 6, went on to say:

> "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".

In *Salduz* similar remarks were made by the court at paragraph 53:

> "These principles, outlined at para 52 above, are also in line with the generally recognised international human rights standards which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6,

> notably equality of arms between the investigating or prosecuting authorities and the accused."

Those remarks would tend, in my judgement, to support the contention that the focus of the court's concern in *Salduz*, and other cases, has been in relation to those situations where methods of coercion or oppression might be more readily, and effectively, employed upon a suspect person, namely when his liberty has been curtailed by the authority detaining him.

113. Significant support for that being the focus of such a rule is to be found in the jurisprudence of the United States, and particularly the seminal decision of the US Supreme Court in *Miranda* v *State of Arizona* 384 US 436 (1966), where at p 467, para 23 the court said:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honoured."

The court then at pp 478-479, paras 66, 67 defined the right and its extent, together with its rationale in the following way:

> "To summarise, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning the privilege against self-incrimination is jeopardised. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honoured, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney

> one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

The *Miranda* decision has informed international legal discussion of the right of the suspect to have access to a lawyer, since the decision was given.

114. Another factor pointing towards the more restrictive extent of the right in question is that the Strasbourg court, in defining it, has done so by referring to the context of what are described as "pre-trial proceedings", see para 50 of the *Salduz* judgment. The person taken into detention who, in due course, may face being tried for a crime, might well be said to be involved, at the stage of any questioning, while detained, to be "in pre-trial proceedings" for the purposes of Article 6. That that is the context in which the Strasbourg court has been considering the right in question under Article 6 is, I think, supported by what the court had to say recently in *Affaire Brusco c France (Requete No 1466/07)* (unreported) given 14 October 2010, at para 45:

> "La Cour rappelle également que la personne placée en garde à vue a le droit d'être assistée d'un avocat dès le début de cette mesure ainsi que pendant les interrogatoires, et ce *a fortiori* lorsqu'elle n'a pas été informée par les autorités de son droit de se taire."

That passage also, to my mind, points to the phrases in *Salduz* "early access to a lawyer" and "from the first interrogation of a suspect by the police" as being references to the earliest point in time after the person is taken into custody with his liberty having been restricted by the investigating authorities. The reference by the Strasbourg court to equality of arms, at para 53 of its judgment in *Salduz,* also, in my opinion, supports that approach. Once a person's liberty is curtailed by the authorities, the balance of power between him and the representatives of the state shifts significantly and, it might be said, requires to be redressed by his having access to a lawyer.

115. All of these considerations, taken together, with what Lord Hope has to say in his analysis of the *Salduz* decision, and other Strasbourg jurisprudence, ultimately persuades me that the proper understanding of those decisions is that the right to have access to a lawyer emerges at the point when the suspect is deprived

of his liberty of movement, to any material extent, by the investigating authorities and is to be questioned by them. It follows that I am in agreement with Lord Hope that the Strasbourg jurisprudence, to date, does not support the defence contention in these references that the ECtHR has gone as far as to say that the right emerges as soon as a suspect is to be questioned by the police in whatever circumstances.

116. As to whether this court should go further than the ECtHR seems to have gone so far, certain important considerations lead me to the conclusion that it should not. The first is the difficulty that can arise in relation to defining precisely at what point in time someone becomes a suspect, as opposed to being a witness or a detained person. The second is that the broader version of the right, contended for by the defence in these cases, could have serious implications for the proper investigation of crime by the authorities. If the police are to be required to ensure that a person who they wish to question about the commission of a crime (in a situation where the circumstances point to the person being a possible suspect) should have access to a lawyer, if he so wishes, then such a requirement could hamper proper and effective investigations in situations which are often dynamic, fast moving and confused. The unfortunately regular street brawls in city and town centres, or disturbances in crowded places like night clubs, which, on occasions, result in homicide, are simply examples of situations which highlight the problems that might be involved.

117. In relation to the first of these considerations I note that the limits of the "Miranda" rights have been, very recently, (16 June 2011) re-visited by the US Supreme Court in *JDB* v *North Carolina* 564 US 2011. That case involved the questioning of a 13 year old. The majority of the court held that the child's age was a relevant factor to be taken into account in addressing the question as to whether he had been in custody at the time of questioning. The majority did not depart from the test being whether or not the person was in custody at the relevant time and at page 18 of the opinion of the court they directed the state court to address that question, taking account of all of the relevant circumstances of the interrogation, including the child's age at the time. The disagreement between the majority and minority was with regard to the relevance of the child's age in judging of the question as to whether or not he was in custody at the relevant time.

118. In giving the dissenting judgment, with which the rest of the minority concurred, Alito J at pp 1-2 said "Miranda's custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement". Alito J, then, at page 8 of his judgment, under reference to previous authorities remarked that "a core virtue" of the Miranda rule has been the clarity and precision of its guidance to "police and courts". Again at page 13 he remarked that "a core virtue" of Miranda was the

"ease and clarity of its application". I am persuaded that the value of clarity and certainty in this area are relevant factors in deciding the extent of the right.

119. As to the second consideration, I recall what was said by Lord Wheatley in *Miln* v *Cullen* 1967 JC 21 at pp 29-30:

> "While the law of Scotland has always very properly regarded fairness to an accused person as being an integral part of the administration of justice, fairness is not a unilateral consideration. Fairness to the public is also a legitimate consideration, and in so far as police officers in the exercise of their duties are prosecuting and protecting the public interest, it is the function of the Court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police in their investigation of crime with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest."

That dictum is, of course, of its time and pre-dates the experience of examples of convictions obtained on false confessions which have caused justifiable public concern. Nevertheless it is difficult, even now, to contradict the substance of what his Lordship said. As was said by Binnie J in the Canadian case of *R* v *Grant* 2009 SCC 32 [2009] 2 SSC 353 at para 180 "It is not controversial that in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved. The police do have the right to ask questions and they need to seek the co-operation of members of the public, including those who turn out to be miscreants."

120. It seems to me that the balancing of legitimate interests referred to by Lord Wheatley is a further justification for restricting the right to have access to a lawyer to situations in which the suspect is in custody. The law in formulating a right designed to protect and support a legitimate interest, such as the right to silence, should seek to avoid defining that right in such a way, as to damage, or unduly inhibit another legitimate interest such as the efficient investigation of crime. The task, which may be a delicate and difficult one, is to produce a result which strikes a rational balance between the two interests. I consider the balance struck in the US "Miranda" jurisprudence achieves that end.

121. For the foregoing reasons I agree entirely with Lord Hope as to the way in which references in the cases of *Ambrose* and *M* should be answered. In relation to these two cases the admissibility or otherwise of the replies to questioning will fall to be determined by the Appeal Court and the trial judge respectively in

accordance with the rules as to fairness. In the passage in his judgment in *Miln v Cullen*, cited above, Lord Wheatley continued:

> "Even at the stage of routine investigations, where much greater latitude is allowed, fairness is still the test, and that is always a question of circumstances."

122. As regards *G's* case I consider that the right to access to a lawyer, before questioning, arises not only when the suspect is taken into the physical surroundings of a police station. The focus should be on whether, at the commencement of the proposed questioning, the individual's liberty is significantly restricted by the police. The location where that occurs is not in itself conclusive. In relation to rights of this kind matters should be judged in accordance with what the substance of the position is rather than its form. It follows that I, therefore, also agree with Lord Hope in the way in which the reference in G's case should be answered.

123. I also agree with Lord Hope, for the reasons given by him, that the *Cadder* rule would not necessarily routinely apply to exclude answers to questions, put to a suspect, without his having been given the opportunity to seek legal advice, during a search. There is no justification in the Strasbourg jurisprudence, as I read it, for the right to be so interpreted.

124. By way of a footnote I would add this. Our attention was drawn by the defence, in support of their position, to a "Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest" recently published by the European Commission – Brussels, XXX COM (2011) 326/3. Article 3(1) of the draft of the proposed Directive, attached to that document is in the following terms:

> "1. Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event:
>
> (a) before the start of any questioning by the police or other law enforcement authorities;
>
> (b) upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;

(c) from the outset of deprivation of liberty."

125. The proposed Article 3 appears to envisage three discrete situations where the right of access to a lawyer should arise. The authors of the proposal appear to believe that those draft provisions reflect the settled jurisprudence of the Strasbourg court - see para 13. It follows from what I have said above that their apparent understanding of the Strasbourg jurisprudence does not coincide with my own.

LORD KERR

Introduction

126. The well known aphorism of Lord Bingham in para 20 of *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 that the "duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less" has been given a characteristically stylish twist by Lord Brown in *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153 at para 106 where he said that the sentence "could as well have ended: 'no less, but certainly no more.'" In keeping with this theme, some judges in this country have evinced what might be described as an *Ullah*-type reticence. On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone. Thus, in the present case Lord Hope says that this court's task is to identify where the jurisprudence of the Strasbourg court clearly shows that it currently stands and that we should not expand the scope of the Convention right further than the current jurisprudence of that court justifies.

127. Lord Bingham's formulation of the principle expressed in para 20 of *Ullah* was prompted by his consideration of the effect of section 2 of the Human Rights Act 1998 by which the courts of this country are enjoined to take into account Strasbourg case law. Therefore, said Lord Bingham, although such case law was not strictly binding, where a clear and constant theme of jurisprudence could be detected, it should be followed because the Convention, being an international instrument, had as the authoritative source of its correct interpretation the Strasbourg court. A refusal to follow this would "dilute or weaken the effect of the Strasbourg case law".

128. I greatly doubt that Lord Bingham contemplated – much less intended – that his discussion of this issue should have the effect of acting as an inhibitor on

courts of this country giving full effect to Convention rights unless they have been pronounced upon by Strasbourg. I believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken. There are three reasons for this, the first practical, the second a matter of principle and the third the requirement of statute.

129. It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. Moreover, as a matter of elementary principle, it is the court's duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available. The great advantage of the Human Rights Act is that it gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by the courts of this country. It is therefore the duty of this and every court not only to ascertain "where the jurisprudence of the Strasbourg court clearly shows that it currently stands" but 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. Finally, section 6 of the Human Rights Act leaves no alternative to courts when called upon to adjudicate on claims made by litigants to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.

130. In this context, it would be particularly unsatisfactory, I believe, if, because of an *Ullah*-type reticence, we should feel constrained not to reach a decision on the arguments advanced by the respondents to these references just because those very arguments are likely to be ventilated on behalf of the applicant in ECtHR in *Abdurahman v United Kingdom* application no 40351/09 and we cannot say how Strasbourg will react to them. If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so.

The nature of the right under article 6(1) taken in conjunction with article 6(3)(c)

131. The true nature of the right under article 6(1), taken in conjunction with article 6(3) (c), can only be ascertained by reference to its underlying purpose. What is its purpose? The respondents argue that its purpose is that when a person becomes a suspect, because of the significant change in his status that this entails; because of the potential that then arises for him to incriminate himself or to deal with questions in a way that would create disadvantage for him on a subsequent trial; and because of the importance of these considerations in terms of his liability to conviction, the essential protection that professional advice can provide must be available to him.

132. The right, it is argued, should not be viewed solely as a measure for the protection of the individual's interests. It is in the interests of society as a whole that those whose guilt or innocence may be determined by reference to admissions that they have made in moments of vulnerability are sufficiently protected so as to allow confidence to be reposed in the reliability of those confessions. For reasons that I will develop, I consider that these arguments should prevail. If it has taught us nothing else, recent experience of miscarriage of justice cases has surely alerted us to the potentially decisive importance of evidence about suspects' reactions to police questioning, whether it is in what they have said or in what they have failed to say, and to the real risk that convictions based on admissions made without the benefit of legal advice may prove, in the final result, to be wholly unsafe. The role that a lawyer plays when the suspect is participating in what may be a pivotal moment in the process that ultimately determines his or her guilt is critical.

133. Thus understood, the animation of the right under article 6(1) cannot be determined in terms of geography. It does not matter, surely, whether someone is over the threshold of a police station door or just outside it when the critical questions are asked and answered. And it likewise does not matter whether, at the precise moment that a question is posed, the suspect can be said to be technically in the custody of the police or not. If that were so, the answer to a question which proved to be the sole basis for his conviction would be efficacious to secure that result if posed an instant after he was taken into custody but not so an instant before. That seems to me to be a situation too ludicrous to contemplate, much less countenance.

134. Two supremely relevant, so far as these appeals are concerned, themes run through the jurisprudence of Strasbourg in this area. The first is that, in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial - see, for instance, *Imbrioscia* v *Switzerland* (1993) 17 E.H.R.R. 441, *Murray v United Kingdom* (1996) 22 E.H.R.R. 29; *Averill v United Kingdom* (2000) 31 E.H.R.R. 839; *Magee v United*

Kingdom (2000) 31 E.H.R.R. 822; and *Brennan v United Kingdom* (2001) 34 E.H.R.R. 507. The second theme is 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 a fair trial - *Poitrimol v France* (1993) 18 E.H.R.R. 130 and *Demebukov v Bulgaria* (Application No 68020/01) (unreported) given 28 February 2008 at para 50.

135. Taken, as they must be, in combination, these features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage.

136. There is no warrant for the belief that vulnerability descends at the moment that one is taken into custody and that it is absent until that vital moment. The selection of that moment as the first occasion on which legal representation becomes necessary is not only arbitrary, it is illogical. 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 later to be relied on admissions are made. This much, I believe, is clear from paras 54 and 55 of the judgment in *Salduz v Turkey* (2008) 49 EHRR 421. It is worth setting out para 54 to examine its constituent parts and in order to draw together the various strands of guidance that it contains. This is what the court said in that para:

> "… the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the tria1. At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed 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. 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. In this connection, the Court also notes the recommendations of the CPT [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment], in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies."

137. The first question that arises from this passage concerns the meaning of "the investigation stage". That stage is stated to be particularly important for two related reasons. The first is that evidence obtained at that stage "determines the framework" in which the offence with which the defendant is charged will be considered at trial. In other words, evidence obtained during the investigation stage can significantly influence the outcome of the proceedings and on that account it requires close attention as to its reliability. The second reason is that at that very time (*viz* when evidence capable of influencing the trial's outcome is being obtained) the accused finds himself in a vulnerable position. It may seem trite to ask why he should be vulnerable at that time but the answer, it seems to me, is both plain and significant. He is vulnerable *because* at this investigation stage, evidence which may be instrumental in securing a finding of guilt against him is being obtained and collated. The way that he reacts during the collection of that evidence may prove to be of critical importance in his subsequent trial. His vulnerability may be enhanced, moreover, because increasingly complex legislation permits the evidence to be obtained and used in ways that were not previously possible.

138. I return then to the anterior question. What is meant by the "investigation stage"? It must surely include any point or juncture at which evidence which is potentially inculpatory of an accused is being obtained. This is of especial importance when the investigation stage provides the setting for a statement by the accused person that might incriminate him. ECtHR recognised in para 54 of *Salduz* that an incriminating statement might occur at an early stage of the investigation and it was for this reason that early access to a lawyer was considered to be necessary. That early access is expressly required so that the very essence of the right not to incriminate oneself is not destroyed. But extinction of the essence of the right, it seems to me, is precisely what may happen if statements tending to incriminate, made without the benefit of legal advice, are admitted in evidence against their maker on his or her trial. And that conclusion reinforces my view that it is not the place at which admissions are made nor whether the individual making

the statements has been detained that is important. What is important is the use to which such statements may subsequently be put.

139. The same message is provided by the opening words of para 55 of *Salduz*:

> "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."

140. Once more, it is noteworthy that the court here does not refer to the place at which the "first interrogation" takes place nor whether the person who is answering questions has been detained. It is from the moment of the first interrogation that the need for the presence of a lawyer is deemed to be required and that point is chosen because that is precisely when self incriminating statements may begin to be made.

141. In this connection I should say that I do not construe the judgments of Judge Bratza and Judge Zagrebelsky in *Salduz* as seeking to link the need for a lawyer's presence inextricably with the moment that a suspect is taken into custody. At O-I2 Judge Bratza said:

> "At para 55 of the judgment, the Court states as a general principle that in order for the right to a fair trial to remain sufficiently, "practical and effective", article 6 requires that, as a rule, access to a lawyer should be provided, "as from the first interrogation of a suspect by the police". 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."

142. It is immediately obvious from this passage that Judge Bratza's concern was that the judgment of the court did not go far enough. It is clear that his assumption was that "the first interrogation of a suspect" would normally take place *after* he had been taken into custody. He felt that to prescribe that the presence of a lawyer was only then required might not be sufficient. Statements could be made or events could occur which might prove incriminating after the suspect was taken into custody but before the first formal interrogation began. That was why Judge Bratza suggested that a lawyer was required when the accused was taken into custody. But his statement to that effect does not betoken a view that the moment that custody begins should be invested with some special significance. On the contrary, it reflects concern that the suspect's vulnerability and his need for a lawyer should not be seen as inevitably coincident with the opening of the formal interview. Statements made or events occurring before that time are just as likely to require the presence of a lawyer if the fairness of the trial is to be assured.

143. The cases decided in Strasbourg post *Salduz* and discussed by Lord Hope in paras 36-40 of his judgment do not appear to me, with respect, to contribute much to the debate except for the case of *Borotyuk v Ukraine* (Application no. 33579/04). All of the cases concerned suspects who were already in custody when the questioning began. Lord Hope has suggested that importance was attached by Strasbourg in some of these cases to the fact that the person was in custody when he was being interrogated. I do not so read them. It seems to me that the cases are at least as consistent with the view that the important factor in play was that the interrogation was the occasion when inculpatory statements might be made and on that account a lawyer's presence was considered an indispensable concomitant of a fair trial.

144. In *Borotyuk* an interesting passage appears at para 79. There the court said:

> "The Court emphasises 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 (see *Poitrimol*, cited above, para 34). As a rule, access to a lawyer should be provided as from the first questioning of a suspect by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there are compelling

> reasons to restrict this right. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used to secure a conviction (see *Salduz v. Turkey* [(2008) 49 EHRR 421], para 55."

145. Quite apart from the observation that access to a lawyer was deemed necessary "as from the first questioning of a suspect", the emphasis in this passage seems to be on the inevitable prejudice that will occur if questioning takes place at a time and in circumstances where incriminating statements might be made. This, as it seems to me, is entirely consonant with the underlying philosophy of article 6(1) taken in conjunction with article 6(3)(c). 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 so that he may be fully advised as to how he may or should respond to the interrogation. Likewise, if he requires advice as to how he should react to questioning, for example by giving information that may subsequently emerge at the trial, he needs to have proper guidance. Remaining silent when a perfectly innocent explanation is available may fatally undermine a subsequently proffered defence.

146. I would therefore express the principle, to be derived from a consideration of the mainstream Strasbourg jurisprudence, in this way: where a person becomes a suspect, questions thereafter put to him or her that are capable of producing inculpatory evidence constitute interrogation. Before such interrogation may be lawfully undertaken, the suspect must be informed of his or her right to legal representation and if he or she wishes to have a lawyer present, questions must be asked of the suspect, whether or not he or she is in custody, in the presence of a lawyer.

147. The Lord Advocate in the present appeal submitted that the touchstone should be the taking into custody of the individual because this marked the start of the coercive atmosphere in which the vulnerability of the suspect was aroused. I cannot accept that argument. Common experience tells us that a coercive atmosphere can exist independently of custody. The subject was also helpfully considered, albeit in a different context, in the Canadian case of *R v Grant* 2009 SCC 32; [2009] 2 S.C.R. 353. In that case the Supreme Court of Canada held that what it described as "psychological detention" such as to give rise to rights under section 9 of the Canadian Charter of Rights and Freedoms was established where an individual has a legal obligation to comply with a restrictive request or demand, or where a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. Although the right under section 9 of the Charter is one that entitles an individual not to be arbitrarily detained or imprisoned, as opposed to the right not to incriminate oneself, the relevance of the

decision to the present appeal lies in the court's analysis of when the interaction between a police officer and the person he has stopped and questioned assumes a coercive quality. At para 30 of the majority judgment of McLachlin CJ and LeBel, Fish, Abella and Charron JJ it was stated:

> "… we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in [*R v Therens* [1985] 1 SCR 613, 644] as follows:
>
> 'In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.'"

148. There is no reason to suppose that a person questioned by police while not in detention would not experience the same need to acquiesce in the power of the police to require answers to potentially highly incriminating questions. In as much, therefore, as a coercive atmosphere is required in order to stimulate the need for the protection that a lawyer's presence brings, I consider that it is just as likely that this will occur outside a police station as within. As I have said, the important question is whether the circumstances in which questions are asked are liable to be productive of incriminating answers, not whether those questions are being asked in a police station or whether the suspected person can be said to be in custody.

149. This decision needs to be examined because of the possibly discordant note that it strikes in what I consider to be the clear message of what I have described as the mainstream European jurisprudence on the subject. The applicant had been stopped by police when driving away from his place of work on 21 February 2001. He was asked to account for two cans of diesel that were discovered in his car. He replied that he had poured the fuel from the tank of a service vehicle that he drove as an employee into the containers that the police had found in his car. He said that he intended to use it for his own personal purposes – in other words, he admitted to having stolen it. A vehicle inspection record was prepared by a police officer at the scene in which it was stated that the applicant had explained that "he had poured out the fuel from the company premises." The applicant signed that document. He also signed another document entitled "explanations" in which his statement to the following effect was recorded:

> "Since 1997 I have been employed as a driver by a private company. On 21 February 2001 I arrived to my workplace at 9 am. During the day I was repairing my service vehicle. In the evening I poured out thirty litres of fuel from the tank of my service vehicle. I have previously brought the cans, ten and twenty litres each, from home. After work, at around 8 pm, I was driving home in my car and was stopped by the police. The car was inspected in the presence of the attesting witnesses. I poured out the fuel for personal use."

150. On 2 March 2001 an official known as an inquirer compiled a report on the events of 21 February 2001. It was recorded that the applicant had intentionally stolen thirty litres of diesel from his service vehicle. The report was stated to have been based on, among other things, the inspection record compiled by the police at the scene and the applicant's written statement. The accusation section of this statement read, "At 8 pm on 21 February 2001 [the applicant] ... being at work intentionally stole from his service vehicle the diesel in the amount of thirty litres. Thereby, he caused to the company pecuniary damage in the amount of 279 roubles". The applicant appended his signature to the following certificates that appeared at the foot of the statement:

> "I have been informed of the nature of the accusation, the right to have access to the case file, the right to legal representation, the right to make requests and challenge the inquiring authorities' actions.
>
> and

> I have studied the case file and have read this document. I have no requests or motions. I do not require legal assistance; this decision is based on reasons unrelated to lack of means. I will defend myself at the trial."

151. At his trial the applicant retracted the confession and instead advanced a defence that he had purchased the fuel. He maintained that evidence of his admissions to police officers when his car was stopped should not have been admitted because he had not been informed of his right against self incrimination. At para 19 of ECtHR's judgment it is recorded that the appeal court in Russia had decided that the applicant's allegation of self-incrimination had been rightly rejected by the trial court as unfounded.

152. At paras 42 and 43 of its judgment, ECtHR dealt with the question of whether the applicant had been charged during the events of 21 February 2001. As to that the court said this:

> "42. The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see *Eckle* v. *Germany,* 15 July 1982, § 73, Series A no. 51, and more recently, *O'Halloran and Francis v. the United Kingdom* [GC], nos. *15809/02* and *25624/02,* § 35, ECHR 2007...). 'Charge', for the purposes of Article 6 § 1, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [person] has been substantially affected' (see *Shabelnik* v. *Ukraine,* no. *16404/03,* § 57, 19 February 2009; *Deweer* v. *Belgium,* 27 February 1980, § 46, Series A no. 35; and *Saunders* v. *the United Kingdom,* 17 December 1996, §§ 67 and 74, *Reports of Judgments and Decisions* 1996-VI). Given the context of the road check and the applicant's inability to produce any proof of the diesel purchase at the moment of his questioning by the police, the Court considers that there should have been a suspicion of theft against the applicant at that moment.
>
> 43. Applying these principles to the facts of the case, the Court notes that the trial court's use made of the admissions made on 21 February 2001, which led to the institution of criminal proceedings against the applicant and then served for convicting him of theft, is at the heart

> of the applicant's complaints under Article 6 of the Convention (compare *Saunders,* cited above, §§ 67 and 74; and *Allen* v. *the United Kingdom* (dec.), no. *76574/01,* 10 September 2002). It is also noted that the inspection record itself indicated Article 178 of the RSFSR Code of Criminal Procedure as the legal basis for the inspection (see paragraph 26 above). Thus, although the applicant was not accused of any criminal offence on 21 February 2001, the proceedings on that date "substantially affected" his situation. The Court accepts that Article 6 of the Convention was engaged in the present case. Nor was there any disagreement on this point between the parties."

153. The "substantial effect" which prompted the finding that article 6 was engaged appears to comprise the suspicion which the court felt the police must have had that the applicant had been guilty of theft and the fact that the events that occurred at the roadside check led to his subsequent prosecution and conviction. On that basis the same conclusion (that article 6 is engaged) is irresistible in the three cases involved in these references. In each of the cases it is clear that, at the time that the relevant admissions were made, the police either did have or should have had a suspicion that the persons to whom they were posing questions were guilty of the offences that were under investigation and that the statements made in answer to those questions were or were likely to be highly incriminating of all three.

154. But why in *Zaichenko*, if article 6 was engaged, was the applicant not entitled to the protection of article 6(3)(c), taken in conjunction with article 6(1)? For an answer to this, one must conduct a probe of the later passages of the judgment which, I should confess in advance, has not led me to an entirely clear understanding of the rationale underlying the court's conclusion on the issue.

155. At para 46 the court said this:

> "46. The Court notes at the outset that the applicant only complained that he had not been afforded enough time to contact a lawyer in a nearby town. The Court cannot but note that, as confirmed by the applicant's representative in his letter to the European Court dated 26 July 2002, both on 21 February and 2 March 2001 the applicant 'chose not to exercise his right to legal representation with the hope that the court would give him a fair trial even without counsel'."

156. It is difficult to be sure that, in using the phrase, "the court cannot but note", the judgment at this point was indicating that, because the applicant had elected

not to have legal representation, this was a basis on which it could be concluded that there had not been a violation of article 6(3)(c). Observations that appear later in the judgment would tend to support that view, however. In the first instance, the para following (para 47) opens with the word "moreover" which suggests that the decision of the applicant not to seek legal representation was, at least, one of a number of reasons for the finding that article 6(3)(c) had not been breached. Secondly, at para 50 of the judgment, the court refers to the applicant's election not to seek legal assistance either on 21 February or on 2 March 2001 as a *waiver* of his right to legal assistance.

157. Some of the other reasons for finding that there had not been a violation of article 6(3)(c) appear in para 47:

> "47. Moreover, the Court observes that the present case is different from previous cases concerning the right to legal assistance in pre-trial proceedings … because the applicant was not formally arrested or interrogated in police custody. He was stopped for a road check. This check and the applicant's self-incriminating statements were both carried out and made in public in the presence of two attesting witnesses. It is true that the trial record contains a statement by the applicant suggesting that the writing down of the inspection record and/or his subsequent statement were started on the spot but were completed in the village of Birofeld. Nevertheless, the Court concludes on the basis of the materials in the case file that the relevant events, namely the drawing of the inspection record and the taking of the applicant's explanation, were carried out in a direct sequence of events."

158. The distinction between *Zaichenko's* case and earlier decisions that is highlighted here *viz* that the applicant had not been arrested or interrogated while in police custody is not expressly stated to be a reason that alone would warrant a finding that there had not been a violation of article 6(3)(c) taken in conjunction with article 6(1). It seems to me impossible to say, on the basis of the statements in this paragraph, that ECtHR has concluded that formal arrest and interrogation in custody are essential prerequisites to the invocation of the right. Rather, it appears that the court treated the cumulative effect of factors that were peculiar to this particular case as the basis for the finding that there had not been a violation of article 6(3)(c). These factors can be enumerated as follows: (1) the applicant had waived his right to a lawyer and had explicitly stated that he did not want a lawyer to represent him despite having been told on 2 March 2001 that he was entitled to legal representation; (2) he had not been formally arrested or interrogated in police custody; (3) the initial questioning of the applicant took place at a road check and not in any formal setting; (4) the applicant was questioned in a public place with other witnesses present who could attest to a lack of coercion on the part of the

police; and (5) the checking of the applicant's car and his questioning as to the source of the diesel all occurred as part of a seamless process.

159. I do not believe that any one of these factors can be elevated to a position of pre-eminence nor does it appear to me that it can be said with confidence that any single factor, taken in isolation, would be sufficient to support the finding that there had not been a breach of article 6(3)(c).

160. The succeeding paragraphs in the judgment repeat the matters dealt with in paras 46 and 47 or expand on them to some extent. It is not necessary to consider these in any detail but I should mention para 48, if only to say that I have had a little difficulty in following the reasoning that it contains. It reads:

> "Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings."

161. It is not immediately clear why someone who was not free to leave the scene could be said not to have had any significant curtailment of his freedom of action. Be that as it may, it appears to be the case that if the court had found that there *had been* a significant curtailment of the applicant's freedom of action, it would have regarded this as a sufficient basis for a finding of a violation of article 6(3)(c). What would constitute such a curtailment of freedom of action has not been made clear, however. Altogether, it is not easy to distil any obvious principle from this paragraph and I would be reluctant to ascribe to it any significance beyond that relevant to the circumstances of the case of *Zaichenko* itself.

162. Although ECtHR concluded that Mr Zaichenko had waived his right to legal assistance, it decided that there had not been a waiver of his right not to incriminate himself. At para 52 the court held that it was incumbent on the police to inform the applicant of the privilege against self-incrimination and the right to remain silent. Their failure to do so at the roadside check before putting questions to him constituted a violation of article 6(1), therefore.

163. In a partly dissenting opinion, Judge Spielmann (who, as Lord Hope pointed out in para 46 of his judgment, was a member of the Grand Chamber in *Salduz*) addressed forthrightly the question of when the right to legal representation arose and, relating it directly to the decision in *Salduz*, came down

firmly in favour of what I believe to be the logical position, namely, that it began when police questioning started. In para 3 of his opinion, Judge Spielmann said:

> "3. In *Salduz v. Turkey* the Court held that as a rule, access to a lawyer should be provided as *from the first interrogation of a suspect by the police* (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008-...). The Court also held that the lack of legal assistance during a suspect's interrogation would constitute a restriction of his defence rights and that these rights would in principle be irretrievably prejudiced when incriminating statements, made during police interrogation without access to a lawyer, were used for a conviction. The Court took a similar approach in the equally important judgment in *Panovits* (*Panovits v. Cyprus*, no. 4268/04, §§ 66 and 70-73, 11 December 2008)." (original emphasis)

164. Judge Spielmann also questioned the reasoning of the majority that is contained in para 48 of the court's judgment. At para 6 he said:

> "6. Contrary to what is said in para 48 of the judgment, I cannot agree that the circumstances of the case disclose no significant curtailment of the applicant's freedom of action. I am of the opinion that those circumstances were sufficient to activate a requirement for legal assistance."

165. I do not understand Judge Spielmann's dissent necessarily to indicate that there was a divergence of views between him and the majority about the nature of the principle at stake. The principle which I believe can be said to be common to both is that when a suspect is interrogated by police he is entitled to legal assistance. Where Judge Spielmann parted company with the majority was in its conclusion as to whether the principle applied. Because of the accumulation of factors that the court had identified (see para 158 above) and because it concluded that there had not been a curtailment of Mr Zaichenko's freedom of action, it held that the principle did not apply. Judge Spielmann, by contrast, did not attach the weight to the factors that the majority had considered militated against a finding of violation of article 6(3)(c) and he disagreed (in my view, quite properly) with the suggestion that someone who was not free to leave the scene nevertheless had not suffered any curtailment of his freedom of action.

Miranda v Arizona

166. As Lord Hope has said in para 52, "curtailment of freedom of action" carries echoes from *Miranda v Arizona* 384 US 436 (1966). And as Lord Hope suggests, it may well be that *Miranda* will influence the thinking of Strasbourg, it having featured in a number of prominent dissenting judgments in that court already. But I question whether this will lead to the adoption of "the custodial approach to the question as to when access to a lawyer is required". Curtailment of an individual's freedom of action can arise even when he has not been taken into custody. The important question must surely be whether the suspect feels constrained to answer the questions posed to him by the police officer. As the *Grant* case illustrates, this can arise either because of the manner in which the police officer manages the exchange with the suspect or because of the latter's belief that he has no option but to answer the questions put to him.

167. Quite apart from these considerations, however, I believe that one must be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence in any wholesale way. The implications of that decision must be considered in the context of police practice in the United States of America. Nothing that has been put before this court establishes that it is common practice in America to ask incriminating questions of persons suspected of a crime other than in custody. Indeed, it is my understanding that as soon as a person is identified as a suspect, police are trained that they should not ask that person any questions until he or she has been given the *Miranda* warnings.

168. Custody was identified in *Miranda* as one of the features necessary to activate the need for legal representation but custody has been held to mean either that the suspect was under arrest or that his freedom of movement was restrained to an extent "associated with a formal arrest" - *Stansbury v. California*, 511 US 318 (1994); *New York v. Quarles*, 467 U.S. 649, 655 (1984). So it is clear that the rule that custody is required before entitlement to legal representation arises is not inflexible or static and that its underlying rationale is closely associated with the question whether the person questioned feels under constraint to respond.

Hampering police investigation

169. One of the principal practical arguments advanced against the requirement that a suspect be informed that he is entitled to legal representation before incriminating questions are put to him is that this will hamper police investigations. The argument is a venerable one. It has been deployed in reaction to various proposals for safeguards intended to protect suspects' rights – including

the right to have a solicitor present during interviews and the audio recording or the videotaping of interviews. There is no evidence that the introduction of those measures brought about any widespread impediment to police investigations nor is there, in my view, any convincing evidence that this would be the result of recognising the right of a suspect to be informed that he or she is entitled to legal representation before being required to provide potentially incriminating answers to police questioning.

170. As the respondents have pointed out, in the final analysis, these cases are about the admissibility of evidence. There is no legal prohibition on police asking questions of a suspect that may produce incriminating answers. The legal consequence of doing so without first informing the suspect of his or her right to be legally represented will be, in my opinion, that the answers produced will be inadmissible in evidence unless compelling reasons such as were discussed in para 55 of *Salduz* exceptionally justify denial of access to a lawyer. One can anticipate, therefore, that police may decide in appropriate circumstances to proceed with questions in order to further the investigation but have to accept that if they are capable of producing incriminating answers from someone who is a suspect, the replies will be inadmissible.

171. A balance will always have to be struck between unfettered police investigatory powers and the complete safeguarding of suspects' rights. The history of criminal jurisprudence shows how that balance has been struck in different ways and at different times, reflecting, no doubt, changing attitudes as to what properly reflects contemporary standards. It is my belief that the proper balance to strike for our times is the one that I have suggested in para 146 above.

Conclusions

172. For the reasons given in para 153 above, I consider that article 6 of ECHR was engaged in each of the respondents' cases at the time that the relevant questions were asked. I have no doubt that when they were asked those questions each of them was suspected of having committed an offence. I agree with Lord Hope that the administration of a caution is not necessarily determinative of this issue but, in the particular circumstances of these cases, I do not believe that any other conclusion is possible.

173. The second and third questions that were put to the respondent, Ambrose, were clearly capable of producing incriminating responses. In fact they did so and it is evident that the answers have been relied on in order to establish his guilt, (although that might well have been possible simply by proving that he was in the car and in possession of the keys). In these circumstances, I am of the view that he

had a right under article 6(3)(c) taken in conjunction with article 6(1) of ECHR to be informed, after his reply to the first question, that he was entitled to legal representation before answering further questions, and that, absent such a warning, the incriminating answers given by him to the second and third questions were not admissible.

174. The questions put to the respondent who has been referred to as M, apart from the first question, were also clearly capable of producing incriminatory replies although whether they would in fact be probative of guilt would be a matter for trial, if indeed the answers were held to be admissible. Since they clearly had the capacity of producing inculpatory responses, however, I consider that the questions put to M at his home, apart from the first question, are inadmissible.

175. In the case of the respondent referred to as G, for the reasons given by Lord Hope (with which I agree), it is indisputable that, at the time the impugned questions were put to him, he was in custody and, whatever view one takes of the effect of the European jurisprudence, the incriminating answers that he gave are inadmissible. But, for the same reasons that I have given in the cases of Ambrose and M, I would have held that they were inadmissible, regardless of whether G was in custody at the time that the answers were given.