

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IND. NO. 15 of 2014

BETWEEN

HER MAJESTY THE QUEEN

And

ITZEL ANDERSON

Defendant

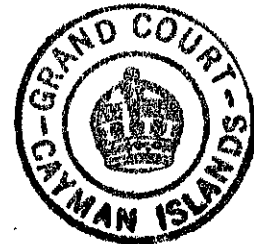
Ms. T. Lobban for the Crown

Mr. N. Dixey for the Defendant

Henderson, J.

Trial: June 4 to 6, 2014

Ruling: June 6, 2014



RULING ON VOIR DIRE

1. The Defendant Itzel Anderson ("Ms. Anderson") is charged with attempting to obstruct, prevent, pervert or defeat the course of justice by attempting to conceal 2 packages of cocaine from police officers who were conducting a search for drugs. On this *voir dire* Ms. Anderson argues that it would be unfair to admit in evidence her interview with the investigating officers because she was denied the benefit of free legal advice.



Facts

2. On November 26, 2013 around 6:30 AM police officers from the Drugs Task Force searched a house in which Ms. Anderson and another person were found. Apparently, Ms. Anderson was a visitor at the premises. A quantity of cocaine was found in the house. Ms. Anderson was arrested and taken to the police station.

3. The Defendant was interviewed by police officers from 12:16 PM until 12:51 PM. She had been found in the bathroom when the officers entered the residence. In answer to questions asked during the interview, she said that she had found two packages floating in the toilet bowl and had removed them and placed them into a nearby garbage bin. These packages contained cocaine; Ms. Anderson claimed she did not know that. Thus, the statement made by Ms. Anderson during the interview is partly exculpatory and partly inculpatory. It assists the Crown in proving that she placed the packages in the garbage bin, which could be viewed as a vain attempt to conceal them from the officers, but also assists the Defendant by tending to show that she did not know the packages contained cocaine.

4. The interview was conducted principally by Detective Constable Day with assistance from Detective Constable Sugden. The Defendant was the only other person present. At the outset of the interview the following conversation took place ('MD' and 'PS' are police officers; 'IA' is the Defendant).

MD: Thank you. Okay I have to remind you that you have the right to speak to an independent, take independent legal advice or speak to an

attorney, okay you can speak to one in private or at any time, okay. Do you wish to speak to an attorney or legal advice before this interview, for interview takes place?

IA: Ummm, okay.

MD: Okay at the moment you don't have a legal adviser, yes?

IA: No, we don't have, we don't have any.

MD: Right you can have a legal advisor present during this interview if you wish...

MD: You're okay to continue? Is there any reason why you don't want a solicitor or an attorney present?

IA: Umm, well, because...

PS: You don't have to say

MD: Okay, this interview can be stopped for you to speak to someone and get legal advice, do you understand that, so at any time if you want to stop the interview to take legal advice you can do, it's your right okay, are you happy to continue this interview at this time

IA: [silence]

MD: Okay. I'm going to caution you now, I'm going to caution you that "YOU DO NOT HAVE TO SAY ANYTHING, BUT IT MAY HARM YOUR DEFENCE IF YOU DO NOT MENTION WHEN QUESTIONED SOMETHING YOU LATER RELY ON IN COURT. ANYTHING YOU DO SAY MAY BE GIVEN IN EVIDENCE". What that means is you do not have to say anything to us, you can tell us something or nothing about why you're here, why you've been arrested, do you understand that?

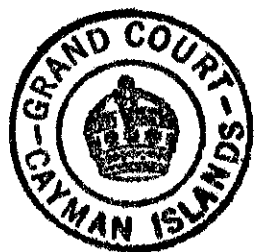
IA: [softly] Uh hub

MD: You have answer cause the microphone

IA: [softly] Yes Sir

MD: Can't see you they can only

IA: [louder] Yes sir, Yes Sir





MD: Hear you

IA: Yes Sir

MD: If you do tell us something now but you go to court later and tell them a different story, yes

IA: Uh huh

MD: They might ask themselves why didn't you tell us that in this interview, why have you changed your story or why have you start telling the court something you didn't tell us, alright

IA: Okay

MA: They might feel that you've done that for a reason, okay and they might choose to be less believing of you because you haven't told us everything now

IA: Yeah

MD: You understand that

IA: Yes Sir

MD: Anything you do say may be written down, so I'm going to take notes, we'll have discs with the interview on and they can be taken and used in court, alright, do you understand

IA: Yeah

MD: Do you understand that caution

IA: Yeah

MD: Okay, Itzell is it

IA: Yes Sir

MD: Okay Itzell do you understand why you're here at this police station today ...

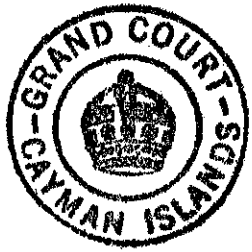
[capitalization and punctuation as in original transcript]

5. Ms. Anderson answered all questions responsively and did not, at any time, request legal advice.

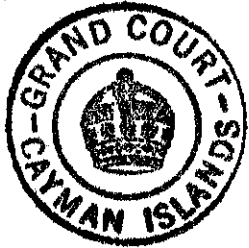
6. Ms. Anderson gave evidence on the *voir dire*. She is 24 years old and is an immigrant worker from Costa Rica. English is not her maternal tongue but she speaks English fluently. She has no prior convictions and has never been arrested. She struck me as a woman of average intelligence and sophistication with little, if any, experience of the legal system.

7. In her evidence Ms. Anderson said, in effect, that she would have liked to receive legal advice and would have taken advantage of that if it had been offered to her free of charge. She said, however, that she assumed that legal advice would be expensive and she could not afford it. At the time, she was working at a beach bar and earning about \$1600 per month.

8. In cross-examination Ms. Anderson gave 2 further reasons for not requesting legal advice: she said she did not realize the seriousness of the situation; and she said she did not want legal advice because she wanted to get out of the police station quickly. She agreed that she understood that she could interrupt the interview at any time for the purpose of speaking to a lawyer. She agreed she was comfortable answering the questions. She said "my conscience said I didn't have anything to do with it so I could get out of it quickly," by which I take her to mean that she answered the questions because



she felt the answers would exonerate her and lead to her immediate release. In that, she was wrong.



9. The first question is voluntariness. Nothing was said by either officer amounting to a threat, promise or inducement. The interview was relatively brief. Ms. Anderson did not request a break in the questioning at any time. Nothing of an oppressive nature was said or done. From Ms. Anderson's point of view, the answers she gave were exculpatory: she denied all knowledge of the cocaine. I am satisfied that the statement was given voluntarily.

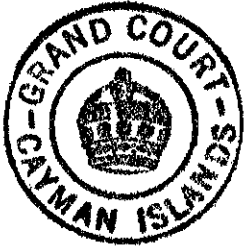
10. I have a discretion provided to me by section 40 of the *Evidence Law (2011 Revision)* to "disallow evidence otherwise admissible which [in my opinion] would, if allowed, operate unfairly against an accused person". I must now consider whether the admission in evidence of the interview would operate unfairly.

Right of Access to Legal Advice

11. The first step is to determine whether any human right of Ms. Anderson's has been violated in the taking of the statement.

12. Ms. Anderson, when interviewed, had been arrested but not yet charged. As a consequence, she had an entitlement to those rights given by our *Bill of Rights* to persons who have been "arrested or detained". A right of access to legal advice for

persons who have been arrested or detained is set out in the *Bill of Rights* under the heading “Personal Liberty” in section 5(4):



5(4) Any person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, and to hold private communication with him or her, and in the case of a minor he or she shall also be afforded a reasonable opportunity of communication with his or her parents or guardian; but when a person arrested or detained is unable to retain a legal practitioner of his or her own choice or be represented by a legal practitioner at the public expense in accordance with section 7(2)(d), he or she may be represented, and hold private communication with, such person as the court may approve.

13. The first part of section 5(4) contains an unequivocal guarantee of a right of access to legal advice where a defendant is able to pay for an attorney’s services. A large majority of persons detained or arrested by the authorities are not in that position. The concluding words of s. 5(4) – the passage commencing with “but” – address the entitlement of a person who has been arrested or detained but is “unable” to retain an attorney or “unable” to be represented by an attorney at public expense. The first-mentioned inability – the inability to retain an attorney - is ordinarily the result of impecuniosity. The last-mentioned inability – the inability to be represented by an attorney at public expense – occurs from time to time because of the lack of any system or legislative provision in the Cayman Islands for granting legal aid before a charge has been laid. There is no scheme in operation for the provision of free legal advice to persons who are detained or arrested and cannot afford to retain a lawyer. Some defence attorneys in the Cayman Islands are willing to attend, without any assurance of

being paid, at a police station on short notice to render legal advice and assistance. If a charge is laid and if the defendant selects as her attorney the individual who advised her prior to charge, the legal aid authorization can be back-dated to provide remuneration for that attorney. At best, the chance of an attorney being remunerated for rendering advice and assistance at a police station prior to a charge being laid is haphazard. The result is that some suspects who cannot afford to retain an attorney receive free legal advice prior to interview and some do not. Another consequence is that police officers in the Cayman Islands have not been instructed to advise suspects that free legal aid is available if they cannot afford to hire a lawyer.



14. The reference in section 5(4) to section 7(2)(d) of the *Bill of Rights* is to a provision which contains one of the safeguards intended to ensure a fair trial. It is a specific instance of the overarching guarantee of a fair trial found in section 7(1). These provisions say:

7(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court with a reasonable time.

...

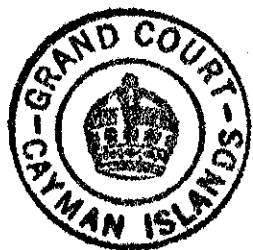
7(2) Everyone charged with a criminal offence has the following minimum rights -

...

(d) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense provided through an established public legal aid scheme as prescribed by law; ...

15. The right to counsel in section 7(2)(d) is expressed as a right enjoyed only by someone who has been “charged with a criminal offence”. On the face of it, those, like Ms. Anderson, who have not yet been charged and who cannot afford to hire an attorney have no right under section 7(2)(d) to be provided with one at state expense. I return to this subject below.

16. Section 64(1) of the *Police Law (2010 Revision)* reads:



64(1) Subject to subsection (4), a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult an attorney-at-law privately at any time.

(2) Subject to subsection (3), a request under subsection (1) and the time at which it was made shall be recorded in the custody record.

(3) A request for an attorney-at-law is not required to be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.

(4) If a person makes a request for an attorney-at-law, he shall be permitted to consult an attorney-at-law as soon as is practicable except to the extent that delay is permitted by this section.

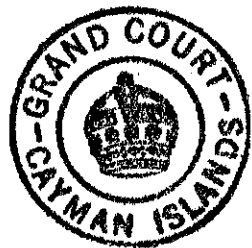
(5) In any case he shall be permitted to consult an attorney-at-law within twenty-four hours from the time of his arrest.

(6) Delay in compliance with a request is only permitted –

(a) in the case of a person who is in police detention for an indictable offence; and

(b) if a police officer of at least the rank of superintendent authorizes it.

(7) A police officer may give an authorization under subsection (6) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.



(8) Subject to subsection (9) a police officer may only authorize delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) at the time when the person detained desires to exercise it –

(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons;

(b) will lead to the alerting of other persons suspected of having committed that offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of that offence.

(9) A police officer may also authorize delay where he has reasonable grounds for believing that –

(a) the person detained for the indictable offence has benefited from his criminal conduct; and

(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1).

(10) For the purposes of subsection (9) the question whether a person has benefited from his criminal conduct is to be decided in accordance with the Proceeds of Crime Law, 2008.

(11) If delay is authorized –

(a) the detained person shall be told the reason for it; and

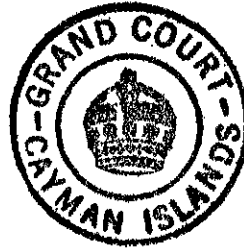
(b) the reason shall be noted on his custody record.

(12) The duties imposed by subsection (11) shall be performed as soon as is practicable.

(13) There shall be no further delay in permitting the exercise of the right conferred by subsection (1) once the reason for authorizing delay ceases to subsist.

(14) Nothing in this section applies to a person arrested or detained under the Terrorism Law (2009 Revision).

17. Section 64(1) provides an entitlement to consult an attorney privately but contains no suggestion of a right to free legal assistance if a suspect cannot afford to retain an attorney.

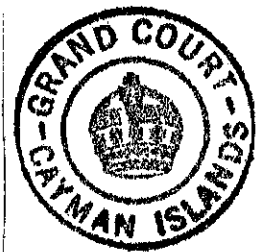


Right to a Fair Trial

18. The provisions I have quoted so far – sections 5(4) and 7(2)(d) of the *Bill of Rights* and section 64(1) of the *Police Law* – confirm the existence of a full right to legal representation for those who can retain an attorney privately. For those who cannot afford to pay a lawyer, the entitlement to legal representation (expressed in section 7(2)(d)) may seem to be only partial as it is dependent upon and is triggered by the laying of a charge.

19. The guarantee of a fair hearing in the determination of a criminal charge enshrined in section 7(1) of the *Bill of Rights* mirrors the provision in article 6(1) of the *European Convention on Human Rights*. Section 7(2)(d) is similar in its wording to article 6(3)(c) of the *Convention*. It follows that decisions of the European Court of Human Rights (ECHR) must have considerable persuasive value when this Court is asked to construe the equivalent Cayman Islands provisions.

20. Several decisions of the European Court of Human Rights have applied the fair trial guarantee to events at the investigatory stage. In *Imbrioscia v Switzerland* (1994) 17 EHRR 441, the Defendant was interviewed by investigators in the absence of his attorney. On the facts, the Court held that there had been no breach of the right to a fair trial but made it clear in its analysis that articles 6(1) and 6(3)(c) can apply to pre-trial police activity during the investigatory stage. In *Murray v UK* (1996) 22 EHRR 29, the Defendant was denied legal advice for 48 hours and made no comment at his interview, which was not conducted in the presence of an attorney. The trial Court drew an adverse inference from his silence. On appeal to the ECHR, it was held that, because of the possibility of drawing an adverse inference from silence, it was of “paramount importance” (para. 66) that legal assistance be available before questioning. The failure to provide it was a breach of articles 6(1) and 6(3)(c). An adverse inference from silence is permitted under Cayman Islands legislation: see s. 148 et seq. of the *Police Law (2010 Revision)*. In *Magee v UK* (2001) 31 EHRR 35, the Defendant was denied access to a solicitor for over 48 hours and confessed. The Court held there had been a breach of articles 6(1) and 6(3)(c), saying the Defendant’s rights had been “irretrievably prejudiced” (para. 44). In *Brennan v UK* (2002) 34 EHRR 18, the Court found on the facts that the absence of legal advice before interview was “not attributable to any measure imposed by the authorities” (para. 47). The judgment proceeds on the assumption that articles 6(1) and 6(3)(c) have application to events occurring at the investigatory stage. The question was put beyond doubt in the judgment of the ECHR in *Salduz v Turkey* (2009) 49 EHRR 19, where the Court said:





50 The Court reiterates that, even if the primary purpose of art. 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the article has no application to pre-trial proceedings. Thus, art. 6, - especially para. 3- b may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgments, the right set out in para.3(c) of art. 6 of the Convention is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in para. 1.

21. I see no reason why these authoritative decisions of the ECHR should not be applied to our own identical constitutional guarantee of a fair trial. As a result, sections 7(1) and 7(2)(d) of the *Bill of Rights* have application to events which occur prior to the laying of a charge as well as to what happens subsequently. A trial may suffer the taint of unfairness from something which occurred during the investigatory phase even though the trial itself is conducted with scrupulous procedural fairness.

The Salduz Decision

22. In *Salduz*, the Defendant was arrested under an anti-terrorism law which provided that the usual (in Turkey) entitlement to legal advice before being questioned was inapplicable to terrorism cases. The Defendant was interviewed before receiving legal advice and confessed. The ECHR held:

51 The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. Nevertheless, art. 6(3)(c) does not specify the manner of exercising this right. It thus leaves to the contracting states the choice of the means of ensuring that it is secured in their judicial systems, the

Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to, "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning Counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.

52 National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, art. 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances.

53 These principles, outlined at [52] above, are also in line with the generally recognized 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.

54 In this respect, 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 trial. 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, 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.



55 Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" art. 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 art. 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.

Application of the above principles in the present case

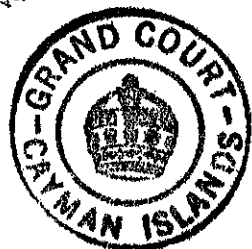
56 In the present case, the applicant's right of access to a lawyer was restricted during his police custody, pursuant to s. 31 of Law 3842, as he was accused of committing an offence falling within the jurisdiction of the state security courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. Thus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of art. 6 in this respect, as set out at [52] above.

...

23. In summary, "in most cases" the particular vulnerability of a suspect in police custody can only be compensated for by the assistance of a lawyer; that is one of the "procedural safeguards" intended to ensure a fair trial. "As a rule access to a lawyer should be provided" before a suspect is interrogated. The rights of a defendant will "in principle be irretrievably prejudiced" when incriminating statements obtained before the defendant

has had access to legal advice are tendered in evidence. Any exception to the right to early legal advice must be “clearly circumscribed” and “strictly limited in time”.

24. Within its decision in *Dvorski v Croatia* (unreported) November 28, 2013, the ECHR expanded upon the underpinnings of its reasoning in *Salduz* with these words about the privilege against self-incrimination:



*As regards the privilege against self-incrimination and the right to remain silent, the court reiterates that these are generally recognized international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 of the convention. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case will seek to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In examining whether a procedure has impaired the very essence of the privilege against self-incrimination, the Court must examine the nature and degree of any compulsion, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put (see *Bykov v. Russia* [GC], no. 4378/02, para. 92, 10 March 2009).*

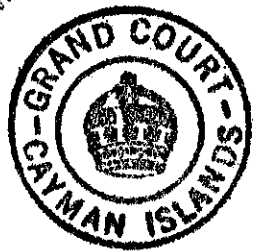
*The Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, para. 54). At the same time, an 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 has tended 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 is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected (see *Pavlenko* [v Russia, no. 42371/02, 1 April 2010], para. 101).*

Implications for Cayman of the *Salduz* Decision

25. In *Cadder v Her Majesty's Advocate (Scotland)* 2010 WL 4137116 the United Kingdom Supreme Court had to consider the impact of *Salduz* in Scotland. The Appellant made admissions to the police during his interview prior to being given access to legal advice. A solicitor was not present during the interview. For decades, the criminal justice system in Scotland had proceeded on the basis that such admissions were admissible in evidence. Her Majesty's Advocate relied on a number of prior decisions which in essence held that other features of the system in Scotland, such as the inability of a jury to draw an adverse inference from silence and a requirement for corroboration of a confession, were sufficient to ensure trial fairness (the full list is in para. 27). The Court was reminded that the ECHR has said repeatedly, including in para. 51 of its judgment in *Salduz* (quoted above), that it is for the contracting states to choose the means by which the fair trial guarantee is implemented in their own systems. At this juncture Lord Hope, with whom the other law lords agreed, went on to say this about *Salduz*:

40 ... But there is no hint anywhere in [the ECHR's] judgment that it had in mind that the question whether or not a detainee who was interrogated without access to a lawyer has had a fair trial will depend on the arrangements the particular jurisdiction has made, including any guarantees otherwise in place there. Distinctions of that kind would be entirely out of keeping with the Strasbourg court's approach to problems posed by the Convention, which is to provide principled solutions that are universally applicable in all the contracting states. It aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other.



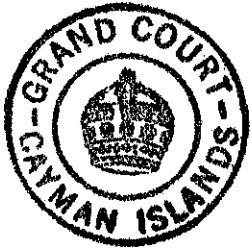


41. *The statement in para 55 [of Salduz] that article 6(1) requires that, “as a rule”, access to a lawyer should be provided as from the first interrogation of a suspect must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will “in principle” otherwise be irretrievably prejudiced must be understood in the same way. It is true that the use of such expressions indicates that there is room for a certain flexibility in the application of the requirement, as the Lord Justice General said in HM Advocate v. McLean, para 24. But they do not permit a systematic departure from it, which is what has occurred in this case under the regime provided for by the statute. The area within which there is room for flexibility is much narrower. It permits a departure from the requirement only if the facts of the case make it impracticable to adhere to it. The reference in that paragraph to its being demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict the right reinforces this interpretation. It is the particular circumstances of the case, not other guarantees that are available in the jurisdiction generally, that will justify such a restriction.*

43 ... *It plainly had in mind that there was a consensus across Europe the presence of a lawyer was a safeguard against ill-treatment, as can be seen from its reference in para 54 to the recommendations of the European Committee for the Prevention of Torture. But it is just as plain that the risk of irretrievable prejudice to the accused because of a lack of respect of his right to remain silent was at the forefront of its mind too: see para 110 of Jalloh, where the court observed that the privilege against self-incrimination is commonly understood in the contracting states and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. Its reasoning cannot be confined to cases where a violation of article 3 is in issue.*

48 ... *The conclusion that I would draw as to the effect of Salduz is that the contracting states are under a duty to organize their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning.*

50 *I should add for completeness that I see no room for any escape from the Salduz ruling on the ground that the guarantees otherwise available under the Scottish system are sufficient to secure a fair trial. The appeal court made much of this point in HM Advocate v. McLean, para 27, as did the Lord Advocate in her address to this court. As I have already said, the*



ruling in para 55 of Salduz must be read as applicable equally in all the contracting states. There is room for a restriction of the right of access to a solicitor during the police interrogation, but only if there are compelling reasons in the light of the particular circumstances of the case which make the presence of a solicitor impracticable.

26. The Supreme Court's conclusion, after exhaustive analysis of the position, is unequivocal. The right of access to legal advice is not just a necessary safeguard against mistreatment of prisoners (although it is that) but is also a manifestation of a suspect's right to remain silent and her right to make an informed choice whether to do so. The "rule" that a suspect must have access to a lawyer before being interviewed is intended to be universal throughout the Council of Europe area. A different regime for Scotland, even one which includes many countervailing protections for suspects, cannot be countenanced. Exceptions are possible, but only in the particular circumstances of individual cases. Governments are under a duty to "organize their systems in such a way as to ensure" that a person who is detained or arrested has access to legal advice from a lawyer before being questioned by the police. There is nothing whatsoever in the *Salduz* and *Cadder* decisions to suggest that the governmental obligation can be tempered or postponed because of budgetary concerns. The view expressed in a number of earlier decisions (see, for example, *Hinds v AG of Barbados et al* [2001] UKPC 56 and *Benham v UK* (1996) 22 EHRR 293) that the complexity of the charges and of the proceedings provides a yardstick for determining whether legal assistance is necessary has been discarded.

27. As a British Overseas Territory, the Cayman Islands is bound to conform. It too must now organize its system in such a way as to ensure the availability of legal advice to anyone who wishes to receive it before being questioned by the police. This will require the creation of a system to ensure that attorneys are available to provide advice and assistance prior to police interviews, and to ensure that they are paid appropriately.



Waiver

28. The Crown says that by electing to proceed with the interview Ms. Anderson waived, at least implicitly, her right to receive legal advice and assistance.

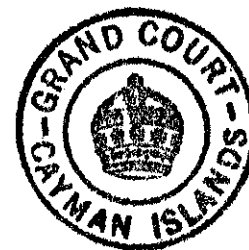
29. The right of access to legal advice can be waived. The decision of the ECHR in *Salduz* addressed the point with these words:

59 The Court further recalls that neither the letter nor the spirit of art. 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Thus, in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent.

30. Did Ms. Anderson give a valid waiver of her right to legal advice and assistance before her interview? A similar question has been considered in a number of decisions of the ECHR and in the courts of the United Kingdom. While the exact parameters of a valid

waiver of a fair trial requirement are still under debate, it is clear that such a waiver must be voluntary, informed and unequivocal. Those are the requirements set out in *McGowan v B* [2011] UKSC 5, which quotes a passage from *Sejdovic v Italy* 42 EHRR 360 saying that a waiver of an article 6 fair trial guarantee must be “made in an unequivocal manner and must not run counter to any important public interest”. This applies equally to express and implicit waivers: *McGowan*, para. 24; also see: *Colozza v Italy* 7 EHRR 516; and *R v Saunders* [2012] 2 Cr App Rep321 (CA).

31. Ms. Anderson was not told of her right to receive legal advice and assistance before and during the police interview for the understandable reason that no organized system exists for providing it. The police investigators cannot be criticized for failing to offer something which, if accepted, might have failed to materialize. I accept the evidence of Ms. Anderson that she wanted the assistance of a lawyer but failed to make that clear because she believed she could not afford one. Since she was not given complete and correct information about the extent of her right to legal assistance, her willingness to proceed with the interview cannot be viewed as a waiver of her right.



Should the Evidence Be Excluded?

32. My discretion to exclude evidence provided by section 40 of the *Evidence Law* is a broad power intended to ensure trial fairness. In most cases, a decision whether to exercise it will depend heavily upon the particular circumstances of the individual case. Historically, British judges have been loath to lay down anything approaching a hard and fast rule. In

the case of evidence obtained by questioning a suspect whose right to legal advice and assistance has been breached, the position has changed. The result of *Salduz*, as interpreted and applied by the UK Supreme Court in *Cadder*, is that such evidence is inadmissible “as a general rule”: see *Cadder*, para. 55. Both decisions contain an acknowledgement that “allowance must be made ... for the possibility that in the light of the particular circumstances of the case there are compelling reasons to restrict the right of access” (at para. 55 in both judgments). To displace the “general rule”, the reason for restricting the right of access must appear “compelling”.

33. There is nothing unusual about the particular circumstances of Ms. Anderson’s interview. The restriction upon her right of access to legal advice occurred not because of the individual circumstances of her case but owing to deficiencies in the system. Those deficiencies must be rectified to ensure the admissibility in evidence in future trials of what a suspect says in answer to police questioning. In the case at bar, I am satisfied that the admission in evidence of Ms. Anderson’s interview would render her trial unfair.

34. For these reasons, I find that the evidence of Ms. Anderson’s interview by the investigators is not admissible.

Henderson, J.

Henderson, J.

