Michaelmas Term
[2011] UKSC 54

JUDGMENT

McGowan (Procurator Fiscal, Edinburgh) (Appellant) *v* B (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson
Lord Hamilton

JUDGMENT GIVEN ON

23 November 2011

Heard on 11 and 12 October 2011

Appellant (McGowan)
Joanna Cherry QC
P Jonathan Brodie QC
Kenneth J Campbell QC
Douglas Fairley
(Instructed by The Appeals Unit, Crown Office)

Respondent (B)
John Scott QC
Ian Bryce

(Instructed by Central Criminal Lawyers)

LORD HOPE

1. This is a reference of a devolution issue which has arisen in proceedings in the Sheriff Court of Lothian and Borders at Edinburgh. It was required by the Lord Advocate under paragraph 33 of Schedule 6 to the Scotland Act 1998. The respondent, to whom I shall refer as "B" as his case has not yet gone to trial, has been charged on summary complaint with housebreaking with intent to steal and having in his possession a controlled drug contrary to section 5(2) of the Misuse of Drugs Act 1971. He pled not guilty and was admitted to bail. A trial diet was fixed for 10 October 2011.

2. By letter dated 1 August 2011 his solicitor gave notice of his intention to raise a devolution issue in terms of paragraph 1 of Schedule 6 to the Scotland Act 1998. The issue was described in his Devolution Minute in these terms:

> "(a) Article 6(3)(c) of the European Convention on Human Rights provides:
>
> 'Everyone charged with a criminal offence has the following minimum rights:
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> …
>
> To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'
>
> (b) That in the Minuter's case he was interviewed by the police. The Minuter was offered legal assistance prior to the interview but declined. This was done without recourse to a solicitor. Access to a solicitor should be automatic when someone has been detained in police custody.
>
> (c) Accordingly the Minuter's right to a fair trial under article 6 has been breached if the Crown choose to lead evidence of the Minuter's police interview."

3. The Lord Advocate understood the propositions in para 2(b) of the Minute to have been based on the observations of the High Court of Justiciary in *Jude v HM Advocate* [2011] HCJAC 46, 2011 SLT 722. In para 34 of his opinion, with which all the other members of the Appeal Court agreed, the Lord Justice Clerk (Gill) said that he could not see how a person could waive his right to legal advice when he had not had access to legal advice on the point. In view of the importance of the question raised by this observation the Lord Advocate invited the sheriff to refer the issue to this court, which the sheriff has now done.

The reference

4. The questions that were referred by the sheriff did not appear to focus the issue in sufficiently precise terms. So, at the Court's request, an amended version was agreed between the parties. The following are the questions in their amended form:

> "(i) whether it would necessarily be incompatible with article 6(1) and 6(3)(c) of the European Convention on Human Rights for the Lord Advocate to lead and rely upon evidence of answers given during a police interview of a suspect in police custody (whether voluntarily, as a detainee under section 14 of the Criminal Procedure (Scotland) Act 1995 or after arrest and prior to charge) who, before being interviewed by the police:
>
> had been informed by a police officer of his *Salduz*/article 6 rights of access to legal advice; and
>
> without having received advice from a lawyer, had stated that he did not wish to exercise such rights.
>
> (ii) whether it would be compatible with the respondent's rights under articles 6(1) and 6(3)(c) of the ECHR for the Lord Advocate, at the trial of the respondent, to lead and rely upon evidence of answers given by the respondent during a police interview conducted with him between 10 and 11 July 2011 in circumstances where, prior to such interview taking place, the respondent was informed by a police officer of his *Salduz*/article 6 rights of access to legal advice and, without having received advice from a lawyer, indicated:
>
> ● verbally to police officers prior to being interviewed;

● in writing by signing a solicitor access recording form ('SARF'); and

● verbally at the start of the interview

that he did not wish to exercise such rights."

The first question raises an issue of principle, which is focused by the word "necessarily". The second question is directed to the facts of this case. The Convention issue which it raises, and to which the argument was directed, is focused by the words "without having received advice from a lawyer".

5. I agree with Lord Hamilton that the task for this court is to identify as best it can the requirements which *the Strasbourg court* has set for the making of an effectual waiver of Convention rights (see para 78, below). I emphasise the words "the Strasbourg court", as they indicate the proper limits of the jurisdiction that was given to this court by the Scotland Act 1998. It may be, as Lord Kerr makes clear in his judgment, that the way interviews with suspects are currently conducted in Scotland is in need of improvement. But I do not think that this should be done by giving a more generous scope to the Convention rights than that which is to be found in the jurisprudence of the Strasbourg court.

6. The structure of the Scotland Act, section 57(2) of which places such a tight fetter on the powers of the Lord Advocate as head of the system of criminal prosecution in Scotland, is an important factor in the determination of how we should perform our task. As Lord Rodger of Earlsferry declared in *HM Advocate v Scottish Media Newspapers Ltd* 2000 SLT 331, 333, the Lord Advocate simply has no power to move the court to grant any remedy which would be incompatible with the European Convention on Human Rights: see also *HM Advocate v Robb* 2000 JC 127, 131, per Lord Penrose. This is in sharp contrast to the position under the Human Rights Act 1998, section 8(1) of which provides that in relation to an act of a public authority which it finds unlawful the court may grant such relief or remedy as it considers just and appropriate. The absolute nature of the fetter which section 57(2) imposes affects cases in the past (other than closed cases) as well as this one, and it will affect all cases in the future. This makes it especially important for us to avoid laying down fixed rules that may impede the prosecution of crime in the public interest, unless they have been clearly identified as such by the court in Strasbourg. We are, after all, dealing here with implied rights which are open, in principle, to modification or restriction so long as this is not incompatible with the right to a fair trial. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice: *Montgomery v HM Advocate* 2001 SC (PC) 1, 29, [2003] 1 AC 641, 673; *Dyer v Watson* 2002 SC (PC) 89, 133,

[2004] 1 AC 379, 429 per Lord Rodger of Earlsferry. There is no treaty provision which expressly governs the circumstances in which a Convention right may or may not be taken to have been waived. The rules, if there are to be rules, must be found in the judgments of that court. It should be remembered, too, that there is a difference between an absolute rule and a guiding principle. The virtue of a guiding principle is that its application will depend on the facts and circumstances of each case. If that is as far as Strasbourg has taken the point on waiver, we should be content with that. We should not try to push it further by creating a system which is fenced in by fixed rules. A descent to that level of detail is contrary to the approach that the court itself has adopted. The President of the court, Sir Nicolas Bratza, said in a paper which he gave in Edinburgh in March 2011 that the Strasbourg court has been careful, in general, to leave the national authorities to devise a more Convention-compliant system without itself imposing specific requirements on the State: [2011] EHRLR 505, 510.

The facts

7. The respondent was detained at 2057 hrs on 10 July 2011 under section 14 of the Criminal Procedure (Scotland) Act 1995 on suspicion of housebreaking with intent to steal. He was cautioned and made no reply. He was searched and found to be in possession of a substance which he said was cannabis. He was then taken to a police station, where he arrived at 2130 hrs. He was then advised that he had been detained under section 14 and that he was under no obligation to answer any questions other than to give his name and address, which he then did. At 2145 hrs he was told of his rights under sections 15 and 15A of the 1995 Act, as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, section 1(4). He was told that he was entitled to have intimation of his detention and of the place where he was being detained sent to a solicitor. In reply he gave the name of a firm of solicitors, Central Criminal Lawyers. He was asked whether he wished to have intimation sent to anyone else, to which he replied "No". He was also told that he had the right for a private consultation with a solicitor before being questioned by the police and at any time during questioning. He was asked whether he wished a private consultation with a solicitor before being questioned, to which he replied "No". These questions and replies were noted on a pro forma detention form.

8. At 2335 hrs the following statement was read out and signed by him immediately before the start of his interview:

> "You have chosen not to have a private consultation with a solicitor. Signing this in no way prevents you from changing your decision at a later time."

His interview began at 2336 hrs on 10 July 2011. It continued until 0032 hrs on 11 July 2011. At the start of the interview he was asked whether he had been offered a consultation with a solicitor prior to the interview. He confirmed that this was correct. He was also asked whether it was correct that he had declined that interview and stated that he was happy to be interviewed without a lawyer being present or having a private consultation. He replied that this too was correct.

9. He was then questioned about the alleged housebreaking with intent to steal, which ultimately became the first charge in the summary complaint. In the course of that interview he made statements in relation to that matter which were incriminating. At 0021 hrs on 11 July 2011 he was cautioned and arrested for housebreaking with intent to steal. He made no reply. The interview then continued in relation to the matter which ultimately became the second charge on the summary complaint. Before he was asked any questions about it the respondent confirmed that when he was first taken into custody he was found in possession of a herbal substance which he stated was cannabis. He was also asked whether he wished to consult with a solicitor before the police continued with the interview, to which he replied "No". He was then questioned in relation to that matter between 0024 hrs and 0032 hrs. At 0032 hrs he was cautioned and arrested for a contravention of section 5(2) of the Misuse of Drugs Act 1971. He again made no reply.

10. I am grateful to Lord Hamilton for the references he has made in paras 74 and 75 to the current legislation and to section 4 of the Manual of Guidance of Solicitor Access produced by the Association of Chief Police Officers in Scotland ("ACPOS" Manual) which was published in January 2011. They are an important part of the background.

The issue in this case

11. At no stage either before or during the police interview did the respondent receive advice from a lawyer on the question whether he should exercise his right of access to a solicitor before being questioned or during the questioning. Nor was he given an opportunity to seek legal advice on this matter before he decided whether or not he should exercise it. The question is whether he can be taken to have validly waived his right of access to a lawyer without having received advice from a lawyer on this point. In other words, does article 6(1) read with article 6(3)(c) of the Convention require, as a rule, that a person must have had legal advice before he can be taken to have waived that right? It does not say so expressly. But, as is abundantly clear from the jurisprudence of the Strasbourg court, the article is to be interpreted broadly by reading into it a variety of other rights to which the accused person is entitled to give effect, in a practical way, to the right to a fair trial: see *Brown v Stott* 2001 SC (HL) 43, p 74C-E; [2003] 1 AC

681, 719 F-G. As those rights are not set out in absolute terms in the article, they are open to modification or restriction so long as they are not incompatible with the right to a fair trial. The ruling by the Grand Chamber in *Salduz v Turkey* (2008) 49 EHRR 421 illustrates how this is done. In para 55, it said:

> "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."

12. In *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, 2011 SLT 1005, [2011] 1 WLR 2435 the issue which the court had to decide was whether the right of access to a lawyer prior to police questioning which was established in *Salduz* applies only to questioning which takes place when the person has been taken into police custody. In para 25 of my judgment in *Ambrose* I said:

> "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."

That approach to the issue was supported by the majority of the court in that case, and I would apply the same approach to the questions raised by this reference too. There is no rule in the domestic case law that says that a detainee cannot ever waive his right to legal advice when he is being questioned by the police when he has not had access to legal advice on the question whether or not he should waive that right, and that police questioning in such circumstances 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.

13. Mr Scott QC for the respondent acknowledged in his written case that there is, as yet, no clear and constant jurisprudence of the Strasbourg court that says that

legal advice is a necessary safeguard in order to ensure that any waiver is valid. He did not depart from that position in his oral argument, at the outset of which he said that it was not his position that a waiver was bad simply because it was given without legal advice, as had been indicated by the Appeal Court. He submitted that legal advice was none the less the most effective of the possible safeguards for ensuring that a waiver is knowing and intelligent and that, in certain circumstances, it may be the minimum safeguard to ensure a valid waiver. His position was that the first question in the reference should be answered in the negative; and that we should answer the second question, which is directed to the facts of this case, in the negative also. For the Crown, the advocate depute also submitted that the first question should be answered in the negative. But she submitted that the second question should be answered in the affirmative.

14. Notwithstanding the position which Mr Scott adopted in the course of his very able argument, I think that the Strasbourg jurisprudence needs to be examined with some care to see whether it provides any support for the Lord Justice Clerk's statement in *Jude v HM Advocate* 2011 SLT 722, para 32 that the argument for the Crown that the appellants' right of access to a lawyer was capable of being waived failed because their consent to be interviewed was not informed by legal advice. He returned to this point in para 34, where he said:

> "Furthermore, a valid waiver can proceed only on the basis of an informed decision. Since the right allegedly waived was that of access to legal advice, I cannot see how any of the appellants could waive that right when, ex hypothesi, he had no reason to think that he had any such right and had not had access to legal advice on the point (cf *Millar v Dickson* 2002 SC (PC) 30; *Pfeifer v Austria* (1992) 14 EHRR 692; *Pishchalnikov v Russia* (Application No 7025/04) (unreported) given 24 September 2009)"

The respondent in this case did have reason to think that he had a right of access to legal advice, as his detention took place after the decision in *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13 and he was told that he had a right to a consultation with a solicitor before he was interviewed. But the question whether his decision not to exercise that right was an informed decision is directly in point in his case, as it is in many other cases which are still pending where this issue has been raised as a devolution issue in the sheriff courts and the High Court of Justiciary.

The Strasbourg cases

15. It is convenient to examine the jurisprudence of the Strasbourg court as it has developed over time in three stages. In the first group there is the jurisprudence which formed the basis of the discussion of this issue in *Millar v Dickson* 2002 SC (PC) 30; [2002] 1 WLR 1615. The second consists of the jurisprudence on which the court relied when commenting on this issue in *Salduz*. The third is the jurisprudence since *Salduz*. It has, of course, to be borne in mind when looking at this jurisprudence that the rights which are said to have been waived may vary in importance according to the circumstances of each case. The right which we are dealing with in this case is the right of the detainee to have access to legal advice prior to and during his interview by the police while in police custody. And the test of whether the waiver is effective may vary in intensity according to whether it was express or is said to have been implied from the actings of the applicant. This is a case where the waiver that is in question was an express waiver, not one that is said to have arisen by implication.

16. So care needs to be taken when looking at cases where the right said to have been waived was a different right, such as the right to an independent and impartial tribunal, and where the right to legal assistance was not declined expressly as it was in this case – and in Scotland it always will be, if the practice of offering it which has been adopted in the light of *Cadder* and the requirements of section 15A of the 1995 Act is properly carried out. The factual background has always been important to the approach that the Strasbourg court has taken to implied rights. Dicta in a case with one set of facts may not be a safe guide to what it would make of a case with facts that were materially different, and the domestic court too should be aware of these differences.

(a) the first group

17. In *Millar v Dickson* 2002 SC (PC) 30 the question was whether the appellants had waived their right to an independent and impartial tribunal under article 6 of the Convention by appearing before the temporary sheriffs without objecting to their hearing their cases on the ground that they did not meet this requirement. Drawing on such jurisprudence as was to be found in the judgments of the Strasbourg court at that time, Lord Bingham of Cornhill said in para 31:

> "In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the

> meaning to be given to the expression. That the waiver must be voluntary is shown by *Deweer v Belgium* (1980) 2 EHRR 439, where the applicant's failure to insist on his right to a fair trial was held not to amount to a valid waiver because it was tainted by constraint (para 54, p 465). In *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 there was held to be no waiver where a layman had not been in a position to appreciate completely the implication of a question he had been asked (para 38, p 713). In any event, it cannot meaningfully be said that a party has voluntarily elected not to claim a right or raise an objection if he is unaware that it is open to him to make the claim or raise the objection."

The words "voluntary, informed and unequivocal" capture the essence of what is needed for a waiver of any kind to be valid. I said in *Millar v Dickson*, para 53 that the Strasbourg jurisprudence showed that, unless the person was in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal. It could also be said to have been uninformed. No evidence was produced by the prosecutor in that case, on whom the onus lay, to show that the appellants were aware of the system which had been developed by the executive for making and not renewing the sheriffs' appointments.

18. The judgment in *Deweer v Belgium* (1980) 2 EHRR 439 was directed to the first part of Lord Bingham's test. The applicant paid a fine under protest, following an order by the public prosecutor for the provisional closure of his butcher's shop unless it was paid by way of settlement. The decision in his case shows that to be effective a waiver must have been "voluntary", not tainted by constraint. The judgment in *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 provides authority for the requirement that the election by which the right is said to have been waived must be "informed".

19. In the absence of his counsel, Mr Pfeifer waived his right under national law to have two investigating judges who later presided at his trial disqualified. He then complained that he had been denied an impartial trial in violation of article 6(1). In para 38 of its judgment in his case the court referred to articles of the Code of Criminal Procedure which required the investigating judges to inform the president of the trial court of the circumstances entailing their disqualification, and to the fact that there was no provision of Austrian law which defined the procedure to be followed for a defendant expressly to waive his right to be tried by a court whose composition was in accordance with the law. It stressed that this was a right of essential importance and that its exercise could not depend on the parties alone. It went on to note that, when the applicant was told by the presiding judge, in the absence of his lawyer, that the investigating judges were disqualified, there was put to him

> "a question which was essentially one of law, whose implication Mr Pfeifer as a layman was not in a position to appreciate completely. A waiver of rights expressed there and then in such circumstances appears questionable, to say the least. The fact that the applicant stated that he did not think it necessary for his lawyer to be present makes no difference."

The decision in that case shows that regard must be had to the character or nature of the right when a decision is made as to whether the person was given sufficient information about that right for him to make an informed decision as to whether or not he should waive it.

20. The requirement that the waiver of a right guaranteed by the Convention must be "unequivocal" was emphasised in *Oberschlick v Austria* (1991) 19 EHRR 389, to which Lord Bingham referred in *Millar v Dickson*, para 31; see also para 55. That was a case where a journalist was convicted by a court which regarded itself as bound by the opinion of the court of appeal which had remitted his case to the lower court for trial after it had been dismissed by that court. The judge who presided over the court of appeal was the same judge as had presided over it on the first occasion, contrary to the code of criminal procedure. The journalist complained that the court of appeal on the second occasion was not an independent and impartial tribunal. The argument that he had impliedly waived that right because he had not raised this objection at the hearing of his appeal was rejected, on the ground that neither he nor his counsel were aware until well after the hearing of all the circumstances that provided grounds for objecting to the tribunal on the grounds of impartiality: *Oberschlick*, para 51. In *Jones v United Kingdom* (2003) 37 EHRR CD269 the applicant was absent and unrepresented throughout his trial. The Fourth Section said at p CD278 that before he could be said to have impliedly through his conduct waived his right it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. This could not be done at the time of his trial as it had not yet been clearly established under English law that it was possible to try an accused in his absence throughout, so it could not be said that he had unequivocally and intentionally waived his rights. His application was held to be inadmissible on other grounds.

21. This first group of cases provides ample support for the proposition that, in order to be effective as a waiver of a Convention right, the acts from which the waiver is to be inferred must be voluntary, informed and unequivocal. But they do not go more deeply into the question as to what is needed for the waiver to be "informed" in the context of an alleged waiver of a right such as that which is in issue in this case, where the person is first told what the right is and then says in terms that he does not want to exercise it. In *Oberschlick* and *Jones* the applicant did not have the information, and in *Pfeifer* the question that was put to him about

disqualification raised an issue of law whose implication he was not in a position fully to appreciate.

(b) the second group

22. The second group of cases consists of those that the Grand Chamber relied on in *Salduz v Turkey* (2008) 49 EHRR 421. The applicant in that case did not have access to a lawyer because the offence which he was accused of having committed fell within the jurisdiction of the state security courts. The system in force at that time did not permit him to have access to a lawyer when he made his statements to the police, to the public prosecutor and to the investigating judge. But he had signed a form in which it was stated that he had been reminded of his right to remain silent. In para 59 of its judgment the Grand Chamber made these comments on this aspect of the case:

> "The Court further recalls that neither the letter nor the spirit of article 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."

Reference was made in support of these observations to *Sejdovic v Italy* (2004) 42 EHRR 360, para 36, *Kolu v Turkey* (Application No 35811/97) (unreported) given 2 August 2005, para 53 and *Colozza v Italy* (1985) 7 EHRR 516, para 28.

23. In *Sejdovic v Italy* the applicant was tried in his absence and convicted of manslaughter. He was held by the Italian authorities to have waived his right to appear at his trial because after the killing he had become untraceable. In para 33 the Court said:

> "The Court re-iterates that neither the letter nor the spirit of article 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, any such waiver must be made in an unequivocal manner and must not run counter to any important public interest."

In para 35 it said that to inform someone of a prosecution brought against him was a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the exercise of the accused's rights. In para 36 it said that, even supposing that the applicant was indirectly aware that criminal proceedings had been opened against him, it could not be inferred that he had unequivocally waived his right to appear at his trial. As for the question of safeguards,

> "It remains to be determined whether the domestic legislation afforded him with sufficient certainty the opportunity of appearing at a new trial."

It held that that safeguard was absent, as the remedy that the criminal procedure code provided did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence.

24. The reference to "the right to take part in the trial" in para 59 of the judgment in *Salduz* appears to have been copied from *Sejdovic v Italy*. It is consistent with the view that the Grand Chamber had expressed in para 54 about the importance of the investigation stage, which was the stage at issue in the *Salduz* case, for the preparation of the criminal proceedings as a whole. I would take from the judgment in *Sejdovic* that the requirement that a waiver must be made in an unequivocal manner applies to waivers that are alleged to have been made expressly as much as to implied waivers, and that the reference in *Salduz*, para 59 to the alleged waiver of a right being attended by minimum safeguards commensurate to its importance applies to them too. But the right under consideration in *Sejdovic* was the applicant's right to present his defence at his trial, and the fact that he had no guarantee that he could do this at any new trial made it all the more difficult for the Court to hold that for him to be deemed to have waived his right to appear satisfied the requirements of article 6 of the Convention.

25. In *Colozza v Italy* (1985) 7 EHRR 516, para 28 the court said that, to be effective, the alleged waiver must be established in an unequivocal manner. In that case it was alleged the applicant had impliedly waived his rights because he did not appear at his trial. But it was held that an examination of the facts did not provide a sufficient basis for saying that the waiver was unequivocal, as there was no evidence that he had been made aware of the opening of the criminal proceedings against him. All that had happened was that notifications of the trial had been lodged with the investigating judge and subsequently with the registry of the court. In *Kolu v Turkey* (Application No 35811/97), according to the minutes, the applicant was asked by the investigating authorities if he required a lawyer, said that he did not want one and then proceeded to make several incriminating

statements in answer to the questions that were put to him: para 19. He complained that he had not the benefit of a lawyer and that the minute had been drafted after, not during, his questioning: para 48. In para 53 the court said that it found it difficult to believe the statement in the minutes that he had refused the assistance of a lawyer. It reaffirmed, under reference to *Colozza v Italy*, para 28, that to be effective a waiver of the benefit of the guarantees under article 6 had to be shown to have been unequivocal, which was not so on the facts of that case.

26. *Sejdovic* and *Colozza* were cases of implied waiver. In *Kolu* it was express. The right that was in issue in *Sejdovic* and *Colozza* was the right to take part in the trial. They do not provide a basis for reading into the ruling in *Salduz* a requirement that the accused must have had legal advice on the point before he can be held to have waived his right of access to a lawyer before being questioned while in police custody. In *Kolu* the point might have been taken, as that was a case where the applicant's complaint was that he had been denied access to a lawyer when he was being questioned. It might have been said, if the court had wanted to make the point, that the argument that he had waived that right was unsustainable because he had not received legal advice on the question whether he should waive it. The court did not take that opportunity. It relied instead on the rule that a waiver, to be effective, must be unequivocal.

(c) the third group

27. The third group of cases consists of a selection from an increasingly large number of decisions of the Strasbourg court on waiver since the Grand Chamber's judgment on 27 November 2008 in *Salduz*. It has been stressed repeatedly that, to be effective, a waiver must be established in an unequivocal manner and attended by the minimum safeguards commensurate to the importance of the right. But in none of these cases did the court say that waiver of a right under article 6 was necessarily incomplete because the applicant had not received legal advice as to whether or not he should waive it. It was not suggested that the court has said this in any other case that might have been selected for consideration in this group.

28. The case which comes closest on its facts to this one is *Pishchalnikov v Russia* (Application No 7025/04) (unreported) given 24 September 2009, which is the only case in this group that was mentioned by the Lord Justice Clerk in his opinion at para 34. The applicant was arrested on suspicion of aggravated robbery. He asked for the assistance of a lawyer during his interrogation, but this was disregarded by the investigator who proceeded to question him. It was argued that his decision then to confess his guilt to the investigator constituted an implied waiver of his right to counsel. The court found that his statements, made without having had access to counsel, did not amount to a valid waiver of his right.

29. In paras 77-78 of *Pishchalnikov* the court said, with reference to the right to counsel:

> "77. A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.
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> 78. The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to interrogation. However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected."

As for the facts of that case, the court said in para 79 that, when an accused had invoked his right to be assisted by counsel during his interrogation, a valid waiver of that right could not be established by showing only that he responded to further police questioning even if he had been advised of his rights. In para 80 it went on to say this:

> "Furthermore, the Court does not rule out that, in a situation when his request for assistance by counsel had been left without adequate response, the applicant who, as it follows from the case file, had had no previous encounters with the police, did not understand what was required to stop the interrogation. The Court is mindful that the applicant may not have had sufficient knowledge, experience, or even sufficient self-confidence to make the best choice without the advice and support of a lawyer. It is possible that he did not object to further questioning in the absence of legal assistance, seeing the confession (true or not) as the only way to end the interrogation. Given the lack of legal assistance the Court considers it also unlikely that the applicant could reasonably have appreciated the consequences of his proceeding to be questioned without the

> assistance of counsel in a criminal case concerning the investigation of a number of particularly grave criminal offences."

30. The reasoning in para 80 shows that the Strasbourg court is sensitive to the facts of the case when it is addressing this issue. I do not find in any of these paragraphs a basis for holding that, as a rule, an accused must have had access to legal advice on the question whether or not he should waive his right to consult a solicitor before being interviewed by the police. But there are indications in the judgment that, in determining what safeguards are necessary, account should be taken of the importance of the right. Account should also be taken of the fact that, for a variety of reasons which will vary from case to case and may depend on the gravity of the offences which he is suspected of having committed, the accused may not have appreciated the consequences of his agreeing to be questioned in the absence of a solicitor. *Pishchalnikov* is, of course, distinguishable on its facts because the investigator ignored the applicant's request for a lawyer. The court noted in para 80 that there was no evidence that the confessions which the applicant made during his further interrogation had been initiated by him. It was a blatant example of a person who was facing a serious charge being denied the very right which he had made it plain he wished to exercise. It was also a case in which the waiver that was in question was an implied waiver.

31. The decision in *Pishchalnikov* does not tell us what view the court would have taken if the applicant had been advised by the authorities that he had a right to a lawyer and he had then told them expressly, of his own free will, that he did not wish to exercise that right. But guidance as to how the court is likely to see a case of that kind is to be found in *Yoldaş v Turkey* (Application No 27503/04) (unreported) given 23 February 2010.

32. The applicant in *Yoldaş* was charged with belonging to an illegal organisation. He was informed of his rights by the public prosecutor and by the judge who placed him on remand. He signed a form which told him that he had the right to appoint a legal representative who could be present when his statement was taken. It also told him that he could benefit from the legal assistance of a legal representative appointed by the bar association if he was not in a position to appoint one. He stated that he understood his rights but that he did not wish to be assisted a lawyer. The court recalled the declaration in *Salduz*, para 59 that, in order to be effective for the purposes of the Convention, any waiver of the right to take part in the trial must be established unequivocally and be surrounded by a minimum of guarantees as to its seriousness. Applying those principles to the facts of the case in para 52, it noted that he had been reminded of his right to legal assistance, that he refused it and that it clearly emerged from his statements taken whilst in custody that his decision to waive his right to legal assistance was freely and voluntarily made:

> "Hence, the applicant's waiver of this right was unequivocal and surrounded by a minimum guarantee."

This decision indicates that where it is shown that the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right and that the waiver was freely and voluntarily made. The minority said in their dissenting judgment that a procedural choice made without a lawyer being able to inform and advise him could not be free and informed, but the court did not accept this argument.

33. The same approach was taken in two other cases in this group. In *Galstyan v Armenia* (2007) 50 EHRR 618 the applicant was arrested when he was on his way home from a protest rally. He was made aware of his rights and expressly declined a lawyer. The Court held that, as it was his own choice not to have a lawyer, the authorities could not be held responsible for the fact that he was not represented in the proceedings against him. In para 91 it said that, while the nature of some rights safeguarded by the Convention was such as to exclude a waiver of entitlement to exercise them, the same could not be said of other rights. A person had a choice under article 6(3)(c) of defending himself in person or through legal assistance, so it would normally not be contrary to the requirements of that article if an accused was self-represented in accordance with his own free will. There was no evidence in that case that his choice was the result of any threats or physical violence or that he was tricked into refusing a lawyer. In *Sharkunov and Mezentsev v Russia* (Application No 75330/01) (unreported) given 10 June 2010, in which it held that there had been no violation of the right to legal assistance, the court reiterated at para 106 that neither the letter nor the spirit of article 6 prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial but that, to be effective for Convention purposes, the waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.

34. In *Paskal v Ukraine* (Application No 24652/04) (unreported) given 15 September 2011 the applicant, who had a university degree in law and at the material time was serving as a police officer, was arrested on suspicion of having taken part in a robbery. He signed a procedural rights notification form and noted that he wished to appoint a lawyer whom he named as his advocate. He was then questioned, without a lawyer being present, about the robbery just after he had explicitly expressed that wish. It was argued that this was a case of an implied waiver. The Court said that it had been mindful in a number of its judgments of the vulnerable position of a suspect vis-à-vis the investigative authorities and had emphasised the paramount importance of access to a lawyer before the first questioning as a means to counter the imbalance between the parties. Recalling the Grand Chamber's observations in *Salduz*, para 59 that neither the letter nor the

spirit of article 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, as long as a waiver of the right is given in an unequivocal manner and was attended by safeguards commensurate to its importance, it addressed the question whether the waiver constituted "an act of the applicant's free will and informed procedural choice": para 77. The fact that the applicant was a policeman and a lawyer himself might not mean that he was not vulnerable and in need of an advocate's support. But the level of his expertise could not be discounted in assessing whether his consent to participate in the particular questioning was well-informed. The court concluded that the waiver was effective as he was not coerced to give any statement in defiance of his will: para 78.

35. But a different view might be taken if there is reason to believe that the applicant was not able to act freely or did not understand his rights. In *Talat Tunç v Turkey* (Application No 32432/96) (unreported) given 27 March 2007 the applicant did not ask for a lawyer. But the court noted in para 60 that he had in effect stated that he was not able to act freely because he was being threatened with ill-treatment and that it was not possible to hold that he could reasonably have foreseen the consequences of his not requesting the assistance of a lawyer in criminal proceedings where he was at risk of being sentenced to death as he did not have any formal education and was from a humble background: see also *Duman v Turkey* (Application No 28439/03) (unreported) given 23 March 2010, para 48; *Lopata v Russia* (Application No 72250/01) (unreported) given 13 July 2010, para 135. In *Plonka v Poland* (Application No 20310/02) (unreported) given 31 March 2009 the applicant signed a form acknowledging that she had been informed of her right to be assisted by a lawyer during her questioning by the police and the prosecution authorities. But it was held that her assertion in the form that she had been reminded of her right to remain silent and to be assisted by a lawyer could not be considered reliable as she was suffering from alcoholism and was in a vulnerable position as the time of her interview: para 37-38. *Bortnik v Ukraine* (Application No 39582/04) (unreported) given 27 January 2011 is another case of this type. In *Şaman v Turkey* (Application No 35292/05) (unreported) given 5 April 2011 the applicant, who was accused of being a member of an illegal organisation and faced a heavy penalty, had an insufficient knowledge of Turkish and was without the help of an interpreter. The Court held that she could not reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer in a criminal case concerning the investigation of particularly grave offences. The waiver may come too late, as in *Zaichenko v Russia* (Application No 39660/02) (unreported) given 18 February 2010, where the relevant incriminating statement was made before the applicant was advised of his right to remain silent: see para 53.

36. No mention was made in this group of cases of a rule that an applicant who has acted of his own free will must have access to legal advice on the question

whether or not he should waive his right before he can be held to have waived that right. But they do show that a different view might be taken if there is reason to believe that the applicant was not able to act freely or that he did not understand the right that was being waived.

Comparative jurisprudence

37. The main source of comparative jurisprudence on the issue of waiver by a suspect of the right of access to a lawyer while being questioned by the police is to be found in decisions of the US Supreme Court. Although the Strasbourg court has not referred to *Miranda v Arizona* 384 US 436 (1966) in any of its judgments, there are signs that it and subsequent cases that the ruling in *Miranda* have given rise to have influenced the thinking of the Strasbourg court as it develops the principles described in *Salduz*: see *Ambrose v Harris (Procurator Fiscal, Oban)* 2011 SLT 1005, paras 52-53. Judge de Meyer noted in his dissenting opinion in *Imbrioscia v Switzerland* (1993) 17 EHRR 441, 460 that the expression "knowingly and intelligently" had been used as long ago as 1966 in *Miranda* and that the principles there defined belong to the very essence of a fair trial.

38. The issue of waiver was raised in *Miranda* in a series of cases where decisions of the courts below were reversed because the accused had not been told of his rights before being questioned while in custody by the police. At p 475 the court said:

> "52-54 An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley v Cochran*, 369 US 506, 516, 82 S Ct 884, 890, 8 L Ed 2d 70 (1962) is applicable here:
>
> 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.' "

At p 479 it summarised the prerequisites for an effective waiver in these terms:

> "[The suspect] 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 to 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 prosecutor at trial, no evidence obtained as a result of interrogation can be used against him."

The phrase "intelligently and understandingly" does not appear in any of the judgments of the Strasbourg court. But the phrase "knowing and intelligent" was used in *Pishchalnikov*, para 77, and it is not far away from Lord Bingham's proposition in *Millar v Dickson* 2002 SC (PC) 30, para 31 that the expression "waiver" is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise.

39. In *North Carolina v Butler* 441 US 369 (1979) at p 373 the Court said that an express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but that it was not inevitably either necessary or sufficient to establish waiver:

> "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

The phrase used here was "knowingly and voluntarily". But the words used in these various formulations of the test all carry with them the idea that the waiver must have been an informed decision, based on an understanding of what the right is that is being waived.

40. In *Edwards v Arizona* 451 US 477 (1981) the Court returned to the question what was needed for a valid waiver. At p 482 it said that it was reasonably clear

under its cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. This was a matter which would depend in each case upon the particular facts and circumstances, including the background, experience and conduct of the accused. At p 483 the trial court was criticised for finding the accused's admission to have been voluntary, without separately focusing on whether he had knowingly and intelligently relinquished his right to counsel. At p 484, recalling that in *North Carolina v Butler* it had strongly indicated that additional safeguards are necessary when the accused asks for counsel, it held that when an accused had invoked his right to have counsel present during custodial interrogation a valid waiver of the right cannot be established simply by showing only that he responded to further police-initiated custodial interrogation. In that case, as Chief Justice Burger noted in a concurring judgment at p 488, when the accused said that he did not wish to speak to anyone he was told by the detention officer "*that he had to*". The reference in this judgment to the need for additional safeguards can be compared with the Strasbourg court's requirement that a waiver must be attended by "minimum safeguards commensurate to its importance" which first made its appearance in *Salduz*, para 59.

41. In *Oregon v Elstad* 470 US 298 (1985) the respondent argued that he was unable to give a fully informed waiver of his rights because he was unaware that his unwarned prior statement could not be used against him: p 316. He suggested that the officer at the Sheriff's headquarters should have added an additional warning to those given to him at the Sheriff's office to cure this deficiency. Delivering the opinion of the court, Justice O'Connor said at p 316 that such a requirement was neither practicable nor constitutionally necessary:

> "Standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. Police officers are ill-equipped to pinch-hit [i.e. substitute] for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held admissible…
>
> This court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiated their voluntariness."

At p 316 the Court recalled that in *California v Beheler* 463 US 1121 (1983) it declined to accept the defendant's contention that, because he was unaware of the potential adverse consequences of statements he made to the police, his participation in the interview was not voluntary. It concluded its discussion of this topic with these words:

> "Thus we have not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and quality of the evidence in the case."

42. More recently the word "intelligent" which was used by the court in *Miranda* has been brought back into the formula, and the court has explained that as a general rule the test will be satisfied if the choice is made with a full understanding of what the rights are. In *Maryland v Shatzer* (2010) 130 S Ct 1213, 1219 Justice Scalia, delivering the opinion of the court, said:

> "To counteract the coercive pressure [of police questioning], *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. Critically, however, a suspect can waive these rights. To establish a valid waiver, the State must show that the waiver was knowing, intelligent and voluntary."

And in *Berghuis v Thompkins* (2010) 130 S Ct 2250, 2262, Justice Kennedy said:

> "Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a *Miranda* warning..., it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."

43. It has not been not suggested by the US Supreme Court in any of these cases that it was essential to a waiver of right to counsel that the accused should have had legal advice on the point as to whether or not he should waive it. The court's reasoning in *Oregon v Elstad* and the presumption to which Justice Kennedy referred in *Berghuis v Thompkins* seem to be in conflict with there being any such requirement.

44. The Crown has drawn attention to the fact that few jurisdictions approach the question of waiver on the basis that legal advice on the consequences of the waiver is a prerequisite. The Supreme Court of Canada described what it has called the informational component of the right under section 10(b) of the Charter of Rights and Freedoms to retain and instruct counsel as relatively straightforward: *R v Willier* [2010] 2 SCR 429, paras 29-31. A person who waives a right must know what he or she is giving up if the waiver is to be valid. It is the duty of the police to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel. This ensures that a detainee who persists on waiving the right of access to counsel has the information and will know what he or she is actually giving up: *R v Bartle* [1994] 3 SCR 173, 206; *R v Prosper* [1994] 3 SCR 236, 274, per Lamer CJ. But there is no indication in its decisions that the detainee must have had legal advice as to whether or not the right should be waived before the waiver can be held to be effective. Information obtained from Eurojust about the position in Member States of the EU suggests that the right to legal advice before being questioned can be waived without prior consultation with a lawyer in Austria, Sweden, Estonia, France and Malta. The courts in Germany and Poland have not decided whether the suspect needs to consult with a lawyer before a waiver can be held to be effective. In Bulgaria, the Czech Republic, the Netherlands and Spain the presence of a lawyer during interrogation is in certain circumstances compulsory.

45. The Strasbourg court found support for the decision it took in *Salduz* from the fact that the principles which it outlined were in line with the generally recognised international human rights standards which are at the core of the concept of a fair trial: (2009) 49 EHRR 421, para 53. It appears to be clear that there is no generally internationally recognised human rights standard on the issue of waiver that would support the conclusion that access to legal advice is an essential prerequisite to an effective waiver by a detainee of the right of access to a lawyer when he is being questioned by the police.

Discussion

46. I do not think that the Strasbourg jurisprudence provides any support for the Lord Justice Clerk's statement in *Jude v HM Advocate* 2011 SLT 722, para 32 that the argument for the Crown that the appellants' right of access to a lawyer was capable of being waived failed because their consent to be interviewed was not informed by legal advice. The court has had the opportunity on a number of occasions to lay down a rule to that effect, but it has not taken it. The cases of *Yoldaş v Turkey* (Application No 27503/04), 23 February 2010, *Galstyan v Armenia* (2007) 50 EHRR 618, *Sharkunov and Mezentsev v Russia* (Application No 75330/01) 10 June 2010 and *Paskal v Ukraine* (Application No 24652/04) 15 September 2011 (see paras 32-34, above) are particularly instructive on this point, as they could not have been decided as they were if there had been a rule to that

effect. The decisions of the US Supreme Court since *Miranda* do not lend encouragement to any suggestion that it would be appropriate for such a rule to be laid down. The wording of its observations in *Oregon v Elstad* 470 US 298 is a strong pointer in the contrary direction. I would hold therefore that the statements in *Jude*, paras 32 and 34 which indicate that there is such a rule should be disapproved. Where the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right, that he understands what the right is and that it is being waived and that the waiver is made freely and voluntarily.

47. There is however a theme that runs through the Strasbourg court's decisions which indicates that access to a lawyer may well be a necessary prerequisite of a valid waiver in some cases. *Talat Tunç v Turkey* (Application No 32432/96) 27 March 2007 and *Şaman v Turkey* (Application No 35292/05) 5 April 2011 (see para 35, above) provide illustrations of this point. The court must be alive to the possibility that the words of the caution, and advice that the detainee has the right to a private consultation with a solicitor before any questioning begins and at any other time during such questioning which is required by section 15A(3), may not be fully understood by everyone. *Comprehending the Scottish caution: Do offenders understand their right to remain silent?* David J Cooke and Lorraine Philip (1998) Legal and Criminological Psychology 13, was written some time ago and does not fully reflect current practice. But it serves as a warning that it should not be taken for granted that everyone understands the rights that are being referred to. People who are of low intelligence or are vulnerable for other reasons or who are under the influence of drugs or alcohol may need to be given more than standard formulae if their right to a fair trial is not to be compromised.

48. Lord Carloway was appointed by the Cabinet Secretary for Justice to review key elements of Scottish criminal law and practice in the light of the decision in *Cadder*. The Carloway Review was published on 17 November 2011. Among the issues with which it deals and about which it makes recommendations is that of waiver: paras 6.1.41-6.1.47. The Association of Chief Police Officers in Scotland has already produced a manual of guidance of solicitor access: the ACPOS Manual which was published in January 2011. That guidance too is currently under review. I am conscious that anything we may say in this case may be overtaken by events, and I would not want in any way to restrict the scope of these reviews. But I would make two suggestions, while emphasising that in making them I am not intending to suggest that article 6 requires that these steps must, as a rule, be taken in every case.

49. The first relates to the question whether the accused has been fully informed of the right of access to a lawyer. I suggest that, to minimise the risk of misunderstanding, the police should follow the practice indicated by para 6.5 of

Code C of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers which was introduced in England in the light of the Police and Criminal Evidence Act 1984, as to the background to which see the editorial, *Legal advice in police stations: 25 years on*, in (2011) Crim LR 1. Para 6.5 states inter alia:

> "If, on being informed or reminded of [the right of access to legal advice], the detainee declines to speak to a solicitor in person, the officer should point out that the right includes the right to speak to a solicitor on the telephone. If the detainee continues to waive this right the officer should ask them why and any reasons given should be recorded on the custody record or the interview record as appropriate."

Offering the detainee the right to speak to a solicitor on the telephone may be relevant if the detainee is concerned about delay in securing the attendance of a solicitor at the police station. The giving of reasons may reveal that, although he has been given the standard caution and advice, the detainee has not fully understood what his rights are. It will provide an opportunity for any obvious misunderstandings to be corrected. Failure to do that may be relevant to the question whether the waiver was "knowing and intelligent" or "voluntary, informed and unequivocal", and thus to the question whether, in all the circumstances, the detainee was deprived of his right to a fair trial. Any reasons that are given should be recorded. But, as Justice O'Connor observed in *Oregon v Elstad* 470 US 298 (1985) at p 316 (see para 41, above), police officers are ill-equipped to substitute for counsel. So it would seem to be unwise for them to be encouraged to take the further step of offering advice to the detainee.

50. Lord Kerr has made a powerful case for requiring steps to be taken to ensure that the accused has a clear understanding and insight as to the significance of dispensing with the services of a lawyer. He would require the steps indicated by para 6.5 of Code C to be taken in every case, because without them a decision to waive cannot be said to have been voluntary, informed and unequivocal: see para 117, below. I recognise the force of his argument, and there is much to be said for this as a suggestion as to how the current practice should be improved. But best practice is one thing. An absolute rule, to which section 57(2) of the Scotland Act must always give effect, is quite another. I do not think that it can be said that an absolute rule to the effect that Lord Kerr contends for has been clearly identified by the Strasbourg court. Moreover, as the terms of the reference make clear, we have not been asked to make a declaration to that effect in this case. What we have been given by Strasbourg, as I see it, is a guiding principle as to what is needed for there to be an effective waiver. Its application in determining whether there will be, or has been, a fair trial will depend on the facts of each case.

51. The second suggestion comes from the observation by the US Supreme Court in *Miranda v Arizona* 384 US 436, at p 473 in paras 41, 42 that, in order fully to apprise a person interrogated of the extent of his right under the system that it was laying down in that case, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. The wording of the advice that, in accordance with the standard practice, the respondent was given when he was told of his right to consult with a solicitor prior to and during his questioning did not go on to advise him of the arrangements that might be made if he wanted to exercise that right and was unable to name a solicitor or was concerned about the cost of employing one. The fact that the respondent was able in this case to give an appropriate name when he was asked if he wished intimation of his detention to be sent to a solicitor suggests that he was under no misapprehension on this point. But it might be wise not to rely on assumptions about this, even in the case of those with previous experience of the criminal process.

52. As for the facts of this case, Mr Scott submitted that the wording of the current safeguards was defective and that the Crown could not show that the respondent waived his rights knowingly and intelligently. The advocate depute, for her part, referred to various safeguards that were in place to ensure that the waiver met this standard. She said that there were no grounds for thinking that the respondent was vulnerable or had not been able to understand the caution. The fact that he had nominated a firm of solicitors with experience of criminal law and procedure showed that he was aware of his rights and of the significance of declining the offer of access to them before and during his questioning.

53. I do not think that it would right for this court to reach a decision on these competing arguments as Lord Kerr would do. The issue has come before us as a reference which was directed to a particular issue on which our guidance was sought, and not as an appeal. It raises questions of fact and degree which ought properly to be dealt with in the trial court. I would remit the question whether for the Lord Advocate to lead and rely on the evidence of his interview would be incompatible with his Convention right to a fair trial to the sheriff for determination after he has heard all the evidence on this issue.

Conclusion

54. I would answer the first question in the reference in the negative. The jurisprudence of the Strasbourg court does not support the proposition that, as a rule, the right of access to legal advice during police questioning can only be waived if the accused has received advice from a lawyer as to whether or not he should do so. I would remit the second question to the sheriff. The answer to it must depend on whether, on a consideration of all the facts and circumstances, the

sheriff is satisfied that it would be fair for the Lord Advocate to lead and rely upon evidence of the answers that the respondent gave during his police interview.

LORD BROWN

55. Having had the opportunity of reading in draft the judgments of Lord Hope, Lord Dyson and Lord Hamilton on the one hand and Lord Kerr on the other, I find myself in full agreement with the majority. I can briefly summarise why by reference to Lord Kerr's judgment at para 127, with much of which I agree but certain parts of which I cannot accept.

56. At para 127(iii) Lord Kerr concludes that a purported waiver should not be regarded as effective "[u]nless it is shown that the suspect had a proper insight into the significance of the decision to waive his right". This conclusion clearly derives from para 117 of Lord Kerr's judgment where he says that the suspect "must have reasonable foresight of the consequences for him of [waiving his right to be advised by a lawyer before or during interview]" and adds:

> "I do not suggest that a suspect needs to be aware of every legal nuance that might arise in the course of his interview but he should be aware in a general sense that legal issues might arise and should have consciously decided that he is prepared to forego the advice that a lawyer might give on those issues either before or in the course of the interview."

57. If by that is meant, as appears to be meant, that the suspect must realise more than that he will be asked questions by the police without the benefit of legal advice, to my mind Lord Kerr is asking too much. As Lord Hamilton says at para 94 of his judgment:

> "The natural and legitimate inference in circumstances where the suspect has responded with a clear negative to the enquiry [whether he wishes to exercise his right to legal assistance] will be that he or she has a proper understanding, including an appreciation that in light of his or her answer legal assistance will not be made available for the purposes of the interview."

58. Lord Dyson says much the same thing at para 70 of his judgment. It is surely obvious that the point of a lawyer is to advise on any legal issues that may arise and that if a suspect chooses to forego this right he will be questioned without

the benefit of such advice. He surely does not have to be told in terms that, in this event, he may say something (or neglect to say something) which a lawyer, had he been present, might have advised him not to say (or, indeed, to say). At para 106 of his opinion Lord Kerr points to the fact that in Scotland a suspect accused of a sexual offence can supply the necessary corroboration to support an eventual conviction by asserting at interview that the sexual activity was consensual. But surely no one suggests that the suspect needs to be made aware of specific legal considerations of this nature before he can be said to have waived his right to legal advice.

59. The other part of para 127 of Lord Kerr's judgment with which I respectfully disagree is the suggestion that within the "minimum safeguards" necessarily to be provided before a waiver can be regarded as "knowing and intelligent", "informed" and "unequivocal", are a question to the suspect as to why he has decided not to exercise his right to legal advice (and the recording of his answer) and informing him that a telephone consultation with a solicitor can be arranged. As to this I agree with what Lord Hope says at para 49 of his judgment. There is much to be said for introducing such further steps into the current practice (as in England and Wales) but I cannot accept that Strasbourg jurisprudence has already established an absolute rule to this effect.

60. All agree that the first question in the reference should be answered in the negative. In common with the majority I too would remit the second question to the Sheriff for his decision on the facts.

LORD DYSON

61. I agree entirely with the judgment of Lord Hope. I add a few words of my own because the waiver issue is as important for the rest of the United Kingdom as it is for Scotland. The questions that were referred to this court by the Sheriff in the present case raise the issue of what is required by the European Convention on Human Rights ("the Convention") for a valid waiver by an accused of the right of access to a lawyer prior to police questioning. This right, which was established in *Salduz v Turkey* (2008) 49 EHRR 421, is implicit in the right to a fair trial accorded by article 6 of the Convention. It is not in doubt that rights accorded by article 6 of the Convention can be waived. In *Salduz* itself, the Grand Chamber said:

> "…….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."

62. The statement that a waiver is unequivocal and attended by minimum safeguards has been repeated as a mantra by the ECtHR in a number of cases. The court has given little further explicit guidance as to what is required for a valid waiver. As so often, in order to determine Strasbourg's approach to this question, it is necessary to examine the court's jurisprudence to see how guidance which has been expressed at a high level of generality is applied in practice. But it is fair to say that on a number of occasions the court has also said that the right to the assistance of a lawyer at police interview can only be validly waived if the accused could reasonably have foreseen the consequences of his decision. Thus, for example, in *Pishchalnikov v Russia* (Application No 7025/04) (unreported) 24 September 2009 (para 77), the court said that a waiver

> "once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be".

63. It is true that *Pishchalnikov* was not a case of express waiver and the accused had been denied a lawyer although he had requested one. But there cannot be a relevant difference between an express and an implied waiver; and it is difficult to see why the requirement of reasonable foresight of the consequences of a decision not to have a lawyer should depend on whether or not the accused requested a lawyer.

64. It is common ground that the ECtHR has not gone so far as to say that there cannot be a valid waiver unless the accused has first been advised by a lawyer of the implications of not having the benefit of the assistance of a lawyer both before and during a police interview. It is accepted by Mr Scott QC that, although legal advice as to the desirability of having a lawyer to protect the interests of an accused at the interview stage is the most effective way of ensuring that his or her article 6 rights are protected, the Strasbourg jurisprudence does not mandate it. As Lord Hope points out, the ECtHR has had many opportunities to insist on such a requirement in every case, but has never done so.

65. But how does a prosecuting authority prove (the burden being on it) that an accused had reasonable foresight of the consequences of a decision to be

interviewed without the assistance of a lawyer? It has never been said by the ECtHR that it must be shown that an accused had reasonable foresight of *all* the consequences of such a decision. That would be tantamount to saying that no person (except perhaps an accused who has experience and understanding of criminal law and procedure) could waive the right to legal assistance without first having legal advice as to the wisdom of doing so. But as I have said, it is not in dispute that Strasbourg has never gone so far as to say this and its jurisprudence is not consistent with such an approach.

66. As Lord Hope points out at paras 32 to 34, there are several decisions of the court where all that was required for the purposes of a valid waiver was proof that the accused had been informed that he had the right to have a lawyer present when he was interviewed and he refused to exercise that right. Thus in *Yoldaş v Turkey*, for example, the accused was informed of his right to be assisted by a lawyer while he was in custody and he refused a lawyer's services. That was enough to persuade the court that the accused had sufficient foresight of the consequences of his decision to refuse the assistance of a lawyer to constitute a valid waiver. It was not necessary to go further and be satisfied that the accused understood precisely how the lawyer might have been able to assist him and from what pitfalls he might have been able to protect him. That could not have been done, not least because it would have been impossible to predict what course the interview would take.

67. On the other hand, if there are reasonable grounds for believing that the accused is vulnerable in some way and that he does not understand in general terms that a lawyer might be able to assist him at the interview, then it is not enough for the police merely to ask him whether he wishes to have the assistance of a lawyer. Additional safeguards are necessary to ensure that such a person does not waive his right to legal assistance at the interview without a proper understanding of the significance of what he is doing. The most obvious way of achieving this is by the provision of legal advice on the question of legal assistance. Depending on the circumstances, however, there may be other ways of ensuring that the accused understands the implications of refusing the assistance of a lawyer at interview.

68. It will be a question of fact in each case whether the accused can reasonably understand the implications of refusing the assistance of a lawyer at police interview. The ultimate question is what fairness demands in the particular case. Lord Hope has referred to a number of cases at para 35 where for one reason or another there were grounds for doubting whether an accused had sufficient understanding of the implications of refusing the assistance of a lawyer. Another case where the court held that the accused had not waived his article 6 rights because it had not been established that he would have understood the implications of his doing so is *Panovits v Cyprus* (Application No 4268/04) (unreported) 11 December 2008. At para 71, the court said:

> "Moreover given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder…"

69. The court had earlier emphasised "the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings" (para 68). He was 17 years of age at the material time.

70. I agree with what Lord Hope says at para 47. The court must be astute to the possibility that the implications of refusing the assistance of a lawyer may not be understood even by an apparently intelligent person. It will depend on all the circumstances, including the age, health and apparent intelligence of the person as well as the extent to which he or she appears to be in a state of stress and the likely length and complexity of the interview. But in a relatively simple case, where the accused appears to be intelligent and not especially vulnerable and he unequivocally and voluntarily refuses the offer of the assistance of a lawyer, the prosecution will usually be able to show that there has been a valid waiver. It is not necessary to show that the accused understood precisely what assistance could have been given but rejected it nevertheless. It is sufficient to show that the accused understood that the lawyer would or might be able to provide assistance at the interview stage which would or might be of benefit to him. The precise nature of the benefit does not matter. In most cases, this cannot be known in advance of the interview.

71. It follows that (as is common ground) the first question must be answered in the negative. I agree with Lord Hope that, for the reasons he gives, the second question should be remitted to the Sheriff.

LORD HAMILTON

72. The first question in the reference as now adjusted before this court is (read short):

> "Whether it would necessarily be incompatible with articles 6(1) and 6(3)(c) of [the Convention] for the Lord Advocate to lead and rely upon evidence of answers given during a police interview of a suspect in custody … who, before being interviewed by the police

(a) had been informed by the police officer of his *Salduz*/article 6 rights of access to legal advice; and

(b) without having received advice from a lawyer, had stated that he did not wish to exercise such rights."

73. It was accepted before us on either hand that the question so formulated fell to be answered in the negative. Mr Scott for the respondent conceded that on the basis of the jurisprudence of the Strasbourg Court as developed to date it could not be maintained that, in order effectually to waive his right of access to legal advice for the purposes of a police interview, the suspect must first actually have been in receipt of legal advice. In my view that concession was inevitable. While the domestic laws of certain of the Convention countries have laid down that, at least in some circumstances, the content of a police interview cannot be received in evidence unless the suspect has prior to the interview (or in its course) been in receipt of legal advice, the jurisprudence of the Court of Human Rights lays down no such requirement. In so far as the opinion of the Lord Justice Clerk in *Jude, Hodgson and Birnie v HM Advocate* 2011 SCCR 300; 2011 SLT 722, at paras 32 and 34 may be read (or misread) as laying down that actual receipt of legal advice prior to interview is a precondition of any effectual waiver, that opinion (with which the other judges concurred) is, in my respectful view, unsupported by the authorities apparently relied upon.

74. The live issue before us is whether the arrangements put in place in Scotland following the amendment of the Criminal Procedure (Scotland) Act 1995 by the insertion of section 15A, an insertion made with effect from 30 October 2010 for the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, are compliant with Convention jurisprudence. That amendment was itself consequential on the judgment of the Supreme Court in *Cadder* v *HM Advocate* 2011 SC (UKSC) 13. Section 15A provides:

"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."

75. Section 4 of the Manual of Guidance on Solicitor Access (2011) produced by the Association of Chief Police Officers in Scotland ("ACPOS")in response to the enactment of section 15A states:

> "4.1 The [new section 15A] has been considered by many to be one of the most significant changes in Scots law for generations and the provision of solicitor access is at the heart of the change in the law. The right to access is one which can be waived, but the greatest of care must be taken if the suspect wishes to waive this right. Any waiver of the rights of a suspect must be an 'informed' waiver, and must be fully recorded.
>
> 4.2 To ensure all suspects are fully informed in their decision, ACPOS consider that all suspects should be provided a specimen form of words, standardised in a manner like the common law caution, when offering a suspect their rights of solicitor access, as follows:
>
> > **'You have the right to have a solicitor informed of your detention/voluntary attendance/arrest. Do you wish a solicitor advised of your detention?'**
> >
> > **'You also have the right to a private consultation with a solicitor before being questioned by police officers and at any time during questioning. Do you wish a private consultation with a solicitor before you are questioned?'**
>
> 4.3 Both these questions must be asked.
>
> 4.4 If the answer to either of these questions is Yes, the suspect should be advised of the following on each occasion:
>
> > **'If you know a solicitor, they can be contacted on your behalf. Alternatively, another solicitor can be contacted for you. Which do you prefer?'**
> >
> > **'Your right is to a private personal consultation with a solicitor which can be in person or by telephone. In the first instance you will be provided the opportunity to speak with a solicitor by**

telephone to instruct them and seek advice. It is then your decision if you need a further private consultation with the solicitor.'

4.5 The foregoing questions and statement are contained in the ACPOS Solicitor Access Recording Forms (SARFs)."

Two forms (respectively ACPOS SARF A and B) have been devised for the purpose of recording in writing the responses of the suspect to these enquiries.

76. It should be acknowledged at the outset that compliance with these arrangements will not suffice in every case. Where the suspect is a child or a vulnerable adult, special arrangements may require to be put in place to ensure that his or her Convention rights are respected, due regard being had to the youth or vulnerability of the suspect in question. The Strasbourg jurisprudence also makes plain that, where an adult is vulnerable, the seriousness of the crime or crimes which he or she is suspected of having committed is also relevant. Where these are of a particularly serious nature (with particularly serious potential consequences in the event of a conviction) special care may be required to ensure that the suspect's rights are respected. I do not endeavour in this opinion to express any view on what might be required in these special circumstances.

77. It has recently been observed by this court that a national court should not, without strong reason, dilute or weaken the effect of Strasbourg case law; it is its duty to keep pace with it as it evolves over time; there is, on the other hand, no obligation on the national court to do more than that (*Ambrose v Harris* [2011] UKSC 43, 2011 SLT 1005, per Lord Hope at para 17, referring to the observations of Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at para 20). Lord Bingham had gone on to observe that it was open to member states to provide for rights more generous than those guaranteed by the Convention but that such provision should not be the product of interpretation of the Convention by national courts.

78. Accordingly, the present task for this court is, by examination primarily of Strasbourg jurisprudence, to identify as best it can the requirements which the Strasbourg Court has set for the making of an effectual waiver of Convention rights, and in particular of the right, implicit in article 6(1) as read with article 6(3)(c), of access to legal advice prior to being questioned by the police as a suspect at a police station. The broad context in which this task falls to be undertaken is reasonably clear; the difficulty arises in the detailed application of the relative principles.

79. In *Salduz* v *Turkey* (2009) 49 EHRR 421 the Grand Chamber of the Strasbourg Court held 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 …" (para 55).

80. In *Cadder* v *HM Advocate* this court held that, notwithstanding other safeguards which Scots law and practice afforded a suspect in custody, application of *Salduz* in Scotland required that such a suspect, before being questioned by the police, have the right to be afforded legal advice (see especially per Lord Hope at paras 48-51, Lord Rodger at paras 92-93 and Lord Brown at para 108).

81. The Strasbourg Court has repeatedly stated that the entitlement to the guarantees of a fair trial afforded under article 6, including the right of access to legal advice before questioning, can be waived, either expressly or tacitly (*Salduz* para 59, citing *Kwiatkowska* v *Italy* (Application No 52868/99) (unreported) given 30 November 2000).

82. In *Salduz* at para 59 the Grand Chamber observed that "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". The Court had reiterated at para 50 that it did not follow from the terms of article 6 that that article had no application to pre-trial proceedings. The Court did not, however, identify what these minimum safeguards might be.

83. There have been a number of subsequent decisions of the Court touching on the issue of the waiver of "*Salduz* rights". I take them in chronological order.

84. In *Plonka* v *Poland* (Application No 20310/02) (unreported) given 31 March 2009 where the applicant signed a form acknowledging that she had been informed of her rights, including the right to be assisted by a lawyer and the right to refuse to testify (para 7), it was concluded that there had been no express waiver of her right to be represented by a lawyer during police questioning (para 36). It was observed, under reference to para 59 of *Salduz*, that the waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (para 37). The court noted that one of the specific features of the case was the applicant's alcoholism and that she was in a vulnerable position at the time of the interview; "… the authorities should have taken this into account during questioning and in particular when apprising her of her right to be assisted by a lawyer" (para 38). In these circumstances it was held that there had been no effectual waiver.

85. In *Pishchalnikov v Russia* (Application No 7025/04) (unreported) given 24 September 2009 – a case concerned with allegedly implied waiver – the applicant had expressly requested legal advice but the questioning had proceeded without such legal advice being made available – the Court (First Section) acknowledged (para 77) that a person might of his own free will, either expressly or tacitly, waive his article 6 rights. It continued:

> "However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance … A waiver of the right, once invoked, must not only be voluntary, but also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. …".

That is, in a case where a Convention right had been invoked by the suspect – he had made a specific request for legal assistance – a valid waiver of that right must be not only voluntary but a "knowing and intelligent relinquishment". The Court continued at para 78:

> "The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to interrogation. However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected."

The Court went on to hold (para 79) that on the facts it was not convinced that "the applicant, in a knowing, explicit and unequivocal manner, waived his right to receive legal representation during the interrogations …".

86. In *Yoldaş v Turkey* (Application No 27503/04) (unreported) given 23 February 2010 the majority of the court (Second Section) noted (para 51) that "in order to be effective for the purposes of the Convention any waiver of the right

to take part in the trial must be established unequivocally and be surrounded by a minimum of guarantees as to its seriousness". At para 52 the majority said "… while [the applicant] was entitled to legal assistance during his custody and although he was reminded of this right, the applicant refused legal assistance. It also clearly emerges from his statements taken whilst in custody that the interested party's decision to waive his right to legal assistance must be considered to have been freely and voluntarily made." The minority dissented in the first place on the assessment of the particular circumstances saying:

> "We feel that the majority too easily accepted that the applicant voluntarily waived the guarantee of legal assistance."

Its second ground of dissent that "[a]ny procedural choice that a person accused of a crime who is held in custody may make without a lawyer being able to inform and advise him cannot be free and informed" is clearly not settled Strasbourg law.

87. In *Duman v Turkey* (Application No 28439/03) (unreported) given 23 March 2010 – another case of purportedly express waiver – the Court referred to the test in *Poitrimol v France* (1993) 18 EHRR 130 – a case concerning the absence of the accused from his trial. The test for effectual waiver there identified was that it must be established "in an unequivocal manner and be attended by minimum safeguards commensurate to its importance" – see *Poitrimol* at para 31. In addressing the particular circumstances (the incriminating statements and participation in reconstructions of events all apparently preceded any purported waiver) the Court said that it was "not convinced that the presence of an undated, pre-printed and signed document in the case file demonstrates with certainty that the applicant was properly informed of his right to a lawyer and his right to remain silent" (para 50).

88. In *Sharkunov and Mezentsev v Russia* (Application No 75330/01) (unreported) given 10 June 2010 the Court (First Section) held (at para 107) that "the circumstances of the case disclose that the second applicant expressly and unequivocally waived … the right to legal assistance …". Emphasis was placed on the contemporaneous recording of that waiver (para 104).

89. In *Bortnik v Ukraine* (Application No 39582/04) (unreported) given 27 January 2011 – another case of purportedly express waiver – the Court (Fifth Section) said that 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 standards commensurate to its importance" (para 40). Reference was again made to *Poitrimol*. In *Bortnik* it was recognised that the applicant was afraid of possible ill-treatment (para 41), suffered from chronic alcoholism and belonged

to a socially disadvantaged group, factors which could lead to the conclusion that he was particularly vulnerable, legally ignorant and susceptible to outside influence (para 43). In these circumstances the Court found that the applicant's waiver of legal representation at the initial stage (when self-incriminating statements had been made) was "not genuine" (para 44).

90. In *Şaman v Turkey* (Application No 35292/05) (unreported) given 5 April 2011 the applicant was of Kurdish origin and illiterate with limited knowledge of Turkish. While held in Turkish custody she was, according to the Government, before each questioning "reminded of her rights as an accused, including her right to be assisted by a lawyer"; she had "refused legal assistance" (para 28). She underwent questioning without such assistance. Although, according to the Government, the applicant had refused legal assistance, the Court appears to have treated the case as one of implied waiver by conduct – submitting to questioning without legal assistance (see para 32, though compare para 33). The essence of the Court's decision (that there had been a violation of article 6) was that the applicant, having an insufficient knowledge of Turkish and being without the help of an interpreter, could not be said to have effectively waived the right to legal assistance – whether expressly or tacitly.

91. This review of the Strasbourg jurisprudence would appear to suggest that the relevant criterion, at least in the case of an express waiver, is whether the waiver is established in an unequivocal manner and is attended by minimum safeguards appropriate to its importance. This is the formulation used by the Grand Chamber in *Salduz* and in all other cases in which the effectiveness of an express waiver was in issue. In *Pishchalnikov* after recital of that criterion it was observed:

> "A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right".

But that was a case in which the applicant had specifically invoked his right to legal assistance and the issue was whether, having subsequently responded to questioning without having that assistance, he had impliedly waived his right to it. The need to focus on a knowing and intelligent relinquishment of the right may be more acute where the waiver is founded on an implication from conduct (in particular, conduct apparently inconsistent with a prior specific request) rather than on an express statement. The criterion, accordingly, against which the current practice in Scotland is, in my view, to be judged is whether the waiver is in an unequivocal manner and is attended by minimum safeguards commensurate to its importance.

92. I acknowledge immediately that the right to legal assistance for the purposes of police interview is important. This is not limited to protection against the making of self-incriminating responses. As Mr Scott pointed out, there will be cases in which it is in the interests of a suspect to give a full and early account of matters; this may, if consistent with his account at trial, support his credibility. On the other hand, an account at trial which is inconsistent with the suspect's responses to the police at interview may damage his credibility as a witness at his trial. Legal advice as to whether to respond may be of real importance in relation to any subsequent trial.

93. I also recognise that quite apart from any bullying or other coercive conduct by the police at interview (against which the common law provides its own safeguards) presence as a suspect in police custody may, for some at least, be an intimidating experience. Mr Scott, under reference to para 53 of *Salduz* and para 68 of *Pishchalnikov* emphasised the importance of equality of arms between investigating authorities and the accused. The suspect faced with questioning by the police in the absence of legal assistance of any kind may be at a disadvantage as against his questioners. It should not too readily be concluded that there has been an effective waiver of such assistance. There should, accordingly, be close scrutiny of cases where it is asserted that there has been such waiver. Such scrutiny by the Strasbourg Court is clear from consideration of the cases which have come before it.

94. Where the alleged waiver is express and is contemporaneously recorded in writing or in some other form, it should not be difficult to decide whether the waiver is unequivocal or not. Provided the language used to inform the suspect of the right to legal assistance is simple and the subsequent enquiry as to whether or not the suspect wishes to exercise his or her right is likewise simply expressed, it should not in the ordinary case be difficult to conclude that the suspect has understood what he or she has been told and has responded to the enquiry with an understanding of what has been put to him or her. The natural and legitimate inference in circumstances where the suspect has responded with a clear negative to the enquiry will be that he or she has a proper understanding, including an appreciation that in light of his or her answer legal assistance will not be made available for the purposes of the interview. Where the suspect is a child or an adult who is vulnerable (whether because of mental difficulties, addiction to incapacitating substances or otherwise) additional safeguards may be required. Indeed the circumstances of such individuals may in some cases be such that a waiver of the right to legal assistance is not in practical terms possible. Special measures for such persons may be part of the minimum safeguards required. Other safeguards include, as mentioned above, that the information given and the question asked are simply expressed and the answer recorded contemporaneously. It is also to be expected – and in the absence of indications to the contrary to be

assumed – that the oral communications to the suspect are clearly and deliberately expressed, not mumbled or rushed.

95. In my view both the statement as to the suspect's right to legal assistance and the question posed as to whether he wishes to exercise that right as set out in SARF A are clearly expressed. A negative answer to the question, duly recorded, will give rise in ordinary circumstances to the conclusion that the suspect has unequivocally waived his or her right to have legal assistance for the purposes of the prospective questioning. The safeguards include the contemporaneous recording of the whole procedure, including the names and ranks of the officer reading the statement and of the corroborating officer, and the informing of the suspect that signing the record in no way prevents him from changing his mind at any time. Provision is then made for the suspect's signature. There is, in my view, nothing in Strasbourg jurisprudence in so far as developed to date which lays down more demanding minimum safeguards than are provided for in this procedure.

96. That is not to say that the procedure could not be improved. A number of suggestions in that regard were made in the hearing before us. Lord Hope discusses these in his judgment. With his observations I agree. I also agree with his proposed disposal of this reference. The issue of whether or not it would be fair for the Crown to lead and rely upon the respondent's answers at interview is, in my view, best decided in the whole relevant circumstances by the sheriff, informed by the judgments delivered in this court.

LORD KERR

97. Once again, regrettably, I find myself in disagreement with my colleagues about the impact of article 6 of the European Convention on Human Rights and Fundamental Freedoms on the right of suspects in Scotland to legal advice in advance of and during interview by police officers. At the outset, however, I should make clear that I agree with Lord Hope that there is no absolute rule to be deduced from Strasbourg jurisprudence to the effect that, in order to make a valid waiver of the right to be advised by a lawyer, a person under interrogation by a police officer must have received legal advice on whether he should waive the right.

98. What Strasbourg jurisprudence makes unmistakably clear, however, is that this is a right of supreme importance and that such a right can only be regarded as waived where the waiver is indubitably given and the consequences of giving it are properly understood. Various formulae have been used to express this principle. Thus statements have been made that the waiver must be "knowing and

intelligent" or "informed" - *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692; *Pishchalnikov v Russia* (Application No 7025/04) (unreported) given 24 September 2009; that it must be "unequivocal" – *Oberschlick v Austria* (1991) 19 EHRR 389; *Kolu v Turkey* (Application No 3581/97) (unreported) 2 August 2005; *Sejdovic v Italy* (2004) 42 EHRR 360; *Pishchalnikov v Russia*; that the person purporting to make the waiver must have reasonable foresight of the consequences of the relinquishment of the right - *Jones v United Kingdom* (2003) 37 EHRR CD269; and that it must be accompanied by safeguards commensurate with the importance of the right to access to legal advice - *Salduz v Turkey* (2008) 49 EHRR 421; *Pishchalnikov v Russia*.

99. In para 15 of his judgment Lord Hope has said that rights which are waived may vary in importance according to the circumstances of each case. This is, of course, true but, in my view, Strasbourg jurisprudence is clear that, whatever the level of importance of the right, it can only be waived if the person waiving it has a proper understanding of the implications of the waiver. I do not understand Lord Hope's suggestion (in para 16) that care is required when considering cases where the right was different from the right to legal assistance to imply that anything less than an understanding of the nature of the right and the possible repercussions of its waiver will suffice for it to be effective.

100. In any event, there can be no doubt as to the fundamental importance of the right to counsel. Strasbourg has repeatedly made this clear – see for instance para 78 of *Pishchalnikov* where it was stated that the right to counsel was "a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of article 6 of the Convention". The right, according to the court was, "a prime example of those rights which require the special protection of the knowing and intelligent waiver standard".

101. The necessary level of understanding on the part of a person waiving a right of the consequences of the waiver has perhaps not been as explicitly spelled out as it might have been in the many cases in this area which Lord Hope has so fully reviewed. Perhaps the best statement on the question is to be found in *Millar v Dickson* 2002 SC (PC) 30. At para 33 of his opinion Lord Bingham set out a series of propositions which, he said, formed the basis of the High Court's finding that there had been a tacit waiver of the right to be tried by an independent and impartial tribunal. The second of the propositions was this: "If knowledge of some material matter is absent, even an express intention to waive a right may readily be recognised as insufficient to constitute a binding abandonment of the right". Lord Bingham, in para 34, accepted the correctness of this proposition. He expressly rejected the third proposition which the High Court had set out. It was to this effect: "In general, regardless of the knowledge or ignorance or misapprehension of an accused or his agent as to the law, knowledge of the law will be imputed to

him". Of that statement, Lord Bingham said that "ignorance of the law will not excuse unlawful conduct; but it cannot suffice to found a plea of waiver" – para 34.

102. Knowledge of all material matters is therefore a prerequisite to a valid waiver and if the person waiving the right is ignorant of a salient aspect of the law, this will prevent the waiver from being effective. It was somewhat faintly suggested by the Lord Advocate that knowledge of the consequences of waiving a right was required only in cases of tacit or implied waiver. There is no logical basis for distinguishing express waiver from implied waiver in relation to this requirement. It was not suggested that an express waiver should be regarded as effective unless it was properly informed. In this context, being informed must mean being aware of what will or might happen if the right is not availed of. As Lord Hope said at para 58 of *Millar*, "Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right … must be rejected as not being unequivocal". Mere possession of the facts is not enough, of course. A clear understanding and insight as to their significance is surely an essential concomitant. It is not enough that an accused person receive information, he must have the wherewithal to understand what that information means to his case. Otherwise, the information is of no value.

103. All of this must be seen against the accepted position that it is for the prosecuting authorities who seek to rely on an alleged waiver to establish that it is effective. They must show not only that the accused person was made aware of his right to legal counsel; not only that he or she had stated that he did not wish to avail of it – or, alternatively, implicitly waived their entitlement to it; not only that he or she was given sufficient information about the circumstances in which legal assistance could be provided; but also that the accused person appreciated what was at stake. Obviously, direct evidence of the degree of understanding of the accused person will not usually be available. Conventionally, the prosecuting authorities will seek to establish this by reference to the safeguards that are in place to ensure that this had happened and it is no coincidence that Strasbourg jurisprudence emphasises the need for the presence of safeguards "commensurate with the importance of the right".

104. Before turning to the safeguards which, the Lord Advocate claims, were efficacious to achieve that, I should say something about the assertion of Miss Cherry QC on his behalf that the "narrow base" of the decision in *Salduz* should inform the debate as to whether the safeguards are sufficient. The "narrow base" from which *Salduz* rights are derived is, Miss Cherry contends, the need to protect the suspect from self-incrimination. The rationale underlying the protection against self-incrimination is one of protecting the suspect from coercion of his will by improper compulsion (physical or psychological) by the police authorities. That rationale - of protecting the suspect against coercion of his will - provides the

context against which the ECtHR's requirements that a waiver of *Salduz* rights be unequivocal and be attended by "minimum safeguards commensurate to its importance" should be construed and applied, according to Miss Cherry.

105. I do not accept these arguments. At para 52 of the *Salduz* judgment the court said:

> "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."

106. Now, true it is that in Scotland there is no statutory provision such as exists in the rest of the United Kingdom expressly permitting the tribunal of fact to draw adverse inferences against an accused because of his or her failure to mention in answer to police questioning facts on which they later relied. But it is not claimed that an accused who seeks to put forward on trial in Scotland a basis of defence that was not foreshadowed in his interviews with the police would not suffer a conspicuous disadvantage in consequence. Moreover, in Scotland, where corroboration of evidence that a sexual offence has been committed is necessary, a statement by an accused person that there was consensual sexual activity may supply (and, we were given to understand, frequently *does* supply) the needed corroboration. This is a paradigm example of national laws attaching consequences to the attitude of an accused at the initial stages of the investigation which have nothing whatever to do with his will being overborne by coercion. And it is clear that it was precisely this type of situation that was contemplated by the court in *Salduz* when it emphasised the importance of the need for access to legal advice at the early stage of the investigation.

107. The "narrow base" argument is therefore plainly wrong. The need for a lawyer at the early stage of an investigation goes well beyond protecting the suspect from coercion of his will by improper compulsion. This much is unmistakably clear from what the court said in *Salduz* at para 54:

> "… 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." (emphasis supplied)

108. The efficacy of safeguards to ensure that a waiver of the fundamental right to legal assistance is effective is therefore not to be judged solely by reference to the need to protect a suspect from coercion of his will by improper compulsion. It must be judged against the backdrop of his need to understand the ways in which the absence of a lawyer might have an impact on the viability of his defence to criminal charges about which he is questioned by police.

109. The advocate depute relied on the safeguards which currently exist under Scots law and which, she said, were commensurate with the importance of the right to legal assistance. These included the administration of the caution which, Miss Cherry pointed out, occurred at various stages of the arrest and interview process. Nothing in the caution advises the suspect of his or her rights to the services of a lawyer, however. Its focus is on conveying to the suspect the right to remain silent. In June 2010, pending the judgment of this court in *Cadder v HM Advocate,* the Lord Advocate issued guidelines to Chief Constables in Scotland as to the steps to be taken to provide a suspect with access to a solicitor prior to and during interview. The guidelines provided that individuals who attended voluntarily for interview by police, or were detained under section 14 of the Criminal Procedure (Scotland) Act 1995 for that purpose, or were interviewed by police between arrest and charge should first be offered (a) a private consultation with a solicitor prior to interview; and (b) solicitor presence/consultation during the interview. The Lord Advocate's Guidelines were withdrawn in January 2011 to coincide with the introduction of a new ACPOS Manual of Guidance on Solicitor Access. Nothing in these guidelines was directed to an investigation of the suspect's understanding of the reasons that he might need to have a solicitor. Nor were they designed to elicit information about why a suspect might choose not to have a solicitor. Nor did they contain any means of discovering whether the suspect had any appreciation of the implications of waiving his right to a solicitor. The procedure that they prescribed consisted of a one-way form of communication with the suspect contributing only an affirmative or negative response to the imparting of the information that he was entitled to have a solicitor.

110. The capacity of the caution and the guidelines to supply safeguards commensurate with the right to legal assistance is intrinsically open to question given the absence of meaningful contribution to the process by the suspect. But the obvious shortcomings of this procedure are demonstrated by research carried out by David J Cooke and Lorraine Philip in 1998 about the level of understanding of suspects of even basic elements of the procedure then adopted by police officers. Although, as Lord Hope has pointed out, this paper was written some time ago and does not reflect current practice in that the caution then used has been changed, the

effect of the results of the survey on the adequacy of the up to date procedure is unmistakable.

111. The Cooke and Philip research showed that the question customarily posed after the caution had been administered, *viz* "do you understand" was valueless because of the tendency of suspects to acquiesce without any real level of understanding. That was troubling enough but overall it was found that there was a poor level of comprehension of the simple caution and, even when this was broken down into the simplest of sentences, the level of understanding remained low. The conclusions of the report are sobering:

> "… it would appear that within Scotland a significant proportion of young offenders are unlikely to comprehend their legal rights when these are presented to them in the form of the common law caution. If the purpose of reciting the caution is to truly inform an accused person of his/her rights rather than merely to record some legal niceties then a simplified caution is required. Simplifying the caution may not be sufficient (Scott, 1996): police officers require to be trained to deliver the caution more effectively."

112. No challenge to the validity of these findings has been presented nor has it been suggested that they are not eminently relevant to contemporary experience. There is therefore no reason to suppose that today's suspects will be any more able to appreciate the importance of the right to legal assistance, much less the implications of relinquishing that right, in light of these findings. Certainly, in the absence of any inquiry whatever (whether of the suspect directly or, if they are capable of revealing it, by examination of the surrounding circumstances) as to why a suspect has decided to waive the right, it is, in my opinion, simply impossible to say that an intelligent, knowing decision has been made.

113. The Criminal Procedure (Scotland) Act, 1995 was amended with effect from 30 October 2010 and this now provides for the right of a suspect to have a private consultation with a solicitor before and during questioning by a police officer. The suspect must be informed of this right but there is nothing in the legislation nor in the ACPOS Manual of Guidance on Solicitor Access which requires any contribution from the suspect beyond confirming that he understands that he has the right and indicating whether he wishes to avail of it.

114. Lord Hope has made suggestions (in paras 49, 51 of the judgment in *McGowan*) as to how the current procedures might be improved. The first of these is to follow the practice indicated by para 6.5 of Code C of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers which was

introduced in England to meet the requirements of the Police and Criminal Evidence Act 1984 (PACE). This requires a police officer to tell a suspect that he can speak to a solicitor by telephone if has refused initially to seek legal assistance. If the suspect continues to waive the right the police officer is then enjoined to ask the reason for this and to record the suspect's reply.

115. There are two obvious purposes behind these requirements in the Code. The first is to dispel the well known and widespread apprehension that suspects feel that if they elect to consult a solicitor this will delay their interview and prolong the period of their detention. The second is to obtain some insight into the reasons for not wishing to have the assistance of a lawyer so that misunderstandings can be corrected. Lord Hope makes it clear that he is not suggesting that these steps be taken in every case but, with respect, why should they not be? How can one have any insight into the reasons for waiving this fundamentally important right, if one does not ask why? If the decision to waive must be knowing and intelligent – and, more pertinently, if the prosecuting authorities must be in a position to prove that it was such – how can that be established if a bland refusal is all that one has to work on? Put simply, unless one knows why the decision to waive has been made, it cannot be said to be "voluntary, informed and unequivocal".

116. I can further explain my conclusion that some means of ascertaining why a suspect has chosen not to consult a solicitor is vital by reference to those cases emanating from Strasbourg post-*Salduz* where this issue has been considered. First, *Pishchalnikov* at para 77 where the court said:

> "A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be."

117. Of course, that statement was made in the context of implied waiver but for the reasons given earlier, foresight of the consequences, if it is necessary in the case of implied waiver, is equally required where the waiver is said to be express. It is interesting to note the two overlapping aspects of the requirement – knowledge and intelligence on the one hand and reasonable foresight of the consequences on the other. The suspect must know what he is doing; he must be possessed of sufficient intelligence to appreciate the importance of the step that he is taking; and he must have reasonable foresight of the consequences for him of doing it. Miss Cherry suggested that the last requirement was fulfilled merely by the suspect knowing that he would be asked questions by police officers and that

his solicitor would not be present. That surely cannot be right, if the knowing and intelligent element is to have any significance. I do not suggest that a suspect needs to be aware of every legal nuance that might arise in the course of his interview but he should be aware in a general sense that legal issues might arise and should have consciously decided that he is prepared to forgo the advice that a lawyer might give on those issues either before or in the course of the interview.

118. In *Yoldaş v Turkey* (Application No 27503/04) (unreported) given 23 February 2010, the court held that the applicant had effectively waived his right to legal assistance. A careful review of the facts of this case is instructive. The applicant was 29 years old at the time of his arrest. After the charges were read to him he was required to sign a form which confirmed that he had been advised of his right to assistance by a lawyer of his choice or a court-appointed lawyer. This happened more than 36 hours after he had been received into the custody of the Turkish police. Mr Yoldaş was asked whether he wished to have his family informed but he said that he did not want them to be contacted until he had appeared before the court. A document containing the handwritten note of this request by the applicant as well as his signature was produced to the court and was not disputed by him.

119. On 24 December 2003, some six days after Mr Yoldaş had been taken into custody, the applicant's deposition was drawn up. According to this document, the applicant's right to remain silent, to have his relative informed, to the assistance of a lawyer and to bring the matter before a judge in order to object to his arrest and his custody were repeated to him. He stated that he was sorry and wished to benefit from law No 4959 of 29 July 2003 concerning reintegration in society. He signed his deposition thus drawn up. On the same date the applicant was referred to the Public Prosecutor, who informed him of his rights as stated in article 135 of the Code of Criminal procedure. Significantly, the applicant stated that *he understood his rights* and did not wish to be assisted by a lawyer or for his family to be informed of his situation. He confirmed his statement made in custody, acknowledged belonging to the organisation in question and having participated in activities as part of this, including armed attacks. He declared that he wished to benefit from the law on repentance. He signed the deposition.

120. Later on the same date, 24 December 2003, Mr Yoldaş appeared before a judge. He was reminded by the judge of his right to legal assistance. The applicant again stated that *he understood his rights* but did not wish to be assisted by a lawyer and made his deposition alone. He repeated his previous depositions and signed the deposition made before the court. Mr Yoldaş had been informed or reminded therefore on no fewer than four occasions of his right to a lawyer. This information had been imparted to him by police officers, a public prosecutor and a judge. He twice asserted that he knew and understood what his rights were. He was clearly familiar with the law on repentance and re-integration into society. It is

clear that these particular circumstances bore heavily on the decision of the European Court that there had been an effective waiver of the applicant's rights to legal assistance. This is especially clear from the opening words of para 52 of the court's judgment:

> "Under *the particular circumstances of this case*, the Court notes that the applicant had been informed of his right to be assisted by a lawyer whilst in custody. In this connection the police drew up a report stating his rights during custody, and in particular that of being assisted by a lawyer (paragraph 6 above). After reading the report, a copy signed by the applicant was delivered to him. Furthermore, the police also reminded the interested party that he was entitled to see his family. The applicant stated that he wished to contact his family after appearing before the competent court (paragraph 7 above). Therefore while he was entitled to legal assistance during his custody and although he was reminded of this right, the applicant refused legal assistance. It also clearly emerges from his statements taken whilst in custody that the interested party's decision to waive his right to legal assistance must be considered to have been freely and voluntarily made. Hence, the applicant's waiver of this right was unequivocal and surrounded by a minimum guarantee *(a contrario, Padalov* v *Bulgaria,* No 54784/00 para 54, 10 August 2006)." (Emphasis supplied)

121. Lord Hope has said (in para 32 of his judgment in *McGowan*) that this decision indicates that where it is shown that the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. I do not so read it. Certainly no statement to that effect is to be found in the text of the judgment and it is replete with references to the importance of the particular facts of the case – see paras 48, 50, 52, 53 and 54.

122. In *Galstyan v Armenia* (2007) 50 EHRR 618 the European Court found that the applicant had been informed of his right to a lawyer both by police officers and the judge before whom he appeared. The applicant had chosen to represent himself – this was a specific finding of ECtHR – para 91. It was the government's case that he had been advised by police to avail of the services of a lawyer but stated that he did not wish to have one – para 16. The applicant was an authorised election assistant for the main opposition candidate in the presidential election and, when he appeared before the judge, was sufficiently robust to demand "justice and lawfulness" when asked by the judge what he wanted. There is nothing in the report which suggests that the presence of a lawyer would have made a significant difference to the outcome. This is a case from which, I think, it would be difficult to discern any principle of general application.

123. In *Sharkunov and Mezentsev v Russia* (Application No 75330/01) (unreported) given 10 June 2010, (referred to by Lord Hope in para 33 of his judgment in *McGowan*) the first applicant made no statement or admissions after his arrest, and the court did not consider it necessary to make findings in his case on his complaint that there had been a violation of article 6 because he had been denied legal assistance. So far as the second applicant was concerned, the court found that he had waived his right to legal assistance, and had expressly said that the waiver was not related to a lack of financial means. Subsequently, when he asked for legal assistance, this was obtained promptly. Significantly, he did not complain that he was not provided with legal assistance between December 1999 and February 2000. And the court found (see para 108) that the case file did not disclose that the second applicant made any statement or admission between those dates. Again, this is a case that is confined to its own facts and upon which no principle of general application can be founded.

124. *Paskal v Ukraine* (Application No 24652/04) (unreported) given 15 September 2011 was a case in which the facts were somewhat unusual. The applicant had a university degree in law. When under interrogation he was a serving police officer. He had been arrested on suspicion of having taken part in a robbery. He signed a procedural rights notification form and noted that he wished to appoint a lawyer whom he named as his advocate. He was then questioned, without a lawyer being present, about the robbery. It was argued that this was a case of an implied waiver. Most significantly, of course, the applicant, when questioned without a lawyer, did not make any incriminating statements – see para 75 of the judgment. The court also observed in that paragraph that because of the applicant's educational and professional background as a lawyer and a police officer, his participation in the questioning was rather well-informed and deliberate.

125. In para 76 of *Paskal* ECtHR stated 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, citing *Salduz* para 55. It also stated that the very fact of restricting access of a detained suspect to a lawyer may prejudice the rights of the defence even where no incriminating statements were obtained as a result. These are strong statements which, unlike the cases of *Yoldaş, Galstyan* and *Sharkunov and Mezentsev*, do have general import. The principle to be derived from them is clear. As a general rule, incriminating statements given during police interrogation where there has not been access to a lawyer irretrievably prejudice the rights of the defence when they are used to obtain a conviction. But the court's disapproval of the adducing of evidence given by a suspect who has not had the benefit of legal assistance did not stop there. At para 79 the court said that "the very fact of questioning a suspect without enabling him to consult a lawyer may shift the power balance between the parties in breach of the fair trial guarantees even absent any appearance of negative

consequences for the outcome of the proceedings". This sends a powerful message. It emphasises the exceptionality of the circumstances in which statements made by suspects who have not had access to a lawyer should be admitted in evidence.

126. Now, as it happens, the European Court in *Paskal* decided that there had been an effective waiver of the right to legal assistance and it is on that aspect of the decision that Lord Hope has concentrated. But I suggest that this conclusion reflects the particular, and somewhat unusual, facts of the case and of far greater significance are the expressions of general principle which it contains and which I have referred to above. It was because the applicant never raised the matter of the lack of legal assistance during his trial and because, although he complained in his cassation appeal in general terms that his right to defence had been breached, he made no express mention of the questioning that took place in the absence of legal assistance that the court considered that a breach of article 6 had not been established. The court was also influenced, to some extent, by the applicant's background as a law graduate and police officer – see paras 78 and 79 of the judgment. But these are, as I have said, unusual facts. They do not remotely sound on the issues that arise in these appeals and reference. They are peculiar to that particular case. *Paskal* is a significant case, however, but significant in my view in favour of the arguments advanced on behalf of the respondents in the appeal and on behalf of *B* in the reference.

127. It is not particularly easy to assemble a list of coherent principles that should guide consideration by courts of the difficult question of waiver of the right to legal assistance. With some misgivings, I suggest that the following are, while by no means exhaustive, perhaps useful guidelines to follow:

i) Each case must be examined on its own particular facts. Close scrutiny of the claim that the right has been waived will always be required. Among the circumstances that will be relevant are the gravity of the offence and the sensitive nature of the charges;

ii) The background of the suspect *may* be relevant, especially if it includes an expertise in legal matters but it should not be assumed that previous experience with police procedures will make it more likely that a waiver is effective;

iii) Unless it is shown that the suspect had a proper insight into the significance of the decision to waive his right, the purported waiver should not be regarded as effective; the most obvious and easiest way of showing

this is when the suspect has been advised by a lawyer as to whether he should waive the right;

iv) A decision to waive the right which is prompted by a desire to get the interview over with or because the suspect does not wish to wait for his solicitor to arrive or because he erroneously believes that he may have to pay for the services of a solicitor are all strong indicators that the waiver is not unequivocal;

v) Unless there is clear evidence that the suspect understands the significance of waiving his right to a solicitor, he should be asked why he has decided not to exercise his right; his reasons should be recorded; and any misunderstanding should be corrected. He should also be informed that a telephone consultation with a solicitor can be arranged. (These minimum safeguards were not present in any of the cases under appeal or the subject of the reference);

vi) Simply because a suspect evinces a willingness to answer questions, it is not to be presumed that he has tacitly waived his right to access to legal advice.

Conclusions

128. I would answer the first question in the negative for the reasons given by Lord Hope. I would answer the second question in the negative also. No attempt was made to discover why B had refused to avail of the legal assistance. I consider that it is impossible to say on the available evidence that his was an unequivocal and informed decision to waive his right under article 6.

129. In para 58 of his judgment, Lord Brown suggests that it is surely obvious that the point of a lawyer is to advise on any legal issues that may arise and that it is also obvious that if a suspect chooses to forego this right he will be questioned without the benefit of such advice. I agree. But knowledge of the obvious is not the same as understanding that this may carry grave implications for the suspect. Otherwise there would be no need for any examination of the circumstances in which a suspect has declined to avail of legal assistance. His statement that he did not wish to have a lawyer would determine the issue. He would be presumed to know the obvious and that would be, in Lord Brown's view, an end of the matter. With respect to Lord Brown, to seek to be sure that the suspect realises that he is foregoing the chance to have a lawyer advise him on legal issues *that might bear directly on his defence* does not seem to me to ask for too much.