

# ***Cadder Case - Background Q&A***

Excerpts taken from the official website of the Scottish Government, available at <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/cadder-case-qanda>

## **Q. What is *Cadder v HMA* about?**

A. The case relates to whether an accused person should have access to legal advice where they are detained by the police for questioning. Previously in Scots law an accused person suspected of committing an offence could, in terms of section 14 of the Criminal Procedure (Scotland) Act 1995, be detained and interviewed by the police for a limited period of time (up to 6 hours), without a right of access to a solicitor. Although suspects had a right to silence during interview, anything they did say could be used as evidence against them in subsequent court proceedings. In its judgment in the case of *Cadder v HMA*, published on 26 October 2010, the Supreme Court decided this practice was contrary to the European Convention on Human Rights. Under the Scotland Act 1998, and the Human Rights Act 1998, both the law of Scotland and the United Kingdom must comply with the Convention.

## **Q. What are the circumstances of the *Cadder* case?**

A. In 2009, Peter Cadder was convicted of two assaults and a breach of the peace at Glasgow Sheriff Court following an incident in the city in May 2007. His conviction relied in part on confession evidence given in a police interview conducted without a lawyer present.

He contended that the procedure in Scottish criminal law that allows police to question people without legal representation for up to six hours before an arrest contravened his human rights. This was based on the results of a test case at the European Court of Human Rights in Strasbourg that decided access to a lawyer during criminal proceedings was part of the fundamental right to a fair trial under the European Convention of Human Rights.

In 2008, the European Court of Human Rights, examining the case of *Salduz v Turkey*, decided that suspects should have access to a lawyer from their first interrogation, unless there were compelling reasons not to grant access.

## **Q. Will all convictions where the accused has not had access to a solicitor now be quashed?**

A. No. This judgment meant that practices around the detention and interview of suspects had to be changed. It does not mean that all convictions obtained under previous procedure are immediately invalid. Indeed, the Supreme Court specifically reached the judgement in a way that will protect finality and certainty in almost all completed cases. The judgement does apply to live cases and where this point has been raised in a timely manner during the consideration of a case.

## **Q. What has the Scottish Government done to deal with the implications of the judgement?**

A. The Scottish Government worked for many months on contingency plans to respond to the possibility of an adverse decision in the *Cadder* case. It worked closely with partners in the Crown Office, ACPOS, Scottish Court Service and Scottish Legal Aid Board to mitigate the impact of this decision. We have also engaged with the Law Society of Scotland.

As the independent head of the prosecution system in Scotland, the Lord Advocate issued updated guidance to Scottish police forces in June in relation to the procedures for interviewing suspects in detention. These included access to legal advice.

As a result of extensive and thorough planning, emergency legislation prepared by the Scottish Government has now been passed by the Scottish Parliament and has received Royal Assent.

The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act:

- Introduces a right of access to legal advice before and during questioning;
- Extends the maximum period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995;
- Creates a power for Ministers to amend the legal aid eligibility rules so that there could be automatic eligibility for criminal advice and assistance in certain circumstances. This would be done by means of regulations in the Scottish Parliament.;
- Reinforces certainty and finality in concluded cases by means of provisions on common law appeals and the tests the Scottish Criminal Cases Review Commission must consider.

Furthermore, the Cabinet Secretary for Justice has invited Lord Carloway, a senior High Court judge, to lead a review of Scottish criminal law and practice in the aftermath of the *Cadder* decision. The review will report within months, ideally before the election but certainly in time for further legislative action, if necessary, in the 2011/12 Parliamentary session.

Finally, the Scottish Government has announced that plans are well advanced for putting in place new arrangements, if necessary, for providing legal advice at police stations from early 2011. This would be intended to provide greater assurance that legal advice will be available when required. Interim arrangements that have facilitated improved access to solicitors will continue in the meantime.

**Q. How many cases will be affected?**

A. The UK Supreme Court limited the impact of the *Cadder* judgement to live cases only, meaning predictions about tens of thousands cases being cast into doubt have proved incorrect. At the time of the judgement, there were 3,471 [filings] lodged with the court, notifying it of the intention to appeal on *Cadder* grounds. At the same time, a small number of live appeals not yet heard by the court will now be done so on the basis of the *Cadder* changes. However, interim guidance to the police issued by the Lord Advocate in June means that substantially fewer live cases rely on admission evidence given in the absence of a solicitor. Current Crown Office policy in relation to the use of admission evidence should also further reduce the proportion of current live cases at risk.

Speaking in the wake of the judgement, Cameron Ritchie, the vice-president of the Law Society of Scotland said: "We don't think there will be a great number of appeals. The Supreme Court made it absolutely clear that if cases are closed and closed now, they will not be reopened. "There may be one or two cases that will be reopened by use of the Review Commission but they will be very small indeed and if the case has not yet been appealed or if there is time left to appeal it, there are very short timescales, then these appeals can be heard but these could be numbered in less than the 100s. So any predictions that this will have a cataclysmic effect on the court system in Scotland are completely wrong."

**Q. What is detention and what powers did the police previously have?**

A. Under the provisions of the Criminal Procedure (Scotland) Act 1995, Scottish police were permitted to question a person suspected of committing an imprisonable offence for up to six hours without the presence of a lawyer. During that period, police were obliged to inform the individual that they were under no obligation to answer any of the questions put to them, beyond offering basic information such as their name and address. Although the individual was under no obligation to say anything during this initial detention period, anything they did say could be recorded and used in evidence at any subsequent court case.

**Q. How has this changed?**

A. We have now extended the detention period to 12 hours, with the option for that to be extended further to 24 hours if a senior police officer, not working on the case, agrees it is necessary for the investigation to be completed.

This extension is vital to help our police investigate crimes properly now that individuals have a right to access a lawyer during the initial interview. Because it can be difficult to access legal advice at all hours of the day - especially in the more remote parts of Scotland - the existing six hour period would have made the proper investigation of crime impossible.

This period is substantially less than the provisions already in place in England, where police are permitted to hold a suspect for 24 hours, extendable to 36 hours on the approval of a senior police officer, with extensions up to 96 hours possible with the approval of a magistrate.

**Q. What changes have been made to the right of access to a solicitor?**

A. Under the previous statutory provisions, an individual was not given an automatic right to a lawyer during the initial period of detention, but they were entitled to have a lawyer informed that they were being questioned. In June 2010 - in anticipation of an adverse judgment - the Lord Advocate issued guidance requiring the police to offer access to legal advice to all detained suspects.

Through legislation, the Scottish Government has now given suspects in detention the right to legal advice before and during questioning as required by the Supreme Court. The Bill allows for this counsel to take place over the telephone where appropriate, but it is not envisaged that anyone charged with a serious offence will rely solely on telephone advice. Offering an initial counsel by telephone will help to protect an individual's human rights, by ensuring they do not waive their right to a solicitor in an attempt to quicken the process.

**Q. How does the Scottish position compare with other parts of the UK and Europe?**

A. A direct comparison with other jurisdictions on this matter - including England and Wales - is not straightforward.

It is important to bear in mind that the criminal law and procedure of Scotland is built upon hundreds of years of legal tradition and consequently differs from elsewhere in the UK and Europe. While periods of detention will differ, so too do other wider rights afforded to accused persons.

As an example, in England and Wales, people brought into police custody have had the right to consult with a lawyer either before or during an initial interview since 1984 under the auspices of the Police and Criminal Evidence Act. However, suspects can also be held for a much longer period than currently permitted in Scotland.

In the European Union, the majority of member states allow for access to a lawyer during police interview. Those that do not are Belgium, France, Ireland and the Netherlands, and in each of these jurisdictions - except Ireland - steps are being taken by the courts or government to amend police interview procedures to comply with the *Salduz* judgement.