



23 November 2011

PRESS SUMMARY

Jude (Respondent) v Her Majesty's Advocate (Appellant) (Scotland)
Hodgson (Respondent) v Her Majesty's Advocate (Appellant) (Scotland)
Birnie (Respondent) v Her Majesty's Advocate (Appellant) (Scotland)
[2011] UKSC 55
Appeals from the Appeal Court, High Court of Justiciary

JUSTICES: Lord Hope (Deputy President), Lord Brown, Lord Kerr, Lord Dyson, Lord Hamilton (Scotland)

BACKGROUND TO THE APPEALS

The Respondents were each detained as suspects for questioning at a police station under sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995. Their detentions took place prior to the decision of this Court in *Cadder v HM Advocate* [2010] UKSC 43, and they did not have access to legal advice either before or during their police interviews. In the course of their interviews, they each made statements which were later relied on by the Crown at their trials. They were convicted and sentenced to various periods of imprisonment. They appealed, and their appeals were still current when the judgment in *Cadder* was delivered on 26 October 2010. The Respondents argued, on the basis of *Cadder*, that the leading of evidence of the statements they made during their police interviews was a breach of their rights under Articles 6(3)(c) and 6(1) of the European Convention on Human Rights, and that, in terms of section 57(2) of the Scotland Act 1998, the Lord Advocate had no power to lead that evidence. For Birnie, it was also submitted that the reliance by the Crown upon his admissions in these circumstances deprived him of a fair trial, to which he was entitled under Article 6(1) and at common law.

The Crown's objections to the devolution issue were repelled by the Appeal Court, and the Crown appealed to the Supreme Court. On the question whether the Respondents had waived their right to legal assistance, the Lord Advocate's position before the Court was that the important point in these appeals was that raised in the case of Birnie. Unlike the other two Respondents, Birnie made an unsolicited statement following his police interview, having declined the opportunity to have access to a lawyer prior to and while making it. The outstanding matters before the Court were therefore:

- (i) Whether the time bar referred to in section 100(3B) of the Scotland Act 1998, as amended, applies to Jude's appeal;
- (ii) Whether Birnie waived his right of access to a lawyer when he made his unsolicited statement following his police interview; and
- (iii) Whether the reliance by the Crown upon the appellant's admissions in these circumstances deprived him of his right to a fair trial under Article 6(1) of the Convention.

JUDGMENT

The Supreme Court unanimously dismisses the Crown's appeal on the question whether section 100(3B) of the Scotland Act 1998 applies in this case. It unanimously dismisses its appeals on the issue as to waiver in regard to the police interviews of Jude and Hodgson. By a majority of 4-1, it allows the appeal on the question whether it was incompatible with Birnie's right to a fair trial for the Crown to lead and rely on the evidence of the statement which he made following his police interview and remits that matter for determination by the High Court of Justiciary. Lord Hope gives the leading judgment. Lord Kerr gives a partly dissenting judgment.

REASONS FOR THE JUDGMENT

(1) *Time Bar.* Section 100(3B) of the Scotland Act 1998, as amended, provides that any proceedings brought on the ground that an act of a member of the Scottish Executive is incompatible with the Convention rights must be brought before the end of the period of one year beginning with the date on which the act complained of

took place. The question is whether that section applies to proceedings brought by way of an appeal under the 1995 Act [6].

A criminal appeal under section 57(2) of the Scotland Act falls plainly into the category of a proceeding that is 'by virtue of' the Scotland Act. The fact that the procedure under which the complaint is made is provided by the 1995 Act is irrelevant as far as this point is concerned, and does not render section 100(3B) inapplicable [13]. The opening subsection of section 100 makes the same distinction as that found in section 7(1) of the Human Rights Act 1998 between bringing proceedings on the basis of Convention rights, and relying on Convention rights 'in any such proceedings'. The wording is not exactly the same in the two Acts, but the assumption is that they have the same effect. The time bar under section 7(5) of the Human Rights Act refers only to proceedings under section (1)(a) and not those under (1)(b) [15]. The time bar in section 100(3B) has the same effect, so it does not apply to proceedings of the kind referred to in section 100(1)(b). The point is that proceedings under that section are proceedings that have been brought by someone *other* than the person who maintains that the act in question is incompatible with the Convention rights [16]. An appeal against conviction or sentence is still part of the prosecution process that has been brought by the Lord Advocate [17]. Further, the 1995 Act contains its own system of time limits for the bringing of appeals. It would be very odd if an appeal were subject to two different time limits under two different Acts [18].

(2) *Waiver*. Birnie was offered rights of access to a solicitor before he made his statement and was also asked whether he wished to have a solicitor present while he was making it. He expressly declined both offers [26]. There is no absolute rule that the accused must have been given legal advice on the question whether or not he should exercise his right of access to a lawyer before he can be held to have waived it: see *McGowan (Procurator Fiscal, Edinburgh) v B* [2011] UKSC 54 [28]. It was not suggested in the course of argument that an absolute rule requiring reasons for the accused's decision to waive his right to legal assistance is to be found in the jurisprudence of the Strasbourg court. The only question for this Court is whether the absence of such an inquiry amounted in itself to a breach of a Convention right.

It is not for the Supreme Court to say how the law and practice respecting crimes should be developed by the common law in Scotland. The fact that the waiver was made without legal advice and without reasons being requested may be taken into account in the assessment as to whether Birnie understood the right that was being waived. But Strasbourg does not require the Court to hold that it would necessarily be incompatible with Article 6 to rely on statements made to police just because it was not ascertained why the suspect did not want to speak to a lawyer. 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. The Supreme Court should be no less careful in the way that it deals with Scottish criminal law and procedure [29].

There is room for argument as to whether Birnie's statement was truly voluntary and in any event whether, taking all the circumstances into account, it was fair to admit this evidence. The question of overall fairness for the purposes of Article 6(1) must be examined in the light of all the facts and circumstances, and is therefore a matter for determination by the High Court of Justiciary [33].

For Lord Kerr, it is an indispensable prerequisite that there must be some means of ascertaining the reason that the right to legal assistance has been waived [53]. On the available evidence, it has not been established that there was an effective waiver by Birnie of his right to legal assistance [57].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html