



Cadder v HMA

The Implications for Police Officers Facing Allegations of Criminal Conduct

The full extent and effect of the decision of the Supreme Court in *Cadder v HM Advocate* [2010] UKSC 43; 2010 SLT 1125, issued on 26 October 2010, is yet to be understood. The decision has had important implications for many who find themselves in the category of a “suspect”. Included within this group are police officers who are the subject of a complaint alleging criminal conduct and are the subject of a subsequent investigation, which would involve the Deputy Chief Constable and a report to both the Procurator Fiscal and Crown Office with regards to whether or not criminal proceedings should be taken against the officer.

Investigating Allegations of Criminal Conduct against a Police Officer

Where any report, allegation or complaint is received from which it may reasonably be inferred that a criminal offence may have been committed by an officer, regulations require the matter to be referred to the Procurator Fiscal.

Police officers facing an investigation are often invited to take part in a tape-recorded interview, either on a voluntary basis or under statutory detention. Even where these take place on a voluntary basis, this is often on the understanding that should they refuse they will be formally detained. However, many officers are also required – often under threat of disciplinary consequences – to provide an “operational statement”. Such a statement will inevitably provide an account of their actions and many other details in relation to the allegation being investigated. The question is now whether such a demand falls within the ambit of the *Cadder* decision, with the effect that before making such a demand an officer will be entitled to consult a solicitor, and will be entitled to maintain a right to silence – which, as I will argue, is also a right not to provide anything which would breach the right against self-incrimination.

Allegations of Criminal Conduct

On receiving information that may reasonably imply that a criminal offence may have been committed by an officer, the Assistant Chief Constable must as soon as possible refer the matter to the relevant Procurator Fiscal. In such circumstances, misconduct proceedings are delayed either until the Procurator Fiscal communicates that criminal proceedings are not to be taken, or until any criminal proceedings have been concluded. Regardless, the Deputy Chief Constable must arrange for the constable to be warned that misconduct proceedings may subsequently be taken against him or her, irrespective of the outcome of any criminal prosecution. All of this is governed by the Police (Conduct) (Scotland) Regulations 1996, SI 1996/1642, reg 7(1)(a).

In general, the internal disciplinary system will be put on hold until the Procurator Fiscal decides whether to prosecute, and, if they do, until the outcome of the proceedings is known. The reasons for this are to protect the integrity of the prosecution system, although the officer may still face misconduct proceedings arising out of the same incident, even if no criminal proceedings result, or if there is an acquittal following trial. At the early stage of any investigation into alleged misconduct, the distinction between external prosecution and internal proceedings is far from clear since from the early stages the investigation will consider the conduct of the officer from both a disciplinary point of view and also with regards to a report for submission to

the Procurator Fiscal about a possible criminal offence. The investigation is at this stage performing a dual role.

In assessing the impact of *Cadder* in cases involving police officers, it is important to start with the recognition that police officers are no different to any other member of the public with regards to their legal rights and protections. This is a legal proposition not always fully grasped by those who carry out such investigations on behalf of the Deputy Chief Constable.

At What Stage of a Police Investigation does *Cadder* Engage?

At the initial investigation stage, the police may question anyone to gather information which may lead to the detection of the perpetrator of a crime. At this stage proceedings are not envisaged against any particular person, and so it is not necessary to administer a caution – even where suspicion is directed towards a particular person, in the sense that he is one of a number of people who must be eliminated from the inquiry. It follows that any statement made by a person will be admissible. Thus, incriminating statements which are made before the police had any justification for cautioning, far less charging, someone are admissible. Only if an incriminating statement can be shown to have been obtained unfairly will it be excluded.

Suspicion

In understanding the impact and effect of *Cadder* and its enhanced protection against self-incrimination, the most important matter to understand is when “suspicion” arises in the mind of those investigating. Suspicion is reached when a particular individual is under serious consideration as the likely perpetrator of the crime. Within this category are persons who have been detained by virtue of the statutory provisions for the detention of suspects, as in *Cadder*. By virtue of the statute, they may only be detained because they have been classed as a suspect. Detention is not required before it can be said that suspicion has arisen – but in the absence of detention, it can be more difficult to determine the precise point at which a person becomes a suspect. In such cases it is the state of knowledge of the officer carrying out the questioning which is important.

Following the decision by the Supreme Court in *Cadder*, which held the Crown's reliance on admissions made by the accused during detention where he had not had access to legal advice was incompatible with his right to a fair trial, the law was amended to require suspects to have access to a solicitor before police questioning. Importantly the rights apply not only to persons detained under the statutory provisions, but also to persons who attend voluntarily at a police station for the purpose of being questioned on suspicion of having committed an offence, and to persons arrested (but not charged) in connection with an offence, who are detained at a police station for questioning. The person has the right to have intimation sent to a solicitor of the fact of his detention, attendance or arrest, and also to have a private consultation with a solicitor before any questioning by a constable begins, and at any other time during such questioning. Only in exceptional circumstances may the police delay the suspect's exercise of his right to have a private consultation with a solicitor, so far as this is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders. The new provision is as follows:

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.]

When does *Cadder* engage?

It appears for the moment the Crown take the view that *Cadder* and the protections which flow from it start at the point that someone is detained. This approach is self-serving and surely incorrect, given any reasonable analysis of *Cadder*. We start the analysis by noting that the decisions in the earlier ECHR *Salduz* case and *Cadder* itself, both follow a plethora of decisions which all robustly

endorse the right against self-incrimination. As a matter of fact both cases involved individuals in detention who were subject to questioning – or, as it is described, “interrogation” – by the police and were not offered the right to consult a lawyer before being questioned. I suggest that although detention was part of the facts in each case, and as such is part of the judgements, it is not actually detention which triggers the right not to self-incriminate, but rather that it is the wish by the police to question or interrogate someone in the category of a suspect. The police’s purpose here is to obtain information as to the possible guilt of the person they have identified as a suspect; in short, this is questioning seeking to incriminate. I therefore suggest the right to consult a lawyer arises not from detention, but rather applies from the moment the police wish to question a suspect. It is convenient at this point to restate the terms of the protection by Article 6 of the European Convention on Human Rights. Article 6(1) provides:

“In the determination [...] of any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law [...]”

While Article 6(3) further provides:

“Everyone charged with a criminal offence has the following minimum rights: [...]”

(c) 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.”

In *Cadder* the detention was in terms of section 14 of the Criminal Procedure (Scotland) Act 1995, which required that the police had identified him as a suspect:

“ (7) Where a person is detained under subsection (1) above, a constable may –

(a) without prejudice to any relevant rule of law as regards the admissibility in evidence of any answer given, put questions to him in relation to the suspected offence;

(b) exercise the same powers of search as are available following an arrest [...]

(9) A person detained under subsection (1) above shall be under no obligation to answer any question other than to give the information mentioned in subsection (10) below, and a constable shall so inform him both on so detaining him and on arrival at the police station or other premises.”

Following *Cadder*, many of us look back with a sense of shame and astonishment at what prevailed beforehand, the origins of which came from the recommendations of the Thomson Committee, published as *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218) (October 1975). Far from protecting against self-incrimination, the recommendations which then became law approved of a system based, in part, on obtaining confession-based evidence. Paragraph 7.16 of this report states:

“Although a person who has been charged with an offence is entitled to an interview with a solicitor, we *recommend* that a solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor. It is for this reason that we recommend in chapter 5.08 that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor.”

The Grand Chamber of the European Court of Human Rights, in the *Salduz* case (heard by 17 judges) marked a change in direction and a resolute restatement of the protection against self-incrimination. They reaffirmed the principles which are said to lie at the heart of a fair trial, and recognised the

need to protect the accused against abusive coercion on the part of the authorities. They made reference to the aims pursued by Article 6 above, notably the equality of arms between the investigating or prosecuting authorities and the accused. They recognised the vulnerable position of the suspect at the investigation stage of the proceedings, and that fairness and balance was achieved by the presence of a lawyer, whose task it is to ensure that the right of an accused not to incriminate himself is respected. Early access to a lawyer is highlighted as a safeguard to which the Court will have particular regard when examining whether there is protection against self-incrimination.

In paragraph 55 of the *Salduz* judgement, the Grand Chamber held:

“Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently ‘practical and effective’ article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”

The emphasis here is clear; the presence of a lawyer is central to ensuring respect for the right of a suspect not to incriminate himself. They also say “from the first interrogation of a suspect by the police”, *not* from the first moment of detention. It is clear that questioning designed to extract incriminating evidence from a suspect can take place just as easily in the suspect’s home, place of work, on the telephone, by email, or in the back seat of a police car long before any issue of detention arises. If detention was the trigger point of a suspect’s right to protection against self-incrimination, it would follow that “resourceful” investigators may be tempted to question suspects prior to detaining them. Such a conclusion is untenable, and no doubt this is why the amended legislation affords the same rights to those suspects who attend for interview on a voluntary basis as it does to those formally detained.

Cadder and *Salduz* are part of a consistent jurisprudence well established and consistently applied. In *Jalloh v Germany* (2006) 44 EHRR 32, paragraph 110, the court observed that the privilege against self-incrimination is commonly understood in the ECHR contracting states and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning, and not to be compelled to provide a statement. *Cadder* made clear (in paragraph 48) that “the *Salduz* principle cannot be confined to admissions made during police questioning. It extends to incriminating evidence obtained from elsewhere as a result of lines of inquiry that the detainee’s answers have given rise to”. This touches directly upon the requirement to provide an Operational Statement by any police officer who is under suspicion of having committed a criminal offence. This statement, which always forms part of the report to the Procurator Fiscal, will provide to the prosecutor information he would otherwise not be entitled to by someone choosing to remain silent, and this will include, in many cases, lines of further investigation for the prosecutor. It places the investigators and the Crown in a better position than they are entitled to be, and offends the principle of equality of arms. By forcing an officer to provide an Operational Statement under threat of disciplinary consequences the police, as investigators, get what they might otherwise not get where the right of silence is exercised. In doing so I suggest they breach the protection against self-incrimination.

Lord Rodger in *Cadder* held;

“The European Court’s reasoning in *Salduz v Turkey* (2008) 49 EHRR 421 starts from the implied right of an accused person under article 6(1) and (3)(c) of the European Convention

not to incriminate himself. The recognition of this right under the Convention can be traced back to the decision of the Grand Chamber in *Saunders v United Kingdom* (1996) 23 EHRR 313, 337, para 68:

“The Court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6.... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention” (internal citations omitted).

This reasoning is reflected in *Salduz*, 49 EHRR 421, 436, para 54. To avoid the risk that the police may use coercion or oppression to obtain evidence from a suspect, the Grand Chamber goes on to derive a further implied right, viz the right to early access to a lawyer. Again, the court is building on its existing case law. It cites, inter alia, *Murray v United Kingdom* (1996) 22 EHRR 29, 66, para 63:

“National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”

In reviewing this jurisprudence Lord Roger concludes that the Grand Chamber in *Salduz* derives this right of access to a lawyer to mean access is to be provided from the first interrogation of the suspect, rather than from the time when he is taken into police custody. In paragraph 71 he makes clear that the right to a lawyer is triggered not by the suspect being in custody but from the suspect's right to legal assistance at the initial stages of police questioning. Any other interpretation would be perverse.

Whilst the point that someone is in custody or detention as a suspect is easy to identify, the important question becomes when do such persons become a suspect in the eyes of those investigating? Lord Rodger states at paragraph 85 that “The very real difficulty for police officers – and for courts – was to determine at what point someone passed, from being a suspect who could be questioned, to being a suspect who could no longer be questioned since there was enough evidence to charge him”. He refers to the judgement in *Chalmers v HM Advocate* 1954 JC 66, 81– 82:

“But there comes a point of time in ordinary police investigation when the law intervenes to render inadmissible as evidence answers even to questions which are not tainted by such methods. After the point is reached, further interrogation is incompatible with the answers being regarded as a voluntary statement, and the law intervenes to safeguard the party questioned from possible self-incrimination. Just when that point of time is reached is in any particular case extremely difficult to define – or even for an experienced police official to realise its arrival. There does come a time, however, when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in

process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement.”

Lord Rodger concludes that:

“In summary, at the stage of routine investigation, the right to protection against self-incrimination was not in play because the individuals were being questioned as potential witnesses rather than as suspects. But, once the police officer realised, or should have realised, that a particular individual was under serious consideration as the perpetrator of the crime, the common law intervened to safeguard him from possible self-incrimination and the only admissible evidence was his own voluntary statement. Admittedly, the intervention of the common law did not go so far as to secure him the right to consult a lawyer.”

It is clear the status of an individual as a suspect and the consequential right to be protected against self-incrimination is not dependent on whether someone is detained; it depends on whether or not they are a suspect. The decision in *Cadder* puts the police and prosecution in Scotland in the same position in this respect as the police and prosecution in the rest of the United Kingdom, and other countries which are members of the Council of Europe.

Further support for the proposition that the matter of importance is whether someone is a suspect rather than someone detained is found in the judgement of Lord Brown at paragraph 108:

“The critical point can, I think, be comparatively shortly made. The Strasbourg jurisprudence makes plain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence and is safeguarded (perhaps most obviously by the video recording of any interviews) against any possibility that by threats or promises of one sort or another he may nonetheless be induced against his will to speak and thereby incriminate himself. It is imperative too that before being questioned he has the opportunity to consult a solicitor so that he may be advised not merely of his right to silence (the police will already have informed him of that) but also whether in fact it is in his own best interests to exercise it: by saying nothing at all or by making some limited statement. He must in short have the opportunity to be advised by a solicitor not to make incriminating statements despite whatever inclination he might otherwise have to do so. It is clearly Strasbourg's judgment that whatever in the result may be lost in the way of convicting the guilty as a result (wholly or partly) of their voluntary admissions is more than compensated for by the reinforcement thereby given to the principle against self-incrimination and the guarantees this principle provides against any inadequacies of police investigation or any exploitation of vulnerable suspects.”

Conclusion

The European Court has consistently reiterated that a suspect has a right to remain silent and cannot be forced to contribute to the evidence against him. In *Saunders v United Kingdom* (19187/91), a case involving DTI inspectors conducting a statutory investigation, the Court held that the right not to incriminate oneself by remaining silent during interviews was an internationally recognised standard central to the concept of a fair hearing under the above Article 6. Whether the right had been infringed depended on the use made by the prosecution during the trial of statements, but they noted that the appellant had been obliged by law to make the statements. It was irrelevant that the statements were not in themselves incriminating (in the sense of making admissions of guilt), as even neutral evidence could be used in a manner that aided the prosecution. The court held that his rights had been infringed. This, incidentally, makes clear that the right to remain silent and to consult a solicitor arises not only in cases where the

police are conducting the investigation, but will arise in any circumstance where those investigating and gathering evidence against a suspect do anything which breaches the suspect's right against self-incrimination.

The obvious question is: what should an officer do when he is asked or compelled to submit an operation statement? As the law stands at the moment, it seems the appropriate advice is for the officer to say that he regards himself in the category of a suspect and ask for confirmation of his status. If indeed it is the case that he is a suspect, then he should say that he would like to have advice from a solicitor, but that if he is compelled to submit a statement without advice he will note this in his notebook. For those who have been required to submit a statement and who face trial a Devolution Minute should be lodged.

On a wider front it may be appropriate for the Scottish Police Federation to give consideration to raising this matter formally with the Crown Office, seeking agreement as to advice that they might offer to the police when conducting such investigations.

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