

SASO Annual Conference – 19 November 2011

The impact of Europe on Criminal Justice in Scotland

The role of the Supreme Court of the United Kingdom

The Lord Rodger of Earlsferry Memorial Lecture

Lord Hope

This lecture is being given in memory of the late Lord Rodger of Earlsferry. The high offices which he held during his lamentably short life were many, but none of them were as significant for the development of our law as those of Lord of Appeal in Ordinary and Justice of the Supreme Court of the United Kingdom. I had the great privilege of working closely with him throughout the ten years that he occupied these offices. It was those years that moulded the role which the Supreme Court now fulfils in regulating the way that the Convention rights are to be given effect in our criminal justice system. It was through him that Europe began to make its impact. I know what held his attention – and what irritated him, for in the nicest possible way like so many very clever men he was often irritated. I also have a good idea of what he would have thought of the McCluskey Group's suggestions for the reform of the Court's role¹ and of Lord McCluskey's criticisms of our decision in the *Cadder* case², although we never got round to discussing them. He died just as the storm was breaking as a result of our judgment in *Fraser v HM Advocate*³. In one of my last emails to him I wrote my comment in Latin

¹ The Group's Final Report was published on 14 September 2011. It can be found at <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf>.

² *Cadder v HM Advocate* 2011 SC (UKSC) 13; see Lord McCluskey, *Supreme Error* 2011 Edin LR 276.

³ 2011 SC (UKSC) 13.

about what we should expect after it was given: *ruat caelum, fiat justitia*⁴ – let the skies fall in, justice must prevail. He did not reply, but I am sure that those words express exactly how he felt. He was not one for making the slightest compromise on the principles that he believed in.

I should like in this lecture, therefore, to trace the development of the Supreme Court's jurisdiction in devolution cases during Lord Rodger's period. That development began, of course, in the comparatively serene confines of the Judicial Committee of the Privy Council in Downing Street – the JCPC as it came to be called in Scotland, although the Law Lords who sat there used to refer to it simply as "the Privy". As the Supreme Court inherited the entirety of the Privy's jurisdiction on devolution issues when it was created on the abolition of the appellate jurisdiction of the House of Lords⁵, it will be simpler to think how the Justices in the Supreme Court are regarded now as I trace this development. So from time to time in this lecture I will use the expression "the Supreme Court" to refer to the two institutions collectively.

The main drivers towards the position that we have now reached occurred before the reform that led to the creation of the Supreme Court took place. As this conference is all about the impact of Europe, it is worth noting that these drivers are not to be found in any of the Convention rights. The two pillars on which the Court's jurisprudence rests are to be found in the wording of the Scotland Act 1998 itself. It is section 57(2) of that Act, and the fact that the definition of "Scottish Ministers" includes the Lord Advocate,

⁴ This maxim, which is not attributable to any classical Latin source, is sometimes phrased "Fiat justitia, ruat caelum".

⁵ Constitutional Reform Act 2005, section 57 and Schedule 10.

that has created the situation which appears to have created so much difficulty. But some may see the jurisdiction which the Scotland Act brought into existence as the foundation for a welcome reinvigoration in our system of respect for human rights.

When I cast my mind back to the winter of 1997 when the Scotland Bill was being discussed at the Committee Stage in the House of Lords I cannot recall any mention being made of the effect that section 57(2) was expected, let alone intended, to have on the system for the prosecution of crime in Scotland. Lord Rodger did not take part in these debates as during this period, he was still the Lord Justice General. But I did and so did Lord Clyde, whom Lord Rodger was to succeed as a Lord of Appeal in Ordinary on his retirement in 2001. It was still acceptable in 1997 for the Law Lords to take part in the ordinary business of the House of Lords. That all came to an end in 2000 when the Human Rights Act 1998 came into force and the Law Lords had to be especially careful to be seen to be independent of the legislature, but in 1997 nobody thought that our participation in debates on the Bill was objectionable. I was not present during all the debates, and I may have missed something. But to say that the scene that the legislators had in mind in 1997 has changed would be a massive understatement. The changes that have taken place have been far-reaching and they have been fundamental. And we have lost not only Donald Dewar who was the architect of the Scotland Bill and who would, had he lived, still have had much to say about how the process of devolution should be handled. We have lost Lord Rodger too.

It was no secret among his colleagues that Lord Rodger did not think much of devolution. He had worked closely with the powers that be at Westminster. He knew how their system worked, and he admired it. Faced with legislation for devolution that he did not much favour, he dug his heels in. He took the legislation literally, warts and all. He relished the contact which devolution issues gave him with Scots criminal law, to which he had devoted so much of his time before he went onto the Bench. But his approach to the legislation was to take the words of the statute as he found them.

As I have already indicated, he was not interested in trying to smooth things out or in compromise. For example, he deplored the phrase “the Scottish Government” as this was not then to be found in the statute. He simply could not bring himself to use it in any of his judgments⁶. And one of the very few occasions when we disagreed with each other in public was in the case of *Martin*⁷, which was about the legislative competence of legislation by the Scottish Parliament which increased the sentencing powers of sheriffs sitting summarily. He analysed the provisions of the Scotland Act about legislative competence with relentless energy and came to a conclusion which the majority of the court could not accept. Lord Walker, who was one of the majority, said that it was important to try and see the provisions in question as part of a rational scheme defining the Parliament’s legislative competence⁸. Lord Rodger said in reply that up to then judges, lawyers and law students had had to try to work out what Parliament meant when, in enacting the Scotland Act, it referred to a rule of Scots criminal law that is “special to a reserved matter”:

⁶ See *Martin v Most* 2010 SC (UKSC) 40, paras 85-89.

⁷ *Martin v Most* 2010 SC (UKSC) 40.

⁸ *Ibid*, para 52.

“That, in my view, is a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery.”⁹

The role he saw for the Judicial Committee and in its turn the Supreme Court – and it is no secret that he did not think much of the setting up of that institution either – was the role it had been given by words used in the Scotland Act: no more than that, but certainly no less¹⁰.

The origin of the jurisdiction that is now vested in the Supreme Court is to be found, of course, in the concept of devolution itself. Central to the whole scheme were to be the limits that the statute placed on the legislative power of the Scottish Parliament and on the powers of the Executive. The impact of Europe was to be found in the provisions that were designed to ensure that these institutions gave effect to the United Kingdom’s treaty obligations. They confirmed that the new system was subordinate to Community law. They also confirmed the position that was to be established in domestic law when the Human Rights Act 1998 took effect. Convention rights were to be enforceable in domestic law. In very simple terms, the role of the Supreme Court was to supervise the exercise of their powers by the Parliament and the Executive – but, of course, only when it was called upon to do so.

It has been suggested that the role that was envisaged for the Supreme Court was that of a constitutional court. The McCluskey Group said in its recent report that this was to ensure that the Convention rights were interpreted and understood in the same way

⁹ Ibid, para 149.

¹⁰ See fn 47.

throughout the United Kingdom¹¹. I think that there was a bit more to it than that. Reading the package as whole, including the provisions that excluded reserved matters from the legislative competence of the Scottish Parliament, the Supreme Court was given a general supervisory role over the entire process. This was to be exercised in a variety of ways – by the scrutiny of Bills prior to their enactment¹², by appeals in devolution issues from the superior courts and on references from the superior courts and by law officers¹³. These words, as Lord Rodger would insist, were carefully chosen and they must be taken to mean what they said. The functions that these various provisions contemplate are all different. The issues that they gave rise to were likely to be constitutional in nature. But I think that the general idea at the time of enactment was simply that an appeal in a devolution case would ultimately have to be dealt with by the court of last resort in the United Kingdom in the same way as any other kind of appeal. It was, of course, understood that there would be no difference between Scots law and English law as to the meaning to be given to any of the Convention rights. So in that respect decisions of the court of last resort could be expected to iron out any differences as to their meaning that may have emerged in the lower courts.

The body that was entrusted with the ultimate responsibility of determining devolution issues was the Judicial Committee of the Privy Council – a comparatively obscure organisation which dealt with appeals from the British Overseas Territories, the Crown Dependencies and several independent states within the Commonwealth. This was thought to be a preferable, and less provocative, alternative to the Appellate

¹¹ Final Report, para 24.

¹² Scotland Act 1998, section 33.

¹³ Ibid, Schedule 6, paras 10-13 and 33 and 34.

Committee of the House of Lords which was too easily identifiable with the Westminster Parliament. But it was to fulfil the same functions as the appellate committee of the House of Lords would have done had it not been open to that objection. So when the Act used the word “appeal” in para 13 of Schedule 6 to the Scotland Act it must be taken to have had in mind the ordinary process of appeal that everyone was familiar with. If the analogy with a constitutional court is meant to suggest that the powers of the court in handling appeals were in some unspoken way limited, Lord Rodger would, I am sure, have rejected it.

It was, of course, never the intention that the Supreme Court should become a court of last resort in matters of Scots criminal law in place of the High Court of Justiciary. The statutory provision that declares that the decisions of that court shall be final and not open to review by any court whatsoever remains unchanged and in full force and effect, just as it always was¹⁴. But the risk that the Supreme Court might be seen to be entrenching on that court’s exclusive jurisdiction in our system of criminal justice was not foreseen. The main area for disagreement between Holyrood and Westminster was thought likely to be about the extent of the reserved matters and the legislative competence of the Scottish Parliament, to which particularly close attention was paid when the legislation was being drafted.

I said earlier that the two pillars on which the Supreme Court’s jurisprudence rests are to be found in the wording of the Scotland Act 1998. The first pillar was revealed to us when, in a judgment which he delivered in September 1999, Lord Penrose held in *HM*

¹⁴ Criminal Procedure (Scotland) Act 1995, section 124(2).

*Advocate v Robb*¹⁵ that the tendering by the Crown of the transcript of an incriminating statement made by the accused when he was being interviewed by the police as a detainee under section 14 of the Criminal Procedure (Scotland) Act 1995 was an act of the Lord Advocate within the meaning of section 57(2) of the Scotland Act. Rejecting the Crown's argument that the word "act" in that subsection did not include everything which was incidental to the Lord Advocate's powers, he declared that there was no justification for giving the word a restricted meaning. The word was apt to encompass all actions taken or avoided in the prosecution of offences¹⁶. He referred to Lord Justice General Rodger's observation three months earlier in *HM Advocate v Scottish Media Newspapers Ltd*¹⁷ that, as he was a member of the Scottish Executive, the Lord Advocate had no power to move the court to grant any remedy which would be incompatible with the European Convention on Human Rights. Lord Penrose's declaration was acquiesced in by the Lord Advocate, and it was referred to with approval by the Judicial Committee of the Privy Council in *Montgomery v HM Advocate*, which was the first devolution issue appeal which was heard by that body, with the leave of the Appeal Court, in October of the same year¹⁸. The huge volume of devolution minutes that soon followed showed how far reaching that declaration was.

Robb does make rather strange reading today, following the Supreme Court's ruling in *Cadder's* case¹⁹ in the light of the ruling by the Grand Chamber of the

¹⁵ 2000 JC 127.

¹⁶ *Ibid*, p 131.

¹⁷ 2000 SLT 331, p 333.

¹⁸ *Montgomery v HM Advocate* 2001 SC (PC) 1, pp 18 and 32.

¹⁹ 2011 SC (UKSC) 13.

Strasbourg court in *Salduz v Turkey*²⁰. Robb was charged with an assault, and the Crown anticipated that the eyewitness evidence against him was likely to be weak. So the main source of the evidence against him was the admission he made when he was being interviewed while in detention. As the questioning became more penetrating and he was asked why he had nothing to say he responded “I just want to speak to a lawyer”. He repeated this response several times. He was told that his lawyer would not be coming, but that he might get access to one when he was arrested. Eventually he began to provide self-incriminating evidence and was then charged. Lord Penrose, who was dealing with the issue at the preliminary stage, left it to the trial judge to decide whether the fairness of the trial would be infringed by the leading of the evidence. He rejected the argument, based on a decision of the Strasbourg court in a case from Northern Ireland²¹, that the concept of fairness in article 6 required that the accused should have the benefit of the assistance of a lawyer at the initial stages of police interrogation. What took place in that case was unsurprising, measured by the standards of those days, and Lord Penrose quite rightly left open the question whether as a result of that interrogation the accused would be deprived of a fair trial. As we now know, however, the position that a detainee was not entitled to access to a lawyer when being questioned by the police became unsustainable once the ruling in *Salduz* had been given.

The second pillar is to be found in Lord Justice General Rodger’s declaration in *HM Advocate v Scottish Media Newspapers Ltd*²² that, as he was a member of the Scottish Executive, the Lord Advocate had no power to move the court to grant any

²⁰ (2009) 49 EHRR 19.

²¹ *Murray v United Kingdom* (1996) 22 EHRR 29.

²² 2000 SLT 331, p 333.

remedy which would be incompatible with the European Convention on Human Rights. The words “no power” are as absolute as they are uncompromising. Lord Rodger, of course, knew that perfectly well. But he was at pains to point out that this is precisely what the section 57(2) of the Scotland Act itself says:

“A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.”

He returned to the issue in *R v HM Advocate*²³ which was a case about the consequences of the Lord Advocate’s failure to bring proceedings within a reasonable time. He put the point this way:

“The conclusion must therefore be that, whenever a member of the Scottish Executive does an act which is incompatible with Convention rights, the result produced by all the relevant legislation is not just that his act is unlawful under section 6(1) of the Human Rights Act. That would be the position if the Scotland Act did not apply. When section 57(2) is taken into account, however, the result is that, so far as his act is incompatible with Convention rights, the member of the Scottish Executive is doing something which he has no power to do: his ‘act’ is, to that extent merely a purported act and is invalid, a nullity. In this respect Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown.”

One hears the complaint from time to time that the devolution system places Scots criminal law at a disadvantage as compared with other parts of the United Kingdom as the Lord Advocate has no power whatever to act incompatibly with the Convention rights, whereas elsewhere an act of the prosecutor which is not open to this very precise and prescriptive objection. There is force in this complaint, as a violation that occurs in England and Wales or Northern Ireland will be unlawful under the Human Rights Act²⁴

²³ 2003 SLT 4, para 128.

²⁴ Human Rights Act 1998, section 6(1).

with the result that the court can grant such remedy or relief as it considers appropriate²⁵, but the act which gave rise to it is not a nullity. Should we have not followed that approach in Scotland? To them Lord Rodger's reply would simply be: look at section 57(2) and see what it says – tell me how it can be said to mean something else. There was, of course, no answer to his unflinching logic.

The effect of the rulings in *Robb* and in *Scottish Media Newspapers Ltd* has been to focus attention on the concept of a fair trial, and what in that respect article 6(1) of the Convention guarantees, in a way that in 1997 was quite unforeseen. But we are where we are, and their effect has been to bring before the criminal courts very many so-called devolution issues where it is contended that the prosecutor has no power to do this thing or the other and that as a consequence the proceedings should be stopped or a conviction set aside. It has been suggested that the Supreme Court, which is the final port of call for issues of that kind under the Scotland Act, has been routinely interfering with Scottish legal system. In fact the devolution cases that have reached the stage of a hearing in the Supreme Court are, in comparison to the whole, very few: a tiny tip of a very large iceberg. Much more often, where we have been asked to give leave because leave to appeal was not given by the Appeal Court, we have refused to give leave.

I do not have figures for the entire period since the start of the system in the JCPC, but we have refused leave in 19 cases since the jurisdiction in devolution cases was transferred to the Supreme Court in October 2009 and given leave in only 2. Only 29 cases in all have gone to a full hearing since the jurisdiction was introduced 12 years

²⁵ Ibid, section 8(1).

ago: 14 of them with leave given by the Appeal Court, 6 of them on references by the Appeal Court or by the Lord Advocate and 9 in which we gave leave to appeal. This is an average of about two and a half devolution cases heard a year. As one would expect, all of these cases raised very significant issues. If that were not so, they would not have been given leave or referred to us to consider. It is worth repeating that in the majority of cases that have been taken to a full hearing it was the Appeal Court in Edinburgh that gave leave or sent the case to us on a reference. We have disagreed with the Appeal Court on the question of leave on only 9 occasions since the jurisdiction came into operation in 1999 (*Holland*²⁶, *Sinclair*²⁷, *Kearney*²⁸, *DS*²⁹, *McDonald*³⁰, *Burns*³¹ and *Allison*³² in the JCPC and *Cadder*³³ and *Fraser*³⁴ in the Supreme Court) and in 4 of these cases (*Kearney*, *DS*, *McDonald* and *Allison*), after hearing the argument, we dismissed the appeal.

Two themes in particular stand out. One is disclosure. That is what a sextet of these cases – *Holland* and *Sinclair*, *McDonald* and *Murtagh*³⁵ and *Allison* and *McInnes*³⁶ – were all about. The other is the right of access to a solicitor when being questioned by the police. This to be found in *Cadder* and what have been referred to as “the sons of *Cadder*” cases. They are concerned with the circumstances in which the right of access

²⁶ 2005 1 SC (PC) 3.

²⁷ 2005 1 SC (PC) 28.

²⁸ 2006 SC (PC) 1.

²⁹ 2007 SC (PC) 1.

³⁰ 2010 SC (PC) 1.

³¹ 2010 SC (PC) 26.

³² 2010 SC (UKSC) 19.

³³ 2011 SC (UKSC) 13.

³⁴ 2011 SC (UKSC) 13.

³⁵ 2010 SC (PC) 39.

³⁶ 2010 SC (UKSC) 28.

to a solicitor exists when the accused has not yet been detained in a police station and the circumstances in which that right can be shown to have been waived. We have dealt with the cases in the first group³⁷. We will be issuing our decision in the group of cases about waiver³⁸ next week. It is remarkable that by the use of the devolution issue mechanism, which relies of course on Strasbourg case law, Scots practice on both of these issues is being brought into line with what the position has been in England and Wales for decades. I do not think that either of us would have been attracted to that result had it not been for the influence of Strasbourg. As Lord Rodger said in *Murtagh*³⁹, it is no part of the Supreme Court's functions to keep English and Scottish procedures in alignment. There have long been substantial differences between them which in general have caused no particular difficulty, since the aim of suppressing crime and punishing criminals throughout the United Kingdom can be achieved by the two systems working in parallel⁴⁰. But when the Strasbourg cases came to be studied in the Supreme Court the conclusions that they led to were irresistible. It has been the impact of Europe that has brought this about.

The development of the law about disclosure was, as Lord Rodger put it in *Murtagh*⁴¹, a long-running saga. It really began with an announcement by the Solicitor General in the High Court of Justiciary in *McLeod v HM Advocate (No 2)*⁴² that the Crown would no longer make a claim for confidentiality for police statements of Crown

³⁷ *Ambrose v Harris* [2011] UKSC 43; *H M Advocate v P* [2011] UKSC 44.

³⁸ *McGowan v B* [2011] UKSC 54; *Jude v HM Advocate* [2011] UKSC 55.

³⁹ 2010 SC (PC) 39, para 46.

⁴⁰ See *Burns v HM Advocate* 2010 SC (PC) 26, para 19, per Lord Rodger.

⁴¹ 2010 SC (PC) 39, para 46.

⁴² 1998 JC 67.

witnesses. This engaged Lord Rodger's interest as a former Law Officer and Lord Justice General. The matter then proceeded step by step through the series of decisions in which he took part, assisted by a careful review conducted by Lord Coulsfield⁴³ and by the active co-operation of the Crown Office as it reformed its practice under the leadership of the then Lord Advocate, Dame Elish Angiolini. The presentation of the Crown's position to the Supreme Court in *Murtagh* by the then Solicitor General, Frank Mulholland, now the Lord Advocate, was a model of clarity and fairness. There is a diminishing backlog of cases under the old system which still have to be sorted out. But I think that we have ended up with a system of disclosure which, taken overall, is both fair and workable. Lord Rodger's contribution to this exercise was uniquely valuable. His insight into the workings of our prosecution system inspired confidence in all of us throughout this exercise.

The decision in *Cadder* is so well known that I need say very little about it. In his introduction to his Review was published last Thursday⁴⁴ Lord Carloway said that it was a serious shock to the system. No-one could disagree with that, or with his comment that there is an acute need to ensure that, so far as possible, the system is not vulnerable to further upheaval as a result of a single court judgment. I would like to take this opportunity of paying tribute to the outstanding work which he and his Review team have done to measure up to that challenge. Some of their recommendations are controversial, as one would expect. Others are plainly very sensible and, one might even say, obviously overdue. Whatever one thinks of *Cadder*, it can at least be said that our decision in that

⁴³ *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (August 2007).

⁴⁴ *The Carloway Review*, 17 November 2011.

case has proved to be a catalyst – a catalyst for identifying and putting into effect changes to ensure that, as Lord Carloway himself as put it, the system of criminal justice in Scotland fully embraces and applies a human rights based approach.

Lord McCluskey has been much less tactful. He has described the decision in *Cadder* as “flawed, mistaken and misconceived”⁴⁵. In the evidence that he gave to the Scotland Bill Committee in the Scottish Parliament on 1 November 2011 he said that it was “a wrong and bad decision”⁴⁶. As Lord McCluskey sees it, the Supreme Court should have followed the example it set in *R v Horncastle*⁴⁷. In that case, which was an English appeal, a court of nine Justices refused to apply a decision of the Strasbourg court called *Al Khawaja*⁴⁸ in which that court held that a conviction which was based solely or to a decisive extent on hearsay evidence was an infringement of the right to a fair trial. The Supreme Court thought that this was one of the rare occasions when the domestic court had legitimate concerns as to whether the Strasbourg court had sufficiently appreciated or accommodated particular aspects of our domestic system⁴⁹. The question was whether the regime for the use in an English criminal trial of hearsay evidence of a witness who had died or was absent due to fear for her safety which had recently been enacted by Parliament⁵⁰, after consideration of the issue by the Law Commission, would result in an unfair trial. Lord McCluskey’s point is that we should have followed that example and refused to apply *Salduz* in the *Cadder* case for all the reasons that the

⁴⁵ *Supreme Error* 2011 Edin LR ...

⁴⁶ The Scottish Parliament, Official Report Debate Contributions, 1 November 2011, p 12 of 58.

⁴⁷ [2010] 2 AC 373.

⁴⁸ *Al Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

⁴⁹ [2010] 2 AC 373, para 11, per Lord Phillips of Worth Matravers.

⁵⁰ Criminal Justice Act 2003, section 116.

Appeal Court gave when the same issue was before it in the seven judge case of *McLean*⁵¹.

Lord Rodger, to whom that criticism is directed as well as me, would have had none of that. The situation that the court was faced with in *Cadder* was entirely different. *Salduz* was a unanimous decision by the Grand Chamber. *Al Khawaja* was a decision of the Fourth Section, so it was quite reasonable for the court to be asked to think again. That was not so in *Cadder*. Sir Nicolas Bratza, the United Kingdom judge on the court in *Salduz*, made it clear in his joint concurring opinion that he did not think that in that case the Grand Chamber had gone far enough. The fact that there was already a right of access to a lawyer under statute in each of the other parts of the United Kingdom would also have made the position that would have had to have been adopted on our behalf very difficult. As Lord Rodger put it in his judgment, there was not the slightest chance that Strasbourg would have found that, because of the protections in the Scottish legal system, it was compatible with the Convention rights to omit that safeguard.⁵² We were, of course, referred to *Horncastle*.⁵³ Indeed three of the seven Justices in *Cadder* sat on that case too,⁵⁴ and we were all very familiar with it as it had given rise to so much discussion in the court. Needless to say, Lord McCluskey sat on neither of these cases. He is entitled to his views, of course. But Lord Rodger would have rejected utterly the idea that our decision in *Cadder* was misguided and misconceived.

⁵¹ *HM Advocate v McLean* 2010 SLT 73.

⁵² 2010 SC (UKSC) 13, para 93.

⁵³ See para 45 of my judgment.

⁵⁴ Lords Brown, Mance and Kerr.

Sir Nicolas Bratza took part in a seminar which was held in the Advocates Library in Edinburgh in March this year at which *Cadder* and its implications for the Scottish legal system were discussed. He said in his paper that, as President of the Grand Chamber in *Salduz*, he had to accept at least part of the responsibility for that judgment but that he found it difficult to accept some of the criticisms that have been made of it⁵⁵.

He went on to say this:

“The fact remains that it was judgment which was a foreseeable development of the Court’s more recent case-law; it was a judgment which was consistent with contemporary standards in the procedural protection of those suspected of a criminal offence; and it was a judgment supported by the practice in a substantial number of Member States, including, as is pointed out by the Supreme Court itself, in the jurisdiction of England and Wales.”

This is as powerful an endorsement of Lord Rodger’s appraisal of the situation as one could wish to find. Sir Nicolas Bratza was recently elected by his colleagues to be the President of the Strasbourg court. His view, surely, must finally put to rest the idea that the decision in *Cadder* was wrong because a different ruling could have been obtained from Strasbourg. The Supreme Court is, of course, well aware that each decision that comes from Strasbourg needs to be examined very carefully to see whether it is directed to its own facts or is laying down a fundamental principle, and if it is the latter whether there is room for us to decide not to follow it. *Salduz* was simply not a case of that kind.

I should make it clear that the results that Lord Rodger and I arrived at in these cases were not dictated to us by our English colleagues. They agreed with us, but it was the two Scots Justices who took the lead and our colleagues were content that we should do this. In some of the earlier cases which raised other issues Lord Bingham wrote the

⁵⁵ *The Relationship between the UK courts and Strasbourg* (2011) EHRLR 505, p 510.

leading judgment⁵⁶. He had a particular interest in the law relating to Convention rights and on almost every issue we welcomed the contribution he made. More recently our English colleagues have supported the Scottish Justices in resisting a more expansive interpretation of the jurisprudence of the Strasbourg court that has been urged on us by one of our number than that which Lord Bingham's approach in the well-known case of *Ullah*⁵⁷ would seem to justify. It has been suggested that we should lay down what would appear to be inescapable rules for the conduct of interviews in the police station – “an indispensable pre-requisite”, as it has been put⁵⁸ – rather than to allow the current procedures and any improvements that may be made to them to be assessed in the broader context of whether there has been a fair trial. I have been determined to resist that approach. It is not only that for us to lay down rules would create the same kind of upheaval that *Cadder* gave rise to, because of the prescriptive nature of section 57(2) of the Scotland Act. It also would run contrary to Lord Bingham's view that, while it is open to member states to provide for rights more generous than those guaranteed by the Convention, such provision should not be the product of interpretation of the Convention by national courts. Strasbourg itself too is quite cautious about this. Sir Nicolas Bratza said in his Edinburgh paper that it has been careful, in general, to leave the national authorities to devise a more Convention-compliant system without itself imposing specific requirements on the State⁵⁹. The words “in general” acknowledge, as *Salduz* itself shows, that there will be exceptions to that approach. The Supreme Court should, I believe, be no less careful in the way that it deals with the Scottish system.

⁵⁶ Eg *Brown v Stott* 2001 SC (PC) 43; *Dyer v Watson* 2002 SC (PC) 89.

⁵⁷ *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 423, para 20

⁵⁸ *Jude v HM Advocate* [2011] UKSC 55, para 53.

⁵⁹ fn 48, p 510.

We have not had the benefit of Lord Rodger's views on this most recent debate. But I am confident that he would not have wanted to impose indispensable rules on this area of our practice unless they were to be found to have been clearly stated in the jurisprudence of the Strasbourg court. To do that, as he said in one of his unpublished lectures, would be to introduce under the guise of applying the Convention rights free-standing rights of the court's own creation. That is not the function of the judges under the Scotland Act.

We had a narrow escape on the issue of time limits. English law has always taken a more relaxed view than we have of the potential injustice of holding people of custody for long periods while awaiting trial. Our 110 day rule, which has of course been modified to some degree, would have been quite impossible for them to live with due to their backlog of cases and what appears to us here to be the rather leisurely way cases proceed to trial in that jurisdiction. The issue came before us in the case of *R v HM Advocate*⁶⁰ which I have already mentioned, when the three Scots – Lord Clyde, having recently retired, was sitting with us on that case – disagreed with Lord Steyn and Lord Walker. As Lord Rodger explained⁶¹, the appellant was using the power given to him by the Scotland Act to rely on his rights under article 6(1). More particularly, he was trying to show that the Lord Advocate's act in continuing to prosecute him was incompatible with his right to have the charges in the indictment determined within a reasonable time. If he could show that, then section 57(2) provided that the Lord Advocate had no power

⁶⁰ 2003 SC (PC) 21.

⁶¹ *Ibid*, para 124.

to continue to prosecute them. His act was not just unlawful. He had no power to do it at all⁶². Lord Steyn's view was that he did have that power if a fair trial was still possible, and that the remedy which the appellant sought, which was a declaration that the charges could not proceed to trial, was not the appropriate remedy. When the same issue came before the House of Lords in an English appeal in which Lord Bingham delivered the leading judgment⁶³ we were predictably outnumbered by 5 to 2. It seemed to be only a matter of time before the issue was brought back as a devolution issue where, without a third Scottish judge, we would be almost certainly in the minority again. When the issue did come back⁶⁴, however, by a lucky chance Strasbourg had spoken⁶⁵ – in favour of the English view that it would not be incompatible with the appellant's Convention rights for the Lord Advocate to continue to prosecute him if a fair trial was still possible⁶⁶. So we were able to agree as to the result that Lord Steyn had argued for without embarrassment.

During this period we have been keen to stress two things. The first is the limited nature of our jurisdiction. I started the process right at the beginning in *Montgomery v HM Advocate*⁶⁷, in which I rather boldly told my colleagues that they would have to get used to the Scottish way of doing things. What I said then has probably been forgotten. But more recently, as much to reassure the judges in Edinburgh as to put down a marker for my colleagues, I have gone out of my way to stress that it is not part of our function to adjudicate on issues of Scots criminal law. I said that the court must be careful to bear in

⁶² Ibid, para 128.

⁶³ *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72.

⁶⁴ In *Spiers v Ruddy* 2009 SC (PC) 1.

⁶⁵ *Kudla v Poland* (2002) 35 EHRR 11; *Zarb v Malta* (Application no 1663/04), 4 July 2006.

⁶⁶ See 2009 SC (PC) 1, para 22.

⁶⁷ 2001 SC (PC) 1, pp 12-13.

mind that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland, and that when the Supreme Court is dealing with questions of that kind it is the law of Scotland that must be applied⁶⁸. Lord Rodger did not make the same point in so many words in any of his judgments, but in another of his unpublished lectures which he gave in October 2005 on the fifth anniversary of the coming into force of the Human Rights Act 1998 he said:

“There could well be situations where, *according to the rules of Scottish procedure or evidence*, one could say that the actings of the Crown had made the trial unfair, but where there would be no breach of the right to a fair trial *according to the criteria embodied in article 6 of the Convention*. In such a case the allegation that the actings of the Crown had made the trial unfair would not, as it seems to me, raise a devolution issue and the Privy Council would have no role to play.”

The second thing that we have stressed is that if we are entirely satisfied that the trial is unfair for a Convention reason the conviction must be quashed. This was something about which Lord Rodger felt particularly strongly. In the same lecture he said that in considering whether a trial had been fair in terms of article 6, the violations, if any, had to be taken together and their total impact on the trial assessed. Sometimes however an individual breach would be so obviously fundamental as, *ipso facto*, to make the trial unfair. Having given some, admittedly rather extreme examples, he said

“If such a violation occurred, leaving aside the position in domestic law, it would amount to such a fundamental breach of the right to equality of arms under article 6 that the accused would not have had a fair trial in terms of article 6. Any conviction would obviously have to be quashed.”

⁶⁸ *Robertson v Higson* 2006 SC (PC) 22, paras 5 and 6; *McInnes v HM Advocate* 2010 SC (UKSC) 28, para 5; *Fraser v HM Advocate* 2011 SLT 515, para 11.

He went on to say that any such case would be wholly exceptional. But his theme was that if, for whatever reason, the trial is unfair, then the conviction *must* be quashed. As he put it:

“That is said in *Holland* and *Sinclair*, if a little *sotto voce*.”

We both knew that the Supreme Court’s decision to quash the convictions in those cases was not well received in Edinburgh. But there is no doubt that Lord Rodger would not in the least have been put off by that. They were, as already mentioned, cases where the Crown had failed to disclose material that ought to have been disclosed to the defence. In *Holland* the Appeal Court had dismissed the appellant’s appeal on the devolution issue and in *Sinclair* it had dismissed his devolution minute. Leave to appeal to the Supreme Court had been refused in both cases, and they had come before us not as references but as appeals. As Lord Rodger had observed⁶⁹, the Judicial Committee had been given by statutory instrument all the powers of the court below in devolution cases⁷⁰. He saw no reason why they should not be exercised as, in his opinion, the Appeal Court would have been bound to set the conviction aside if the case had been returned to it. He took the same view of the procedure that the Supreme Court should adopt in the case of *Fraser*. His response to anyone who objected to this was simple. The Supreme Court had been given those powers and, in a case where it was satisfied that the trial was unfair, it should not hesitate to exercise them. As he put it to me when we were discussing what we should do in *Fraser*, any other course could be taken as suggesting that the trial had been fair after all. He was firmly of the view that we could not avoid saying that there was *a real possibility*, having regard to the way that trial was

⁶⁹ *Holland v HM Advocate* 2005 SC (PC) 3, para 86.

⁷⁰ The Judicial Committee (Powers in Devolution Cases) Order 1999 (SI 1999/1320).

actually conducted, that the jury would have arrived at a different verdict if the material had been disclosed. That led logically to the conclusion that there was a miscarriage of justice and that the conviction should be set aside.

This brings me to the recommendations of the McCluskey Group. As I said at the beginning, I have a good idea what Lord Rodger would have thought of them. For obvious reasons I do not wish to put my own views on record, but I can tell you what I think his views would have been. He would, of course, have welcomed the Group's acknowledgment that the Supreme Court should continue to have a role in devolution issues relating to the powers of the Lord Advocate. But I think that he would have wanted to resist the two qualifications that the Group wishes to make: that the Supreme Court should be a court of reference only on devolution issues and not a court of appeal, and that it should be a pre-condition of leave to appeal to the Supreme Court that there should be a certificate as is the case for criminal appeals from the other parts of the United Kingdom. But I think that he would have been more concerned about the effects of certification.

It is true that the devolution system laid down by the Scotland Act 1998 has been more invasive than was anticipated. But whether this has been a good or a bad thing depends on your point of view. It all depends on where your priorities lie. If your priority is to protect the integrity of the Scottish system, then the more protections there in place the better. But if your priorities are those which the European Convention had in mind when it was formulated, the balance may well tilt the other way. One has to

wonder, Lord Rodger would have said, if the McCluskey Group's proposals had been in place from the beginning where we would be now. The probability is that the impact of Europe on the criminal justice system would have been much less. It is unlikely that the disclosure cases would have been certified. In both *Holland* and *Sinclair* leave to appeal was refused. It is certain that *Cadder* would not have been certified standing the decision of seven judges in *McLean*. *Fraser* would not have been certified either. And we would not have had the Carloway Review. One has to bear in mind too that one of the most striking features of the Convention is that the rights which it describes are given to everyone. Even, if I may coin a phrase, to "the vilest people on the planet"⁷¹. There are dangers in reducing the procedural protections against the risk of an unfair trial that presently exist. It is not obvious that they will be strengthened if the Group's recommendations were to be put in place and subjected to the test of general public importance. The record to date suggests that the protections might well be less strong than they are at present. Going to Strasbourg for, at best, a finding that there has been a violation of a Convention right is really no substitute for what it has been possible to achieve for the individual under the present system. You may think too, in the light of the figures I gave earlier, that the suggestion that the Supreme Court's jurisdiction is interfering too frequently has been somewhat exaggerated.

Leaving these contentious issues aside, there is much to enjoy in Lord Rodger's judgments. He was deeply interested in the history of our criminal justice system, and he

⁷¹ A phrase used by the First Minister, Alec Salmond MSP, in a interview in the *Holyrood* magazine in June 2011 to describe those who were claiming compensation for slopping out and who stood to benefit from the decision of the House of Lords in *Somerville v Scottish Ministers* 2008 SC (HL) 45 on the issue of time limits.

took obvious pleasure in exploring it and describing it for us as he reasoned out his opinions. There is a rich vein of scholarship there which ought not to be overlooked. His discussion in *Cadder*⁷² of the long pedigree in Scots criminal law of the issue whether legal advice should be available to suspects being questioned about an offence is just one example, among many more. It was typical of him that, once he was engaged with a subject, his restless enthusiasm for research found its way into his judgments too. We have the influence of Europe to thank for the fact that, even after he had moved to London, he was still able to work in this field and tell us what he thought about it.

It goes without saying that his contribution to the work of the Court is sorely missed. But I think that we can feel that the main steps forward that had to be taken have been taken. The pattern of our jurisprudence has been settled, and so have the tests that have to be applied. That is not to say that there is no more work to be done. But the path should be easier from now on. We must all be grateful to Lord Rodger for all that he has done to point us in the right direction.

18 November 2011

Lord Hope of Craighead

⁷² 2011 SC (UKSC) 13, paras 73-86.