

Police Station Interviews during Covid 19

Presented by Hannah Gladwell &
Marie de Redman



GOLDSMITH
CHAMBERS

The National Protocol

- ▶ 2 April 2020: National Police Chiefs' Council, Crown Prosecution Service, The Law Society, Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association produced a national protocol for police station attendances.
- ▶ <https://www.lawsociety.org.uk/support-services/documents/coronavirus-interview-protocol-april-2020/>
 - ▶ The new national protocol allows defence solicitors and representatives to work remotely.
 - ▶ Representatives do not need to be physically present
 - ▶ They should be able to use video technology and phones to give advice prior to, and during the interview

Free and independent legal advice

- ▶ S.58(1) PACE - Access to legal advice.
- ▶ A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.
- ▶ PACE Code C, para 6
- ▶ "all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available"
- ▶ National Police Chiefs' Council 'Operation Talla – Custody', para 4.13
- ▶ "Enabling detainees to exercise their right to legal advice is essential. Custody staff should work in conjunction with legal representatives to ensure this process is effectively managed. Consideration should be given to telephone advice in appropriate circumstances."
- ▶ Article 6(1) and 6(3)(c)
- ▶ Right to legal advice/representation of your choosing extends to legal advice when in a police station [Salduz v Turkey (2009) 49 E.H.R.R. 19; Murray v U.K. (1996) 22 E.H.R.R. 29],

Custody officer duties

- ▶ PACE Code C, para 3.6:
- ▶ *“the custody officer is responsible for initiating an assessment to consider whether the detainee is likely to present specific risks to custody staff, any individual who may have contact with detainee”*
- ▶ PACE Code C, para 3.8A:
- ▶ *“information should not be withheld from any person acting on the detainee’s behalf, for example, an appropriate adult, solicitor or interpreter, if to do so might put that person at risk”*

Voluntary Interviews

- ▶ PACE Code C, 3.21 (b)
- ▶ Sets out an individual's right to free legal advice
- ▶ An individual's rights and entitlements apply to all those who are to be interviewed by police
- ▶ They are not reduced simply because the interview is arranged on a voluntary basis

Appropriate Adults

- ▶ The National Appropriate Adult Network's position is that appropriate adults should continue to attend custody, subject to three requirements:
 1. Detentions/procedures are necessary (cannot be delayed or avoided)
 2. Appropriate PPE is provided to AAs by police whenever it is needed
 3. The custody environment is being run in a safe manner
- ▶ If any of the three requirements are not met, the AAs should decline to attend or remove themselves from custody.
- ▶ Although the National Protocol applies to legal representatives and solicitors, PACE remains, and it continues to be the case that an AA must be physically present for an interview of a child or vulnerable adult.
- ▶ National Protocol, para 6:
 - ▶ *"If the attendance of an appropriate adult is required then that will need to be taken in to account when an interview is being considered; in the circumstances created by the Covid-19 crisis it may not be possible to conduct an interview with a suspect and an appropriate adult"*

Issues that solicitors and representatives are facing

- ▶ Officers simply are not aware of the protocol, despite it being published on 2 April 2020
- ▶ Police stations do not have the technology
- ▶ Officers at the police station may not know there is an issue with the technology
- ▶ Charge without interview
Where an individual has requested legal advice and the station is unable to accommodate, the police may decide to charge matters without interview. This can cause an issue as defendants have a right to put forward a defence in interview.
- ▶ Cell door interviews may be conducted by officers
- ▶ Missed opportunity for a caution

Options to consider

- ▶ Written representations
 - If the police are trying arrange a voluntary interview
- ▶ Make use of technology
- ▶ Advise client over the telephone
- ▶ Standard “covid” prepared statement
- ▶ Prepared statement setting out nature of your client’s defence
- ▶ Consider making representations at the first appearance
 - In relation to breaches of protocol and/or option for caution*
- ▶ Ask for your representations to be noted on the custody record
- ▶ If you are able to be present remotely for the interview state your representations at the beginning of the interview
- ▶ Make a full note of what happened and be prepared to make a witness statement

How to approach the interview at Court

- ▶ Abuse of Process
- ▶ Application to Exclude
 - ▶ S.76 PACE 1984
 - ▶ S.78 PACE 1984
- ▶ Adverse inferences
 - ▶ S.34 Criminal Justice and Public Order Act 1999

Abuse of Process

- ▶ *R v Maxwell (2010) UKSC 48*: The Court has the power to stay proceedings in two categories of case:
 - ▶ Where it will be impossible to give the accused a fair trial; and
 - ▶ Where it offends the courts sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.
- ▶ Jurisdiction: bear in mind that if proceedings are in the magistrates' court, only arguments on the first limb can be addressed. Proceedings where an argument under limb two is to be progressed should be adjourned to allow an application to be made to the Divisional Court.
- ▶ Limb 2 arguments likely to be focused on a **deliberate** or **wilful** disregard for the protocol with the intention of placing the accused person at a disadvantage, denied access to legal advice etc. Burden of proof rests with the Defence, so may be difficult to establish unless there is evidence of comments made by officers/custody sergeant etc. to support the argument.
- ▶ Limb 1: impossible to have a fair trial: Article 6(1) and 6(3)(c) the Right to legal advice/representation of your choosing extends to legal advice when in a police station [*Salduz v Turkey (2009) 49 E.H.R.R. 19; Murray v U.K. (1996) 22 E.H.R.R. 291*, unless there are compelling reasons. However even then, if there is scope within the trial process to exclude that evidence, very unlikely that the whole of the trial process would be deemed unfair: *Beuze v Belgium [2019] Crim L.R. 233 ECHR*].
- ▶ Also consider other consequences of the breach of the protocol particular to the defendant or their case. Might opportunities to seek diversions or cautions have been lost? Was Code C followed in other respects? E.g. AA's, FME assessments, interpreters, welfare issues etc.

Application to Exclude: Section 76 (2) PACE 1984

- ▶ Two conditions under which a “confession” may be excluded:
 - ▶ Obtained under oppression (s.76(2)(a)); or
 - ▶ In consequence of anything said or done which was likely to render the confession unreliable (s.76(2)(b)).
- ▶ Burden of proof is on the **Prosecution** to show that the confession was not made under those circumstances.
- ▶ Arguable an interview in which D is potentially exposed to risk of contracting Covid-19 as a result of police failure to apply protocol could be oppressive. If so, even if the confession was true, it ought to be excluded because of the risk against self-incrimination.
- ▶ D may instruct that they said whatever the police wanted to hear to get out of there, completely distracted by the worry about the risk to their health.
- ▶ If not given access to legal advice or limited access, or no interpreter, or interpretation limited because its over the telephone etc. could render the confession unreliable.
- ▶ Determination of the application to exclude would probably require evidence to be called on the Voir Dire.
- ▶ If application is unsuccessful, that is no barrier to the Defendant asserting that the interview was oppressive when giving evidence. It would seem that in those circumstances, the Judge must direct the jury, if they found that the confession was or might have been made as a result of oppression, they must disregard it, even if they were sure that the confession was true To not do so would be incompatible with Article 6. R v Murray (1950) 34 Cr. App R. 203 R v Mushtaq (2005) 2 Cr. App. R 32.

Application to Exclude: Section 78(1) PACE 1984

- ▶ *"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*
- ▶ Nothing preventing an application under section 78 even if application under section 76 has failed. Question of fairness, rather than reliability.
- ▶ For no comment interviews or interviews where D has failed to mention something unlikely to be able to use s.76 but s.78 is appropriate.
- ▶ *Ibrahim v UK [2017] Crim LR 877* sets out considerations where access to legal advice has been denied in breach of Article 6 (3) and s. 58 PACE. Always a question of whether that breach has created unfairness. One of the considerations: what directions can be given to the jury?

Application to Exclude: Section 78(1) PACE 1984 (cont'd)

- ▶ Important to have the detail available as to what occurred at the police station. Argue that a breach of the protocol has a similar effect as a breach of PACE Code C. Protocol designed to protect the rights of the detained person AND make reasonable adjustments to ensure the safety of all participants.
- ▶ Likewise, there may have been breaches of Code C that can be the subject of a section 78 application. It doesn't matter that the breach might be "understandable"; if there has been a breach it might be worth an application to exclude.
- ▶ No requirement for "impropriety" or "bad faith" on the part of the Police [Samuel (1988) 87 Cr. App. R 232, CA:]. Issues regarding lack of facilities to apply the protocol for example; even if officers have tried their best, it may be unfair to admit the evidence. However, if you can establish that there was bad faith, this will usually lead to the exclusion of the evidence [Alladice (1988) 87 Cr. App. R 380].
- ▶ Consider whether a Voir Dire is needed. Might the Crown make an admission as to the conditions under which the interview was undertaken? It may not be contentious, the crown can still argue not unfair to admit the evidence even if they concede that the protocol was not followed, or even that a breach of Code C occurred.

Adverse inferences: Section 34 Criminal Justice and Public Order Act 1994

- ▶ Section 34(1):
 - ▶ Where a defendant fails to mention facts in interview under caution which he later relies upon in his defence; s.1(a)
 - ▶ Being a fact which in the circumstances which existed at the time the accused could reasonably be expected to mention when so questioned; s.1
 - ▶ The Court or Jury , in determining whether the accused is guilty may draw such inferences from the failure as appear proper. s.2(d)
 - ▶ Does not apply if D refused to leave his cell to be interviewed; not in the face of questioning. [Johnson (2005) EWCA Crim 971]. However if the police decide to conduct the interview in the cell it does apply.
 - ▶ Applies to silence / no comment and to comment interviews where facts not mentioned.
 - ▶ Crucial element for COVID-19 interviews: “the circumstances which existed at the time”. This is not to be construed restrictively – Argent (1997) 2 Cr App R 27.

Adverse inferences: Section 34 Criminal Justice and Public Order Act 1994

- ▶ Section 34(2):
 - ▶ Adverse inference cannot be drawn if D was denied opportunity to consult a solicitor [if at an authorised place of detention, i.e. police station].
- ▶ May be an argument that if, as a result of Police failing to apply the protocol or provide safe environment for consultation to take place, D is unrepresented this section applies. Police failure amounts to an active denial?
- ▶ **Reliance on Legal Advice:** D will need to give evidence that that was why he failed to answer questions; e.g. my solicitor advised me to say no comment;
- ▶ Be careful not to waive privilege unless intend to do so. "I was advised over the telephone that because I couldn't be represented, I should just say no comment", or "I was advised that because the police were not providing a safe environment for the interview" etc. would be waiving privilege. BUT it may be that there's no issue with that, if D did in fact outline a defence to the representative, or perhaps consultation was limited to that advice and that advice alone; i.e. the defence was never even discussed.
- ▶ It may be appropriate for the solicitor / representative to also give evidence regarding what occurred at the police station to outline the problems that contributed to the decision to not answer questions.

Adverse inferences

- ▶ Direction to Jury:
 - ▶ Must only draw an adverse inference if
 - ▶ Prosecution case at the time of the interview called for an answer
 - ▶ No sensible explanation for the failure other than he had no answer to give or none that would stand up to scrutiny; the jury must consider any explanation given including legal advice and be told that unless they are sure that that was not the genuine reason for D's failure, they should not draw any conclusion against D as a result of it; and
 - ▶ In their view, it is fair and proper to do so.
 - ▶ Special direction RE legal advice: if jury decide that D was or may have been so advised, they are still entitled to consider whether it was reasonable to follow that advice. They should take account of matters such as D's age, maturity, **and any evidence about reason for the advice being given.**
 - ▶ Judge might decide not to give an adverse inference direction. Defence may ask that they do so, if they feel in the circumstances it would be safer.
 - ▶ Judge is also entitled to direct the jury that they **must not** hold a no comment interview against a Defendant if they have decided that no adverse inference should be drawn.

Practical Advice

- ▶ Make contemporaneous note of your actions and interactions with custody.
- ▶ Be prepared to draft a witness statement and potentially come to court to give evidence about what occurred.
- ▶ If client comes to you post interview, ensure that you take detailed instructions from the client as to what occurred / what access to legal advice was (s)he given? Include this in the proof of evidence.
- ▶ You may need to track down the representative that had contact with client to seek notes and witness statement in due course.
- ▶ Raise issues with the interview on the PET form at the first appearance or on the PTPH form at PTPH.
- ▶ Obtain custody records which should include the details of concerns raised by police station representatives / solicitors regarding interview. PACE entitlement and/or disclosure.
- ▶ Ensure that whoever is conducting the trial is aware of (a) the protocol that should have been followed; (b) what actually occurred;
- ▶ INSTRUCT trial advocate to consider whether there is an application to exclude / abuse argument in advance of the trial as witnesses may be required.

Contact Details

**Name – Hannah Gladwell & Marie de Redman
Goldsmith Chambers**

E-mail

Clerks: John Francis, Lynn Pilkington and Michael Johnson:

j.francis@goldsmithchambers.com

l.pilkington@goldsmithchambers.com

m.johnson@goldsmithchambers.com

Tel: 020 7353 6802

