Briefing on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

October 2010

For further information contact
Jodie Blackstock, Senior Legal Officer (EU: JHA)
Email: jblackstock@justice.org.uk Tel: 020 7762 6436
JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its Scottish Advisory Group.

2. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill has been presented as emergency legislation in response to the judgment handed down in Tuesday 26th October 2010 in *Cadder v HMA* by the UK Supreme Court.[1] These amendments have clearly been prepared in readiness for the judgment, yet there has been no time built in for scrutiny of the proposals other than one emergency session. No scrutiny has been afforded by the Human Rights and Civil Liberties Group in Parliament, the Justice Committee or the Scottish Human Rights Commission, never mind interest groups, members of the profession or civil society. Their Lordships in *Cadder* observed that:

> *But, by preferring to go their own way, those who were promoting the legislation that gave effect to the Thomson Committee's recommendations were shutting their eyes to the way thinking elsewhere was developing. Now, sadly, 30 years on the Scottish criminal justice system must reap the consequences.*[2]

3. We have watched with dismay the debate in Parliament and heard the Justice Secretary suggest that the emergency legislation is necessary to ensure that the rights of victims and wider society remain at the forefront of the Scottish justice system.[3] The decision in *Cadder* reiterates what has long been the corner stone of the Scottish justice system – that a suspect is innocent until proven guilty and holds an unqualified right against self incrimination. Lord Rodger in his judgment traces the

[1] UKSC [2010] 43
[2] Per Lord Hope, para 51.
[3] *Swift Action to change Scots law*, News Release, Scottish Government, 26th October 2010.

history of the right to legal advice. He recalls that the Criminal Procedure (Scotland) Act 1887 afforded the right to be assisted by a lawyer upon arrest. This right was gradually eroded with the introduction of police officers and finally its removal approved by the Thomson Committee. The right to legal advice upon arrest is crucial as Lord Brown observes:

> *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.*[4]

4. The presence of a lawyer enables the detained person to be advised as to what the law is, whether they have any defence if they were involved in the alleged offence, or how to present evidence to show their innocence if they were not. It gives them the opportunity to seek bail, or an alternative to prosecution where this is appropriate. It allows the case to be put properly to the investigating officer as early as possible, at what is in most cases the most crucial part of any potential prosecution. The decision of the Justice Secretary to introduce emergency legislation without careful consideration as to its effects, and the subsequent remarks he has made to the press and before Parliament appear to display a concerning disregard for the rights of the accused, who at this stage is far from a convicted criminal.

5. Whilst it is too late to influence Parliamentary consideration of the Bill, we record our concerns as to the proposed amendments below:

Clause 1 – Limitation of the right of access to a solicitor

6. Clause 1 introduces the right of access to a lawyer, which is of course to be welcomed as a statutory right. We equally welcome the right is to access to a 'solicitor' and to 'private consultation' as provided in proposed section 15A(3).

[4] Per Lord Brown, paragraph 108.

7. However, section 15A(5) proposes a limitation to this right to 'consultation', which would enable *by such means as may be appropriate in the circumstances* including telephone consultation. The Financial Memorandum then suggests at paragraph 47 that costs will be incurred by ensuring that a telephone is available in each interview room for an accused to obtain advice during detention. It is not clear how this is envisaged to work. Telephone advice is not a substitute for face to face advice and should only be used for an initial consultation. Where an interview is to take place, it is imperative that a solicitor is present, to ensure that effective representation is possible – if a solicitor cannot hear the line of question, how are they able to fully advise their client or represent them properly?

8. Furthermore, their Lordships in *Cadder* made clear that the right requires presence in interview:

> *The emphasis throughout is on the presence of a lawyer as necessary to ensure respect for the right of the detainee not to incriminate himself. The last sentence of paragraph 55 could hardly be more clearly expressed.*[5]

9. <u>Amendment section 15A(5)</u>

We would therefore propose an amendment to section 15A(5) as follows:

"In subsection (3) "consultation" means consultation by such means as are **necessary** in the circumstances **to enable access to advice as soon as practicable. This may include by means of telephone for an initial advice."**

[5] Per Lord Hope, paragraph 35.

Amendment to section 15A(6)

10. Section 15A(6) does not specify the *time* from which a suspect is to be entitled to be informed of their rights. We would propose the insertion of 'immediately' in subsection (a) and (b) to make the obligation upon the police clear.

11. Sections 15A(7) and (8) propose delay to advice 'in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.' We consider this to be far too widely drafted. Lord Hope observes in *Cadder*, with reference to the *Salduz v Turkey* Strasbourg decision:

> *The area within which there is room for flexibility is much narrower. It permits a departure from the requirement* ***only if the facts of the case make it impracticable*** *to adhere to it. The reference in that paragraph to its being demonstrated in the light of the particular circumstances of the case that there are* ***compelling reasons to restrict the right*** *reinforces this interpretation.*[6]

12. The decision to delay must also be taken by a more senior officer than a constable given the seriousness of any decision to obstruct the right.

Amendment to sections 15A(7) and (8)

"**An officer of the rank of sergeant or above may** delay the suspect's exercise of the right under subsection (3) **where there are compelling reasons in the interests of justice for the** investigation or the prevention of crime or the apprehension of offenders."

Clause 2 – Legal Aid Provision

13. Clause 2 relates to making legal aid provision without reference to financial limits. Whilst we welcome the move towards this, it is somewhat disappointing that it only refers to the possibility of regulations at some stage in the future. It is entirely impractical to administer an eligibility scheme in police station advice and assistance;

[6] At paragraph 41.

suspects may not know without speaking with a solicitor whether they need assistance at all; they will not be able to evidence their needs from the documentation on them when detained; they will require a relationship of trust with the advising solicitor which cannot operate subject to qualification. We hope that regulations will follow this provision with expediency to ensure legal aid to cover all police station advice.

Clause 3 – Extension of detention periods

14. Clause 3 presents an extension of the current detention period from six to twelve hours. There is no explanation offered for this extension. Such an extension of time must be justified by empirical evidence to show that (a) solicitors are not able to attend within the six hour period and/or (b) police officers are hindered in completing their investigations by this period. The Lord Advocate's interim guidance has been in operation since July. As such, we would expect evidence to be available to support the need for this amendment. From the discussions we have had with members of the profession, there does not appear to be a need for any extension.

15. Furthermore, the proposed section 15A(7) and (8) allows for delay to enable investigation. This in of itself presents the opportunity to ensure investigation can take place without the delay of waiting for a solicitor to advice in compelling circumstances.

16. We are most concerned about the proposed *period* of detention which appears to be entirely arbitrary; A blanket extension to twelve hours with the potential for 24 hours does not build in sufficient consideration of the right to liberty under article 5 of the European Convention on Human Rights.

17. Any extension of detention past 6 hours *must be subject to review by an independent reviewing officer* to ensure that grounds for detention still exist and also that the welfare of the detained person has been verified. Thereafter, a review must take place every six hours. This is the position in England and Wales under Part IV of the Police and Criminal Evidence Act 1984 (PACE). If the proposed amendment seeks to replicate the position under PACE it in fact goes much further.

18. We wholly reject the justifications for the extension of detention periods and would stand the part entirely. However, if any extension is to remain, we would propose amendments as follows:

Amendment to section 14A

(2) Before the expiry of the period of **6 hours** mentioned in section 14(2), a custody review officer **must**, subject to subsection (4) authorise that period to be extended in relation to the detained person by a further period of **6 hours.**

Appeals

19. We concerned to see provisions on appeal appearing in emergency legislation. The amendments will effect all cases, not just *Cadder* related appeals. Such amendments must be subject to scrutiny and consultation. This has not been possible in the short period of time available. We do not consider these amendments to be appropriate and would stand clauses 5 and 6 in their entirety.

Clause 5 – Extension of time for late appeals

20. Sub clauses (2) and (3) propose to allow the prosecutor to respond to any application for an extension of time to appeal. We cannot see how there is a role for the prosecutor at this stage. We would remove sections (2B) and (2C) in each section.

Clause 6 – Bills of Advocation and Supervision

21. We cannot see the need for amendments to Bills of Suspension and Advocation. The position is clear under *Ruddy v Griffiths*.[7] It should not be put on a statutory footing by way of emergency legislation.

Clause 7 - limitation of the role of the Scottish Criminal Cases Review Commission

22. Again, we are most concerned to see the proposed amendment in emergency legislation given the impact that it will have on cases in which miscarriage of justice is argued.

23. The establishment of the Scottish Criminal Cases Review Commission is set out clearly in the Glasgow Bar Association submission and we adopt their concerns.[8]

[7] 2006 SCCR 151.

The Commission was necessary to enable cases which otherwise would not be open to review by the courts because of the rules of evidence, to be reconsidered due to the clear possibility that a miscarriage of justice had occurred. The very essence of the Commission's role is to investigate all the circumstances of an application through a mechanism not constrained by the rules of court.

24. In some respects it is obvious that the Commission will be aware of the need for finality and certainty, since their remit would not be engaged but for the closure of a case. The purpose of the amendment must therefore be clarified. All Clause 7 would appear to do is to seek to place a fetter upon the discretion of the Commission by imposing a *limiting* duty of the Commission's hitherto flexible role in its decision making. Article 6 ECHR does not afford such a balancing exercise when considering the fairness of a trial as a whole: the right is to a fair and public hearing. To restrict the role of the SCCRC is a retrograde step which we wholly oppose.

25. A second fetter is proposed upon the discretion of the High Court in reviewing the Commission's recommendations. Given that the inherent jurisdiction of the Court is limited by finality,[9] the only possibility of enabling a review in a miscarriage of justice case is through an application from the Commission. There is no requirement in *Cadder* that this be affected, on the contrary, their Lordships made clear that such cases should be considered through the mechanism of the SCCRC. It is imperative that this route is not restricted *for all cases* by irrational concerns about how the Commission and Court will treat with closed cases potentially affected by *Cadder.*

JUSTICE

October 2010

---

[8] Available at http://www.glasgowbarassociation.co.uk/media/20928/gba%20briefing%20on%20emergency%20cadder%20bill-1.pdf

[9] *Beck and others* [2010] HCJAC 8