The right to legal assistance in Scotland

Jodie Blackstock describes the developments in and obstacles to defence rights

Practitioners and academics often talk with pride about the UK criminal justice system as being superior to other jurisdictions when it comes to procedural safeguards. It is regularly forgotten that the UK comprises four jurisdictions, two of which have devolved criminal justice systems; Northern Ireland obtained the power to legislate for policing and criminal justice powers in 2010 as part of the Good Friday agreement, and the approach to law enforcement has been essentially the same as that in England and Wales. Yet Scotland has always had a distinct criminal justice system, despite Westminster legislating until little over a decade ago. Whilst the Scots conform to a common law system, their approach to criminal law and procedure differs markedly to the rest of the UK in certain respects. One in particular, until recently, has been the point at which the right to legal assistance is available to suspects of crime.

The Scottish system pre *Cadder*

Until 2010 the standard practice in Scotland, pursuant to the *Criminal Procedure (Scotland) Act 1995,* was for the police to detain a suspect for up to six hours, during which they could interview the suspect. Only after that detention was the suspect, if there was sufficient evidence, arrested and charged. During the six hour period suspects were entitled only to have a solicitor informed of their detention. They would not meet the solicitor until, if charged, they appeared in court. This system had been recommended by the Thomson Committee (Scottish Home Dept, 1975) to avoid the dubious process of 'voluntary attendance' at the police station. The Committee saw the need for a formalised period of police custody, but thought that lawyers would interfere with the investigative process, allowing suspects to 'stand on their rights.' Although lawyers challenged this exclusion over the years, it was not until recently that two significant events forced reform.

The first event of significance was the case of *Salduz v Turkey* (2008) 49 EHRR 421 (GC). This was the first occasion that the Grand Chamber of the European Court of Human Rights (ECtHR) had acknowledged systemic exclusion of lawyers during police detention and interrogation as being a violation of the European Convention on Human Rights (ECHR). *Salduz* set out in the clearest terms that where evidence obtained during interrogation, without the accused having the opportunity to consult a lawyer, is relied upon at trial, the right to a fair trial will be irretrievably prejudiced.

The second significant event was the EU 2009 resolution to establish a roadmap to strengthen procedural safeguards for suspects and defendants in criminal proceedings, which included a measure on the right of access to a lawyer. It was anticipated that the right would apply from the point of arrest through to final appeal.

These developments led to the UK Supreme Court decision in *Cadder v HM Advocate* [2010] UKSC 43, in which JUSTICE intervened. The Court looked at the caselaw of the ECtHR, other common law and EU systems, as well as at the available research (predominantly from the materials JUSTICE was able to put before the Court), and concluded that there was not the remotest chance that the ECtHR would consider the Scottish system to be compatible with the Article 6 ECHR.

To its credit, the Scottish Government immediately set about amending the law. However, it did so through the emergency *Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010*, against a rhetoric portraying the Scottish members of the Supreme Court as having 'gone native' and of London imposing its will upon Scotland. The new law provides for a right to legal assistance at the police station (subject to derogation in the interests of the investigation), but extends the maximum period of police detention to twelve hours (which may be further extended to twenty four hours), limits the routes to appeal, and restricts appeals from the Scottish Criminal Cases Review Commission. Tightening of appeal rights was justified by the government's concern that the floodgates would open and that offenders, from the introduction of the *Scotland Act* onwards (at which point the Convention was directly applicable in Scotland), would seek to have their convictions overturned. However, the *Cadder* judgment had specifically dealt with this problem by limiting the right of appeal to current cases. The right to appeal across all criminal cases has therefore been unnecessarily fettered as a result.

There followed an extensive, year long, review by High Court judge Lord Carloway, who recommended wholesale changes to Scottish criminal procedure (Carloway, 2011). These changes, if introduced (and legislation is anticipated from the government in 2013), would lead to a unified arrest procedure, a time limit on detention from arrest until court production, improved standards for children and vulnerable suspects, and police bail. All of these are familiar to practitioners from the

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three other jurisdictions of the UK and should be welcomed. But some critics see the reforms as encroaching upon the unique Scottish system. Of more concern, the Carloway Review recommended the abolition of corroboration and evidential rules that would remove evidence from consideration by the jury. Scotland is one of few jurisdictions that retain the corroboration safeguard, and there are pros and cons to its retention that are for another day. However, the erosion of existing trial safeguards following the introduction of a right of access to a lawyer is an unhappy consequence. It is still uncertain whether the Scottish Government will bring forward legislation to restrict the right to silence as occurred in England and Wales following the *Police and Criminal Evidence Act 1984* reforms, though fortunately Lord Carloway makes no such recommendation.

Access to a lawyer in practice

The right of access to a lawyer had been recognised in July 2010, when the Lord Advocate issued guidelines to the police in anticipation of the judgment. Since then, and unlike in France following a similar judgment of the Conseil Constitutionelle, there has not been a storming of the Bastille (Christafis, 2011) but rather a slow and unsatisfactory trickle. Firstly, there were concerns amongst solicitors that attendance at police stations could impact upon existing client relationships, either because another lawyer would attend when the requested lawyer was otherwise engaged and 'steal' the client, or because attending at the police station would mean that the lawyer could not service their court clients satisfactorily. Secondly, there was an embittered struggle with the Scottish Legal Aid Board (SLAB) concerning the proposed duty lawyer scheme which resulted in the scheme being substantially boycotted in the days following its introduction. This led the government to employ more public defence solicitors (PDSO) to operate the duty scheme, which entrenched opposition by private practitioners.

Eventually, compromises have produced something close to satisfactory fees and a duty scheme which provides a duty solicitor in every court area, every day of the week. However, in practice, in 86 per cent of known cases, advice is provided over the telephone (SLAB, 2013). SLAB has set up an advice line, operated by employed lawyers, who direct calls to preferred solicitors, or who provide telephone advice where no solicitor is available. From research being carried out in an EU Commission funded project to be published this summer, (Blackstock et al., forthcoming), it is clear that the SLAB and PDSO lawyers understand the importance of attendance at the police station far better than private lawyers, perhaps because they actually attend more often. The majority of private solicitors appear to be providing advice over the telephone unless the case is solemn (rape or murder), or the client is a child or vulnerable suspect. The nature of such advice, in almost all cases, is to remain silent in the interview. Since the right to remain silent in Scotland is absolute and disclosure is perfunctory at best this is not, in principle, bad advice. However, those lawyers who have attended on clients in police interviews provide similar accounts of the confusion, vulnerability and urge to speak amongst suspects in Scotland as emerged in England in the 1990s from the work of McConville (McConville et al., 1993) and others. Moreover, it is unlikely, given their absence from the police station at the point when these decisions are taken, that these solicitors are demanding better disclosure for their clients, release from detention or discontinuance of proceedings.

Making the right effective

The Law Society of Scotland has run training sessions for solicitors and is in the process of preparing a guidance manual on police station advice. This is welcome. But the right to legal assistance has been in place for two years, with little sign that (most) solicitors actively understand the full nature of their role, nor the importance of the right in ensuring an effective defence. There is widespread ignorance of the experiences of their peers south of the Border. Worse, the notification of the right by the police ticks the Article 6 ECHR compliance box, and admissions in interview are fully admissible at trial, because the prosecution can assert that a knowing and intelligent waiver of the right to assistance in the interview room has been made. But this is often because the lawyer on the telephone has advised the suspect that their presence is not necessary.

There are many aspects of the Scottish procedure which are valuable and worthy of retention. Certainly, overall, the Scottish defence profession stands apart from many comparable European systems for its diligence and excellence. It would be disappointing, however, if in an effort to preserve a separate jurisdiction to the rest of the UK, the full realisation of the right to an effective defence is in practice diminished by both the law makers and lawyers. ■

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