

LORD ADVOCATE'S GUIDELINES ON ACCESS TO A SOLICITOR BY SUSPECTS¹

INTERIM GUIDANCE

Purpose

1. The following guidelines have been prepared to assist Chief Constables with the steps which must be taken to provide a suspect with access to a solicitor before or during interview while the decision of the Supreme Court in *HMA v Cadder* is awaited.

Background

2. Following the decision in [Salduz v Turkey Application No. 36391/02, 27 November 2008](#) and the decision of the High Court in [PF Forfar v Duncan MacLean](#), (*HMA v McLean* 2010 SLT 73), the Supreme Court has considered whether a suspect requires access to a solicitor in order to ensure compliance with Article 6 of the European Convention on Human Rights in the case of *Cadder v HMA* which was argued before the court between 24 and 26 May 2010. The Court has advised that its decision will be issued on 20 October 2010. The current position in Scots laws has previously been considered by the Court of Appeal in 1999 in [Paton v Ritchie 2000 SCCR 151](#), by a bench of five judges in [Dickson v HMA 2001 SCCR 397](#) in 2001 and by a bench of seven judges in [PF Forfar v Duncan MacLean](#), (*HMA v McLean* 2010 SLT 73) in 2009 and found, without dissension, to be compatible with the European Convention on Human Rights.

3. These interim guidelines have been prepared to outline the approach which should be taken prior to 20 October 2010 in light of the possibility that the Court issues a decision which does not support the Crown position and which provides for the right of access by a suspect to a solicitor in advance of or during interview.

Application of guidelines

4. These guidelines apply to all cases where individuals are interviewed as suspects in police stations whether: during detention under Section 14 of the Criminal Procedure (Scotland) Act 1995; during

¹ Please note that these guidelines from the Lord Advocate to the police are interim only and have been issued pending the decision of the UK Supreme Court in the *Cadder* case which is expected in October 2010. Other similar guidelines to the police have been made available on the COPFS website. The interim guidelines will be revised in October 2010 in light of the Supreme court's decision. They are not intended to pre-empt the decision of the Supreme Court and are issued with the intention of protecting prosecutions pending the decision of the Supreme court.

voluntary attendance for interview or under common law between arrest and charge.

Role of the Senior Investigating Officer

5. Where the SIO determines that interview of a suspect is necessary the suspect must be offered access to a solicitor for a private consultation, in person, in advance of the interview. The suspect should also be asked at this stage whether they wish to have a consultation by telephone in the event that a solicitor is unable to attend at the police station.

6. The suspect should be invited to nominate a solicitor who can be contacted on his behalf. If the solicitor cannot attend or is likely to be unduly delayed then in areas where the Public Defence Solicitor's Office ("PDSO") has an office the PDSO should be contacted and asked to attend; if a solicitor from the PDSO cannot attend, or if the PDSO do not have an office in the area, then a solicitor identified from the local Duty Scheme should be contacted and asked to attend.

7. In the event that personal attendance by a solicitor cannot be arranged, and if the suspect has agreed to a private telephone consultation then the nominated solicitor should be contacted in the first instance to provide such a consultation. If this cannot be arranged the PDSO should be contacted to provide a telephone consultation, which failing a solicitor from the local duty scheme should be contacted to provide a telephone consultation.

8. Where a suspect has indicated that he wishes access to a solicitor in advance of interview, and there is no other bar to such access, facilities should be made available for a private consultation to take place between the solicitor and the suspect, prior to any interview unless it is considered that there are compelling reasons why this should not be permitted (see paragraphs 9 and 10 below). Any such reason should be clearly noted and detailed in full.

9. If the accused or the solicitor wishes the solicitor to be present during the interview then access should be allowed unless, once again, it is considered that there are compelling reasons why this should not be permitted. Any such reason should be clearly noted and detailed in full.

10. The scope of the solicitor's role at the interview should be stated clearly at the outset by the interviewing officer. The suspect should be allowed to consult with the solicitor during an interview. The solicitor however is not permitted to answer questions on behalf of the suspect. In circumstances where a solicitor is being obstructive, argumentative or is hindering the police investigation, and therefore the interviewer is unable to properly put questions to the suspect they may be removed from the interview. The reasons should be recorded (in those cases where the detention interview is subject to recording) and in the interviewing officer's notebook. For the avoidance of doubt advice given by a solicitor

not to answer a question or to offer no comment does not fall to be regarded as being either obstructive or hindering the investigation.

11. The SIO may proceed with an interview of a suspect who has not had advice from a solicitor if:

(i) the solicitor nominated by the suspect; a solicitor from the PDSO or the solicitor identified from the Duty Scheme are contacted and are unable to attend; or

(ii) a solicitor agrees to attend but will be unduly delayed and the delay will significantly prejudice the investigation and/or is likely to lead to:

- Interference with, or harm to, evidence connected with an offence;
- Interference with or physical harm to other people;
- Serious loss of or damage to property;
- The alerting of other people suspected of having committed an offence but not yet arrested for it; or
- The hindering of the recovery of property obtained in consequence of the commission of an offence

In either of these instances occurring the suspect should be offered the opportunity to consult privately with the solicitor by telephone. It is a matter for the suspect to decide whether or not to accept this.

12. Consideration should also be given as to whether there are compelling reasons to proceed to interview suspects in the absence of a solicitor where the SIO has reasonable grounds to believe the solicitor the detainee wants to consult will inadvertently or otherwise pass on a message from the detainee or act in some other way which will lead to

- Interference with or harm to evidence connected with the offence; or
- Interference with or physical harm to other people; or
- The alerting of other people suspected of having committed a serious offence but not yet arrested for it; or
- The hindering of the recovery of property obtained in consequence of the commission of a serious offence

In this instance the suspect should be offered the opportunity to nominate a different solicitor and the principles which are set out in paragraph 5 above will apply.

13. A witness who can speak to the attempts made to obtain a solicitor should be included as a witness in the police report.

14. Where no solicitor is present during the interview and the interview is recorded, the interviewing officer should state on tape that the offer of access to a solicitor pre-interview has been made, whether the suspect has waived the offer of a solicitor; and

- whether the suspect has sought the services of a solicitor;
- the steps that have been taken to obtain a solicitor;
- whether the suspect has had a consultation (including by telephone) with a solicitor; and
- if the interview is to take place due to any of the circumstances outlined in paragraphs 9 or 10 above, the reason why the interview is taking place despite the request for a solicitor. In some circumstances over specification of the reasons as to why access has been denied might lead to the very outcome which is being guarded against. In such cases the reason might require to remain generic such as “compelling operational reasons”.

Where a suspect declines access to a solicitor this, and any reasons given by the suspect, should be clearly noted and detailed in full.

Implementation

15. These interim guidelines shall come into force on 9 June 2010 in respect of the categories of cases set out below and by 8 July 2010 for all other cases. Further guidelines will be issued once the judgment of the Supreme Court in *Cadder* is available.

- All homicides (including drugs deaths);
- Attempted murder and offences of serious violence;
- All sexual offences (including historical allegations) and
- Road traffic fatalities where such fatality is believed to have been caused by a contravention of the Road Traffic Act 1988; and
- All other cases which are likely to be prosecuted in solemn procedure.

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