

## ADVICE ON THE INTERVIEW PROTOCOL AND THE COMPATIBILITY OF REMOTE LEGAL ASSISTANCE WITH ARTICLE 6 EUROPEAN CONVENTION ON HUMAN RIGHTS

1. The Joint Interim Interview Protocol ('Interview Protocol') produced by the National Police Chiefs Council, Crown Prosecution Service, Law Society, the Criminal Law Solicitors' Association, and the London Criminal Courts Solicitors' Association, was issued in April 2020. The latest version was issued in May 2021.
2. For the reasons set out below, we conclude that:
  - (a) the Interview Protocol which purports to amend PACE Code C simply does not have the power to do so;
  - (b) whether a remote interview violates Article 6 ECHR will depend on the facts of the case;
  - (c) consent to a remote interview on the basis of the Interview Protocol does not constitute a valid waiver;
  - (d) the basis for any challenge to the admissibility of a remote interview will depend on the facts of the case.

### B. The impact of the Interview Protocol on PACE Code C

3. PACE Code C is the Code of Practice for the detention, treatment and questioning of persons by Police Officers. Paragraph C:6 of the Code applies to the detainees' right to legal advice.
4. The starting point is that unless Annex B applies, the detainee 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 from the duty solicitor*" (C:6.1, emphasis added). If a detainee has the right to speak to a solicitor in person but declines to exercise the right, C:6.5 states that "*the officer should point out that the right includes the right to speak with a solicitor on the telephone*".
5. C:6.8 confirms that, "*a detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed unless one*

*of the exceptions in paragraph 6.6 applies*” (emphasis added). While ‘presence’ is not defined as physical attendance, the remote attendance of a legal representative at an interview by video or audio link is not provided for in Code C. As such, while Code C does allow remote legal advice to be provided, the text does not allow for remote interviews by either video or audio link.

*i) The interpretation of PACE Code C during the pandemic*

6. The Interview Protocol has been used as a tool to guide the interpretation of Code C in light of the pandemic. Both versions acknowledge that “*remote interviews by video and audio link are not within the current letter of the Code of Practice*”, but that remote interviews “*are within the spirit of recent amendments to criminal procedure, law and evidence in the Coronavirus Act 2020*” (April 2020 Interview Protocol, para. 7 and May 2021 Interview Protocol, para. 10). The key difference between the two is that the May 2021 version does not apply to suspects under the age of 18 or those that are vulnerable.
7. The Interview Protocol April 2020 states that:
  - “*In the case of children and vulnerable adults, the physical presence of an appropriate adult is always required for interview, save for urgent interviews in accordance with Code C 11.18 [...] in the circumstances created by the Coronavirus crisis it may not be possible to conduct an interview with a suspect and their appropriate adult (where one is required), and the alternatives set out in Annex A and Annex B should be considered*” (paragraph 6);
  - that remote interviews by video and audio link “*are a fair and proportionate option to be made available to a suspect who has the benefit of legal advice and who having been fully informed and advised and together with their appropriate adult (where one is required) consents to a remote interview*” (paragraph 7, emphasis added).
8. From the wording used, consent to a remote interview is required from all suspects before it can proceed in this way.
9. The Interview Protocol does not make in-person interviews compulsory for those under 18 or vulnerable. Instead, it requires “*special care*” to be taken when deciding how the interview of a child or vulnerable adult should proceed (paragraph 8). Where legal

representation is to be provided remotely, the custody officer or interviewing officer, in consultation with the legal advisor and appropriate adult, has to consider “*whether a suspect’s ability to communicate confidently and effectively for the purpose of the interview is likely to be adversely affected, undermined or limited without the physical presence of a legal advisor*” in accordance with C:12.A.

10. The Interview Protocol states that “[*l*]legal advice for suspects should take place whenever possible over the telephone (for legal advice) and by video link for interviews with suspects” (para. 10). No mention is made of reasonable adjustments or alternatives to a telephone conference for those under the age of 18 or vulnerable adults.

11. If a video link interview is not possible, a legal representative can attend the interview via audio link (para. 11). Where the parties agree on this course of action, “*the informed consent of the suspect together with their appropriate adult (where one is required) should be obtained and endorsed on the custody record*”. Where an interview proceeds in this way, the Interview Protocol states that it should be visually recorded by the police.

12. The Interview Protocol makes clear its preference for completely virtual interviews, followed by partial virtual interviews, and then finally physical interviews (paragraph 16). In-person interviews may take place where:

*“All parties physically required due to the serious nature of the case or because the suspect and appropriate adult do not consent to a completely or partial virtual interview”.*

13. Save for in these circumstances, the Interview Protocol envisages interviews proceeding virtually, either completely or partially.

#### Interview Protocol May 2021

14. Para. 6 of the May 2021 Interview Protocol explicitly states that it does not apply to suspects who are either under the age of 18 or vulnerable (as defined by C:1.4 and C1.13(d)). Save for deleting the sections relating to these, the wording used in the May 2021 Protocol remains the same as the April 2020 version.

### C. Does the Interview Protocol lawfully amend PACE Code C?

15. The Covid-19 pandemic posed unprecedented challenges across all sectors. In the legal sphere, the urgent need to reduce the risk of catching the virus required processes to be adapted to ensure the safety of all parties.
16. PACE Code C was not amended or modified by the Secretary of State in response to the Covid-19 pandemic. Instead, the Interview Protocol has been relied on to guide the application of Code C during the pandemic. However, the practical effect of the Interview Protocol is that it amends Code C and grants a power to conduct remote interviews by video and audio link, despite this not being within the current language of the Code.
17. While a Home Office consultation on amending PACE in line with the Interview Protocol took place in June 2020, no further action has been taken. The Government's Response to the consultation, dated 2 February 2021, noted that "*the driver for the proposed temporary changes [to PACE Codes of Practice C and E] was to support the continued operation of the Interview Protocol [...]*" (para.2.1.2). As such, there is a clear acceptance that, if codified, the Interview Protocol would modify the existing provisions of PACE (para.2.1.3).
18. In accordance with PACE 1984, only the Secretary of State has the power to amend the Codes (s.66, 67(2)). An order bringing a code into operation or revising a code, must be laid before Parliament (s.67(7), (8)). Pursuant to s.67(7C), this cannot occur until the Secretary of State has consulted various stakeholders.
19. Although the signatories assert that remote interviews are within the "spirit of recent amendments" and the Coronavirus Act 2020, this does not provide a legal basis for the guidance to amend the Codes and circumvent the clear procedure required by ss.66 and 67 PACE 1984. The Interview Protocol was not subject to any of the scrutiny required by s.66 PACE 1984, nor was the legislative process followed to amend the text of the Codes. The signatories do not possess the power to by-pass the legislative process required by PACE and make amendments. Therefore, where there is a conflict between the text of Code C and the Interview Protocol, the former should prevail.
20. The signatories have acted beyond the powers prescribed to them and have purported to amend Code C (through the Interview Protocol) to include a power to conduct

remote interviews. The approach taken is inconsistent with the parameters imposed by the statutory framework. The signatories purport to exercise a power that they simply do not have. A suspect's consent to a remote interview cannot cure this. By creating a Protocol that amends the Codes, it is arguable that they have acted *ultra vires*. The signatories have failed to observe the statutory procedures in place to amend the Codes and sought to circumvent these using the Interview Protocol.

#### **D. Is the provision of remote legal assistance compatible with Article 6 of the ECHR?**

##### *i) The relevant authorities*

21. The European Court of Human Rights has interpreted Article 6(1) of the ECHR as including a requirement that a suspect has access to a lawyer "*from the first interrogation*" by the police (*Salduz v Turkey* [GC], App. No. 36391/02 (Judgment of 27 November 2008), para. 55). This was codified in the EU Access to a Lawyer Directive in 2013 (Directive 2013/48/EU), and confirms that a suspect should have access to a lawyer during interrogations in custody.

22. Of assistance is the ECtHR's decision in *Doyle v Ireland* (App. No. 51979/17 (Judgment of 23 May 2019)). The Court considered the previous jurisprudence and provided a summary of the key principles emerging from the same. It held that Article 6(3)(c) does not specify the manner of exercising the right of access to a lawyer, but leaves it to states to choose the means of ensuring that it is secured in their judicial system (para. 73). However, it found that this must consist of at least the following at para. 74:

- First, suspects must be able to contact a lawyer from the time when they are taken into custody and the lawyer must be able to confer with their client in private and receive confidential instructions;
- Second, suspects "*have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings*", to ensure that the defence rights of the interviewed suspect are not prejudiced; and,
- Third, lawyers should ensure respect for the right of an accused not to incriminate themselves and their right to remain silent.

23. The ECtHR asked itself two questions: (1) were there compelling reasons to justify the restriction of access to a lawyer; and (2) were the proceedings overall unfair. This two-stage approach was also applied at paragraph 257 in *Ibrahim v United Kingdom* [GC] Apps. Nos. 50541/08, 50571/08/ 05073/08 and 40351/09 (Judgment of 13 September 2016).

24. With regards to whether compelling reasons exist or not, the Court confirmed in *Beuze v Belgium* [GC] App. No. 4429/09 (Judgment of 28 June 2011) that the finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. In each case, the proceedings must be viewed as a whole. Where there are no compelling reasons justifying such a restriction, the court will apply very strict scrutiny to its fairness assessment. The absence of compelling reasons under the first limb of the test does not in and of itself determine whether there has been a violation of Article 6.

25. A non-exhaustive list of factors, drawn from the case law, have been used to aid the examination of the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings. For example: whether the person was vulnerable, by reason of the age or mental capacity; whether the legal framework governing admissibility can cure any prejudice; the use of the evidence at trial, its importance to the case as a whole, and the strength of the other evidence in the case; and, the relevant procedural safeguards afforded by domestic law and practice (*Beuze*, para.150; *Ibrahim*, para. 274). The ECtHR has concluded that the burden is on the state to “*demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice*” (*Ibrahim*, para. 264).

#### *ii) Application of the principles to remote legal assistance*

26. It is important to note that the Interview Protocol does not impose a blanket ban on in-person interviews. There is nothing precluding the physical presence of a lawyer. Where the case is serious or the suspect and appropriate adult withhold their consent, then a remote interview will not take place. The Interview Protocol purports to strike a balance between the challenges posed by the pandemic and a suspect’s rights.

However, Code C – which reflects the law – does not provide for remote interviews by video or audio link.

### Compelling reasons

27. In our view the dangers posed by Covid-19 pandemic and the state of a public emergency could amount to “compelling reasons” and thus justify a restriction of a legal representative’s physical presence. However, when assessing whether compelling reasons have been demonstrated,

*“of relevance is whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operation decision-making by those responsible for applying them” (Ibrahim, para.258).*

28. As set out above, we are of the view that the Interview Protocol is guidance and not law. C:6.8 confirms the right of a suspect to have a legal representative present when they are interviewed unless the exceptions in C:6.6 apply. There is nothing within these exceptions that allow a legal representative to appear remotely on public health grounds. The scope and contents of the restriction provided for in the Interview Protocol is not sufficiently circumscribed by law. The Reports pointed to by those instructing confirm the divergent approaches being taken and the issues caused by this. The right is, in effect, being restricted on the basis of guidance issued by the signatories and not legislation. With regards to consent, we are of the view that a suspect cannot consent to a procedure that amounts to a procedural irregularity and is the product of the signatories acting *ultra vires*.

29. Therefore, while a state of public emergency may in principle provide a compelling reason to justify a restriction, absent a cogent legal basis for this, we are of the view that the pandemic cannot constitute a compelling reason in and of itself. We note that the absence of compelling reasons alone does not lead to a finding of a violation of Article 6.

### The fairness of the proceedings as a whole

30. Even where there are no compelling reasons to deny access to a legal representative, the ECtHR has gone on to examine the trial proceedings to assess the impact of the

admission of statements made to determine the fairness of the proceedings as a whole. This will be determined on a case-by-case basis.

31. Consent / waiver raises several issues in these circumstances. While the case law confirms that there is nothing within the Convention that prevents a person from waiving their Article 6 rights, for this to be effective for Convention purposes it “*must be unequivocal and attended by safeguards commensurate to its importance*” (*Dvorski v Croatia* [GC] App. No. 25703 (Judgment of 20 October 2015), para.101). First, if there is no legal basis for a remote interview, a suspect cannot consent to a process that is unlawful. Second, even if it was found that they could, there would need to be evidence to support that the waiver was in fact unequivocal. Evidence of this will be important to establishing this.

32. The following will need to be considered for adult suspects and suspects under the age of 18 or vulnerable:

- The decision-making process required by para.8 of the Interview Protocol April 2020 to justify a decision to interview a suspect under 18 or vulnerable remotely;
- the basis of any purported consent to a remote interview (did the legal representative consider the legal basis for remote interviews and challenge this, was the suspect fully advised about their options, did they have a realistic choice);
- whether the interview was adversely affected, undermined or limited without the physical presence of a legal representative;
- if the contents of the interview can be attributable to the absence of a legal representative.

33. Privilege may need to be waived to enable all the relevant records to be considered, and any written records made by the officer and appropriate adult involved in this decision would need to be reviewed.

34. Whether a legal representative intervened, the interview was recorded, and the nature of any comments made, will all be assessed to determine whether the safeguards in place were sufficient to cure any alleged unfairness. In cases where the legal representative appeared remotely but actively participated throughout, the court are



less likely to find that their physical absence was prejudicial. Further, if there is nothing harmful to the suspect's case was said or done during the interview, a court is unlikely to find that admitting the contents of a remote interview would have an adverse effect on the fairness of the proceedings.

35. S.76/78 PACE 1984 can be used to challenge the admissibility of a remote interview. Breaches of PACE could be argued on the basis that the Interview Protocol is guidance, and not law. However, as the ECtHR's case law confirms, if the interview is excluded it is unlikely that the proceedings as a whole would be considered to be unfair under Article 6.

36. Whether or not the overall fairness of the trial is irretrievably prejudiced by the admission of a remote interview restriction will be determined on a case-by-case basis. For this reason, we are of the view that whether there has been a breach of Article 6 will very much depend on the facts of an individual case. Even if the ECtHR found that no compelling reasons existed for a restriction of the right to access a lawyer, when considered as a whole the trial could be found to be fair. Conversely, the fact that the ECtHR applies its test of fairness on the specific facts of the case before it means that even were the Government to change the law so as to permit the proper amendment of the Code, that might not guarantee that remote advice was compatible with article 6.

**E. In what circumstances could the admissibility of an interview be challenged on the basis that the suspect had remote legal assistance?**

37. It is difficult to provide a comprehensive list of the circumstances in which the admissibility of an interview could be challenged. We do not consider that every interview could be challenged on the basis that it was conducted remotely.

38. Whether it is arguable that a remote interview had an adverse impact on a suspect's ability to communicate effectively will very much depend on the facts of the case. For example, an adult that consents to a remote interview for a non-serious offence is less likely to be prejudiced than a vulnerable individual with communication difficulties charged with a serious offence. Communicative needs will be relevant to the assessment of whether a remote interview was appropriate and the contents therein are admissible.

39. With regards to the issue of consent, we note that even if the court were to find that informed consent was not, or could not, be given, that does not mean that a remote interview would be automatically excluded. Consideration will be given to the contents of the same and the prejudicial impact of the remote interview's admission on the fairness of the proceedings.

40. There may be cases where technical issues could give rise to an application to exclude. For example, where an interview was plagued with technical issues and the legal representative was unable to be heard or interject to advise a suspect of their right to remain silent, or stop the interview to advise on issues relating to self-incrimination. However, the steps taken to remedy the situation and whether a suspect was prejudiced by this would need to be carefully considered.

## **F. Conclusion**

41. Those arrested and questioned about crimes that they are suspected of having committed are often amongst the most vulnerable in society. They may be unwell, troubled, intoxicated, scared, forgetful or feel under pressure from others who they dare not name to the police. As both the European Court of Human Rights and the Courts of the United Kingdom have recognised, the provision of legal advice is crucial to guard such people's rights. It follows that any encroachment of the protection of legal advice merits the greatest scrutiny.

42. Should those instructing require any further assistance or wish to discuss the contents of this advice in more detail, please do not hesitate to contact us.

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