Scotland concedes legal access to those arrested, but curtails appeals

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Scotland has been forced to agree that police suspects must be allowed the elementary right of access to a solicitor before questioning, after opposing this demand for more than two decades. However, the "emergency" legislation it drafted in response to a UK Supreme Court ruling also contains an assault on legal rights.

The legislation came in response to the Supreme Court's long expected ruling in the case of Peter Cadder. The 20-year-old from Glasgow was convicted for assault and breach of the peace in 2009. The court ruled that under the European Convention on Human Rights, which is included in UK and Scots law, Cadder's right to a fair trial had been violated because he was denied access to a lawyer after his arrest—a common practice.

The pre-history of the ruling stretches back to a report on Scotland by the European Committee for the Prevention of Torture (CPT) after visits to the UK in 1994 and 2003. The CTP had noted, "The period immediately following deprivation of liberty is when the risk of intimidation and ill-treatment is greatest" and insisted that the right of access to a lawyer was of paramount importance.

The Supreme Court ruling was made unavoidable by a 2008 landmark case in which the European Court of Human Rights ruled that the Turkish authorities breached the rights of Yusuf Salduz, an 18-year-old Kurd, in denying him access to a lawyer. Salduz was arrested in 2001 on suspicion of taking part in a demonstration in support of the Kurdistan Workers Party (PKK) and hanging a banner from a bridge in support of arrested PKK leader Abdullah Ocalan. Statements extracted from Salduz under duress and without access to a lawyer were used to convict and jail him for four and a half years.

A similar case to Cadder's had previously been thrown out by the Scottish Lords Commissioners in the Court of Appeal in Edinburgh. In 2009, seven of Scotland's senior judges ruled against Duncan Maclean, rejecting his claim that his rights had been violated because he had no access to a lawyer. Lawyers in Scotland therefore took Cadder's case to the Supreme Court. Although Scotland retains a distinct legal system, the Supreme Court retains final jurisdiction in civil and constitutional areas.

The Supreme Court, faced with no alternative, ruled unanimously in Cadder's favour. In a 48-page judgement, Lord Hope, the Court's Deputy President explained that the verdict's 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 current situation in Scotland, Hope continued, "deliberately deprives the suspect of any right to take legal advice before being questioned by the police in the hope that, without it, he will be more likely to incriminate himself during questioning".

The court ruled, however, that its judgement should not be applied retrospectively to other miscarriages of justice in up to 76,000 cases in which people had been convicted on a similar basis to Cadder. As a result, only 3,500 cases currently in various stages of completion were thought likely to be affected by appeals. Scottish Lord Advocate Elish Angiolini had implemented interim measures over the summer through which detainees were given immediate access to lawyers *if requested*.

On October 27, the day of the verdict, the Scottish National Party (SNP) government in the devolved parliament in Edinburgh pushed through the Criminal Procedure (Detention, Legal Assistance and Appeals) (Scotland) Act. The "emergency" bill was presented at 2:05 p.m. and timetabled for a vote by the 129

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members of the Scottish parliament a mere four hours later. In the event, it took until 7:52 p.m. for the bill to be passed by 97 votes to 18.

Although the legislation concedes the right to a lawyer to the 50,000 or so people arrested in Scotland each year, the Scottish government seized the opportunity to increase the period during which a detainee can be held without charge from 6 to 12 hours immediately following the verdict. Twenty-four hours detention would be available to the police if requested. During the parliamentary debate Justice Secretary MacAskill declared, “Six hours is now entirely inappropriate because the scales of justice have been tipped. We need this legislation and we need it now.”

MacAskill also smuggled through a number of restrictions to the right of appeal. According to a briefing note put out by the Glasgow Bar Association, Clauses 5 and 6 tilt time limits in Appeals and Bills of Suspension against convictions in favour of the authorities. Clause 7 undermines the Scottish Criminal Cases Review Commission (SCCRC) and “represents and overall diminution in the ability of appellants to appeal”. The note also warned that the SCCRC ability to detect miscarriages of justice would be reduced.

John McGovern, president of the association, commented, “This is legislation by stealth. There is no emergency here at all. There has been no public debate on a Bill that restricts centuries old appeal rights, fundamentally questions the role of the Scottish Criminal Cases Review Commission and will allow the police to refuse access to suspects being detained for questioning if they deem it necessary.”

Among the most high-profile cases before the SCCRC in recent years was that of Abdelbaset Ali Mohmed Al Megrahi, convicted of the Lockerbie bombing in 1988. The SCCRC authorised a second appeal by Megrahi against his conviction on the basis that a miscarriage of justice may have taken place because Megrahi’s defence did not have access to some evidence. Megrahi abandoned his appeal shortly before he was allowed by MacAskill to return to Libya, ostensibly on health grounds.

In recent weeks, however, a number of British Lockerbie relatives have announced they intend to revive Megrahi’s dropped appeal. According to Robert Black QC, Clause 7 has created an “entirely new hurdle” for the relatives because the High Court can reject an appeal on the basis of “the need for finality and certainty in criminal proceedings”.

MacAskill also announced a review of Scottish legal procedures under Lord Carloway. The long-held legal principle of “corroboration”, under which any piece of evidence has to be backed up by at least one additional source, is expected to be called into question. The right to maintain silence without any inference being drawn is, as is already the case in England, also likely to be called into question.

The SNP sought to divert attention from their role by waving the Scottish flag and proclaiming unwarranted English interference. MacAskill claimed to be upholding Scotland’s “proud, distinctive, justice system”. First Minister Alex Salmond had earlier written to the Scottish Advocate General complaining that the “devolution settlement did not envisage the Supreme Court acquiring such a degree of jurisdiction in relation to criminal matters”.

None of this should be taken as proof of the superiority of the legal system in England and Wales, or of the democratic bona fides of the Supreme Court. While detention periods have now been increased to 24 hours in Scotland, in England and Wales the Supreme Court and its predecessor, the Law Lords, has overseen an increase in the legal detention period to a maximum of 96 hours. People charged with “terrorist” offences can be held for up to 28 days across the UK.

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