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How Safe are Safety Interviews?

Paul Mendelle Qc and Ali Naseem Bajwa discuss the rules that govern their conduct and admissibility

"The seriousness of terrorist offences should never be a reason for anything other than the best of good practice", Mr Justice Mackay, Woolwich Crown Court, Glasgow Airport Case

There is a growing trend in terrorism investigations to conduct one or more interviews with a suspect in circumstances where he does not enjoy his usual minimum statutory rights. These interviews have no formal title and the term "safety interview" does not appear in any Code of Practice. They would be more accurately described as "urgent interviews" but investigators and courts usually refer to interviews conducted in these circumstances as "safety interviews" so, for the sake of consistency, we too shall use that term.

The practice of conducting safety interviews is controversial and open to abuse. Moreover, there is a degree of uncertainty amongst lawyers, the public and even investigators as to what a safety interview is, what rules govern its conduct and admissibility and the value of such an interview. We shall address each of those issues in this piece.

What is a Safety Interview?

A safety interview is best defined as an interview conducted with a suspect before he has been afforded many of his usual pre-interview and interview rights on the grounds that there is an urgent "safety" need which requires an interview to be conducted without delay.

A safety interview is permissible in any criminal investigation however, for obvious reasons, it is most likely to be used in terrorism investigations.

Provision for investigators to conduct a safety interview with a suspect is made in both Code H (which governs terrorism investigations) and Code C (which governs all other criminal investigations) of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 (PACE). Code H: 11.2 and C: 11.1 permit a safety interview at the point of arrest, before arrival at the police station and Code H: 6.7 and C: 6.6 permit a safety interview at the police station.

(i) Safety Interviews before Arrival at the Police Station

Code H: 11.2 and Code C: 11.1 provide that following a decision to arrest a suspect, a safety interview may be conducted before arrival at the police station if the consequent delay would be likely to:

(a) lead to interference with, or harm to, evidence connected with an offence; interference with, or physical harm to, other people or serious loss of, or damage to, property;
(b) lead to alerting other people suspected of committing an offence but not yet arrested for it; or
(c) hinder the recovery of property obtained in consequence of the commission of an offence.

Code H: 11.2 and Code C 11.1 go on to say that this interview "shall cease once the relevant risk has been averted or the necessary questions have been put in order to attempt to avert that risk."

A safety interview before arrival at the police station would usually be conducted at the scene of the arrest or in the police vehicle *en route* to the police station. An interview in these circumstances involves a serious infringement of the suspect's rights, principally, the right to legal advice, the right to have a solicitor present when he is interviewed and the right to have the interview tape recorded. The Codes of Practice are silent as to what record must be kept of a safety interview conducted before arrival at the police station. In our view, because there is no tape recording of the interview, it is arguable that the spirit of the Codes imposes an obligation on an officer to make a verbatim record of the interview, timed and signed and, where practicable, offered to the suspect to agree or not, in the same way as is required when a suspect makes an unsolicited comment. It is difficult to see why the Codes should protect the maker of an unsolicited comment more than the subject of a deliberate interview.

(ii) Safety Interviews at the Police Station

Code H: 6.7 and C: 6.6 provide that a suspect who wants legal advice may be subjected to a safety interview before he has received such advice if:

(a) He is being held incommunicado in terms of access to a solicitor in accordance with Annex B of the Codes;
(b) an officer of at least the rank of superintendent rank has reasonable grounds for believing that the consequent delay might lead to interference with or harm to evidence, physical harm to other people, serious loss of or damage to property, alerting other as yet unarrested suspects or hinder the recovery of property obtained in consequence of the commission of an offence; or

(c) awaiting the arrival of the solicitor would cause unreasonable delay to the process of investigation.

Codes H and C and Annex C to the Codes state that in these circumstances, no adverse inferences from silence in a police station safety interview will apply because the suspect has been denied his right to legal advice. Accordingly, at the commencement of a safety interview, the suspect must be cautioned in the pre-1994 way, namely, "You do not have to say anything, but anything you do say may be given in evidence" ("the old style caution").

Note that wording of Codes H and C appears to suggest that the restriction on drawing adverse inferences from silence applies *only* to a police station safety interview and *not* to a safety interview carried out before arrival at the police station. We would suggest that, for the same reasons that there is restriction in a police station safety interview, silence in a safety interview conducted before arrival at police station should *not* attract adverse inferences. Indeed, it is hard to envisage the Crown seeking, or the trial Judge permitting, the drawing of adverse inferences in such circumstances. Therefore, in our view, although Codes H and C do not expressly require it, again, the spirit of the Codes dictates that officers administer the old style caution at the commencement of a safety interview conducted before arrival at the police station.

Another point of importance is that in respect of a police station safety interview, Code C: 6.7 states that "once sufficient information has been obtained to avert the risk, questioning must cease until the detainee has received legal advice". There is no such provision in Code H. Does that mean that a safety interview conducted in a terrorism investigation may continue once sufficient information has been obtained to avert the risk of harm? It might be argued that this is a deliberate omission but in our view, terrorism investigators would continue an interview at their peril once the justification for conducting a safety interview has ceased to exist. One has to recall that a suspect has been denied the very important right to legal advice and to have a solicitor present when he is interviewed. If the suspect is not answering questions, no adverse inference can be drawn from silence; if he is co-operating, there is a risk that any incriminating answers given in reply to questioning about the offence generally would be excluded as being unfairly obtained and/or unreliable. In our view, the right course in any investigation, terrorism or otherwise, is to cease questioning as soon as sufficient information has been obtained in a safety interview to avert the risk of harm.

"A safety interview is permissible in any criminal investigation however, for obvious reasons, it is most likely to be used in terrorism investigations."

R. v. Ibrahim & others

R. v. Ibrahim & others (2008) 4 All ER 208 is the leading authority on the admissibility of safety interviews. The case concerned the failed suicide bomb attacks in London on July 21, 2005. Following the arrest of the main suspects on July 29, eight days after the failed attacks, the investigators conducted safety interviews with three of the principal suspects both before arrival at the police station and at the police station. Because Code H had not at that time come into force, the safety interviews were carried out pursuant to the same provisions in Code C.

We shall focus on the facts pertaining to the main defendant Muktar-Said Ibrahim, although his experience was by no means unusual amongst those arrested. Ibrahim was arrested at 1.45pm and a safety interview was carried out with him at the scene of arrest. He answered questions and said that he knew of nothing that might harm the public. Ibrahim arrived at the police station at 2.20pm. He asked for a solicitor but, for various reasons relating to a lengthy booking-in procedure and the lack of available consultation rooms (there being a large numbers of persons in custody in relation to both the July 7 and July 21 investigations), no face to face or telephone consultation was arranged. At 6.10pm, a detective superintendent gave his authorisation to conduct a safety interview and ordered that Ibrahim's right to legal advice be delayed on the basis that: "Awaiting the arrival of a solicitor and permitting any pre-interview consultation …will cause unnecessary delay to this interview process …".

In fact, the police station safety interview did not take commence until nearly two hours later, at 7.58pm, over five-and-a-half after Ibrahim had arrived at the police station. Unfortunately, Ibrahim was then given the wrong caution at the outset of his safety interviews; far from being given the old style caution, he was told that adverse inferences could be drawn from any silence. Ibrahim was questioned extensively, including being asked over 20 times whether he knew of anything or anyone who might cause the public harm, who was involved in the July 21 attacks and other less obvious "safety" topics, such as his view on suicide bombings. Ibrahim denied being involved in the events of July 21 in any way. He lied about a number of matters and did not mention his later defence, namely that he did carry (ineffective) explosives on July 21 as part of a hoax suicide bombing attack in order to protest against Britain's foreign policy. When the safety interviews ended and Ibrahim received legal advice, he made no further comment in any interview.

Ibrahim stood trial at Woolwich Crown Court in January 2007. The defence argued that the police station safety interviews were inadmissible on the basis that:

(a) there had been significant and substantial breaches of Ibrahim's right to legal advice and to have a solicitor present during his interview;
(b) in giving Ibrahim the wrong caution, there had been a breach of his privilege against self-incrimination; and
(c) the interviewing went well beyond what could properly be described as a safety interview.

The Crown contended that the interviews were admissible and suggested that the jury was entitled to use the evidence to reject Ibrahim's defence on the basis that if his conduct was nothing more than a hoax and a protest, one

would not have expected him to lie prodigiously and deny any involvement in the events of July 21.

The trial Judge, Fulford J, held that, whilst he accepted that Ibrahim had been denied a telephone consultation with his solicitor and being given the wrong caution, admission of the safety interviews was not unfair. Ibrahim was subsequently convicted of conspiracy to murder and he appealed against his conviction.

The Court of Appeal rejected Ibrahim's appeal against the trial Judge's ruling on the admissibility of the safety interviews. The court ruled that:

There is no basis for saying that safety interviews should automatically be excluded on public policy grounds. The admission of the safety interviews, or their fruits, in evidence at a subsequent trial is subject to the ordinary principles governing a fair trial and the over-arching provisions in s.78 of PACE.

In determining the issue of fairness, much would turn on the nature of the warning or caution, if any, given by the police to the suspect. If the suspect were to be assured in terms that any information provided by him would not be used against him, that would provide a powerful argument against the admission of incriminating evidence obtained in consequence. Much too may turn on whether the interviews produce evidence directly relevant to the charge which led to the suspect's original detention, or whether the first connection that the prosecution may establish against him with any offence arises directly from his full co-operation with them during the course of the safety interview. These will be fact specific decisions, to be made in the overall circumstances of each individual case;

> *"There is no basis for saying that safety interviews should automatically be excluded on public policy grounds."*

The fact that no adverse inference could be drawn from *silence* in a safety interview did not mean that *lies* during a safety interview were inadmissible; and

There was no basis for interfering with Fulford J's decision that the safety interview should be admitted.

R. v. Abdulla & Asha

R. v. Abdulla & Asha concerned the failed London and Glasgow Airport car bomb attacks on June 29 and 30, 2007.

Dr Mohammed Asha was arrested on June 30 and he arrived at the police station at 1am on July 1. At 5am, the custody sergeant left a message for the duty solicitor and at 6.15am, the solicitor called back and was told that Dr Asha was resting. At 10.15am, the police conducted their first safety interview. At 10.54am, the solicitor called again and at 11.25am, he had a telephone consultation with Dr Asha. At 3.05pm, the solicitor said that he could not attend until 6pm. At 3.35pm, the police conducted their second safety interview.

At his trial in autumn 2008, Dr Asha, far from seeking to exclude the evidence, positively sought the admission of the safety interviews. He relied on the fact that he had answered questions and set out his defence under the pressure of his safety interviews which contained aggressive and misleading questioning. There can be little doubt that the interviewing officers sought to take advantage of the fact that Dr Asha had no solicitor present by adopting a style of questioning (for example, swearing and ridiculing his answers) and telling him, falsely, that they had new information about him.

The trial Judge, Mr Justice Mackay, made it clear that if Asha had incriminated himself and sought to exclude the evidence, he would have ruled the evidence inadmissible because of the breaches. "The seriousness of terrorist offences should never be a reason for anything other than the best of good practice," he said. During his summing up, Mackay J told the jury: "What this trial may have revealed to you, on this occasion, [is that] Mohammed Asha's rights were not fully respected."

It is clear from Mackay J's strong comments in the *Asha* trial that whilst the Court of Appeal in *Ibrahim* may have declined to interfere with the trial Judge's discretion, that does not mean that a trial Judge faced with the breaches of the suspect's rights cannot and will not exclude incriminating evidence elicited during a safety interview. Judges must be mindful of the importance that the European Court of Human Rights attaches to early access to a lawyer and that court's concern about evidence obtained during incommunicado detention (see *G v. UK* (1984) 35 DR 75 and *Barbera, Messegue and Jabardo v. Spain* (1989) 11 EHRR 360).

In future, a trial Judge, perhaps faced with a less exceptional factual case than *Ibrahim* may well come to the view that admission of incriminating evidence obtained during a tainted safety interview would have an adverse effect on the fairness of the proceedings.

Summary

To summarize the main points, a safety interview:

- may only be conducted where there is such an imminent risk of harm to person, property or evidence that the investigators simply cannot delay interviewing the suspect until he has arrived at a police station or has received legal advice;
- must commence at the police station with the old style caution and, arguably, before arrival at the police station too;
- must be recorded contemporaneously or as close to contemporaneously as possible before arrival at the police station,;
- must not contain questioning about matters which trespass beyond that which relates to averting the risk of harm to person, property or evidence; and
- must cease as soon as the risk has been averted or, in the case of a safety interview conducted before arrival at the police station, the necessary questions have been put in order to *attempt* to avert that risk.

In short, whenever a safety interview is conducted, anything less than best practice may mean that incriminating and otherwise admissible evidence is excluded. In that event, public safety, far from being protected, will in fact be compromised.

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