



2. The established procedure for dealing with such a challenge (see, eg, *Law Officers of the Crown v Correia* (unreported, 17 August 2015) and *Law Officers of the Crown v De Kock* (unreported, 15 March 2016)) is to hold a *voir dire* and deal with it as a preliminary issue. Evidence was called on behalf of the Prosecution from four law enforcement officers, two of whom had to be recalled to deal with further issues that had arisen during the course of the evidence and, as a late development, I also heard from a Latvian interpreter called on behalf of the Defendant. The Defendant did not give evidence and chose not to call any further evidence.
3. The first count on the indictment alleges that the Defendant attempted to evade the prohibition on importation of goods, contrary to sections 77(1)(b) and 77(A)(1) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended. (The second of those sections was inserted in 1991, although the parentheses around the “A” should not be there.) On behalf of the Prosecution, Advocate Perry has acknowledged that this count has been added to the indictment as a result of what the Defendant said in interview. Accordingly, it is likely that this count could not be pursued if the interviews were to be excluded. The other five counts all allege offences of being concerned in the fraudulent evasion of the prohibition on importation of goods, contrary to section 77(1)(b) and 77(2) of the 1972 Law. The time frame for each of those alleged offences is between 31 December 2016 and 24 February 2017. Each relates to a postal package, three of which were addressed to the Defendant (counts 4 to 6) and two of which were addressed to others (count 2 relating to Jack Bodeen and count 3 to Radric Matterson), although all five were to be delivered to the same premises, which is the Defendant’s home address. The other difference is that counts 2 and 3 relate to Cannabis Resin and counts 4 to 6 to Cannabis. The Defendant has already pleaded guilty to count 3.

#### **Outline of facts**

4. As a result of inspecting the five postal packages addressed to the Defendant’s home address at the sorting office, the Defendant was arrested on the morning of 24 February 2017 at his workplace. At that time he was 18 years old. He is a Latvian national. He was taken to the Police Station and processed by the custody officer, PS Hart. The custody record shows that there was a delay between the time of arrival and her beginning the steps to authorise detention. I have seen a copy of the custody record which is a computer-generated document. It is apparent that there are opportunities at various points for a detained person to counter-sign the custody record and the signature appearing in those places is acknowledged to be that of the Defendant. I have also seen a number of screenshots from the computer system that show the boxes that have to be filled in as a detainee is processed and which contain the details that are then transposed so as to populate the content found in the print-out of the custody record.
5. PS Hart’s evidence was in my view, clearly given and she readily accepted that she had no real recollection of dealing with the Defendant and that she was making use of the custody record and her usual approach when acting as a custody officer for the purpose of giving her answers. She explained that she had been a custody officer for more than two years at the time of the Defendant’s arrest and detention and that approximately one-third of the persons brought before her in that capacity do not have English as their first language.
6. Having authorised the Defendant’s detention for the purpose of securing/preserving evidence and obtaining evidence by questioning, PS Hart proceeded through the stages that the computer system requires, covering aspects relating to the Defendant’s medical condition and his property. There is then a section dealing with the giving of rights. On the custody record, this section is shown as:

*“A notice setting out my rights has been read to me and I have also been provided with a written notice setting out my entitlements whilst in police custody*

*I do not want anybody informed of my arrest at this time.  
I have been informed of my right to speak with an advocate in person or on the telephone at any time during my custody.  
I do not want to consult with an advocate at this time because: NOT AT THIS TIME  
The detainee has declined a copy of the Codes of Practice at this time”.*

The officer explained that these entries are made as a result of her running through the series of questions that are visible on the screen when reaching this stage in the process. This is one of the screenshots I have seen. For example, in relation to an Advocate, there is a box to complete in respect of the question “Does the detained person want an Advocate?”, against which “no” has been inserted and then “If not why?”, where the capitalised wording (“NOT AT THIS TIME”) has been inserted by her. The next section on that screen deals with an interpreter and has not been completed. However, approximately 45 minutes later, PS Hart has made an entry on the Defendant’s custody record that his “first language is latvian [sic] but he is fluent in english [sic]. D/P declined to have an interpreter”. The final section on the screen has the heading “Embassy” and against the question “Does the detainee wish to communicate with their embassy/consulate or high commission?” the officer has entered “N/A”. During the evidence that PS Hart gave when recalled, she accepted that this was an error on her part. This is an issue to which I will turn in more detail in due course.

7. In respect of the Defendant’s command of English, PS Hart’s evidence was that she was happy that he understood English sufficiently for all the procedures to take place. She had not had any issues communicating with him and got a good idea of his ability from asking the medical questions and the manner in which he responded. She also explained that the rights were read to him in English. I have been shown a copy of the document headed “Notice of Rights & Entitlements” on which the three primary rights are highlighted:

*“Tell the police if you want an advocate to help you while you are at the police station. It is free.  
Tell the police if you want someone to be told that you are at the police station. It is free.  
Tell the police if you want to look at their rule-book called the Codes of Practice. This tells you about Police powers and procedures whilst you are held in detention”.*

It is common ground that this document is available in other languages, including Latvian. PS Hart could not recall if the Defendant had taken a copy of this document away with him or whether it had been offered to him in Latvian. Much further into this document (which is printed on two sides in three columns) is a section headed “People who are not British”:

*“If you are not British, you can tell the police that you want to contact your High Commission, Embassy or Consulate to tell them where you are and why you are in the police station. They can also visit you in private or arrange for an advocate to see you.”*

8. Fairly early on during his detention, the Defendant enquired of PS Hart how long it would be until he was interviewed. The request was made in English. There was a subsequent request made by the Defendant about progress between the two interviews that took place on that day. That request was also made in English. This occurred shortly before the review of continued detention that was undertaken by an inspector mid-afternoon. As PS Hart commented, the Defendant did not appear to have any difficulty understanding what was happening and did not request an interpreter.

9. The second witness was Customs Officer Ferry. He interviewed the Defendant for 41 minutes from 12.53 pm on the day of arrest. Officer Batiste was also present and asked a few questions of clarification at the end of that interview. Customs Officer Ferry also interviewed the Defendant for 15 minutes at 5.22 pm. On that occasion he was accompanied by Officer Player, who did not ask any questions.
10. After the preliminaries, Officer Ferry cautioned the Defendant and asked him if he understood what it meant, to which the Defendant replied "Yes". Officer Ferry further explained to him: "you're aware of anything you tell us now in relation to the questions we ask you that could be used in any court case if it goes goes [sic] to that", with which the Defendant indicated he was okay. The officer continued:

*"I appreciate you are a Latvian national and English isn't your first language, if you get stuck or confused with anything I'm asking you, please let me know and I'll try and rephrase it erm if it is proving difficult then we will get an interpreter here but obviously you've stated you've been in Guernsey 3 years and we've had a conversation so I'm quite happy your English is better than my Latvian anyway erm so today we attended you place of work and you were arrested by my colleague on suspicion of being concerned in the importation of controlled drugs in that erm controlled drugs were sent via the post to an address that you live at and some of the packages were addressed to you by name erm my first question and I ask this to everybody, are you guilty of that offence? Did you arrange for those packages to be sent to you?"*

The Defendant simply replied "No", so the officer next asked:

*"Okay erm during this interview whether you choose to answer my questions or not and whether you choose to be honest or not is entirely up to you, I must say it's very much your opportunity to give your version of events, the more honest you are with me the better it will be, obviously we are gonna be conducting other enquiries, we will be analysing your mobile phone, if you've got a laptop or computer at your address that will also be analysed okay, other enquiries will be conducted as well, other investigations so if you tell me one thing now and then erm there's something on your phone or your computer that contradicts that then that won't look very good okay so I want you to be 100% honest with me in any questions I ask you".*

The officer clarified with the Defendant that he understood this, emphasising that it was the Defendant's opportunity to tell the investigators what had been going on. In cross-examination, the officer accepted that he had not asked the Defendant to explain the caution to him.

11. During the course of the interview, the Defendant was shown a package addressed to him and was able to identify what was contained within it as a drug, referring to marijuana. He stated that he had not posted this to himself and when asked if someone else has asked him to do so, answered that "They didn't ask me, they threatened me". The Defendant identified who this person was and elaborated on what had happened. It was at this point that he offered the information that he had attended at the Post Office and got a package under a different name and that, without opening this package, he had delivered it to the person who had threatened him. (This is the basis for count 1 on the indictment.) The Defendant was also shown the four other packages that had been intercepted, a couple of which contained bars of Cannabis Resin, with which the Defendant was unfamiliar in that form. The Defendant denied knowing about the various packages, save that he recognised the name of Radric Matterson (albeit the name is transcribed in slightly different forms from time to time in the transcript) because he

recognised it as the name he had been given when he went to the Post Office to collect a package.

12. Following that interview, the custody record has a further entry that *“During the interview D/P was obviously scared about potential repercussions of telling officers who was involved”* and also that the Defendant *“was upset, scared and shaking throughout the interview”*.
13. In relation to the second interview that day, Officer Ferry accepted that he had not reminded the Defendant that he was under caution and apologised for that omission.
14. Having been bailed from time to time pending further enquiries, the Defendant returned to the Police Station on 22 July 2017. On this occasion, the custody officer was Acting Sergeant Winslade, who was the third witness from whom I heard. This officer was (and still is) less experienced than PS Hart, but he had had the benefit of reviewing the custody record opened by her (and completed by another officer following a change of shift on 24 February 2017) to ascertain the reason why the Defendant was attending. A/S Winslade followed a similar approach to that previously followed by PS Hart when completing the booking-in procedure. It was perhaps a little quicker, though, apparently as a result of this being a return visit. The officer indicated that the fact that the Defendant had not requested or been provided with an interpreter on the earlier occasion had an influence on his decision that the Defendant did not require an interpreter that day. A/S Winslade also had little or no actual recollection of dealing with the Defendant and so relied on the custody record he had completed and his usual practice. When the Defendant was given his rights, *“NO REASON”* is recorded in respect of why the Defendant did not want an Advocate. On the question of an interpreter, the officer inserted *“LATVIAN NATIONAL WITH VERY GOOD ENGLISH”*. Against the question *“Does the detainee wish to communicate with their embassy/consulate or high commission?”* this officer similarly entered *“N/A”*.
15. The third interview with the Defendant was conducted by Customs Officer Gallienne, commencing at 5.07 pm and lasting eight minutes. Officer Batiste was again present. After the preliminaries, the officer cautioned the Defendant. He asked him if he understood and the Defendant replied *“Yes”*. He asked the Defendant to explain what he believed the caution to mean, and the Defendant responded: *“Anything what I say use as evidence”*. The officer then explained: *“Yeah so basically it can go towards erm proving your innocence or it can go towards proving your guilt”*. In cross-examination, the officer agreed that his further explanation did not extend to the Defendant’s right to silence. It was during this interview that the Defendant was shown still images taken from the CCTV from when he had attended at the Post Office.
16. Having heard from the four witnesses, the recordings of the three interviews were then played. I heard the Defendant chuckle at the joke Officer Ferry made about the Defendant’s English being better than the officer’s Latvian. Although some of the Defendant’s responses were brief, when he gave a long answer I considered him to be speaking in quite a flowing manner. Even where the order of the words would strike a native English speaker as unusual, the Defendant appeared to be speaking confidently. When bars of Cannabis Resin were produced from a package, I formed the impression that the Defendant was genuinely surprised. When he was unsure what was meant by the officer, he asked for clarification as to the meaning. In the second interview, I also noted that any longer answer was still given in a flowing manner and that the Defendant appeared to express surprise at something being found in a shoe in a box in his room, even though this item has nothing to do with the offences he now faces. He referred to someone colloquially as *“sick in the head”*. On his return for the third interview, I formed the impression that he was answering questions quickly, from which I infer he knew

what they were about and that he was not struggling at all to understand what was being put to him.

17. The recordings of these three interviews were played a second time at the adjourned hearing on 28 August 2018. They were played at the request of Advocate Maindonald so that Andra Le Bideau, a Latvian interpreter, could listen to them and tell the Court whether at any time she heard the Defendant speaking in Latvian. This possibility arose because Advocate Maindonald had been told by the Defendant's mother, who had been in the public gallery when the interviews were first played, that she had heard the Defendant use Latvian. However, Mrs Le Bideau's evidence was that she had not heard the Defendant use Latvian during any of these interviews. Although he had mumbled at times, she believed he had spoken in English throughout. One advantage of hearing the interviews for a second time and comparing the transcripts that were also before me is that it reinforced the view I had taken as to the way in which the Defendant had responded throughout each interview.

### **Code of Practice**

18. This preliminary issue squarely engages Code of Practice C (A Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers), issued under section 73 of PPACE. There is further relevant direction about Codes of Practice contained in section 74 of that Law:

*“(9) A failure on the part –*

*(a) of a police officer to comply with any provision of such a code; or ...*

*shall not of itself render him liable to any criminal or civil proceedings.*

*(10) In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.”*

In my opinion, there are aspects of Code C that are clearly relevant to the question of admissibility of these three interviews of the Defendant and so I have had regard to whether or not there has been a failure on the part of the officer in question to comply with it. For the reasons that follow, I am satisfied that there have been a number of breaches of Code C when dealing with the Defendant on the two days in question last year.

19. On behalf of the Prosecution, Advocate Perry conceded that there had been a breach of the Code in relation to the failure to remind the Defendant that he was under caution at the start of the second interview. Indeed, Officer Ferry apologised for this omission. Paragraph 10.7 of the Code provides that:

*“After any break in questioning under caution, the person being questioned must be made aware they remain under caution. If there is any doubt the relevant caution should be given again in full when the interview resumes.”*

There is a cross-reference to Note 10D, which states:

*“It may be necessary to show to the court that nothing occurred during an interview break or between interviews which influenced the suspect's recorded evidence. After a break in an interview or at the beginning of a subsequent interview, the*

*interviewing officer should summarise the reason for the break and confirm this with the suspect.”*

20. Advocate Perry did not concede that there had been any other breaches of the Code, although he did recognise that a finding that there had been a breach in respect of not informing the Defendant of his entitlement to communicate with his consulate was clearly open given that both PS Hart and A/S Winslade had entered “N/A” to that issue when running through the rights. A/S Winslade went further in referring to Latvia not being in the list of countries in an Annex to Code C, and to his need to refer the issue to his training department, which rather suggests to me that this is an area where there is a lack of clarity within those performing the functions of custody officer. I am, however, satisfied that there has been a failure to comply with the requirements of the Code in this respect.

21. Within Section 3 of the Code (Initial Action), para. 3.3 provides that:

*“A citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, must be informed as soon as practicable about their rights of communication with their High Commission, Embassy or Consulate.”*

There is a cross-reference to Section 7 (Foreign Nationals), in which it is provided that:

*“7.1 Any citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, may communicate at any time with the appropriate High Commission, Embassy or Consulate. The detainee must be informed as soon as practicable of this right. He should also be informed as soon as practicable of his right, upon request, to have his High Commission, Embassy or Consulate told of his whereabouts and the grounds for his detention. Such a request should be acted upon as soon as practicable.*

*7.2 If a detainee is a citizen of a country with which a bilateral consular convention or agreement is in force requiring notification of arrest, the appropriate High Commission, Embassy or Consulate shall be informed as soon as practicable, subject to paragraph 7.4. The countries to which this applies are listed in Annex F.*

*7.3 Consular officers may visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice. Such visits shall take place out of the hearing of an officer.*

*7.4 Notwithstanding the provisions of consular conventions, if the detainee is a political refugee whether for reasons of race, nationality, political opinion or religion, or is seeking political asylum, consular officers shall not be informed of the arrest of one of their nationals or given access or information about them exception at the detainee’s express request.”*

22. 38 countries are listed in Annex F. Latvia is not included among them. Accordingly, there was no requirement for the Embassy or Consulate to be informed of the Defendant’s arrest as soon as practicable pursuant to para. 7.2, but there was an obligation to inform the Defendant of his entitlement to communicate at any time with his Embassy or, perhaps more likely when there is a well-known and active local honorary consul, with that person. I am satisfied that nothing was said to the Defendant about this entitlement by PS Hart, or by A/S Winslade, at the time that this should have been raised. I am further of the view that making available a written document containing the short paragraph about “*People who are not British*” is

insufficient to comply with this aspect of Code C. Note 3A suggests that the notice of entitlements should *inter alia* list the entitlements in the Code, including “*visits and contact with outside parties, including special provisions for Commonwealth citizens and foreign nationals*”, and the document made available does comply with this guidance. However, in my judgment, there is a distinction between being provided with information and being informed. The latter suggests to me that steps need to be taken to ensure that a detained person is aware of this entitlement rather than leaving it to the detained person to inform himself by actually reading any material made available.

23. I take the view that the computer system supports that view by including a question about the detainee’s wish to communicate with the Embassy or Consulate and then there being a separate question: “*Does the country involved have a bilateral consular convention or agreement in force?*” By setting out the two aspects distinctly, which is entirely consistent with the terms of Code C, it shows that the wish of the detained person to communicate is of general application and there is then a secondary question as to whether a bilateral convention exists imposing an obligation on those detaining the person to notify the relevant High Commission, Embassy or Consulate unless there is a valid reason for not doing so, which the computer system prompts the officer to insert. Accordingly, I am satisfied that there was non-compliance with Code C at the outset of what took place on both days, ie, prior to the interviews being conducted.
24. The final aspect of the Code to which I can refer relates to the question of whether an interpreter should have been found to assist the Defendant. Paragraph 13.2 provides:

*“Unless paragraph 11.2 or Annex C applies, a person must not be interviewed in the absence of a person capable of acting as interpreter if:*

- (a) he has difficulty in understanding English;*
- (b) the interviewer cannot speak the person’s language;*
- (c) the person wants an interpreter present.”*

25. Although this paragraph does not include any use of “and” or “or”, I take the view that (c) overrides either (a) or (b), so that if the detained person to be interviewed wants an interpreter to attend, one will be found, unless it is a case where the delay involved is governed by para. 11.2 or Annex C, neither of which has any relevance in relation to the Defendant. However, there has been no suggestion that the Defendant wanted an interpreter to be present at any of his interviews. Accordingly, the issue for PS Hart to determine (and subsequently A/S Winslade) was whether the defendant had difficulty in understanding English. If he did, then an interpreter should have been found to assist in the interview process on the basis that there has also been no suggestion (and indeed the contrary from Officer Ferry) that the interviewer could speak Latvian. To the extent that Advocate Perry submitted that there should be an “or” inserted at the end of both (a) and (b) so that all three aspects are to be read disjunctively, I disagree. Whilst (c) is an obvious alternative situation in which an interpreter must be found, in any case where the person to be interviewed has difficulty in understanding English but the interviewer can conduct the interview in the person’s own language, it seems to me that it would be permissible to follow that course of action. Consequently, just because the interviewer cannot speak the person’s own language (para. 13.2(b)) does not automatically lead to the interview having to be conducted using an interpreter. What is important is that there must be effective communication between the interviewer and the person being interviewed, as demonstrated by para. 13.10:

*“When the custody officer cannot establish effective communication with a person charged with an offence who appears deaf or there is doubt about their ability to*

*hear, speak or to understand English, arrangements must be made as soon as practicable for an interpreter to explain the offence and any other information given by the custody officer.”*

Although this relates to a later stage in the process, I think it is indicative of the scheme of this Section of the Code.

## **Confession**

26. It makes sense to deal first with the challenge to the admissibility of the interviews under section 76 of PPACE. This basis for the challenge only arose during the course of the hearing, but the Advocates filed supplementary Skeleton Arguments during the adjournment after the first stage of the hearing and elaborated upon them in closing. The term "*confessions*" is defined in section 91(2) of PPACE as including "*any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise*". As a result, the term does not apply to the entirety of all three interviews because some of what the Defendant had to say was to deny any knowledge of the postal packages that were en route to his home address, whether in his name or that of someone else. His admissions are, therefore, limited and, in any event, qualified. There were, however, statements made by the Defendant in the interviews that were adverse to him, particularly in respect of count 1 and count 3, although he has already pleaded guilty to count 3.

27. Section 76 of PPACE deals expressly with the admissibility of confessions:

*"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*

*(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –*

*(a) by oppression of the person who made it; or*

*(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*

*the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."*

There has been no suggestion that subsection (2)(a) is applicable and the submissions have proceeded on the basis of unreliability.

28. Although it was not raised in any particular way by the Advocates, I have reminded myself of what I referred to in *De Kock* (*supra*) on the topic of so-called "*mixed statements*", the general summary of which is now in para. F18.93 of *Blackstone's Criminal Practice 2018*:

*"It is the convention to admit in evidence statements made by an accused when being questioned by the police whether or not they contain admissions (Pearce (1979) 69 Cr App R 365) but such statements are admitted as evidence of reaction and not as evidence of the facts stated (see **F6.39**). The rule is different in relation to a mixed statement, which in part comprises admissions and in part exculpatory or self-serving*

statements (*Hamand* (1985) 82 Cr App R 65 at p. 67). An example would be 'I admit I hit him, but he was trying to kill me'. A 'partly adverse statement' is a confession by virtue of the PACE 1984, s. 82(1) (see **F18.1**), and is admissible as such provided that the requirements of s. 76 are complied with. In *Finch* [2007] 1 WLR 1645, the Court of Appeal identified as suitable for full argument the question whether the presence of an admission in a police interview rendered the entire interview a 'confession', and Hughes LJ said that not everything stated at the time of a partial admission is necessarily part of a 'confession'; a proposition relied upon in *Sliogeris* [2015] EWCA Crim 22 (see **F18.5**). Whether a particular statement is truly 'mixed' is, it is submitted, a question of fact, and both temporal and contextual separation will be relevant to whether two or more propositions form part of the same statement. It will be a question for the court in each case to determine whether an excuse or explanation so accompanies an admission as to be part of a mixed statement for the purposes of this rule. In *Pearce* (1979) 69 Cr App R 365, the principle was said to be that a statement which is not an admission is admissible if it is made 'in the same context as an admission', and the Court of Appeal accepted that the two parts of the mixed statement may occur at different places in 'the same interview or series of interviews'.

Where an admission is made which is qualified by an explanation or excuse, 'all the authorities agree that it would be unfair to admit the admission without admitting the explanation' (*Sharp* [1988] 1 All ER 65 per Lord Havers at p. 12). In *Pearce* (1979) 69 Cr App R 365, it was said that to exclude answers at interview which are favourable to the accused, while admitting those which are unfavourable, would be misleading, and a breach of duty on the part of the prosecutor, whose obligation is to present the case fairly to the jury."

29. In the context of the present preliminary issue, I have also had regard to the further explanation at the beginning of para. F18.94:

"In *Sharp* [1988] 1 All ER 65, Lord Havers identified two views which had emerged as to the evidential value of the self-serving parts of a mixed statement. The view which the House of Lords accepted is that the whole statement is admissible by way of exception to the hearsay rule, and is thus evidence of the truth of all the facts stated in it. The House expressed approval of the law as stated in *Duncan* (1981) 73 Cr App R 359 by Lord Lane CJ, who said (at p. 365):

Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state."

30. To my mind, the relevance of this guidance as to the approach that I consider is equally applicable in Guernsey is that there needs to be a proper balance between assessing what the adverse, or incriminating, parts of the interview are with the potential benefit to the Defendant of showing that he offered an excuse or explanation at the earliest opportunity. It seems to me that the content of each interview, but particularly the first interview, can be treated as being a type of mixed statement to which these principles apply.

31. This Court's approach to the admissibility of a confession has adopted the way it was set out for England and Wales in *R v Barry* (1991) 95 Cr App R 384 (see both *Correia (supra)* and *De Kock*). Accordingly, there are three questions to answer:

- (i) was there anything said or done?
- (ii) if so, was this likely in the circumstances to render "any confession" unreliable, which may have been made as a consequence?
- (iii) if so, did the thing said or done actually cause the defendant to make his particular confession?

When considering anything said and done, this has to be confined to extraneous matters, meaning that it does not apply to anything emanating from the Defendant himself, although that is of no relevance in the present case. It is common ground that section 76(2) imposes a burden on the Prosecution to the criminal standard of proof that the confession is not inadmissible. Advocate Maindonald has also highlighted two cases (and helpfully provided copies of the judgments in both) which are summarised in para. F18.9 of *Blackstone's Criminal Practice 2018*, which notes:

*"If ... the prosecution are unable to prove admissibility beyond reasonable doubt, the confession must be excluded, notwithstanding that it may be true: the court has no discretion in the matter (Paris (1993) 97 Cr App R 99). In Beeres v CPS [2014] EWHC 283 (Admin) it was said that a court should be particularly vigilant to scrutinise a confession that is the sole evidence relied upon by the prosecution."*

32. Advocate Maindonald's submissions focus on the omissions made by the interviewing officers. She argues that there should have been a fuller explanation to the Defendant of the caution at the outset in the first and third interviews. I have taken into account that Note 10C in the Code states that *"If it appears a person does not understand the caution, the person giving it should explain it in their own words."* In my opinion, this aspect of the guidance is not engaged because I do not find from the evidence I have considered that the Defendant did not understand the caution. I appreciate, however, that it will be good practice to make an enquiry and also to offer some explanation of it in layman's terms. In respect of the second interview, it is common ground that there was non-compliance with the requirement to remind the Defendant that he was under caution. Although the test is couched in positive terms, it extends to things that should have been said or done. The way the caution was dealt with by Officers Ferry and Gallienne was in marked contrast to the evidence that PS Hart and A/S Winslade gave about the way they would set out to explain the caution. Perhaps this is indicative of a different training approach between the two arms of the law enforcement agencies. It is clearly desirable, if any explanation is to be given, to be even-handed so as refer to the right to silence to the same degree as the use in evidence that may be made of anything actually said. Consequently, for the purpose of the first of these questions, there is acknowledgement on the part of the Prosecution that there was non-compliance with Code C in relation to the second interview and I find that there were small deficiencies in the manner in which the two officers explained the caution that they had properly administered.

33. The second question involves considering the hypothetical issue of whether what happened was likely in the circumstances to induce an unreliable confession. For this purpose, it is necessary to ignore whether the actual confession was reliable. I am not persuaded that this question can be answered in favour of the Defendant. Because the first count on the indictment arises from a confession made in this interview, I have given particularly anxious scrutiny to this question, but remain of the same view that the approach being taken on behalf of the Defendant is based more on theory rather than practice. Although it was not as explicit as it could have been, in the first interview, Officer Ferry did say to the Defendant *"whether you choose to answer my questions of not, and whether you choose to be honest or not is*

*entirely up to you*". The option to remain silence was, therefore, touched upon. I do not think that there is anything improper in reminding a person being questioned that the interview presents the opportunity for them to give their version of events. To the extent that I have found that there was a deficiency, or shortcoming, in the explanation Officer Ferry offered, I remain unpersuaded that this was the type of deficiency or shortcoming that objectively renders what followed unreliable.

34. Similarly, in relation to the second interview, although Advocate Maindonald has drawn attention to what is set out in para. F2.29 of *Blackstone's Criminal Practice 2018*, including the reference to *R v Pall* (1992) 156 JP 424, in which "*it was held that the absence of a caution was bound to be significant in most circumstances*", I have taken into account that the sequence of events in this case was that there had already been a substantial interview of the Defendant that had concluded less than four hours prior to the second interview commencing, which I do not consider to be an unduly long time during which the effect of the caution given would have somehow been lost.
35. Finally, in relation to the third interview, the same cannot be said about the proximity in time of the interviews, but I still take the view that, having properly given the caution and asked the Defendant to explain it, it was not incumbent on the interviewer to point out that the explanation given only covered the second half of the caution. I appreciate that this is a more borderline case than the first two interviews but, in the overall context of what had taken place, my principal conclusion is that it fails on the second test.
36. If I am wrong to reach that conclusion, in relation to any of the three interviews, then I would still find that the prosecution has discharged its burden and shown that there is no causal link between the officers failing to say as much as should have been said and the Defendant making his confession. I am particularly conscious that Guernsey affords a defendant an absolute right to silence and the consequences of that valuable shield being lost by someone in a situation such as the Defendant, but I am satisfied that, even if the option of saying nothing, albeit coupled with a request, no doubt, to actually articulate "no comment", had been emphasised to the Defendant, there would have been no difference in what then took place. It is not a case where "but for" causation has been established. Having had the benefit of hearing the three interviews, I am sure that the Defendant would have volunteered the answers he did to the questions put to him even if those interviewing him had explained the terms of the caution (or reminded the Defendant he was still under caution) as they should have done. In particular, I reject Advocate Maindonald's submission that the Defendant clearly did not understand the terms of the caution. I am satisfied that he did understand both that he had a right to silence and that, if he chose to speak, anything he said could be used in evidence. Having regard to the whole circumstances, including the fact that both the second and third interviews did not really contain anything new by way of admission, I do not think that the Defendant was induced to give his answers as a result of the omissions made.
37. I find, therefore, that the prosecution has, as required, proved beyond reasonable doubt that whatever amounts to a confession in each of these three interviews was not obtained in consequence of anything said or done which was likely, in the circumstances that existed at the time to render such a confession (or the entire interview record) unreliable as a result. None of the three interviews is, in my judgment, liable to be excluded by reason of section 76 of PPACE.

### **Exclusion of unfair evidence**

38. This leads me on to consideration of the general ground on which Advocate Maindonald has consistently relied as the reason why the interviews should be declared inadmissible, based on section 78(1) of PPACE, which provides:

*"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*

There is an inevitable overlap here with some of the aspects of what I have just described in relation to section 76(2).

39. I have first reminded myself that section 78 of PPACE is in the same terms as section 78 of the Police and Criminal Evidence Act 1984 and take the view that the position in England and Wales can properly be regarded as also reflecting the law of Guernsey. I have, therefore, reminded myself of the overview given in para. F2.7 of *Blackstone's Criminal Practice 2018*:

*"Section 78(1) is generally regarded as conferring a discretionary power. In Jelen (1989) 90 Cr App R 456 Auld J said, at pp. 464-5:*

*... the decision of a judge whether or not to exclude evidence under section 78 of the 1984 Act is made as a result of the exercise by him of a discretion based upon the particular circumstances of the case and of the adverse effect, if any, it would have on the fairness of the proceedings. The circumstances of each case are almost always different, and judges may well take different views in the proper exercise of their discretion even when the circumstances are similar. This is not an apt field for hard case law and wellfounded distinctions between cases.*

*However, strictly speaking s. 78(1) does not involve an exercise of discretion because, if a court decides that admission of the evidence in question would have such an adverse effect on the fairness of the proceedings that it ought not to admit it, it cannot logically exercise a discretion to admit it (per Auld LJ in Chalkley [1998] QB 848 at p. 874)."*

40. The section focuses on the effect there will be on the fairness of the proceedings. As noted in para. F2.14 of *Blackstone's Criminal Practice 2018*, "*The critical test under s. 78 is whether any impropriety affects the fairness of the proceedings: the court cannot exclude evidence under the section simply as a mark of disapproval of the way in which it was obtained (per Auld LJ in Chalkley).*" Advocate Perry has further referred to the summary given in *Zander on PACE* (6th ed.) at para. 8-46:

*"In summary, the court generally will uphold the defence position under s.78 only where it is persuaded: (a) that there was a breach of the rules or other impropriety; (b) that it was significant and substantial; (c) that it affects the proceedings unfairly from the defence standpoint; and (d) that the unfairness is so great as to require that the evidence be excluded."*

As a consequence, Professor Zander suggests that this shows that the burden is likely to be on the defence as opposed to the burden in respect of section 76(2), which is placed on the Prosecution.

41. I have already stated that I am satisfied that there were breaches of Code C that affect each of the three interviews. For the purposes of section 78, I am further satisfied that each of these breaches can properly be characterised as substantial and significant. In that regard, I reject Advocate Perry's attempt to characterise the failure to inform the Defendant of his entitlement to contact the honorary Latvian consul (or, if he had so wished, the Embassy) as somehow of less significance than certain of the other rights and entitlements. The right of access to legal advice is clearly important, but I do not accept that there is a hierarchy of rights and entitlements in quite the manner suggested by Advocate Perry because each has a bearing on the fairness of the process. For example, although a foreign national may just want to get things over with, a discussion with someone who is a representative of his or her country may lead to a different outcome. The Code expressly provides that this step must be taken as part of the initial action of dealing with a person who has been detained and, in my view, this is for good reason. Foreign nationals are treated differently from British people simply because they are foreigners. They are given the additional comfort and support of being permitted to communicate with someone official from their own country who should be well-versed in giving any further advice as to how a detained person might sensibly respond to being detained and, more likely than not, questioned. This is an important additional layer of protection to someone who is being dealt with in what is, to them, a foreign country. Non-compliance with the Code in this regard must, in my judgment, be characterised objectively as a significant and substantial breach. In fact, I regard this aspect of non-compliance as being at least as serious, if not more serious, than the failure to remind the Defendant that he was under caution before proceeding with the second interview, which in itself is a significant and substantial breach for these purposes (see, eg, *Pall (supra)*).
42. The effect, however, of there being a significant and substantial breach is not that this leads automatically to the exclusion of the evidence but rather that it lays the foundation from which to assess whether admitting the evidence would affect the fairness of the proceedings against the Defendant.
43. I do not know whether the Defendant would have availed himself of the right to communicate with the honorary consul had this entitlement been mentioned to him. Consequently, I have had to ask myself what inferences, if any, I can draw. Having listened most carefully to the interviews themselves, as I have previously noted, I am not persuaded that the Defendant divulged anything he might not otherwise have chosen to divulge. Further, the way in which he volunteered the explanation he has given for how he became involved with these packages being despatched to his home address may well lay the basis for his defence to the counts where he has pleaded not guilty. Again, I do not know what his defence will be, but if the interviews were to be ruled inadmissible it would probably mean that the Defendant would have to give evidence, whereas if they remain admissible the option of him not giving evidence remains. I consider that to be a strong factor in favour of concluding that it would not be unfair to let the interviews stand as part of the Prosecution case. In short, I do not believe that the failure to inform the Defendant of his entitlement to communicate with the Latvian authorities has infected the way in which the evidence has been obtained through interview to an extent that it affects the fairness of the trial he will receive so that it requires any of these interviews to be excluded.
44. I have also considered carefully whether the absence of an interpreter at these interviews makes relying upon them unfair. I have borne in mind that the Defendant had the assistance of an interpreter for the *voir dire*. However, that factor is not determinative as to whether he should have been assisted by an interpreter at any of the interviews. As I have already stated, I do not find that PS Hart fell into error when deciding that no interpreter was required. The only impression I have been able to form of the Defendant's command of English comes from listening to the three interviews (and, as it turned out, I did so twice). I am, therefore, unsurprised that PS Hart felt able to conclude, as recorded in the custody record, that the

Defendant was fluent in English, recognising that “fluent” may be a relative term where the test she was applying from para. 13.2(a) of Code of Practice C was whether the Defendant “*has difficulty in understanding English*”. The whole circumstances of the detention and interviewing of the Defendant satisfies me that he did not in 2017 have difficulty in understanding English. On any occasion during the interview when he did not understand what was being asked he sought clarification. To the extent that he may have misunderstood the subject-matter of any question and given answers about something that was not being asked, I do not find that this arose from any language barrier but may (and this would be an issue for such further evidence and submissions at trial as appropriate) have arisen from any anxiety arising from being interviewed (noting that the custody record records what those interviewing him must have relayed to PS Hart about the Defendant being scared).

45. When the Defendant returned to the Police Station on 22 July 2017, I do not find that A/S Winslade should have made any more detailed enquiries than he did before being satisfied that the Defendant could be interviewed without an interpreter being present. In my view, he was entitled to have regard to what had already taken place some months earlier. His review of the custody record would have shown that the Defendant had not requested an interpreter and had been interviewed twice without an interpreter being present. Although the officer’s dealings with the Defendant were comparatively brief, I think adopting the same approach was permissible. There was also some oblique reference in this officer’s cross-examination to there being a separate attendance of the Defendant at around this time when another police officer had decided that an interpreter should assist. However, this was not an issue put in evidence adequately on behalf of the Defendant for me to reach any conclusion about anything other than how the two custody officers dealt with the Defendant in relation to the these offences and, in a similar fashion to the approach of the Court under section 78, it is quite possible for different officers to reach different conclusions on such an issue because each situation depends on its own facts. To that extent, I have disregarded this oblique reference to another occasion involving the Defendant.
46. Although I am not very impressed by the way in which this Defendant was dealt with by the officers, and I am slightly troubled that there may be a systemic failure to comply with the Code in respect of foreign nationals who are not from countries mentioned in Annex F thereto, when I view matters in the round, I am persuaded that there will not be the level of unfairness to the Defendant that needs to be shown to justify exclusion of any of these interviews. I have considered each of the interviews distinctly, although inevitably I have concentrated most on the first interview, because what happened before PS Hart was obviously the most relevant element of how the Defendant was dealt with. I have no doubt that PS Hart was acting in good faith although she did fail to afford the Defendant the chance to communicate with the Latvian authorities. Her assessment of the need for an interpreter was, in my opinion, the correct one in the circumstances that presented themselves. In other words, although PS Hart clearly should have afforded the Defendant the additional protection to which he was entitled, I do not believe that this would have led to anything different happening prior to Officer Ferry conducting the first interview. This is not a case where everything that happened thereafter is tainted by what happened at the outset. Similarly, although Officer Ferry could have been more precise in deconstructing the caution into two parts, I do not find that there was any breach of the Code as such and what followed from the Defendant choosing to answer the questions put to him does not, in my opinion, amount to involving anything so unfair that only the exclusion of that first interview is required. Once the first interview is not ruled inadmissible, the scope for challenging the second and third interviews necessarily reduces. This follows from the fact that the absence of an interpreter cannot be criticised in the same way as would apply to the first interview and, although Officer Ferry fell into error in not reminding the Defendant he remained under caution, I am not persuaded that that led to any real degree of unfairness at all. This interview sought to clarify certain matters with the Defendant and, at least in some respects, paints the Defendant in a positive light. Similarly in

the third interview, although it relates in part to count 1, there is nothing particularly adverse to the Defendant over and above what had already been said by him and it did provide him with the opportunity to explain the CCTV footage of his attendance at the post office where that evidence would be admissible in any event. In those circumstances, rather than it being unfair to him to admit the interview, it is arguable it would be unfair to him to rule it inadmissible. Overall, I am quite satisfied that these interviews should be capable of being used and submissions made in respect of them, as appropriate, to the trial court. They are evidence on which the Jurats can be invited, with the benefit no doubt of submissions from both parties, to determine where the truth lies.

## **Conclusion**

47. For the reasons I have given, the Defendant's challenge to the admissibility of all three interviews is dismissed. I am satisfied that, if the Prosecution wishes, each of these interviews can be relied upon, although the transcripts may benefit from a further review as it is apparent from listening to the recordings that there are some bits that could have been transcribed more accurately.