# THE RIGHTS OF PEOPLE WHO HAVE BEEN ARRESTED

## A REVIEW OF THE LAW IN NORTHERN IRELAND

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

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## Introduction

1 At a meeting on 20 January 2004 the Northern Ireland Human Rights Commission decided to review the existing law in Northern Ireland as it relates to alleged injustices suffered by people who have been arrested (whether or not the arrest itself was lawful) and to consider whether to make any recommendations for reform. In particular the Commission decided to look at the rights of arrested people who have been mistreated while in custody. This paper is the outcome of that review.

## When is an arrest lawful?

2 The law on when an arrest is lawful in Northern Ireland is quite clear and appears not to be in need of review. As well as the "ordinary" powers of arrest there are some special powers of arrest in relation to terrorism offences.

3 The ordinary law provides that a person can be arrested if he or she is reasonably suspected of having committed an "arrestable offence", a category which includes offences carrying a sentence (for those aged over 21) of five years or more, as well as some less serious offences for which Acts of Parliament provide a separate arrest power. The full list is in article 26 and Schedule 2 of the Police and Criminal Evidence (NI) Order 1989. This PACE Order also provides that the police can arrest without a warrant any person who is reasonably suspected of attempting or conspiring to commit any of the listed offences, or of inciting, aiding, abetting, counselling or procuring their commission. Article 27, moreover, makes it clear that the police may arrest someone for a non-arrestable offence if the service of a summons (*i.e.* a document requiring later attendance at court) is not

practicable or appropriate. There also exists a judge-made power to arrest someone for a breach of the peace and the 1989 Order maintains the rule that the police may arrest any person so long as a warrant for that purpose has been issued to the police by a Justice of the Peace: the JP must be satisfied that the police reasonably suspect the person of a crime and that his or her voluntary co-operation is unlikely.

4 Section 41 of the Terrorism Act 2000 provides that a constable may arrest without a warrant a person whom he or she reasonably suspects to be a terrorist. For this purpose a "terrorist" is defined by section 40 as a person who is, or has been, concerned in the commission, preparation or instigation of acts of terrorism or as a person who has committed an offence under a number of sections in the Terrorism Act itself. Just as in the case of the PACE Order's powers, a police officer can be said to have "reasonable suspicion" for the purposes of section 41 if he or she is acting on information supplied and instructions issued by a superior police officer. Under section 82 of the Terrorism Act 2000 a police officer may arrest without warrant any person whom he or she reasonably suspects is committing, has committed or is about to commit a scheduled offence or an offence under the Terrorism Act which is not a scheduled offence. When the list of scheduled offences (set out in Schedule 9 to the Act) and other offences created by the Act is compared with the list of offences for which a person can be arrested without warrant under the PACE (NI) Order 1989 (see above), there is almost a complete overlap.

5 If the police arrest a person under the Terrorism Act, they still have to indicate why the arrest is occurring and under what power. If subsequent questioning – or the lack of it – shows that there were no real grounds for reasonably suspecting a connection with terrorism, an action in the civil courts for compensation for false imprisonment may succeed. The use of arrest powers merely for the gathering of information would be a

contravention of Article 5(1)(c) of the European Convention on Human Rights, which says that arrest or detention must be for the purpose of bringing the person "before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his (sic) committing an offence".

## The use of force when carrying out an arrest

6 In all situations a police officer is entitled to use reasonable force when carrying out an arrest. The 1989 Order says that in exercising any power under the Order, the police "may use reasonable force, if necessary" (art.88). However, the use of unreasonable force, or of reasonable force in circumstances where it is not necessary, will not make the arrest unlawful. It will only make possible a claim for compensation, under the civil law, for assault. Using force to effect what is in any event an unlawful arrest may lead to the police having to pay so-called "exemplary" damages to the victim.

## Arrests for further offences

7 Under article 33 of the Police and Criminal Evidence (NI) Order 1989, if a person has been arrested for an offence and is at a police station in consequence of that arrest, he or she should also be arrested for any other offence for which he or she would be liable to be arrested if released from the first arrest. The thinking behind this provision is that a person should not have his or her liberty interfered with on more occasions than are absolutely necessary. It is also more efficient from a policing point of view to have various matters relating to one suspected offender dealt with at the same time. The Human Rights Commission has learned, however, that in practice

arrests for further offences often do not take place when they should because the police have not by that time run certain checks, such as fingerprint checks, in relation to the suspect. The result is that a person could be arrested for, say, one alleged car theft but then, after being released from police custody, arrested soon afterwards for an alleged car theft which had been detected some time earlier and in relation to which fingerprint checks, etc. had not been run expeditiously.

## Time limits

8 The law so far described is the current law. It should not necessarily be assumed that people who were wrongfully arrested or mistreated *before* the PACE Order came into force (in 1990) would today be entitled to the same remedies as someone wrongfully arrested or treated *after* that date. As well, the law usually imposes a three year time limit on anyone wishing to take proceedings to court alleging that personal injury has been suffered, or a six year time limit if some other loss has been suffered.

## Situations where remedies are available for arrested persons

9 If a person believes that he or she has been unlawfully arrested he or she can immediately apply for release and sue for compensation for false imprisonment, as mentioned above. If an arrested person has been mistreated while being detained, or has been the victim of inordinate delay, the situation regarding remedies is more complicated. Whether there is a remedy and, if so, what kind of remedy, depends on what form the mistreatment has taken.

a. If a person is assaulted, he or she can sue for compensation for the personal injury but will not necessarily succeed in an application for release (see *R v Deputy Governor of Parkhurst Prison, ex parte Hague*[1] and *Cullen v Chief Constable of the RUC* [2]).

b. If a person is assaulted and makes a confession or supplies other information as a result of that assault, the evidence is still admissible in court against the person but under article 76 of the PACE (NI) Order 1989, which now also applies in cases of alleged terrorist activity, the judge has a discretion to refuse to admit the evidence if it appears that, having regard to all the circumstances, its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

c. If an arrested person suffers any form of mistreatment, or inordinate delay in the processing of his or her case by the police, he or she can make a complaint to the Police Ombudsman's Office, which has the power to investigate the complaint completely independently from the police. The findings of this investigation can be passed to the Director of Public Prosecutions for a decision on whether the police officer(s) should be prosecuted and senior officers in the police must decide whether to discipline the police officer(s). The Police Ombudsman can *direct* that disciplinary proceedings be brought, but not that a prosecution be brought.

d. If an arrested person suffers inordinate delay in the processing of his or her case by the office of the Public Prosecution Service, he or she can argue in court that to pursue the case would be an

[1] [1992] 1 AC 58 (House of Lords).
[2] [2003] 1 WLR 1763 (House of Lords).

"abuse of process". But such claims are notoriously difficult to substantiate.

e. If an arrested person suffers torture or inhuman or degrading treatment while being arrested or while in custody, he or she can claim an (unspecified) remedy under section 8 of the Human Rights Act 1998 for the breach of his or her right under Article 3 of the European Convention on Human Rights. Usually this remedy will be an award of compensation but as such it will have no direct effect on whether the person in question should be, or should have been, released from custody. While all forms of torture would be an assault, not all forms of inhuman or degrading treatment would be an assault.

## Situations where remedies are not available for arrested persons

10 It would seem that there is no remedy in the following situations where an arrested person has been mistreated while being detained.

a. If an arrested person is unlawfully denied access to a solicitor, he or she does not have a right to sue for compensation: *Cullen v Chief Constable of the RUC*.[3]

b. If an arrested person is denied other rights guaranteed by law (*e.g.* to have someone informed that he or she has been arrested) or by Codes of Practice (*e.g.* to have certain rest periods) the law does not yet provide any clear remedy. The person can refer to the denial of rights when being tried for the offence for which he or she

[3] The Commission part-funded this case, which was narrowly lost by (3 v 2) in the House of Lords.

has been arrested, and breaches of Codes of Practice have to be taken into account by courts in such situations, but there is no guarantee that the person will, as a result of the denial of rights, be acquitted of the offence, be given a more lenient sentence or be able to claim compensation.

c. If an arrested person is released without being charged or, having been charged, without being tried, there is no remedy available in law to him or her unless some other form of mistreatment has occurred during the detention. If the arrested person were to be tried and acquitted, there would likewise be no remedy in law in the absence of some other form of mistreatment. The present legal system's view is that such unfortunate incidents are the price that has to be paid for a criminal justice system that demands a high standard of proof to be satisfied before a person is convicted of a crime. If compensation were payable every time a person is arrested but not convicted – so the argument goes – too many payments would have to be made and the prospect of this happening would unduly deter law enforcers in their work.

## Situations where remedies are available for convicted persons

### *The statutory scheme*

11 If an arrested person is tried and convicted, but is then later acquitted on appeal, he or she will be entitled to compensation in some situations. Article 3 of Protocol 7 to the European Convention on Human Rights, which the UK government has not ratified, provides as follows:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

12 An identical right (but without the phrase "or the practice of the State concerned" in the sixth line), is conferred by Article 14(6) of the International Covenant on Civil and Political Rights, which the UK government *has* ratified. In fact statutory effect was given to Article 14(6) in Northern Ireland (and elsewhere in the UK) by section 133(1) of the Criminal Justice Act 1988. For an applicant to qualify under this section it is necessary that his or her conviction should have been "reversed", a word which is defined in section 133(5) as referring to a conviction which has been quashed either on an appeal out of time or on a reference (by the Criminal Cases Review Commission) under section 14 of the Criminal Appeal (NI) Act 1980 or under the equivalent Acts for England and Wales or Scotland.

***The ex gratia scheme***

13 All other claims to compensation for persons who have been wrongly convicted fall to be considered under the government's *ex gratia* scheme, which was announced by Mr Douglas Hurd, the then Home Secretary, in a statement to Parliament on 29 November 1985 (HC Debs. 29 November 1985; cols.691-692). This statement was formally endorsed on 17 June 1997 by the then Home Secretary of the current government (Mr Straw) and

by the then Secretary of State for Northern Ireland (Dr Mowlam). It reads as follows:

> "There is no statutory provision [remember this was before the enactment of the Criminal Justice Act 1988] for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application *ex gratia* payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.
>
> In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations [he then cites Article 14.6 of the International Covenant on Civil and Political Rights]…
>
> I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.

It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a question in the House of Commons on 29 July 1976 at columns 328-330. Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr Michael Ogden QC as the assessor for England and Wales. He will also assess any case that arises in Northern Ireland, where my right hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice."

14 In *In re McFarland* (11 March 2004) the House of Lords held that persons could not qualify for compensation under the *ex gratia* scheme if their conviction was quashed because they had pleaded guilty on the basis that they believed the Resident Magistrate was going to refer them to the Crown

Court for sentencing if they did not do so. But while Lords Bingham, Scott, Rodger and Walker held, as an aside, that a judge or magistrate could not be a "public authority" for the purposes of the *ex gratia* scheme, Lord Steyn disagreed in quite strong terms (at paras.28 and 30):

> "one is entitled to ask what citizens will make of the idea that victims of wrongful convictions may be compensated for a serious default of the police and prosecution, but in respect of very serious misconduct by a judge, magistrate or jury the policy statement excludes them. Surely, this creates the risk of an impression in the public mind of judges protecting their own kind. There must be something awry in the legal logic which leads to such a result…Given that a contrary view has prevailed on the point under consideration, it may be that the extant policy statement will now require explicit revision to cover serious default of a judge, magistrate or jury."

15 Lord Scott, again as an aside, also expressed views about how binding the Home Secretary's statement of 1985 can be on subsequent Home Secretaries, with particular reference to judicial review (at paras.40 to 42):

> "In making *ex gratia* payments the Home Secretary is disbursing public money. But he is not doing so pursuant to any statutory duty or statutory power. There is no statute to be construed. He is exercising a Crown prerogative. He is accountable for what he does with public money to Parliament and, in particular, to the House of Commons….
>
> So, on the footing that the requisite Parliamentary authority exists, the *ex gratia* payments are lawfully made under the prerogative power of the Crown. It is now well established that the Crown prerogative origin of the power to make *ex gratia* payments

does not exclude the scheme under which the payments are made from judicial review (see *R v CICB, ex parte Lain* [1967] 2 QB 864 and *R v CICB, ex parte P* [1995] 1 WLR 845). But the scope of the courts' powers of intervention are, in my opinion, limited by the nature of the prerogative power in question. The Secretary of State for the time being is not bound by the statement of policy made by his predecessor. He is not bound to make an *ex gratia* payment to a person whose case falls within the current statement of policy and he is not bound to refuse a payment to a person whose case falls outside it. Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive *ex gratia* payments, and provided the procedure he adopts for the decision making process is not unfair, I find it difficult to visualise circumstances in which his decision could be held on judicial review to be an unlawful one.

….If the Secretary of State is not willing, post the enactment of section 133(1), to consider making payments pursuant to Article 14(6) of the ICCPR, there is nothing irrational about that. If the Secretary of State is not prepared to make *ex gratia* payments to compensate those who have suffered imprisonment on account of some serious error by a judge or magistrate, there is nothing irrational in that. Nor would there be anything irrational in a policy that did allow *ex gratia* payments in such cases, a policy that many, or most, might prefer. The policy, bar irrationality, is for the Secretary of State."

## Recommendations for reform

16 The preceding analysis of the current law concerning the rights of people who have been mistreated or suffered other forms of injustice while under arrest, or against whom charges have been dropped before they have been tried, leads the Northern Ireland Human Rights Commission to make the following recommendations:

(1) The Government should create a statutory right to compensation for arrested persons who have been unlawfully denied access to a solicitor or who have been denied the right to have someone informed that they have been arrested (see paras. 10a and 10b above).

(2) The Government should create a statutory right to compensation for arrested persons who have suffered torture or inhuman or degrading treatment or punishment in breach of Article 3 of the European Convention on Human Rights. At present there is no right to compensation unless the mistreatment constitutes an assault (see para. 9e above). To award compensation in other cases would be in line with the duty on the state, imposed by Article 13 of the European Convention, to provide an effective remedy for breaches of Convention rights. Courts currently have a discretion to award compensation under section 8 of the Human Rights Act 1998 if Article 3 is breached, but the Commission believes that compensation should be mandatory in such cases (with a discretion in the court only as to the amount to be awarded).

(3) The Police Service of Northern Ireland should review their compliance with article 33 of the Police and Criminal Evidence (NI) Order 1989 and, if necessary, the Chief Constable should then issue a General Order

requiring checks on suspects to be conducted more quickly than at present so that arrested suspects can be questioned about earlier incidents which they are also suspected of having committed (see para. 7 above).

(4) The Government should give careful consideration to specifying in a statute what remedies are available for other forms of injustice suffered by persons who have been arrested, such as those caused by inordinate delays (see paras. 10b and 10c). In particular the Government should consider what other forms of mistreatment should give rise to a claim for compensation.

(5) The Government should amend the Criminal Justice Act 1988 so that it allows for discretionary compensation to be paid in additional situations to those already specified in section 133 (see paras 12 to 16 above). These should include:

- situations where a person has spent a period in custody but has been released before trial having been given no satisfactory explanation as to why he or she was arrested in the first place and why he or she could not have been released earlier;

- situations where a person has spent a period in custody following a wrongful charge or conviction as a result of serious default on the part of a police officer, a judge, a magistrate, a jury or some other public authority; and

- situations where facts emerge at trial, or during an appeal within time, which show beyond a reasonable doubt that the person on trial could not have committed the offence in questions.