College of Policing

Digest

December 2013

A digest of police law, operational policing practice and criminal justice

The Digest is a primarily legal environmental scanning publication intended to capture and consolidate topical and key issues, both current and future, impacting on all areas of policing.

During the production of the Digest, information is included from governmental bodies, criminal justice organisations and research bodies. As such, the Digest should prove an invaluable guide to those responsible for strategic decision making, operational planning and police training.

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Contents

Overview

This month's edition of the Digest contains a summary of issues relating to police law, operational policing practice and criminal justice.

There are reports of cases on:

- the forfeiture of money deemed to have been obtained by unlawful conduct found by an innocent party
- whether the Investigatory Powers Tribunal had jurisdiction to decide claims of human rights violations by police officers
- whether a person detained for examination under Schedule 7 to the Terrorism Act 2000 is entitled to have a solicitor present during the interview.

We look in detail at:

- the new approach to prosecuting cases of child sexual abuse
- the code of practice for victims of crime
- the Government's progress on the recommendations from the Equality and Human Rights Commission (EHRC) Inquiry into disability-related harassment
- the publication of guidance on the use of Sobriety Conditional Cautions.

We also look at:

- the independent review of the Association of Chief Police Officers
- new proposals to reform the Riot (Damages) Act 1886
- Home Office Circular 015/2013 providing guidance on the rights of persons detained under Schedule 7 to the Terrorism Act 2000
- statistics on alcohol and late night refreshment licensing England and Wales 2012/13
- Home Office Circular 014/2013 providing further information on long-term police pension reform.

The progress of proposed new legislation through parliament is examined and relevant Statutory Instruments are summarised.

Legislation

Bills before parliament 2013/14 – progress report

On 8 May 2013, the Queen's Speech unveiled the legislative programme for the 2013-2014 parliamentary session. The progress of Bills can be found at: **http://services.parliament.uk/bills/**

Anti-Social Behaviour, Crime and Policing Bill

This Bill is divided into 13 separate parts. Line-by-line examination of the Bill took place during the fourth day of committee stage on 25 November 2013. Amendments discussed covered clauses 45, 45, 47, 49, 50, 52, 55-58, 60-64, 67 and 69 of the Bill. Committee stage continues on 2 December when further amendments will be discussed.

Part 1 – Injunctions to prevent nuisance and annoyance

This is a purely civil injunction, available in the county court for adults and the youth court for 10 to 17-year-olds. It will allow a wide range of agencies, including the police, local councils and social landlords to deal quickly with anti-social individuals, nipping behaviour in the bud before it escalates.

Part 2 – Criminal Behaviour Orders

This will be available following a conviction for any criminal offence and can address the underlying causes of the behaviour through new, positive requirements. Breach will be a criminal offence with a maximum penalty of up to five years in prison for adults. It will demonstrate to the offender and the community the seriousness of the breach.

Part 3 – Dispersal Powers

This will enable officers to require a person who has committed, or is likely to commit, anti-social behaviour to leave a specified area and not return for up to 48 hours.

Part 4 – Community Protection Notices

This part is split into three chapters covering:

- Community Protection Notices
- Public Spaces Protection Orders
- Closure Orders.

These new powers will be faster, more effective and available to more agencies to use to tackle a whole range of place-specific anti-social and criminal behaviour.

Part 5 – Recovery of possession of dwelling-houses: anti-social behaviour grounds

Anti-social behaviour can have a negative impact on neighbourhoods and communities. Social landlords have a key role in tackling anti-social behaviour. Provisions in the Bill introduce a new ground for possession to speed up the process in the most serious cases of anti-social behaviour, bringing faster relief to victims and communities.

Part 6 – Local involvement and accountability

The new Community Remedy will give victims of low-level crime and anti-social behaviour a say in the punishment of the offender out of court, while the Community Trigger will give victims of persistent anti-social behaviour the right to demand action where they feel their problems have not been dealt with.

Part 7 – Dangerous dogs

The proposals in the Bill are part of a wider package of measures to reduce dog attacks and make owners more responsible for their dogs. These powers sit alongside anti-social behaviour powers in the Bill that can be used to tackle dangerous dogs and irresponsible owners.

Part 8 – Firearms

The Bill targets those who sell or transfer prohibited weapons or ammunition by introducing a new offence and increased sentencing powers for the courts.

Part 9 – Forced marriages

The Bill makes two changes to tackle forced marriage more effectively:

- criminalising forcing someone to marry
- criminalising the breach of Forced Marriage Protection Orders.

Part 10 – Policing

The Bill builds on government reform of the policing landscape towards greater freedom for the police to take local decisions that fit the needs of the areas they serve. It will enhance the integrity and professionalism of the police by extending the powers and remit of the Independent Police Complaints Commission and the College of Policing.

The Bill will also make changes to the body that reviews police pay by abolishing the Police Negotiating Board and replacing it with an independent Police Remuneration Review Body. The new body will make evidence-based recommendations on police remuneration.

In addition, Clause 124 introduces Schedule 6, which makes amendments to the port and border security powers in Schedule 7 to the Terrorism Act 2000 and the associated Schedule 8 to that Act which governs the detention of persons detained under Schedule 7.

Part 11– Extradition

The measures on extradition proposed in the Bill are designed to improve the efficiency of the operation of the Extradition Act 2003 and follow from a review of the UK's extradition arrangements by Rt. Hon Sir Scott Baker.

Part 12 – Criminal justice and court fees

The Bill will improve the speed and efficiency of the criminal justice system's response to low level offending by enabling the police to prosecute uncontested minor offences of shoplifting. It will extend the scope of the statutory witness protection scheme to cover other vulnerable individuals. It will also ensure that offenders sentenced to custody will contribute to the costs of supporting victims by removing the power of magistrates' courts to add additional days to a sentence of imprisonment instead of the victim surcharge.

Part 13 – General

This part contains minor and consequential amendments to other enactments and general provisions including provisions in respect of the parliamentary procedure to be applied to orders and regulations made under the Bill.

Offender Rehabilitation Bill

This Bill makes a number of changes to the release arrangements set out in the Criminal Justice Act 2003 for offenders serving custodial sentences of less than 12 months and those serving sentences of between 12 months and two years. The Bill is designed to ensure that all adult offenders serving custodial sentences can be supervised on release for at least 12 months.

The Bill had its second reading debate on 11 November 2013. The Public Bill Committee will meet next on 3 December 2013. The Committee will scrutinise the Bill line by line. The Public Bill Committee is now accepting written evidence and is expected to report to the House by 3 December 2013.

In particular, the Bill:

- applies arrangements for release under licence to offenders serving fixed-term custodial sentences of more than one day but less than 12 months
- introduces new supervision arrangements for offenders released from fixed-term custodial sentences of less than two years so that all offenders are supervised in the community for at least 12 months

- creates a new court process and sanctions for breach of supervision requirements for offenders serving fixed-term custodial sentences of less than two years
- introduces a requirement that offenders sentenced to an extended determinate sentence must have an extension period of supervision of at least one year
- introduces for offenders released from custody a new drug appointments condition for the licence or supervision period, and expands the existing drug testing requirement for licences to include Class B drugs and makes it available during the supervision period
- introduces a requirement that any juvenile who reaches his or her 18th birthday before being released from the custodial element of a Detention and Training Order (DTO) should spend at least 12 months under supervision in the community.

The Bill also makes some changes to the arrangements for community orders and suspended sentence orders. In particular, it:

- creates a new 'rehabilitation activity requirement' for community orders and suspended introduces new arrangements for the designation of 'responsible officers' in relation to the supervision of offenders and makes clear that the responsibility for bringing breach action lies with the public sector
- introduces new arrangements for offenders serving community orders or suspended sentence orders to obtain permission from the responsible officer or the court before changing their place of residence.

Statutory Instruments

SI 2013/2669 The Police Act 1997 (Criminal Records) (Amendment No. 2) Regulations 2013

These Regulations come into force on **2 December 2013** and extend to England and Wales.

These Regulations amend the Police Act 1997 (Criminal Records) Regulations 2002 to substitute new prescribed purposes for which an enhanced criminal record certificate may be required in accordance with a statement made by a registered person under section 113B(2)(b) of the Police Act 1997. In particular, the new prescribed purposes include the consideration of a person's suitability to 'work with children', which is defined in new regulation 5C, and assessing the suitability of a person for any office or employment which relates to national security.

These Regulations also amend the Police Act 1997 (Criminal Records) (No. 2) Regulations 2009 to substitute a new prescribed purpose for which suitability information in relation to children must be included in an enhanced criminal record certificate.

SI 2013/2774 The Police and Criminal Evidence Act 1984 (Amendment: Qualifying Offences) Order 2013

This Order, which came into force on **11 November 2013**, adds various offences to the list of 'qualifying offences' in section 65A of the Police and Criminal Evidence Act 1984. Under Part 5 of that Act, designation of an offence as a 'qualifying offence' has implications for the circumstances in which a constable can require a person convicted of the offence to attend at a police station for the purpose of taking his fingerprints or a non-intimate sample, and has implications for the period for which such a person's fingerprints or sample can be retained.

SI 2013/2770 The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) (No. 2) Order 2013

This Order came into force on **31 October 2013**.

It amends the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 which makes provision in connection with the coming into force of Chapter 1 of Part 1 of the Protection of Freedoms Act 2012.

Article 3 inserts a new article into that Order, making provision in relation to a person whose DNA profile or fingerprints are taken before 30th September 2014. If the person is arrested for or

charged with a subsequent offence, or is convicted or given a penalty notice for a subsequent offence, then that person's profile or fingerprints can be retained by the rules applicable to that subsequent offence.

SI 2013/2793 The Police (Amendment) Regulations 2013

These Regulations came into force on **25 November 2013**.

They amend the Police Regulations 2003 to implement recommendations 3, 16, 17 and 18 of the Independent Review of Police Officer and Staff Remuneration and Conditions: Final Report(1).

Those recommendations were as follows:

Recommendation 3 – From April 2013, an additional qualification should be added to the list required for appointment to a police force in regulation 10 of the Police Regulations 2003. Candidates eligible for appointment to a police force should have either a Level 3 qualification, or a police qualification which is recognised by the sector skills council, Skills for Justice, or service as a special constable or service as a police community support officer (or another staff role which the chief officer is satisfied provides appropriate experience). The chief officer should have a discretion in relation to which of these criteria should apply to applicants for entry to his force.

Recommendation 16 – Provision should be made in police regulations to enable police officers to be seconded to organisations outside policing for a period not exceeding five years.

Recommendation 17 – The Police Regulations 2003 should be amended to provide for the return to the police service of former non-probationary officers at the rank they last held. There should be no right of return and there must be a suitable vacancy. Return after more than five years should not be allowed other than in exceptional circumstances.

Recommendation 18 – The Police Regulations 2003 should be amended to provide that returning officers should be subject to a probationary period of six months.

SI 2013/2786 The Court of Appeal (Recording and Broadcasting) Order 2013

This Order, which came into force on **29 October 2013**, prescribes the conditions to be satisfied for the recording and broadcast of hearings in the Court of Appeal. Where the conditions are satisfied, section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 do not have effect. Section 41 makes it an offence to film in court. Section 9 provides that it is a contempt of court to record sound in court except with the permission of the court.

Articles 1 to 4 set out when the Order comes into force, the definitions in the Order, that the Order applies to proceedings in the Court of Appeal and that section 41 and section 9 do not apply where the conditions in the Order have been satisfied.

Articles 5 to 7 set out the types of hearing that can be recorded, what part of the hearing can be recorded and who can record a hearing.

Articles 8 to 11 set out when the recording of a hearing can be broadcast and what content is permitted in a broadcast.

SI 2013/ 2853 The Public Bodies (Abolition of Victims' Advisory Panel) Order 2013

This Order came into force on **5 November 2013**, save for Article 2(3) which came into force on **6 November 2013**.

This Order abolishes the Victims' Advisory Panel (the VAP), which is listed in Schedule 1 to the Public Bodies Act 2011 (the 2011 Act).

The VAP was established by section 55 of the Domestic Violence, Crime and Victims Act 2004. All of the VAP's functions are abolished by this Order.

Article 2(2) repeals and amends provisions in consequence of the abolition of the VAP.

Article 2(3) repeals the entry for the VAP in Schedule 1 to the 2011 Act.

SI 2013/2909 The Road Vehicles (Registration and Licensing) (Amendment) Regulations 2013

These Regulations come into force on **16 December 2013**.

They amend the Road Vehicles (Registration and Licensing) Regulations 2002.

Regulation 3 makes provision for first nil licences for vehicles to run from specified dates during a month. Such licences may run for a period of 12 months plus a further period commencing on the 10th, 17th or 24th day (as appropriate) of the month in which the licence first has effect.

Regulation 4 alters provisions relating to statutory off-road notifications. Schedule 4 is amended to remove the requirement to have to annually make a statutory off-road notification; once a statutory off-road notification is made it will have effect indefinitely, until such time as a vehicle licence or nil licence is taken out for that vehicle. In the event the vehicle keeper of an unlicensed vehicle is changed, and the new vehicle keeper wishes to keep the vehicle unlicensed, the new vehicle keeper will have to make a new statutory off-road notification.

SI 2013/2908 The Coroners and Justice Act 2009 (Commencement No. 16) Order 2013

This Order commences section 148 of the Coroners and Justice Act 2009, which contains a power for the Lord Chancellor to make an order allowing for the designation of tribunal security officers and to apply the provisions in Part 4 of the Courts Act 2003 relating to court security to tribunals.

Section 148 commenced on **18 November 2013**.

SI 2013/2907 The Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013

This Order brings the revised code of practice entitled 'The Code of Practice for Victims of Crime' into operation on **10 December 2013**. The revised code of practice replaces the code of practice that was brought into operation on 3 April 2006 by SI 2006/629.

Online copies of the revised Code of Practice for Victims of Crime can be accessed at **https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime**

Hard copies can be obtained by emailing **JusticeReformDirectorate@justice.gsi.gov.uk** or writing to the following address:

Victim and Criminal Proceedings Policy Team
Ministry of Justice
102 Petty France
London SW1H 9AJ

SI 2013/2904 The Motor Vehicles (Third Party Risks) (Amendment) Regulations 2013

These Regulations extend to Great Britain and come into force on **16 December 2013**.

They amend the Motor Vehicles (Third Party Risks) Regulations 1972 to remove the requirement to produce evidence of motor insurance or comparable surety when applying for a vehicle excise licence. This requirement is set out in regulation 9(1) of the Motor Vehicles (Third Party Risks) Regulations 1972, and exceptions to it are set out in regulations 9(2), 9(3) and 9(4).

Regulation 9 is subject to regulation 8 of the Motor Vehicles (International Motor Insurance Card) Regulations 1971 which allows holders of green cards (visitors to Great Britain) to provide a green card as proof of valid insurance as an alternative to the requirements of regulation 9. Both provisions are omitted because regular checks for valid motor insurance are made under the continuous insurance enforcement scheme.

SI 2013/2971 The Special Measures for Child Witnesses (Sexual Offences) Regulations 2013

These Regulations are made as part of the implementation in England and Wales of Directive 2011/93/EU(1) of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

Regulation 2 amends the Youth Justice and Criminal Evidence Act 1999 so that a complainant of a relevant offence whose age is uncertain will be presumed to be under the age of 18 if there are reasons to believe that person is under the age of 18. The effect is that a complainant to whom the presumption applies will be eligible for 'special measures' under section 16 of that Act. Special measures are measures intended to assist and protect certain categories of witnesses in the giving of evidence in criminal proceedings. Previously the presumption only applied to a complainant of a human trafficking offence (an offence under section 59A of the Sexual Offences Act 2003 or an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004). The presumption will now additionally apply to a complainant of a sexual offence (as defined by section 62 of the 1999 Act) and a complainant of an offence under section 1 of the Protection of Children Act 1978 and a complainant under section 160 of the Criminal Justice Act 1988.

These Regulations come into force on **18 December 2013** and extend to England and Wales.

SI 2013/2970 The Firearms (Amendment) (No. 2) Rules 2013

These Rules came into force on **1 December 2013**.

These Rules replace the existing prescribed firearm certificate and shotgun certificate with new certificates. These new certificates are designed to accompany the new single application form which applies for the purposes of applications for firearm and shotgun certificates.

Rules 3 and 5 make minor changes to the conditions attached to a firearm certificate and a shotgun certificate. These changes relate to the certificate holder's obligation to inform the chief officer of police of developments in connection with the certificate, the firearm, the shotgun or the ammunition.

Rule 4 omits the prescribed reference form that is used by referees in relation to an application for a firearm certificate. This is no longer required in light of the content of the new single application form, which contains provision for the input of referees.

Rule 6 amends the requirements for referees in relation to applications for shotgun certificates. The effect of the change is that the referee is not required to fall within a particular category of professional; rather they are simply required to be a person of good character. This change reflects the existing requirement for referees in respect of applications for firearms certificates.

Rule 7 of these Rules amends rule 9 of the Firearms Rules 1998, with the effect that from now on there will be only one prescribed auctioneer's permit, rather than two separate prescribed permits: one for firearms and ammunition and the other for shotguns.

Rule 8 substitutes the new firearm certificate, which appears at Schedule 1 to these Rules, for the formerly applicable prescribed certificate.

Rule 9 substitutes the new shotgun certificate, which appears at Schedule 2 to these Rules, for the formerly applicable prescribed certificate.

Rule 10 substitutes the new auctioneer's permit, which appears at Schedule 3 to these Rules, for the formerly applicable prescribed auctioneer's firearm permit, and omits the old auctioneer's shotgun permit.

Case law

Evidence and procedure

Abdelrazag Elosta and Commissioner of the Police for the Metropolis and the Law Society and the Secretary of State for the Home Department [2013] EWHC 3397 (QB)

A hearing in the High Court of Justice Queens Bench Division Administrative Court before Mr Justice Bean. The full case report can be found at **http://www.bailii.org/ew/cases/EWHC/Admin/2013/3397.html**

Introduction

This claim for judicial review concerned whether a person detained for examination under Schedule 7 to the Terrorism Act 2000 is entitled to have a solicitor present to advise him during the interview.

The facts

On 10 November 2012 at 4.10pm the Claimant arrived at Heathrow airport having been to Saudi Arabia on Hajj. He was stopped by officers of the Metropolitan Police for examination under Schedule 7 to the Terrorism Act 2000, whereupon he provided his name, address, phone number and passport details but asked to speak to a solicitor before answering further questions.

At 4.30pm an examining officer telephoned the Claimant's solicitor in Birmingham, informing her that the Claimant had been stopped pursuant to Schedule 7 and that his examination was likely to last 30 to 40 minutes. He stated that the Claimant 'had a right to consult a solicitor in private' but that the examination would not be delayed pending the solicitor's arrival. The Claimant was allowed to speak to his solicitor on the phone but not in private: officers remained in the room and could hear what the Claimant said. It was accepted by the Defendant that it was inappropriate for the officers to have heard what the Claimant said and offered an apology to that effect.

The Claimant's solicitor informed officers that she would arrange for a London-based solicitor to attend. Another officer repeated that they would not wait for the arrival of the solicitor to commence questioning. He said that at 5.30pm they would continue to examine the Claimant and would arrest him if he refused to answer any question.

The Claimant was permitted to pray between 4.50pm and 5.20pm. At 5.22pm he was served with the appropriate TACT1 and TACT2 (discussed later) notices and was detained. At 5.26pm the Claimant's solicitor called back and asked one of the examining officers to delay questioning so that a London-based solicitor could attend. This request was refused and it was repeated that unless the Claimant started answering questions, he would be arrested.

Officers began questioning at 5.45pm. The examination was concluded shortly before 6.30pm and the Claimant was permitted to leave.

The Terrorism Act 2000

Paragraph 2(1) of Schedule 7 provides that an examining officers may question a person present at a port or border who is believed to be entering or leaving the UK for the purpose of determining whether he appears to be a person falling within the definition of a 'terrorist' under section 40(1)(b) of the Act, namely a person who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism.' There is no requirement for the officer to suspect the person of terrorism or of any wrongdoing.

Under paragraph 5 of Schedule 7, a person questioned must provide the examining officer with such information and documentation as is requested. Refusal to do so will result in the commission of an offence carrying a maximum sentence of up to seven months' imprisonment.

Paragraph 6(1)(b) of Schedule 7 provides that a person may be detained by an examining officer for the purposes of exercising a power under paragraph 2. Such a person may be detained and questioned for up to nine hours. Time runs from the point when the examination begins. There is no provision for an extension of this period.

Paragraph 7 of Schedule 8 provides that a person detained at a police station in England, Wales or Northern Ireland under Schedule 7 or section 41 'shall be entitled, if he so requests to consult a solicitor as soon as is reasonably practicable, privately and at any time.'

A place designated by the Secretary of State as a place where a person may be detained under Section 41 is included within the term 'police station' when used in Schedule 8.

Under paragraph 8 of Schedule 8 consultation with a solicitor may be delayed by an officer of at least the rank of superintendent, though it was not suggested that this power was used in this case. An officer of at least the rank of commander or assistant chief constable may, under paragraph 9 of Schedule 8, give a direction in prescribed circumstances that the right to consult with a solicitor may only be exercised in the sight or hearing of a qualified officer. Again, no such direction was given in this case.

The Code of Practice for Examining Officers

This Code of Practice was laid before Parliament by the Home Secretary on 2 July 2009. Having regard to paragraph 5 of Schedule 14 which states 'An officer shall perform functions conferred on him by virtue of this Act…in accordance with any relevant code of practice…' it is the Claimant's case that examining officers have a statutory duty to comply with the Code.

The purpose of a Schedule 7 examination is set out in the Code of Practice as being 'to determine whether a person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism.' Following initial screening questions an individual can simply be examined or can be detained and examined. Examination and detention under Schedule 7 are not the same. A person being examined does not necessarily need to be detained. Detention is usually required where an individual refuses to cooperate and insists on leaving. In such circumstances it may not always be necessary to take the person to a police station: detention may be necessary to complete an examination and as such be short lived.

TACT 1 and TACT2 notices form the two Annexes to the Code of Practice and set out the rights accorded to those detained and examined. TACT1 must be provided to a person after one hour of examination and is provided to those examined but not necessarily detained. The following is stated in TACT1 with regard to access to a solicitor:

> You can request to consult either in person, in writing or on the telephone, privately with a solicitor. Examination will not be delayed pending the arrival of a solicitor. If you do not wish to do so now, you may do so later and at any time while you are being questioned.
>
> Consultation with a solicitor will not be at public expense. You do not have a right to have someone informed or to contact a solicitor whilst being examined. Informing someone or contacting a solicitor will be at the discretion of an examining officer.

TACT2 is provided only when a person is detained and states the following in relation to access to a solicitor:

> Do you want to contact a solicitor?
>
> You may consult either in person, in writing or on the telephone, privately with a solicitor. If you do not wish to do so now, you may do so later and at any time while you are detained. NB. Under paragraph 8 of Schedule 8 to the Terrorism Act 2000, or paragraph 16 of Schedule 8 in Scotland, an officer of at least the rank of Superintendent may delay this right.
>
> Consultation with a solicitor will not be at Public Expense.

This latter sentence was incorrect due to that fact that the Legal Aid Agency may fund advice and assistance to those detained under Schedule 7 and so pending a full revision of the Code of Practice, Home Office Circular 07/2011 corrected this error. This Circular also confirmed the Home Office's view that the right to consult a solicitor applied wherever a person is detained under Schedule 7 and not only when they are detained at a police station, stating:

> Schedule 8 provides the right to consult a solicitor, as soon as reasonably practical, privately and at any time. Although in the Terrorism Act 2000 this applies only to those detained at a police station, the code of practice requires a TACT 2 to be served on all those detained and this remains the case. Notwithstanding that the statute does not provide a right to legal advice other than at a police station, all detainees irrespective of the location should be offered access to legal advice.

Discussion

Counsel for the Claimant, supported by counsel for the Law Society as intervener, submitted that once detained, Mr Elosta had a right to consult his solicitor in person (ie, face to face) before and during his interview. Counsel for the Metropolitan Police argued that he had no right to consult a solicitor at all; alternatively it was for the officers, not Mr Elosta, to specify the mode of consultation permitted, and having spoken to his solicitor on the telephone, he had exhausted his right to legal advice. Counsel for the Home Secretary supported the Commissioner on the second point but not on the first. He accepted that the officers were bound by the Code of Practice but argued that on its proper construction the Code gave them the right to specify the mode of consultation.

Did the Claimant have the right to consult a solicitor at all?

Counsel for the Metropolitan Police argued that:

- the Claimant was not detained at a police station, and the statutory right to legal advice in paragraph 7(1) of Schedule 8 to the 2000 Act did not apply to him
- the Code of Practice does not create a right to obtain legal advice; nor do the Annexes, which in any event are not part of the Code.

Counsel for the Claimant argued that the right to legal advice is conferred by a different route. Examining officers are required to perform their functions in accordance with the Code of Practice under paragraph 5 of Schedule 14. Paragraph 21 of the Code of Practice requires a TACT 2 form to be served when an individual is detained. TACT2 states that consultation with a solicitor is allowed. Further, although Circular 07/2011 does not have the force of law, it confirms the view of the Secretary of State that while the Act only provides the right to consult a solicitor to those detained at a police station, the Code requires a TACT 2 to be served on all those detained.

Counsel for the defendant was unable to offer to the court a reason why (if the Commissioner's argument was correct) Parliament should have wished to create such a striking divergence between the rights of someone detained at a police station or a place designated for the questioning of arrested persons at a port or airport and the rights of a detained person being questioned anywhere else (including somewhere else at the same airport). It was noted that in the Anti-Social Behaviour, Crime and Policing Bill 2013 currently before the House of Lords, there is a provision deleting the words 'at a police station' in paragraph 7(1) of Schedule 8 to the Terrorism Act 2000. The court stated that though not a legitimate aid to the interpretation of the statute currently in force, it at least indicated the improbability of some hidden police reason for this differentiation in the rights of detainees under Schedule 7 depending on the location of their examination.

The court stated that on this issue the Claimant, the Law Society, the Secretary of State, the TACT 2 form and Circular 07/2011 were right that as a detainee under Schedule 7 Mr Elosta had the right to consult a solicitor before being interviewed.

Did the Claimant have the right to consult a solicitor face to face?

Counsel for the Defendant, and supported by counsel for the Secretary of State, asserted that any legal right conferred by the Code of Practice and its forms does not include the right to consult a solicitor in person before questioning under Schedule 7. It was submitted that a person may lawfully be examined under Schedule 7 powers without being detained and having no right to consult a solicitor, at least during the first hour before service of TACT 1. It was argued that there is not the same nexus between the right to consult a solicitor and the questioning as arises under the Police and Criminal Evidence Act 1984 (PACE) and furthermore a person being examined under Schedule 7 commits a criminal offence if he refuses to answer questions in contrast to an interview under PACE.

The court considered the House of Lords judgment in R v Chief Constable of the RUC ex p Begley [1997] 1 WLR 1475 which contrasted the right under section 58 of PACE 1984 for a suspect (including a suspect arrested under section 14(1) of the Prevention of Terrorism Act) 'to consult a solicitor as soon as reasonably practicable, privately and at any time' with the statutory provisions applicable in Northern Ireland under which an individual detained under the terrorism provisions was entitled 'to consult a solicitor privately'. The House of Lords in Begley held that the omission of the words 'at any time' was deliberate and reflected Parliament's intention that detainees in Northern Ireland under the terrorism legislation in force there should not have the right to the presence of a solicitor during interview.

In the instant case the court found that it was the contrast between the English and Northern Irish primary statutes, not the content of the codes of practice issued under PACE, which was crucial to the conclusion reached in Begley. It was stated that paragraph 7 of Schedule 8 was clearly modelled on section 58 of PACE and that the draftsmen who used that wording, and Parliament enacting it, must be assumed to have been aware of the interpretation given to section 58 in Begley.

The court considered the question of the proper interpretation of the statement in the TACT 2 form, namely 'You may consult either in person, in writing or on the telephone privately with a solicitor.'

The meaning to be given to this by counsel for the Commissioner and for the Secretary of State was 'You may consult privately with a solicitor, but it is a matter for the examining officer to decide whether you may do so in person, in writing or on the telephone'.

The TACT 2 form continues: 'If you do not wish to do so now, you may do so later and at any time while you are detained.'

On the meaning attributed to this by the Commissioner and the Secretary of State's case this was to be read as meaning: 'If you do not do so now, you may do so later, at any time while you are detained, but only once.'

The court found these to be strange constructions which the wording of TACT 2 does not reasonably bear. The form tells the individual detained that he may consult a solicitor privately 'in person, in writing or on the telephone' and the court found this to mean what it says. The detainee has the choice and exercise of this right may occur at any time during the period of detention and may be exercised repeatedly but not in a manner which frustrates the proper purpose of the examination. It was stated that if a solicitor attends in person he may be present during the interview because that was what the House of Lords in Begley held to be the effect of the identical wording used in section 58 of PACE.

Though not central to this case the court heard argument on the utility of having a solicitor present in interview. The court attached the greatest weight to the views of the Independent Reviewer of anti-terrorism law in the UK, Mr David Anderson QC, in concluding that the solicitor does have a useful, if limited role to play.

Article 5 of the European Convention on Human Rights (ECHR)

The Claimant's second ground for judicial review was that there had been a breach of Article 5 of the ECHR. Counsel for Mr Elosta argued that to be lawful pursuant to Article 5, detention must be lawful in domestic law as well as falling within one of the subparagraphs of Article 5 itself. He submitted that the examining officers had no power to question the Claimant once he had requested the presence of a solicitor and prior to the arrival of his solicitor, and if they did not wish to wait for the arrival of the solicitor they were required to cease to detain him. On this basis, it was submitted that from 5.45pm on 10 November 2012 until he ceased to be detained at 6.30pm, Mr Elosta's detention breached Article 5.

The court stated that while the questioning of the Claimant between 5.45pm and 6.30pm was unlawful following his request for his solicitor to be present, this did not make his detention unlawful. It was stated that the Claimant had no domestic cause of action in false imprisonment since if the officers had waited for the arrival of his solicitor he would have been detained for longer and as such had suffered no loss. In reference to Article 5(1)(b), the Claimant was lawfully detained in order to secure the fulfilment of his obligation to answer questions put to him under the 2000 Act.

Remedy

The Claimant was entitled to a declaration that the refusal of the examining officers to wait for the arrival of his solicitor was unlawful. It was not considered that this was a proper case for an award of more than nominal damages as there was no evidence that the 45 minutes of questioning caused Mr Elosta any loss nor any adverse consequences.

The Claimant did not seek a further declaration regarding the fact that his telephone consultation with his solicitor was not in private. It was accepted by the Commissioner of the Metropolitan Police that this should not have occurred.

General police duties

Steven Fletcher and Chief Constable of Leicestershire Constabulary [2013] EWHC 3357 (Admin)

A hearing in the High Court of Justice Queens Bench Division in the Administrative Court before Mr Justice Lewis. The full case report can be found at **http://www.bailii.org/ew/cases/EWHC/Admin/2013/3357.html**

Introduction

This is an appeal by way of case stated from Leicester Crown Court. In March 2011, there was a flat fire in King Street, Leicester, after which the flat remained unoccupied. On 11 September 2011, the Appellant, Mr Fletcher, began repairing the flat in the course of his business. During the refurbishment he found a metal box hidden under a kitchen unit which contained £17,940 all in £20 notes and neatly bundled into £1000 bundles bound with elastic bands. Mr Fletcher took the find to the police, whereupon the Chief Constable of Leicestershire Constabulary considered that the money was the result of unlawful criminal conduct. The police made an application to the magistrates' court for an order forfeiting the sum, pursuant to section 298 of the Proceeds of Crime Act 2002 (PCA 2002), which was granted by the court. Mr Fletcher appealed against the forfeiture order to the Crown Court, submitting that the powers of forfeiture do not apply on the facts of this case. The Crown Court dismissed the appeal and granted the Chief Constable an order forfeiting the money. The Crown Court stated a case for the consideration of the High Court.

The case stated

The relevant facts as found by the Crown Court and set out in the case stated were as follows:

(a) Mr Fletcher is a man of good character and is not suspected of any wrongdoing whatsoever;

(b) in the period to March 2011, Mr Brucciani was the assured shorthold tenant of the Flat and a Ms Elizabeth Hamilton held the long lease of the Flat;

(c) both Mr Brucciani and Ms Hamilton are of good character and neither is suspected of any wrongdoing whatsoever;

(d) there was a fire (the fire) at the Flat in March 2011 when Mr Brucciani was in occupation;

(e) the Flat was not legitimately occupied after the Fire was unsecured (door damaged in process of extinguishing the fire) until the Find;

(f) the money, all £20 notes, was found on 11th September 2011 (six-months after the Fire), neatly bundled in £1000 bundles bound with elastic-bands, hidden in a metal box with a screw-down lid), itself concealed under a kitchen unit, on the floor below the plinth.

(g) the money comprised of notes, nearly all of which were issued after Mr Brucciani became the tenant of the Flat (so not a historic hoard);

(h) only one partial and smudged finger-print was found on the money and metal box;

(i) Mr Brucciani's tenancy came to an end between the date of the Fire and the Find, and he removed his belongings from the Flat at that time (but, if the money was under the sink at that time, he obviously did not remove it);

(j) the police made enquiries of Mr Brucciani and Ms Hamilton and were satisfied that neither of them had hidden the money (the police established that Mr Brucciani lived with his fiancée, a solicitor);

(k) the bank-notes were tested for illegal drugs and, whilst a small percentage showed traces of cocaine (and a very small number of notes showed higher readings), the drug testing was inconclusive;

(l) the identity of the person who hid the money (the Hider) was unknown; and

(m) Mr Fletcher did not intend to use the money for any unlawful purpose.

On the balance of probabilities the Crown Court found as a fact that the money had originally been obtained by unlawful conduct of an unidentified kind. That is, the Crown Court decided that the money was the result of criminal conduct on someone's part but were unable to identify the type of criminal conduct involved. In reaching that conclusion the Crown Court considered the following facts as significant:

(a) The money was neatly sorted in uniform bundles of notes of one denomination, and was therefore unlikely to be the profits of legitimate cash trading.

(b) The money was hidden.

(c) The money was not taken away while the Flat was unoccupied.

(d) The money has not been claimed by anybody claiming to be the true owner.

The Crown Court made the following inferences from the facts:

(a) at the time the money was hidden, the Hider knew that the money had been obtained by unlawful conduct;

(b) the purpose of hiding the money was to keep it safe for the Hider to spend at some time in the future;

(c) in the period following the hiding of the money and before it was found, the Hider intended to return and retrieve the money;

(d) the Hider has been prevented by some unknown event from retrieving the money.

The Crown Court further found as a fact:

> …on the balance of probabilities that the Hider never abandoned his intention to recover the money, in order to use it, because it is extremely unlikely that anybody would willingly abandon £17,940, and because the purpose of hiding the money had been to make it available to be used at some time in the future.

In such circumstances, the Crown Court noted that if the hider spent the money it would amount to a criminal offence of converting criminal property contrary to section 327 of the PCA 2002 and that virtually any dealing with the money, other than handing the money over to the police, would involve committing a criminal offence under section 327.

As such the Crown Court, acting pursuant to section 298(2)(b) of the PCA 2002, granted the application for an order forfeiting the money. The court also found that as it was unable to identify the type of unlawful conduct through which the property had been obtained, it would not have been able to make the order under section 298(2)(a) of the Act.

The following four questions were asked by the Crown Court:

(1) In the absence of any direct evidence as to how the money was obtained, was it permissible for the Court to find as fact (from the fact and circumstances of the hiding, in particular those facts set out in paragraph 5 herein) that the money had been obtained by unlawful conduct of some unspecified kind?

(2) in the absence of any direct evidence as to:

(a) the Hider's intention; and/or

(b) the reason or event that had prevented the Hider from retrieving the money:

was it permissible for the court to find as fact that the Hider never abandoned his intention to recover the money, in order to use it and, instead, intended, at all material times, to spend the money at some time in the future?

(3) Assuming that it was permissible to find that the money had been originally obtained by unlawful conduct of some unspecified kind, and to find that the Hider always intended to recover the money and spend it, was it permissible to grant forfeiture on the basis that the Hider intended the money be used in unlawful conduct because any plausible use of the money by the Hider would amount to unlawful conduct (because of the money laundering provisions in the 2002 Act)?

(4) In the case of hidden money (earlier obtained by an unknown person and by unspecified unlawful conduct) found by an innocent finder and handed to the police, is the Hider's intention, at the moment immediately before the money is found (and/or at any later date), to retrieve the money and use it,

sufficient to justify forfeiture under section 298(2)(b) of the 2002 Act, when the innocent finder has no intention to use the money for unlawful purposes, and when an application under section 298(2)(a) of the 2002 Act could not succeed?

Relevant legal framework

On examination of the relevant statutory provisions contained in the PCA 2002, section 298 deals with forfeiture, with subsection (2) being of particular relevance, namely:

> …The court or sheriff may order the forfeiture of the cash or any part of it if satisfied that the cash or part –
>
> (a) is recoverable property, or
>
> (b) is intended by any person for use in unlawful conduct.

With regard to the first limb above, section 304 provides that property obtained through unlawful conduct is recoverable property. Whether property has been obtained through unlawful conduct is to be determined having regard to section 242 of the Act, namely:

> (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
>
> (2) In deciding whether any property was obtained through unlawful conduct –
>
> (a) It is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
>
> (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

It was noted that in Carol Angus v United Kingdom Border Agency [2011] EWHC 461 (Admin), the Divisional Court held that on a proper interpretation of section 242(2)(b), the applicant has to establish that the property was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct. It is not sufficient to establish that the property was obtained through criminal conduct of an unidentifiable kind.

The second limb of section 298(2) focuses on whether cash is intended 'by any person' for use in 'unlawful conduct', which is defined in the Act as conduct in any part of the UK which is unlawful under the criminal law of that part. The relevant provisions of the criminal law in the instant case were sections 327 and 340 of the PCA 2002:

> Section 327 Concealing etc:
>
> (1) A person commits an offence if he –
>
> (a) conceals criminal property;
>
> (b) disguises criminal property;
>
> (c) converts criminal property;

(d) transfers criminal property;

(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

Section 340 Interpretation

(2) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if—

(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

(4) It is immaterial—

(a) who carried out the conduct;

(b) who benefited from it;

(c) whether the conduct occurred before or after the passing of this Act.

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(7) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other.

(8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct.

The issues

Two issues arose out of the questions posed by the Crown Court, namely:

- was the Crown Court entitled to draw the inferences that it did in the present case regarding the origins of the cash and the intention of the hider of the cash?
- on a proper interpretation of section 298(2)(b) of the PCA 2002, is the cash capable as a matter of law of being forfeited in the present case?

Analysis

The High Court stated that the Crown Court had been entitled to infer that the money had been obtained by unlawful conduct of an unidentifiable kind, identifying a number of features which, taken together, entitled the Crown Court to reach that conclusion, and which pointed to the fact that the money did not have a legitimate source. These were:

- the amount of money involved was large.
- it had been concealed at least for a period in a derelict and unoccupied flat.
- the owner of the money did not come forward to claim the cash.

It was stated that the Crown Court was also entitled to take into account that the fact that the notes were all in one denomination indicated that it was unlikely to represent the profits of a legitimate trade. The Crown Court could also, had it wished to do so, have relied on the fact that there were no fingerprints on the money and only one smudged print on the box itself, indicating that the person who hid the money was at pains to ensure that he could not be identified from either the money or the box.

The High Court considered other possible explanations for the presence of such a large amount of money hidden in this way, such as the possibility that the money represented honest earnings or savings with the person who hid it there having been prevented from recovering or claiming it due to ill health or death for example. However it was considered, in the judgment of the High Court, that the Crown Court was entitled to infer from the facts that on a balance of probabilities the money was or represented the proceeds of some kind of unlawful conduct.

Similarly the High Court found that the Crown Court was entitled to find on the balance of probabilities that the hider had not abandoned his intention to recover the money. Nearly all the notes had been issued after Mr Brucciani commenced his tenancy of the flat and neither he nor the owner of the flat had hidden the money, meaning the money was not an historic hoard. As such, the Crown Court was entitled to find that the person hid the money intending to recover it.

Thirdly, it was stated that the Crown Court was entitled to find that the hider intended to use the money in unlawful conduct. Given the finding that the money was criminal property, any further use by the hider, such as concealing it, spending it (which would have amounted to conversion), transferring it or removing it, would almost inevitably have involved the hider in committing a criminal offence under section 327 of the PCA 2002. Therefore the Crown Court was entitled to make the finding it did on the basis of the inferences that it drew from the facts as found by it.

With regard to the second, and more difficult, issue of whether on a proper interpretation of section 298(2)(b) of the PCA 2002 the cash was capable as a matter of law of being forfeited, it was submitted on behalf of Mr Fletcher that the provisions of section 298(2)(b) were not intended to enable forfeiture where the cash had been found by an honest and innocent find such as Mr Fletcher.

This argument was made up of essentially three strands:

Firstly, as a matter of common law, the rights of Mr Fletcher as the finder would take priority over the rights of the police. It was asserted that Parliament should not be taken to have intended to have altered pre-existing common law rights in the absence of clear language.

Secondly, it was submitted that Parliament should not be taken to have legislated in a way that would create unjust and unfair outcomes, as would occur here if an innocent finder who handed money to the police then saw the money being forfeited.

Thirdly, it was submitted that an interpretation which permitted the police to forfeit the money under section 298(2)(b) if they could show only that the money had come from some unspecified and unidentified criminal conduct, would lead to absurd consequences. Section 298(2)(a) requires the court to be satisfied that the money is from one or more identifiable kinds of criminal conduct. That provision would be pointless if the money could nevertheless be forfeited under section 298(2)(b) of the Act if it could be shown that the money being came from some, albeit unidentifiable, criminal conduct. Counsel for Mr Fletcher stated in his skeleton argument that:

> …interpretation urged upon the Court by the Applicant requires that the Applicant must:
>
> (a) Satisfy the Court that the money was obtained through unlawful conduct of an identifiable kind or kinds; but (at the same time)
>
> (b) Only has to satisfy the Court that it was obtained by some unidentified unlawful conduct.

Against this background the High Court considered first the proper interpretation of section 298(2)(b) of the PCA 2002, the question being whether the cash was 'intended by any person for use in lawful conduct'.

The reference to intention by 'any person' must include the person who hid the money in the instant case. That person must intend it to be used in unlawful conduct, that is, conduct which is unlawful under the criminal law of part of the UK, the relevant provision being section 327 of the Act. Concealing, converting, transferring or removing the cash from England and Wales would be an offence under section 327 if the case were 'criminal property' under section 340 of the PCA 2002.

In R v Anwoir [2008] EWCA Crim 1354 the Court of Appeal held that:

> …there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.

On the facts as found by the Crown Court, the hider did intend to use money derived from criminal conduct for the purpose of acts rendered unlawful by section 327 of the PCA 2002. The cash was criminal property in that it was obtained from some kind of criminal conduct and the hider intended to recover the money and spend it. That is, he intended to convert the criminal property, which is a criminal offence under section 327. The High Court found that all the elements of section 298(2)(b) of the PCA 2002 were therefore satisfied and the Crown Court had been entitled to make the order for forfeiture.

The High Court found that there was no alternative interpretation of section 298(2)(b) which is feasible given the wording of the subsection and its purpose. It was stated that it is not feasible to interpret the subsection as applying only when the money is intended 'for use' in unlawful conduct in the sense of intended for use for further criminal activities (eg, buying illegal drugs) as opposed to use of the money itself being unlawful conduct. In each case, the policy of the Act is clearly to permit forfeiture of cash obtained by criminal conduct of some kind.

The Court stated that it is not possible to interpret section 298(2)(b), by reading words into the section, as meaning 'intended by any person for use in unlawful conduct but not including the mere hiding, transfer or conversion of money obtained by unlawful conduct of an identifiable kind'.

Nor did the court find it possible to regard section 298(2)(b) as inapplicable in situations when an innocent finder intends to use the money. The subsection applies when 'any' person intends to use the money for criminal conduct, which must include not only use by an innocent finder but by the person who hid the money.

For these reasons the High Court found that the cash could be forfeited under section 298(2)(b) of the PCA 2002 in the instant case. The Court did not consider that the first two arguments submitted on behalf of Mr Fletcher justified any alternative conclusion. It was stated that it is the case that the words of section 298(2)(b) do alter the common position in relation to property found by a person if that property is the result of criminal conduct. It was further noted that Parliament either did not regard the fact that an innocent finder would be deprived of a windfall as unjust or unfair, or considered that any unfairness was outweighed by the benefits of removing the proceeds of crime from circulation.

With regard to the third argument advanced on behalf of Mr Fletcher, the High Court saw the force of the argument that it is an apparent oddity to have two tests for forfeiture, one requiring satisfaction of a more stringent test than the other. There may conceivably be some cases in which section 298(2)(a) may be available but not section 298(2)(b) but it was deemed that probably the overwhelming majority of cases falling within subsection (a) could also fall within subsection (b) of the PCA 2002. Ultimately, however, given the wording of section 298(2)(b) and the present breadth of the offence under section 327 this situation was considered to be unavoidable. Parliament intended to enable property obtained through unlawful conduct or intended for use in unlawful conduct to be liable to forfeiture as appears from the preamble and the structure of the Act. This purpose is achieved by section 298(2)(a) and (b). The PCA 2002 was not intended to restrict forfeiture to cases of property being obtained through criminal conduct.

It intended to provide for forfeiture in a broader range of cases. In the circumstances therefore, the High Court found that on a proper interpretation of section 298(2)(b), the cash was capable of being forfeited in the instant case on the basis of the inferences drawn by the Crown Court.

Conclusion

The High Court answered the four questions posed by the Crown Court as follows:

1. It was permissible for the court to find (from the fact and circumstances of the hiding) that the money had been obtained by unlawful conduct of some unspecified kind.
2. It was permissible for the court to find that the hider never abandoned his intention to recover the money and, instead, intended, at all material times, to spend the money at some time in the future.
3. It was permissible to grant forfeiture on the basis that the hider intended the money to be used in unlawful conduct because any plausible use of the money by the hider would amount to unlawful conduct.
4. In the case of money hidden by an unknown person and obtained by unspecified unlawful conduct and found by an innocent finder and handed to the police, the intention of the hider at the relevant time to retrieve the money and use it is sufficient to justify forfeiture under section 298(2)(b) of the PCA 2002, when the innocent finder has no intention to use the money for unlawful purposes, and when an application under section 298(2)(a) of the Act could not succeed.

In these circumstances the appeal was dismissed.

Human rights

AJA, ARB, Thomas Fowler and Commissioner of Police for the Metropolis and Chief Constable of South Wales Police and Association of Chief Police Officers

And the case of

AKJ, KAW, SUR and Commissioner of Police for the Metropolis and Association of Chief Police Officers [2013] EWCA Civ 1342

A hearing in the Court of Appeal (Civil Division) on Appeal from the High Court, Queens Bench Division before Master of the Rolls, Lord Justice Maurice Kay and Lady Justice Sharp. The full case report can be found at: **http://www.bailii.org/ew/cases/EWCA/Civ/2013/1342.html**

Introduction

The case concerned whether the Investigatory Powers Tribunal (IPT) that was created pursuant to section 65 of the Regulation of Investigatory Powers Act 2000 (RIPA) had jurisdiction to decide claims by the appellants that their rights under the ECHR had been violated by police officers for whom the respondents were said to be responsible. The details of these claims are discussed below. The appellants also alleged that the same conduct was unlawful at common law in that it involved the commission of the torts of deceit, misfeasance in public office, assault and negligence as well as breach of the Data Protection Act 1998.

The first issue that arose was whether the IPT had jurisdiction to determine the claims brought under section 7(1) of the Human Rights Act 1998 (HRA). This turned on whether Part II of RIPA applied to the alleged conduct. The judge agreed that it did and that the IPT therefore had the jurisdiction to decide the human rights claims.

The second issue was that the judge in the High Court stayed the proceedings pending the determination of the HRA claims by the IPT. The appellants submitted that he was wrong to do so; however the respondents argued that this was a case management decision which was not plainly wrong and with which the Court of Appeal should not interfere.

Background

There were two sets of claimants, namely AKW, KAW and SUR (referred to as 'the Birnberg claimants', named after their legal representation) and AJA, ARB and Thomas Fowler (referred to as 'the Tuckers claimants', named after their legal representation). The Binberg claimants were all committed environmental activists. Mark Kennedy, a married police officer with two children worked as an undercover officer and was provided a false identity by the first respondent. He used this false identity to deceive all three claimants into having intimate sexual relationships

with him while he was working undercover. These relationships lasted between 7 months and 7 years. He knew that none of the claimants would have entered into a relationship and consented to sex with him had they known his true identity and true purpose. He encouraged all three claimants to become emotionally dependent on him, and he attended intimate family gatherings and private holidays. He used his sexual relationships with the claimants to enable him to gather intelligence and/or for personal gratification. The relationships were known about by other police officers, including other undercover officers, his day-to-day handler and his managers in the National Public Order Intelligence Unit.

The Tuckers claimants were all members of the Cardiff Anarchists Network (CAN), a body of locally-based individuals engaged in direct action and political protest on domestic and international issues. MJ, alleged to be a police officer, first met members of CAN in 2004 and told the claimants he was a truck driver who was separated from his former partner. He formed close relationships with all three claimants, including sexual relationships with the first and second claimant. The sexual relationship with the second claimant was instigated while she was in a relationship with the third claimant. During these relationships, MJ purported to be a confidant, empathiser and source of close support to each. He exploited their vulnerabilities and sought to encourage them to rely on him emotionally. None of the claimants would have entered into the relationships if they had known MJ was a police officer. He used the respondents' resources to conceal his identity and further the relationships he had initiated.

RIPA

RIPA sets out the regulatory requirements for the exercise of six investigatory powers. It was advanced by all appellants that RIPA established a hierarchy of powers, with those considered to be the most intrusive available in more limited circumstances, to fewer public bodies and subject to more stringent requirements. In descending order of intrusiveness, the hierarchy was:

1. interception of communications
2. intrusive surveillance
3. demands for decryption
4. covert human intelligence source (CHIS)
5. directed surveillance and acquisition of communications data.

According to section 26(8) of RIPA, for the purposes of Part II of the Act, a person is a CHIS if –

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or

(c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

The jurisdiction of the IPT is governed by section 65 of RIPA and the schedules to which it refers. Subsection (2) provides that the IPT is the only appropriate tribunal for the purposes of proceedings under section 7(1)(a) of the HRA 1998 which fall under subsection (3).

Subsection (3) provides that proceedings fall within the subsection if '(a) they are proceedings against any of the intelligence services …. (d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5)'.

Subsection 5 provides that '…conduct falls within this subsection if (whenever it occurred) it is… (d) [other] conduct to which Part II applies'.

The first issue: did the IPT have jurisdiction over the human rights claims?

The appellants' case

Firstly, the establishing and/or maintaining of an intimate sexual relationship for the covert purpose of obtaining intelligence would, if permitted, be the most intrusive form of covert investigatory technique. It would amount to a gross invasion of an individual's common law right to personal security and would also amount to a breach of 'a most intimate aspect' of the rights to privacy under Article 8 of the ECHR. Part II of RIPA contained no express words to permit the gross infringement of these rights occasioned by engaging in intimate sexual acts in order to obtain intelligence, and it could not be said that the power arose by necessary implication. The principle of legality required the court to interpret the general words 'personal or other relationship' in section 26(8)(a) as being limited by the fundamental rights of the individual.

Secondly, the hierarchy referred to above showed that RIPA provided a regime for the use of a range of covert techniques, with CHIS being considered among the least intrusive. Investigation by a CHIS does not, for example, require a warrant signed or authorised by the Secretary of State or any particular high ranking official, nor is there a requirement for those authorising the use of a CHIS to consider whether the information could reasonably be obtained by other means. It was inconceivable that Parliament would have designed RIPA in the way it did, had it intended sections 26 to 29 to cover the use of intimate sexual relationships to obtain intelligence.

Thirdly, the appellants submitted that a further indication that Parliament was not aware of the possible use of sex as an undercover technique, and did not intend it to be so used, was the fact that neither of the codes of practice issued under section 71 of RIPA referred to such a use nor provided guidance on when it would be appropriate to use it. Finally the appellants argued there was nothing in the legislative history to indicate that Parliament had confronted the use of such an invasive investigative technique.

Discussion

In R (A) v Director of Establishments of Security Service [2009] UKSC 12, [2010] 2 AC 1, the Supreme Court held that section 65(2)(a) of RIPA conferred on the IPT exclusive jurisdiction to

hear claims under section 7(1)(a) of the HRA. The question raised by the first issue was whether the alleged conduct of which the complaint was made was conduct to which Part II of RIPA applied. If an intimate sexual relationship is not a 'personal or other relationship', the IPT would have no jurisdiction to entertain the human rights claims and they must, therefore, be determined by the court. The Court considered that as a matter of ordinary language, a sexual relationship is an example of a relationship between persons and therefore a personal relationship.

The principle of legality

The Court accepted that establishing and/or maintaining an intimate sexual relationship for the covert purpose of obtaining intelligence was a seriously intrusive form of investigatory technique. It did not accept that it was in issue that it amounted to an invasion of the common law right to personal security and that it was of a most intimate aspect of the right to respect for privacy under Article 8 of the ECHR.

The principle of legality is that fundamental rights cannot be overridden by general or ambiguous statutory words. The phrase 'personal or other relationship' in section 26(8)(a) of RIPA is conduct which can be authorised under section 27 and which, if it is carried out in 'challengable circumstances' may be the subject of human rights proceedings before the IPT under section 65. In its plain and ordinary meaning, the Court stated that this includes intimate sexual relationships. To give 'personal or other relationship' its ordinary meaning so as to include intimate sexual relationships did not produce any startling or unreasonable consequences which Parliament could not have intended. As a result, the Court did not consider that the principle of legality required the words to be given a narrower meaning than that which they naturally bear.

The hierarchy and further points made by the appellants

The Court accepted that Parts I to III of RIPA provide a comprehensive regime for using a range of investigatory techniques from the most to the least intrusive and that, generally, the use of CHIS was at the less intrusive end of the spectrum. It did not, however, consider this to be a sufficient reason for giving a meaning to the phrase 'personal or other relationship' which, it stated, it could not bear. It stated that in any event, the use of CHIS to establish or maintain intense and prolonged non-sexual relationships could in some instances be extremely intrusive and it was difficult to see why the hierarchy argument should carry more weight where the relationship was sexual.

The Court accepted that if the codes of practice referred to the establishing or maintaining of sexual relationships and gave guidance on the circumstances in which they might be used, this would fortify the case that personal or other relationships included sexual relationships. However, the converse was not true. The absence of any reference to such relationships in the codes could not be invoked to support the proposition that personal or other relationships did not include sexual relationships. Finally, the Court agreed that there was nothing in the legislative history to indicate that Parliament squarely confronted the use of sexual relations as a covert surveillance technique, but stated that this absence was not necessarily significant.

Conclusion on the first issue

The court stated that while the distinction between sexual and non-sexual relationships was critical for the purposes of the Sexual Offences Act 2003, it was an arbitrary distinction to draw in the present context. Relationships between human beings are infinitely varied and complex. For some individuals, non-sexual relationships may be regarded as more intense, passionate, meaningful and intimate than sexual relationships. A person subject to surveillance by a CHIS with whom he or she enjoyed a long and intense platonic relationship might feel more betrayed, outraged and traumatised on discovery of the true facts than another (perhaps more robust) person who is subject to surveillance by a CHIS for a short period during which there was a moderate amount of sexual touching. There was no rational basis for saying that the former conduct should be capable of being authorised under section 27of RIPA, but that the latter should not be.

Secondly, if it were necessary for an undercover operative to form a relationship, including a sexual relationship, with a dangerous terrorist in order to maintain cover, discover sensitive information and save lives, counsel for the appellant were arguing that any human rights proceedings about such a relationship would have to be brought in court and defended by reference to the common law doctrine of necessity. The Court, however, agreed with the respondent, that it made no sense to require a human rights case, which involved the use of covert operations, to be heard in open court and not by the IPT, simply because sex was one of the tactics alleged to have been used. This could not have been Parliament's intention.

Thirdly, if counsel for the appellants was right, the IPT is the sole forum for dealing with claims of breaches of Convention rights arising from non-sexual relationships established or maintained by CHIS, but does not have jurisdiction to deal with claims for breaches of Convention rights arising from sexual relationships. This, the Court stated, was absurd. Parliament clearly intended that human rights proceedings about the establishing or maintaining of relationships by undercover police officers should only be determined by the IPT. The proposition that sex made all the difference between a case that was sensitive enough to be required to be heard in a special tribunal and a case which was not so sensitive was absurd. The reason why the case needed to be heard in a special tribunal was because it related to undercover operations arising out of personal or other relationships. Furthermore, the Court stated that it was clear that a virtually identical claim to that made by the Birnberg and Tuckers claimants, if brought in respect of the conduct of the intelligence services, would go to the IPT. There was no explanation as to why Parliament should have intended a different allocation of jurisdiction in police CHIS cases.

The Court decided the first issue in favour of the respondents. Accordingly, the IPT has jurisdiction to determine the human rights claims made by all the appellants and is the appropriate forum for their determination.

The second issue: was the judge wrong to stay the High Court proceedings pending the outcome of the proceedings before the IPT?

The Court agreed that the judge was wrong to stay the High Court proceedings. All parties had agreed that should this be the case, the Court of Appeal would decide the matter afresh rather than remit it to the judge. The Court stated that the respondents could not point to a real risk of injustice if the High Court proceedings continued. Their arguments did not demonstrate that it was in the interests of justice to stay the High Court proceedings and the appellants should be allowed to proceed with them.

Policing practice

Crime

New approach to prosecuting child sexual abuse published

The Director of Public Prosecutions has set out the approach prosecutors will take in tackling cases of child sexual abuse, following a public three month consultation.

The guidelines should be applied to cases where a sexual offence has been committed against a child or young person, unless there are good reasons why not in a particular case and these reasons are noted clearly by the prosecutor. The guidelines also include cases of adult victims of sexual abuse in childhood.

These guidelines replace the interim guidelines issued on 11 June 2013 and come into immediate effect.

In large or complex child sexual abuse cases there should be early consultation between the police and the Crown Prosecution Service (CPS). The CPS should be consulted and informed of the investigation strategy so that early advice can be provided to the police if necessary. The guidelines state that the decision to involve the CPS at an early stage is a matter for the police but experience has shown that early CPS involvement can help address some of the evidential or presentational issues that may arise at a later stage of a case.

The police and CPS should work closely together and, in more complex cases, joint case review meetings should be held periodically so that progress can be checked and advice on case matters can be given. The frequency and timing of the meetings will be dictated by the size and scale of the investigation and prosecution.

In conjunction with the guidelines the CPS has also published a protocol and good practice model on disclosure of information in child sexual abuse cases, which will come into force on 1 January 2014. Prosecutors and police are now expected to share and seek appropriate information about vulnerable youngsters with and from social services, schools and family courts in accordance with the protocol and good practice model.

The aims and objectives of the protocol and good practice model are stated as follows:

- to provide early notification to the Local Authority and to the Family Court that a criminal investigation has been commenced
- to provide timely early notification to the Local Authority and to the Family Court of the details and timescale of criminal prosecution

- to facilitate timely and consistent disclosure of information and documents from the police and the CPS into the Family Justice System
- to provide notification to the police and the CPS of an application to the Family Court for an order for the disclosure of prosecution material into the Family Justice System
- subject to the Family Procedure Rules 2010 (and relevant Practice Directions, in particular Practice Direction 12G) the Criminal Procedure Rules 2013 and the common law duty of confidentiality, to facilitate timely and consistent disclosure of information and documents from the Family Justice System to the police and/or the CPS
- to provide a timely expeditious process for the Local Authority to respond to a request from the police for material held by the Local Authority which would assist a criminal investigation
- to provide for timely consultation between the CPS and the Local Authority where Local Authority material satisfies the test in the Criminal Procedure and Investigations Act 1996 for disclosure to the defence
- to provide a streamlined and standard process for applications by the police and/or the CPS for the permission of the Family Court for disclosure of material relating to Family Court Proceedings
- to specify a procedure for linked directions hearings in concurrent criminal and care proceedings.

The guidelines and joint protocol for information sharing can be found in full at **http://www.cps.gov.uk/news/latest_news/csa_guidelines_and_tpp/**

Diversity

Mental health and learning disabilities in criminal courts

In his 2007 review of people with mental health problems or disabilities in the criminal justice system, Lord Bradley recommended that members of the judiciary and criminal justice staff undertake mental health and learning disability awareness training. Following this, the Prison Reform Trust and Rethink Mental Illness have issued advice on mental health and learning disabilities in the criminal courts.

This online resource is designed to provide an overview of the signs to be aware of that may indicate that someone has a mental health condition or a learning disability.

The resource addresses:

- information about mental health conditions and learning disabilities and how to recognise them
- the implications of conditions for individuals appearing before the courts and how to support vulnerable defendants in court
- ways in which defendants can be helped to participate effectively in court proceedings
- bail and remand decisions
- sentencing options
- information on the Mental Health Act 1983.

Mental Health & Learning Disabilities in the Criminal Courts Information for magistrates, district judges and court staff can be found at **http://www.mhldcc.org.uk/**

Government's progress on the recommendations from the Equality and Human Rights Commission Inquiry into disability-related harassment

Following the EHRC Inquiry into disability-related harassment, the Government's overarching approach to ensure equality for disabled people has been set out in the documents:

- Fulfilling Potential, the Discussions So Far
- Fulfilling Potential: next steps.

These documents provide a response to the concerns of disabled people and disabled people's organisations and outline the Government's strategic vision and principle. In recent months, the Office for Disability Issues has also published the following documents which look at how the strategy will be delivered:

- Fulfilling Potential – Making it Happen
- Fulfilling Potential: Making it Happen Action Plan.

Other action taken to tackle hate crime and disability-related harassment which cuts across the police and other criminal justice agencies and health and social care includes:

- Schedule 21 of the Criminal Justice Act 2003 was amended to double the starting point for disability and transgender hate crime murders. This ensures that murders motivated by hatred or hostility towards disabled or transgender victims have the same starting point as murders aggravated by race, religion and sexual orientation.
- The Law Commission has been asked to review the existing hate crime offences and examine the case for extending the legislation to create other specific offences, including stirring up hatred on the grounds of disability and separate aggravated offences also covering disability hate crime. The Law Commission recently undertook a public consultation process involving engagement with disabled people's organisations and with the Government's Independent Advisory Group on Hate Crime. The Commission is due to report its findings by Spring 2014.
- The report of the Criminal Justice Joint Inspection (CJJI) on disability hate crime led by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) made a number of recommendations for the police, the CPS and Probation Trusts to do more to ensure that disability hate crime is treated on an equal footing with other hate crimes, and that victims have the confidence to report crimes.
- In response to the EHRC's Inquiry and more recently the CJJI, the CPS has developed its disability hate crime action plan. This action plan is structured around key themes, including: leadership; data; support; good practice and innovation; performance; victims and witnesses; and working with partners.
- Improvements have been made to the way hate crimes are recorded by the police with a commitment to ensuring that cases of disability hate crime are identified and recorded to the same level as other hate crimes. The police are also working more closely with the CPS to review and identify disability hate crime cases in order to learn lessons and promote greater consistency of case handling.
- The National Offender Management Service has published its Hate Crime Framework. This applies to offender management in both the community and in custody and sets out expectations in relation to identification, assessment, provision of interventions and management of offenders convicted of all types of hate crime, including that which is disability related.

- In October 2013 the Government published a new Code of Practice for Victims of Crime. This aims to give victims of crime clearer entitlements from criminal justice agencies and focuses resources on victims who need the most help and support.
- Following the abuse that took place at Winterbourne View Hospital, the Government published its report into the reviews of the hospital which included actions to ensure that staff are aware of and know how to raise concerns of disability hate crime.
- The Care Bill was introduced into the House of Lords in May 2013 and includes proposals to require all local authorities to have a Safeguarding Adults Board (SAB) with, as a minimum, representatives from the local authority, clinical commissioning group and the police. The Bill completed its passage through the House of Lords on 29 October 2013.

A progress report and refresh of the Government's hate crime action plan 'Challenge it, Report it, Stop it' is expected to be published by the end of the year.

An overview of the Government's specific achievements to address hate crime and disability-related harassment to date can be found at **https://www.gov.uk/government/publications/government-response-hidden-in-plain-sight-report**

Police

Independent review of the Association of Chief Police Officers published

General Sir Nick Parker KCB, CBE has completed his independent review of the Association of Chief Police Officers (ACPO).

By way of context, ACPO has historically been funded by a combination of Home Office grant and Police Authority funding. In 2012/13 the Home Office temporarily increased financial support to ACPO to bridge the gap between police authorities and police and crime commissioners (PCCs). However, it was made clear that there would be no funding from the Home Office in the financial year 2013/14 unless agreed by PCCs. The Association of PCCs (APCC) formed a working group to consider the matter which made an initial recommendation to continue ACPO funding for the financial year 2013/14. This agreement was subject to a more fundamental and strategic report for APCC members. It was agreed that a report by an independent party would be commissioned to make recommendations to the working group.

The aim of the independent report was to examine the standing structures and functions currently delivered by ACPO in the context of the radically different national environment of PCCs, the College of Policing and the National Crime Agency (NCA), and to make recommendations to PCCs on the requirement for a collective national policing function analogous to that currently carried out by ACPO. In particular the effectiveness of the current arrangements, governance and accountability, and value for money were considered along with any alternative mechanisms to sustain effective output.

Recommendations

Is there a requirement for a collective national policing function akin to that currently fulfilled by ACPO?

There is a requirement for such a function that focuses on:

- conducting operational and managerial coordination between independent chief constables
- maintaining direct links to the National Business Areas in order to inform policy and implement practice
- acting as the focus for command and leadership of the police service.

The current arrangements, are they fit for purpose? How are these delivered; are the outcomes clear and unambiguous; are they best delivered centrally/nationally under ACPO auspices or are there alternative models?

The police service is engaged in a process of transformation involving many stakeholder interests. For the working group's recommendations to be effective they need to be considered

as part of the strategic programme that oversees the integration of the collective national policing function with the introduction of PCCs, the College of Policing and the NCA.

Many of ACPO's outputs will endure, but they can be delivered in a number of ways. An overarching management structure will continue to be required. Of the three alternatives highlighted in the report, it is recommended that a model is developed based on a properly supported Chief Constables' Council with a full-time chair elected by the membership.

Are the governance and accountability arrangements appropriate and transparent? Is the current funding model(s) appropriate or are there alternative ways of sustaining output which should be considered?

Governance and accountability require attention:

- the governance of national units should be examined in detail and a bespoke solution for each agreed between chief constables and PCCs
- ACPO should be invited to identify an alternative funding mechanism that focuses central funding on the effective operation of the Chief Constables' Council
- PCCs should seek greater visibility of National Business Area governance and output. The existing mechanism has many advantages and great care should be taken not to undermine it.

Does the present model deliver the most efficient and effective service and are the public deriving maximum value for money?

The current service costs approximately £4.2m. The outputs are necessary and are likely to be required in some form, even if they are not delivered by ACPO. However, there is scope for change to increase efficiency and effectiveness.

On the condition that PCCs see a commitment to address the output and governance issues raised in this report, it is recommended that these funding decisions are passed to individual chief constables to be considered as part of the local force's operational budget.

Are the decision making processes efficient and effective and is the correct balance being struck between safeguarding operational independence and achieving appropriate public scrutiny?

It is recommended that the requirement for the senior police leadership to be represented in a collective body at the national level is supported by PCCs. It should be expected to influence debate, act independently and express a view. It must be transparent and operate within the boundaries of government policy. The mechanism must be sufficiently sophisticated to generate consensus among chief constables. Investment into more responsive internal communication mechanisms should be encouraged. It is recommended that the Chief Constables' Council is adapted to fulfil this requirement.

The full report can be found at **http://www.apccs.police.uk/press-releases/press-release-141113-2**

Improved police.uk site launched

The revamped police.uk website has been launched with a fresher look and new functions with a view to making it easier for the public to find the information they want.

The new site will give the public even more access to information about crime problems and how they are dealt with in their area. People can use police.uk to set up personalised 'crime maps' with, for example, information on crime, anti-social behaviour and criminal justice outcomes, which can be shared with other users.

New user-friendly interactive functions of the site include:

- email alerts informing people when crime data for their area is updated
- the ability to compare the performance of their local police with similar forces
- crime prevention advice relating to specific offences which site users search for.

Further information can be found at **http://www.police.uk/**

Domestic Violence Disclosure Scheme and Domestic Violence Protection Orders to be rolled out nationally

The Home Secretary has announced her intention to roll out both Domestic Violence Protection Orders and the Domestic Violence Disclosure Scheme across England and Wales from March 2014 following the successful conclusion of two pilot schemes.

Domestic Violence Disclosure Scheme

Known as 'Clare's Law', every request made under this scheme is thoroughly checked by a panel made up of police, probation services and other agencies such as social services who decide whether any disclosure is lawful, necessary and proportionate.

The scheme will operate on a 'right to ask' and a 'right to know' basis:

- **Right to ask** – this enables someone to ask the police about a partner's previous history of domestic violence or violent acts.
- **Right to know** – the police can proactively disclose information in prescribed circumstances.

Further information can be found at **https://www.gov.uk/government/publications/domestic-violence-disclosure-scheme**

Domestic Violence Protection Orders (DVPO)

These enable the police to put in place protection for the victim in the immediate aftermath of a domestic violence incident. Where there are reasonable grounds to believe that a perpetrator has used or threatened violence against the victim and the victim is at risk of future violence behaviour, the police can issue a Domestic Violence Protection Notice immediately, provided they have the authorisation of an officer of superintendant rank.

The case for the Protection Order itself must then be heard at the magistrates' court within 48 hours of the Notice being made. If granted, the Order may last between 14 and 28 days.

An evaluation of the pilot of Domestic Violence Protection Orders can be found at **https://www.gov.uk/government/publications/evaluation-of-the-pilot-of-domestic-violence-protection-orders**

Home Office Circular 014/2013: further information on long-term police pension reform

The reform design framework (RDF) for a new police pension scheme to come into effect on 1 April 2015, was published on 4 September 2012. The RDF sets out the government's final position on the main elements of the scheme design, including principles on protection of accrued rights and protection for those close to retirement.

The core parameters for the new scheme are:

- a pension scheme design based on career average revalued earnings (CARE)
- a normal pension age of 60
- a provisional accrual rate of 1/55.3 of pensionable earnings each year, subject to agreement on the outstanding issues
- a revaluation rate of active members' benefits in line with the Consumer Prices Index (CPI) + 1.25%
- pensions in payment and deferred benefits to increase in line with CPI
- average member contributions of 13.7%
- retirement from the scheme's minimum pension age of 55, built around the scheme's Normal Pension Age of 60
- a deferred pension age equal to the individual's state pension age
- an optional lump sum by commutation at a rate of £12 for every £1 per annum of pension foregone in accordance with HMRC limits and regulations.

The RDF made clear that there was further detail to be resolved in finalising the scheme.

Circular 014/2013 sets out the government's position on some of that detail, including further information about how transitional arrangements will apply. This is intended for member information only. The final scheme rules will be set out in forthcoming regulations.

Consultation with the Police Negotiating Board on the detail of the scheme is continuing and further information on outstanding issues will be provided in due course.

The Circular provides further information on:

- the CARE scheme and revaluation
- calculation of accrued benefits
- part-time service and transitional and tapered protection
- part-time service and accrued rights in the 1987 scheme
- career breaks and unpaid leave
- commutation
- transitional and tapered protection
- opting out
- actuarial reduction
- protected pension age
- pension transfers
- added 60ths, added years, additional voluntary contributions and additional pension
- death in service – lump sum death grant
- next steps
- equality considerations
- glossary.

Circular 014/2013 can be found at **https://www.gov.uk/government/publications/circular-0142013-further-information-on-long-term-police-pension-reform**

Criminal justice system

Using conditional cautions with sobriety requirements guidance

The Home Office has published guidance and information on lessons learned in the use of Sobriety Conditional Cautions (SCCs). The guidance is designed to assist those intending to use a Conditional Caution with sobriety conditions as a means of disposal for low level alcohol-related crime and/or disorder. It uses the knowledge and experience gained from five sites used in a pilot scheme that ran from May 2012 to January 2013.

SCC guidance

Sobriety conditions as part of a Conditional Caution aim to tackle low level crime, within the existing out-of-court disposal scheme and use existing police breathalyser equipment. An offender who accepts an SCC is required to abstain from drinking at key times and to undergo regular testing. Failure to comply may result in prosecution for the original offence. Sobriety conditions may be used for any offence for which Conditional Cautions are available, however they should be given particular consideration by the police and prosecutors in relation to the following offences:

- common assault
- assaulting a police officer
- sections 4 and 4A of the Public Order Act 1986
- section 5 of the Public Order Act 1986
- obstructing a police officer
- drunk and disorderly
- simple drunk
- destroying or damaging property
- threats to destroy or damage property.

This type of disposal can be offered to offenders who meet the following criteria:

- the offence is one for which a Conditional Caution can be offered
- the offender was under the influence of alcohol at the time the offence was committed
- the offender has admitted the offence
- the offender agrees to accept a Conditional Caution with sobriety conditions attached as a means of disposal.

Offenders will be offered the following conditions:

- to completely abstain from drinking alcohol for a specified period on the days which they are likely to offend as a result of drinking alcohol (eg, Friday to Sunday each week)
- to regularly attend a suitable venue for sobriety compliance testing
- to not reoffend.

Other conditions could also be considered, such as to attend an alcohol project or similar to assess the possible needs of the offender. The overriding principle is that the conditions attached to Conditional Cautions must be proportionate to the offence committed, appropriate and achievable. The sobriety conditions may be offered alongside other non-sobriety related conditions.

Once agreed, the Conditional Caution is administered in the usual way and the subject is released with a duty to attend for testing on the chosen dates and times. At this point the custody record is closed. A condition should be set requiring the offender not to commit any further offences while subject to this Conditional Caution. As a general rule this condition should be set for one week after the date of completion of the last breath test on the last date of required attendance.

On attendance, a screening test should be conducted on an approved hand-held device. If the test is passed, the procedure is complete for that appearance. If the subject fails and alcohol is detected, this will be followed by a test on an evidential standard electronic breathalyser machine.

If this second test shows a reading of 4µg/ml or above, the offender will be considered to have failed the test and consumed alcohol which should be considered as non-compliance with the Conditional Caution. A reading of 3µg/ml or less can be attributed to alcohol levels occurring naturally and should be considered as passing the test. Failure to appear for testing as required should be considered under non-compliance procedures.

Lessons learned

The sobriety scheme pilot ran in Cardiff, Hull, Plymouth, St Helens and Westminster. These areas were selected on the basis of:

- having an identified issue with alcohol-related offending
- having Drinking Banning Orders in place
- historical high numbers of alcohol-related Conditional Cautions issued
- their willingness to participate.

The pilot schemes commenced in May 2012. After six months, one of the pilots had not started the scheme and two of the remaining four pilots had not issued any SCCs. The number of offenders who admitted the offence and also accepted the SCC was low. Of the 92 potentially

eligible individuals, ten started the disposal and six of these completed the condition. There was variation between the schemes: one scheme gave SCCs to three offenders (one completed) and another scheme gave SCCs to seven offenders (five completed).

Of the 92 eligible offenders, 68 did not consent to the SCC. Offenders who turned down the SCC were most often given a Penalty Notice for Disorder (PND).

At the time of the pilot, the CPS were required to authorise a Conditional Caution. This is no longer the case following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provisions on 8 April 2013. During the pilot the CPS did not authorise five SCCs. Two were rejected because the sentence was not considered proportionate; two because it was not in the public interest and one because the offender's antecedent history dictated that a charge was more suitable.

There were three breaches where the offender failed to report for the breath test, having complied with the conditions for between eight to 18 days. In one additional case, an offender breached but was then allowed to continue and subsequently completed the condition.

The pilot demonstrated that it is feasible to set up an SCC scheme, however, substantial implementation issues were experienced by the majority of the pilot sites. It is stated that the pilot highlighted a general lack of understanding of the process and the guidance advises that areas intending to use this system should have an early meeting with the various stakeholders and decision makers to ensure that each person understands their role and that of other parties involved. In addition, the guidance states that the identification of any training needs and a raised awareness of the general benefits of sobriety schemes would also be beneficial.

It is noted that care must be taken not to appear to offer an SCC and a PND as options to the offender, who would probably view a PND as the easier option. It is for the officer to make the decision on the most suitable disposal taking into account the circumstances of the offence and the offender, as well as the views of the victim and the relevant guidance.

Feedback from the pilot sites demonstrated that having a nominated individual monitor the scheme locally proved to be beneficial. Such a person can:

- provide suitable briefings to officers, prisoner processing staff and those likely to deal with breath testing requirements
- arrange for any training needs to be addressed
- ensure attendance requirements are monitored
- ensure staff and equipment are readily available
- conduct any follow-up enquiries as necessary.

The guidance can be found in full at **https://www.gov.uk/government/publications/using-conditional-cautions-with-sobriety-requirements**

Home Office Circular 015/2013: guidance on the rights of persons detained under Schedule 7 to the Terrorism Act 2000

Following the case of Abdelrazag Elosta v The Commissioner of Police for the Metropolis [2013] EWHC 3397 (QB) any person who is detained, whether at a port or police station, has the right to consult a solicitor in private, in person and at any time during the period of detention. This includes before questioning begins and having a solicitor present during questioning.

The Home Office has provided the following guidance for interpreting the Terrorism Act (TACT2) Notice of Detention for examining officers:

- A person detained for examination has the right to consult privately with a solicitor regardless of whether the person is detained at a port or a police station.
- A person detained for examination has the right to consult with a solicitor privately whether by phone, in writing (including by text or e-mail) or in person. If the examining officer, or any other officer, remains in the room during the consultation it will NOT be considered private, and you will NOT be allowing the detained person to exercise the right to consult privately.
- A person detained for examination has the right to consult with a solicitor at any time. This means whenever they want, whether in person, in writing or by telephone, and as often as they want.
- A person detained for examination may choose to exercise their right to consult with a solicitor privately in person before questioning begins. This must be allowed, and will require that questioning is delayed for a reasonable period pending the arrival of a solicitor.
- A person detained for examination may choose to exercise their right to consult with a solicitor during questioning. This must be allowed and will require that questioning is suspended for a reasonable period.
- A person detained for examination is not entitled to exercise their right to consult with a solicitor in a manner which will frustrate the proper purpose of the examination.

Illustrative examples of circumstances in which an examining officer might consider that the exercise of the right to consult with a solicitor will frustrate the proper purpose of the examination and would cause unreasonable delay to the process of examination include a person detained for examination seeking to consult in person where the waiting time for the arrival of the solicitor would mean that an examination could not be properly conducted or seeking to consult privately with the solicitor repeatedly during questioning.

Circular 015/2013 can be found at **https://www.gov.uk/government/publications/circular-015-2013-providing-guidance-to-examining-officers-on-the-rights-of-persons-detained-for-examination-under-schedule-7-to-the-terrorism-act**

Code of Practice for Victims of Crime published

The Ministry of Justice has published a code of practice governing the services to be provided in England and Wales to victims of criminal conduct which occurred in England and Wales. The Code has been issued under section 32 of the Domestic Violence, Crime and Victims Act 2004 and implements the relevant provisions of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/26/EU).

The Code sets out the services to be provided to victims of criminal conduct by criminal justice organisations in England and Wales, referred to collectively in the code as 'service providers'. Criminal conduct is behaviour constituting a criminal offence under the National Crime Recording Standard (NCRS). Service providers may provide support and services in line with the Code on a discretionary basis if the offence does not fall within the NCRS.

This Code requires the following organisations to provide services to victims:

- the Criminal Cases Review Commission
- the Criminal Injuries Compensation Authority
- the Crown Prosecution Service
- the First-tier Tribunal (Criminal Injuries Compensation)
- Her Majesty's Courts and Tribunals Service
- Her Majesty's Prison Service
- National Offender Management Service (NOMS)
- the Parole Board
- police and crime commissioners
- all police forces in England and Wales, the British Transport Police and the Ministry of Defence Police
- providers of probation services
- the UK Supreme Court
- Witness Care Units
- Youth Offending Teams.

Summary of key entitlements

A victim of criminal conduct is entitled to:

- an enhanced service if he/she is a victim of serious crime, a persistently targeted victim or a vulnerable or intimidated victim

- a needs assessment to help work out what support he/she needs
- information on what to expect from the criminal justice system
- be referred to organisations supporting victims of crime
- be informed about the police investigation, such as if a suspect is arrested and charged and any bail conditions imposed
- make a Victim Personal Statement (VPS) to explain how the crime affected them
- read his/her VPS aloud or have it read aloud on his/her behalf, subject to the views of the court, if a defendant is found guilty
- be informed if the suspect is to be prosecuted or not or given an out of court disposal
- be informed about how he/she can seek a review of CPS decisions not to prosecute, to discontinue or offer no evidence in all proceedings
- be informed of the time, date and location and outcome of any court hearings
- be informed if he/she needs to give evidence in court, what to expect and discuss what help and support might be needed with the Witness Care Unit
- arrange a court familiarisation visit and enter the court through a different entrance from the suspect and sit in a separate waiting area where possible
- meet the CPS prosecutor and ask him or her questions about the court process
- be informed of any appeal against the offender's conviction or sentence
- to opt into the Victim Contact Scheme (VCS) if the offender is sentenced to 12 months or more for a specified violent or sexual offence
- if the victim opts in to the VCS to:
  - make a VPS for consideration by the Parole Board if the offender is considered for release or transfer and apply to the Parole Board to read it out at the hearing
  - make representations about the conditions attached to the offender's licence on release and be informed about any licence conditions relating to him/hero make a VPS for consideration by the Parole Board if the offender is considered for release or transfer and apply to the Parole Board to read it out at the hearing apply for compensation under the Criminal Injuries Compensation Scheme
- receive information about Restorative Justice
- make a complaint if he/she does not receive the information and services they are entitled to, and to receive a full response from the relevant service provider.

The Code of Practice can be found at **https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime**

Consultation on new statutory powers for the Forensic Science Regulator

A consultation has been launched seeking the views of police forces, forensic service providers and the legal profession on whether new statutory powers for the Forensic Science Regulator are necessary, how they would work and any available alternatives.

The Home Office has set out some of the key issues associated with the current role of the Forensic Science Regulator in setting and monitoring standards in the provision on forensic services to the criminal justice system, and proposes a new set of statutory powers to help address these issues.

The proposals focus on putting the role of the Regulator on a statutory footing, introducing a statutory Code of Practice for any organisation working with forensic science evidence, and powers to investigate any serious breach of standards.

The consultation runs until 3 January 2014.

Responses to the consultation should be emailed to **FSRconsultation@homeoffice.gsi.gov.uk**

Responses can also be posted to:

Home Office
Forensic Regulator Consultation
Police Transparency Unit
6th Floor Fry Building
2 Marsham Street
London SW1P 4DF

The consultation paper can be found at **https://www.gov.uk/government/consultations/new-statutory-powers-for-the-forensic-science-regulator**

Statistical bulletin: Alcohol and late night refreshment licensing England and Wales 2012/13

National statistics have been published on a range of measures under the Licensing Act 2003. The release contains statistics on the following licensing authority powers under the Act:

- premises licences
- club premises certificates
- personal licences
- late night refreshment and 24-hour alcohol licences
- temporary event notices.

In addition, it includes statistics on:

- reviews, hearings and appeals
- cumulative impact areas.

Headline figures based on data received from licensing authorities as well as estimates for non-responding authorities show that in England and Wales on 31 March 2013, there were in force:

- 204,400 premises licences – an increase of 1% (1,900) on the previous year
- 15,700 club premises certificates – a decrease of 2% (-300) from the previous year
- 544,600 personal licences – an increase of 7% (34,300) on the previous year.

The full statistical release can be found at **https://www.gov.uk/government/publications/alcohol-and-late-night-refreshment-licensing-england-and-wales-31-march-2013**

Consultation on out of court disposals

The Ministry of Justice and the police, in partnership with the Home Office, the Attorney General's Office and the CPS are consulting in order to give the public and practitioners an opportunity to share their thoughts and experiences of out of court disposals, their use and how they might be reformed.

The knowledge, expertise, experience and opinions of policing and criminal justice stakeholders as well as the public are sought in order to ensure that out of court disposals are as effective, simple and transparent as possible. The youth out of court disposal framework does **not** fall within the scope of this consultation.

The consultation runs until 9 January 2014.

Responses to any or all of the sections in the consultation can be provided by completing the online survey at **https://consult.justice.gov.uk/**

Written responses can be sent to:

Claire Steeksma
Post Point 8.06
8th floor
102 Petty France
London
SW1H 9AJ

Further information can be found at **https://consult.justice.gov.uk/digital-communications/out-of-court-disposals**

Parliamentary issues

New proposals to reform the Riot (Damages) Act 1886

The Home Secretary commissioned Neil Kinghan to conduct an independent review into the compensation arrangements under the Riot (Damages) Act 1886 and how they were implemented following the riots of August 2011 in cities across England.

The Act rests on the premise that the police are responsible for maintaining law and order and should be held to account if law and order breaks down and a resulting riot causes damages to property. The police and crime commissioner is then liable to pay compensation to the owners of that property. The Act provides for claims against the police to be on a strict liability basis; if the claim is in line with the criteria in the Act, compensation must be paid. The claimant has no need to prove that the police were at fault, or to take them to court.

The following issues were addressed in the review:

- the rationale for the requirement imposed on police and crime commissioners by the Riot (Damages) Act to compensate individuals and businesses whose property is damages as a result of a riot
- the rationale for retaining compensation to insurers in respect of payments they have made to people whose property is damaged in a riot
- the administration of the Riot (Damages) Act by police authorities and the Government following the riots in August 2011
- the scope for new arrangements to improve the administration of the Act (or its successor) in preparation for the possibility of future riots
- the case for retaining the Riot (Damages) Act or a new Act to replace it, and what changes should be made if a statutory scheme is retained
- the case for replacing the Riot (Damages) Act with a discretionary scheme
- the case for replacing the Riot (Damages) Act with a collaborative scheme like Pool Re
- the definition of a riot for the purposes of a new Act.

The following recommendations were made:

- the principle of police accountability for riot damage should be retained in new legislation to replace the existing Act
- insurers should continue to receive compensation under new legislation but their compensation should be capped

- preparations for the possibility that compensation will be payable under major riots in future should be taken forward as soon as possible and:
  - a riot claims bureau should be developed by agreement between the Home Office and the insurance industry
  - a manual should be prepared as soon as practicable to provide guidance on the type of claims that are likely to follow a riot, dealing with claimants unused to making claims and other issues
  - local authorities should be asked to include within their emergency plans planning for a riot-recovery service to provide coordinated advice and support
  - the Government should commit itself to meet the costs of these operations including the local authority costs in the aftermath of major riots
- new legislation should:
  - cap compensation payable to insurers in future by reference to the turnover of the business insured, so that compensation is payable only in respect of payments made to small businesses
  - apply the cap equally in relation to owners of commercial property and residential property. It should not be applicable for owner-occupiers, leaseholders or tenants of residential housing
  - apply the cap to compensation payable directly to victims of riots, that is to those who are uninsured, or to businesses which self-insure, and to excesses which are not covered by insurance
  - modernise the language of the Riot (Damages) Act
  - include cars and other vehicles within the scope of compensation
  - provide for interim payments to be made where appropriate and clarify powers to differentiate the handling of small and large claims as necessary
  - provide for the Secretary of State to delegate responsibility for the administration of payments under the Act and decisions about those payments to a body established for that purpose, a Riot Claims Bureau or something similar, subject to audit arrangements to be prescribed
  - allow flexibility for the delegated body to ignore payments made to victims of riots by charities or other non-public sector bodies at the request of the charity or other body concerned
  - provide for compensation to be paid in future on the basis of the replacement value of the property damaged, not indemnity (except in the case of vehicles)
- personal injury and consequential loss should not be covered by new legislation
- the option of a discretionary scheme should not be pursued

- the option of a Pool Re scheme should not be pursued
- new legislation should take a new approach:
  - to give explicit responsibility for decisions on whether a riot had taken place to the police and crime commissioners (the deputy mayor in London) on the advice of the chief constable (or commissioner of the Metropolitan Police), the chief executive of the local authority area affected and a representative of the local community; to require them to have regard to the geography and scale of the disturbances; to use the Public Order Act 1986 concept of people who are present together and use or threaten unlawful violence for a common purpose; and to require such decisions to be taken within seven days of the disturbance taking place.

The full review can be found at **https://www.gov.uk/government/news/new-proposals-to-reform-riot-damages-act**

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As the professional body for policing, the College of Policing sets high professional standards to help forces cut crime and protect the public. We are here to give everyone in policing the tools, skills and knowledge they need to succeed. We will provide practical and common-sense approaches based on evidence of what works.

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To find out more about the Digest or to request this document in an alternative format:

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