

Court in Bloody Sunday case applies “necessity” threshold for lawful arrest

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In *B, N, O, Q, R, U, V (Former Soldiers) v The Chief Constable of the Police Service of Northern Ireland* [2015] EWHC 3691 (Admin), Lord Thomas provided helpful clarification on the court’s interpretation of legislation governing police powers of arrest without a warrant.

The case concerned the investigation by the Police Service of Northern Ireland (“**PSNI**”) into the ‘Bloody Sunday’ shootings. As part of this investigation, the PSNI sought to arrest the claimants (all former British soldiers) in England and Wales, in order to transfer them to Northern Ireland for interview. As an alternative to this, the claimants offered an undertaking that they would co-operate and attend an interview under caution with the PSNI at a police station in England and Wales.

Relevant law

The primary statutory provisions relating to police powers of arrest in Northern Ireland are contained in article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989, and Code G of the Northern Ireland PACE Codes. These provisions effectively mirror section 24 of the Police and Criminal Evidence Act 1984 (“**PACE**”) and Code G issued under PACE (“**Code G**”). Under these provisions, the power of arrest arises only when there are reasonable grounds for suspecting someone of committing a criminal offence. In addition, since 2006 there has been a requirement for a reasonable belief that arrest is ‘necessary’ for one of a number of specified purposes set out in section 24(5) PACE. The purpose on which the PSNI relied was “*to allow the prompt and effective investigation of the offence or of the conduct of the person in question*”.

In *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517, Hughes LJ confirmed that the correct test for ‘necessity’ in this context is a two-stage one:

1. did the officer actually believe that the arrest is necessary, and for a section 24(5) reason?;
and
2. objectively assessed on the information known at the time, was the decision made on reasonable grounds?

Application

In this instance, it was assumed that the first of the two limbs of the ‘necessity test’ in *Hayes* had been met, i.e. that the PSNI subjectively believed that the arrest was necessary to allow the prompt and effective investigation of the offence. However, the court “*unhesitatingly*” concluded that the threshold for the second limb of the test had not been reached, and that the PSNI had not shown objectively reasonable grounds for believing that the arrest of the soldiers was necessary.

This conclusion was primarily a result of the undertaking offered by the claimants, which negated the need for arrest. The majority of the PSNI’s submissions on the need for arrest and transfer to Northern Ireland essentially amounted to arguments of administrative convenience and cost-effectiveness. Lord Thomas clarified that “...[t]he bar for necessity cannot be set so high as to frustrate the legislative intention to facilitate cross border arrests in appropriate circumstances, but nonetheless it must be met; it plainly requires more than merely desirable or more convenient to the arresting authority”.

The court also looked somewhat sceptically at the PSNI’s reliance on the words “*prompt*” and “*effective*” in this context. For example, the PSNI submitted that it would be more “*effective*” to show an interviewee hard copies of documents, all of which were in this case stored in Northern Ireland.

However, the relevant documents were also stored electronically, and thus could just as effectively be shown to an interviewee in soft copy at a police station in England or Wales. Similarly, given the time elapsed since the events of Bloody Sunday (which took place in 1972), the court did not accept that arrest was necessary for a “*prompt*” investigation.

Lessons for practitioners

In this case, the basis for challenging the proposed arrest and transfer to Northern Ireland was in part a concern for the suspects’ safety. However, even in instances where safety is not a concern, it is likely to be of considerable importance to a client that they not be placed under arrest. For those who travel there will be serious overseas travel implications with an arrest on record, particularly with regards to the US where entry requirements are amongst the most stringent. An arrest may also have implications for insurance cover, and for other aspects of the suspect’s professional and personal life (in particular for individuals in professions requiring enhanced CRB disclosures).

The case is an important addition to a growing body of case law which makes clear that the bar for arrest is high. Since the power to arrest represents a significant interference with human rights, an arresting authority must show an objective need to arrest that goes beyond mere practicality or cost-effectiveness. In England and Wales, Code G expressly states that arrest must be “*fully justified*” and that officers must first consider if the necessary objectives can be met by other, less intrusive means. Although voluntary interviews have become increasingly common since the necessity requirement was introduced a decade ago, cases such as these are a reminder that breaches do occur and that practitioners should be prepared to challenge suggestions that arrest is objectively necessary.