

THE POLICE AND HUMAN RIGHTS
(false imprisonment — inhuman treatment — deprivation of liberty)

1 A recent Court of appeal judgment in England has made in-roads into the traditionally protected area of operational policing. The case in question, known as *Commissioner of Police for the Metropolis v. ZH*¹ concerned a severely autistic and epileptic young man who suffers from learning serious disabilities and who cannot communicate by speech. Whilst the facts of the case are extreme, that aspect of the case dealing with human rights (as opposed to British legislation which has no application in Bermuda) is of general application.

THE FACTS

2 ZH was part of a small group of special needs students and carers who went to a community swimming pool on a “familiarisation” visit. It was not intended that any of the students would swim. The group watched from the viewing gallery above the pool. When they left the gallery, ZH broke away and made his way to the poolside. The carers knew that he had an aversion to being touched and would be likely to react adversely if he was touched.

3 One carer remained at the swimming pool. The carer told one of the lifeguards that she must not touch ZH because he was autistic and that, if she touched him, he would likely jump into the pool. The police were called after some time and told that “we have a disabled male trying to get in the pool ... the carer is trying to stop him and he is getting aggressive”. In fact, ZH was not behaving aggressively at all.

4 One of the police officers spoke with a carer in a corridor, away from the pool. The carer told the police officer that ZH was autistic. The officer said that she could not stand there talking to the carer whilst someone might injure himself and possibly die. She felt that she and the other officer had to go and help as there was an immediate risk to ZH and nobody was taking control of the situation. ZH was still standing by the poolside towards the shallow end of the pool.

5 The police officer then went up to ZH and said “Hello Z, I’m Hayley” and touched him gently on his back to see if he would respond. ZH then moved closer to the pool and the police officer thought that he was going to jump in. She therefore took hold of his jacket just as he began to gather forward momentum towards the water; and the other police officer

¹ [2013] EWCA Civ. 69 (14 February 2013).

also took hold of his jacket at the same time. But they were unable to prevent ZH from jumping into the water.

6 At trial the judge found that:

- 6.1 if the police officer had not touched ZH, there was no reason to believe that he would have entered the water when he did;
- 6.2 the presence of two uniformed officers coming up towards him and standing close, one on either side, was probably in itself sufficient to cause him to jump into the pool;
- 6.3 police support was requested and three more police officers arrived while ZH was in the pool;
- 6.4 three carers were present and trying to encourage ZH to come out of the pool;
- 6.5 there was “ample opportunity for the police to have sought the advice and assistance of the carers as to the best way of safely removing ZH” from the pool, but they did not do so (neither did the carers volunteer any advice to the police);
- 6.6 the police decided that the lifeguards should move ZH to the shallow end and lift him out, with the assistance of the officers if necessary;
- 6.7 the danger ZH was in was “not substantial, though still present” and, with the lifeguards present in the pool, there was “no appreciable risk” of his drowning and the risk to his safety “significantly diminished in the shallow end with the lifeguards preventing him from accessing the deep end”;
- 6.8 ZH was enjoying himself in the water and, for that reason, and because he disliked being touched, he resisted attempts by the lifeguards to move him towards the shallow end of the pool, but he was not aggressive and was not lashing out;
- 6.9 after he had been brought to the shallow end, ZH was lifted out of the pool by the lifeguards with two of the officers standing on the poolside taking hold of his arms;

- 6.10 ZH was struggling or wriggling as he was lifted out. There was an opportunity for ZH to be released by the lifeguards in the shallow end so that he could stand in the vicinity of the steps, but that did not happen. There was no danger to ZH since he was standing in the water (the water came up to between his knees and thighs), there were three lifeguards present in the water, the pool had been cleared of other swimmers and there were three carers by the poolside at the shallow end;
- 6.11 once the officers lifted ZH from the water, he was immediately placed on his back and restrained by several officers applying force to his body, holding him down and shouting loud commands which ZH did not understand. Handcuffs and leg restraints were placed on ZH and the application of personal force then ceased;
- 6.12 neither ZH nor any of the officers suffered any physical injury, which suggests that the restraint was applied without excessive force and that ZH's struggling was effectively restrained, or that he was not violent in his struggling;
- 6.13 ZH was then taken to a police van which was parked in the car park. He was placed alone in the cage in the rear of the van, still in handcuffs and leg restraints. About 25 minutes later, the police removed the handcuffs and leg restraints. After ZH had been examined by the London Ambulance Service, he was permitted to leave with his carers;
- 6.14 The experience was intensely frightening and distressing for ZH. As a result of his autism, he had an aversion to being touched in an unfamiliar way and would not have understood what was happening to him.

- 7 The agreed medical evidence was that ZH had experienced an acute level of psychological suffering and as a result of the incident suffered from post-traumatic stress syndrome and an exacerbation of his epilepsy.

THE CLAIM

- 8 As a result of this episode, ZH brought an action against the Commissioner of Police for the Metropolis alleging (amongst other things) trespass to the person (by reason of the application of force), false imprisonment (by reason of being placed in the police van) and breaches of Articles 3 and 5 of the European Convention on Human Rights (the "Convention").

- 9 The Commissioner of Police accepted that officers had used force on ZH and that ZH had been imprisoned (for the purposes of the tort of false imprisonment). The burden then fell on the Commissioner of Police to justify the officers' conduct. He contended that the police officers had acted in ZH's "best interests" and that accordingly he was not liable in tort for their actions. He also claimed that the matter was one of operational policing and therefore not suitable for examination by the court, as to do so could cause police officers to act defensively and make effective policing impossible. The police must be accorded a reasonable amount of discretion in carrying out their duties. This contention is well recognised in law.

THE RESULT

- 10 The trial judge found, and the Court of Appeal upheld, breaches of Articles 3 and 5 of the Convention.

Article 3

- 11 Article 3 of the Convention provides that '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*'. That provision corresponds with section 3 of the Bermuda Constitution.

- 12 The trial judge put his finding in relation to the breach of Article 3 in the following terms:²

'When the duration of the force and restraint, injury sustained, and age, health and vulnerability of ZH are taken into account [to found liability] I am satisfied that there has been a breach of Article 3. The minimum level of severity has been attained when the whole period of restraint is taken into account. It is not just the application of handcuffs and leg restraints which has to be considered but the whole time when restraint on the poolside and in the van occurred which has to be considered. It is clear that there was no intended humiliation in this case as there was in *Archip* but nevertheless the treatment of ZH amounts to inhuman or degrading treatment.'

- 13 The judge's reference to the case of "*Archip*" (*Archip v. Romania*³) is to the fact that the use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3 '*where the measure has been imposed in connection with lawful detention and does not entail the use of force or public exposure exceeding what is reasonably considered necessary*'. The European Court of Human Rights (ECtHR) added that

² At paragraph 144.

³ Application no 49608/08 (27 September 2011).

the manner in which the applicant is subjected to the restraint should not go beyond the threshold of a *minimum level of severity* envisaged by the court's case-law under Article 3. But, importantly, the trial judge here did not base his conclusion only on the fact that ZH had been in handcuffs and leg restraints.

- 14 The phrase “minimum level of severity” was considered by the ECtHR in *Price v. United Kingdom*,⁴ where that Court said as follows:

The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

In considering whether treatment is “degrading” within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.’

- 15 Just last year (2012) the ECtHR had occasion to consider how Article 3 of the Convention applies to people with disabilities.⁵ The ECtHR said this:

‘Moreover, where the authorities decide to detain a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to the person’s individual needs resulting from his disability ... States have an obligation to take particular measures which provide effective protection of vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge ... Any interference with the rights of persons belonging to particularly vulnerable groups – such as those with mental disorders – is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction ...

...

... in particular that the inevitable feeling of isolation and helplessness flowing from the applicant’s disabilities, coupled with the presumable lack of comprehension of his own situation and of that of the prison order, must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment,

⁴ (2002) 34 EHRR 53 at paragraph 24.

⁵ *ZH v. Hungary* (Application No 28973/11), 8 November 2012 at paragraphs 29 through 31.

especially in the face of the fact that he had been severed from the only person (his mother) with whom he could effectively communicate’.

Article 5

16 Article 5 of the Convention provides that ‘*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases ...*’. That provision corresponds with section 5 of the Bermuda Constitution. It was accepted that none of the exceptions to Article 5 applied, and the same exceptions exist in Bermuda. The matter was simply one of whether the actions of the police in relation to ZH amounted to deprivation of his liberty by the police officers.

17 The trial judge recorded his finding this way:⁶

‘The nature and duration of the restraint lead me to the conclusion that there was a deprivation of liberty, not merely a restriction on movement on the facts of this case. Furthermore, even though I am of the view that the purpose and intention of the police (namely at least in part to protect ZH’s safety) is relevant to the consideration of the application of Article 5, I am nevertheless satisfied that even when that is taken into account, a deprivation of liberty has occurred. The actions of the police were in general well-intentioned but they involved the application of forcible restraint for a significant period of time of an autistic epileptic young man when such restraint was in the circumstances hasty, ill-informed and damaging to ZH. I have found that the restraint was neither lawful nor justified. Even though the period may have been shorter than that in *Gillan v. United Kingdom* 2010 APP No 4158/05, it was in my judgment sufficient in the circumstances to amount to a deprivation of liberty under Article 5.’

18 The general rule in relation to the right to liberty was set out by the ECtHR more than 30 years ago in the case of *Guzzardi v. Italy*⁷ as follows:

‘The Court recalls that in proclaiming the ‘right to liberty’ paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Article 5, the starting point must be his concrete situation and account must be

⁶ At paragraph 145.

⁷ (1980) 3 EHRR 333 at paragraphs 92 and 93.

taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.'

- 19 The Court of Appeal endorsed that passage and pointed out that deprivation of liberty can take many forms other than 'the classic detention in prison or strict arrest'. Where there is detention in such a paradigm case, even a short duration is sufficient to amount to a deprivation of liberty. It is then for the state to justify the detention as falling within one of the exceptions to Article 5. As the ECtHR has consistently pointed out, it is one of the fundamental principles of a democratic society that the state must strictly adhere to the rule of law when interfering with the right to personal liberty.
- 20 The message seems clear. The courts (in England, at least) are more prepared now than previously to hold the police (and presumably prison and similar services) liable for breaches of human rights in relation to carrying out their duties. In *Commissioner of Police for the Metropolis v. ZH* there was no suggestion that the police acted heavy-handedly or with malice. The trial judge expressly found that the police applied restraint to ZH without excessive force. There was no suggestion of intentional breaches of ZH's human rights. What the Court of Appeal concluded is this:
 - 20.1 a court should not lightly find a violation of Article 3. The ECtHR has repeated many times that a minimum degree of severity of treatment is required. Whether that degree of severity is established on the facts of a particular case involves a question of judgment, which is manifestly a matter for the court, not the police; and
 - 20.2 the purpose and intention of the police may be relevant to whether there is a breach of Article 5, but only on the subsidiary issue of whether that confinement can be justified by one of the exceptions under Article 5. Purpose and intention is not relevant to the initial question of whether the threshold has been crossed. That is a matter of mixed fact and law to be determined by the court on the evidence before it.

- 21 It seems that the law is now that even when the police use reasonable force, they still must justify the use force at all when challenged. If the police cannot justify the use of force, it does not matter that such force as was used was reasonable. It will still amount to a breach of human rights and will be actionable at the instance of the victim.
- 22 This is significant because the person accusing the police does not have to prove anything beyond arrest using some force. Once the use of some force is proved, the burden of proof shifts to the police to justify that use of force and then (if successful) to show that the amount of force used was reasonable in the circumstances.

This article addresses general principles only and is not intended to be a comprehensive exposition of the subject. Specific legal advice should be obtained in respect of any particular issue in Bermuda regarding human rights.

For further information please contact Paul A. Harshaw, Director, Canterbury Law Limited at +1 441 296 8444 or Paul.Harshaw@CanterburyLaw.bm