

Chapter 1:

Legal Basis and Human Rights

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	Page No
Introduction	20
Context	20
Police (Northern Ireland) Act 2000	21
Lethal Force	21
Absolute Necessity	22
Independent Investigation	23
Positive Obligation	23
Non Lethal Force	23
Other Human Rights Issues	24 - 26
Investigations	26
Children and Members of Other Vulnerable Groups	26
Other Relevant Legal Provisions	26 - 27

Chapter 1

Legal Basis and Human Rights

Introduction

- 1.1 This chapter is designed to provide a summary of the legal rules governing the use of force. It is designed to provide practical guidance to officers, so that they are aware of their rights and responsibilities when using, or considering the use of, force. It will set out the main legal provisions, and give some practical examples, referring to relevant legislation, leading cases and other sources of law, as necessary. Article 4 of the PSNI Code of Ethics sets out the standards expected of officers, and serves as a useful aide memoire of the key principles. It is not feasible to cover all of the issues in this document, and officers may have questions that are not answered here. If further guidance is required, an officer should contact their supervising officer. If questions still remain, the PSNI Human Rights Legal Adviser can be contacted.

Context

- 1.2 Police, by virtue of their position in society, are subject to onerous responsibilities concerning the use of force. The Council of Europe (an international organisation established in 1949 to, amongst other things, defend human rights and promote the rule of law - The European Convention on Human Rights is a Council of Europe Treaty) has recognised this, stating “police play a vital role ... they are frequently called upon to intervene in conditions which are dangerous for their members, and (...) their duties are made yet more difficult if the rules of conduct of their members are not sufficiently precisely defined ...” (Resolution 690 (1979) of the Parliamentary Assembly of the Council of Europe on the Declaration of the Police). Abuse by police of their powers can have extremely serious consequences for the rights of the individual and for society as a whole. For these reasons, clear rules governing the use of force by police officers, coupled with robust oversight mechanisms, are key.
- 1.3 Police officers may use force in order to defend themselves or another, effect an arrest, carry out a lawful power, secure and preserve evidence or uphold the peace, provided such force is lawful, proportionate and reasonable in the circumstances. The carriage of firearms by a police officer or the presence of an armed officer does not, in itself, constitute a use of force. When a police officer makes use of a firearm or less lethal weapon, for example, by pointing it or by discharging the weapon that will constitute a use of force for which the officer is both legally and organisationally accountable.
- 1.4 For the purpose of this guidance, a police officer will be deemed to have used a firearm or less lethal weapon when it is:
- Pointed or aimed at another person.

- Fired at another person.
- Discharged in any other operational circumstances, including an unintentional discharge.

Police (Northern Ireland) Act 2000

1.5 Section 32 of the Police (NI) Act 2000 states:

“It shall be the general duty of police officers:

- To protect life and property.
- To preserve order.
- To prevent the commission of offences.
- Where an offence has been committed, to take measures to bring the offender to justice.”

1.6 It is clear that, in the execution of their duties, police officers may be required to use force in certain circumstances. A clear distinction can be made between lethal force and non-lethal force.

Lethal Force

1.7 Lethal force includes:

- The use of force which is intended to result in the death of a person and which has that effect.
- The use of force which results in the death of a person and which could have been reasonably foreseen to have that consequence.
- The use of force which results in serious injury to a person, where death could have occurred.

1.8 United Kingdom law, interpreted in the light of Article 2 of the European Convention on Human Rights (ECHR), imposes upon States an obligation to safeguard life. This consists of 3 main duties:

- Not to deprive a person of his or her life unless absolutely necessary for a specified aim (which is, in effect, the protection of the life or lives of others).
- To investigate suspicious deaths; and
- To take steps to protect life (often referred to as the “positive obligation”).”

Absolute Necessity

- 1.9 Lethal force may be used only where it is absolutely necessary to do so, in pursuit of a specified aim. Article 2 of the ECHR makes reference to 3 specified aims. However, in United Kingdom law, a deprivation of life may only be justified if it is absolutely necessary for the protection of the lives of others. The other aims (to quell a riot or insurrection or to prevent the escape of a detainee) may not, of themselves, be used as a justification for the use of lethal force.
- 1.10 There is a requirement of strict proportionality between (a) the objective and (b) the force used to achieve it. The person using the force must honestly believe that it is absolutely necessary to use lethal or potentially lethal force to avert a real and immediate risk to the lives of themselves, and/or others. An honestly held belief may subsequently be shown to have been mistaken, but this will not of itself render the deprivation of life in violation of Article 2 of the ECHR.
- 1.11 The question of whether a use of force was “absolutely necessary” in the circumstances is one that depends to a very large degree on the facts of the individual case. Key issues to consider include:
- The nature of the aim pursued – is it the protection of a person from unlawful violence which poses a real and immediate risk to life?
 - Is the use of lethal/potentially lethal force absolutely necessary in the circumstances, bearing in mind the dangers to the lives of all persons involved?
 - What are the risks to others, including the subject of the force and all others in the vicinity?
 - What other options were considered before resorting to the use of force? What weapons or equipment were available at the time? Why were these options discounted? Have all relevant decisions been recorded and reported?
- 1.12 The method of applying force must be in accordance with PSNI instructions and training. Officers must report any defects, etc. in their equipment, and to ensure that they undergo training in accordance with Service instructions.
- 1.13 The ECHR closely examines the planning and control of operations. A key issue is whether the operation was “planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.” (McCann and others v United Kingdom (1996) 21 EHRR 97). This standard is reflected in the PSNI Code of Ethics, at Article 4.2. All decisions should be subjected to a process of constant critical analysis.

Independent Investigation

- 1.14 If death (or injury) occurs as a result of the use of force or other involvement of a PSNI officer, an independent investigation is required. In practice, this will be carried out by the Police Ombudsman's Office. All PSNI officers and staff must comply with any investigation (see Policy Directive 03/06 – Post Incident Procedure, Deployment of Post Incident Managers – Discharge of Firearms). In addition, all suspicious deaths (whether involving the police or not) must be the subject of an effective official investigation, and police officers must facilitate such investigations as appropriate.

Positive Obligation

- 1.15 A full discussion of this issue is outside the scope of this chapter. In brief, there are situations where the police are required to take all reasonable steps to avert a real and immediate risk to life from the criminal acts of others, of which they are aware or should have been aware. Where lethal force is necessary to protect the lives of others, including those attempting to self-harm, paragraph 1.7 above will apply.

Non Lethal Force

- 1.16 When police are required to use force to achieve a lawful objective (such as making a lawful arrest, acting in self-defence or protecting others) the legal bases are to be found in:
- Common law.
 - Section 3 Criminal Law Act (NI) 1967.
 - Article 88 Police and Criminal Evidence (NI) Order 1989 (PACE).
- 1.17 All force used must be 'reasonable in the circumstances'. More specific guidance on the usage of a particular method of force (including the use of forced entry techniques) can be found in this manual. Factors which may assist in establishing whether or not the use of force was reasonable in the circumstances are:
- Was the use of force lawful? – e.g. is the aim one of those outlined in Section 3 Criminal Law Act, PACE or Common Law?
 - Was the degree of force used proportionate in the circumstances?
 - What other options were considered? If so, what were they? Why were those options discounted? Has an adequate record of all relevant decisions been made?
 - Was the method of applying force in accordance with Service instructions and training?

- 1.18 Any force used must not be greater than was reasonable in the circumstances. If force used is not reasonable it may leave the officer open to criminal or misconduct proceedings. In addition, it may constitute a violation of the human rights of the person against whom the force was used.
- 1.19 Article 3 of the ECHR prohibits torture or inhuman or degrading treatment, or punishment. Excessive use of force by the police can engage Article 3. In *Timurtas v. Turkey* ((2001) 33 EHRR 121) the European Court of Human Rights stated: "... where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention." In *Ribitsch v. Austria* ((1996) 21 EHRR 573) the Court held that: "... in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."

Other Human Rights Issues

- 1.20 A use of force may involve an interference with the enjoyment of a number of human rights. For example, an excessive use of force in removing a demonstrator may raise an issue under Article 3 (inhuman or degrading treatment), in relation to that demonstrator. It may also, depending on the circumstances, involve an interference with the demonstrator's rights to respect for their freedom of thought, conscience and religion (Article 9 ECHR), freedom of expression (Article 10 ECHR) and freedom of assembly and association (Article 11 ECHR). In addition, the police conduct could constitute an interference with the rights of others, who may be discouraged from exercising their rights, out of fear of the consequences. These rights are considered by the European Court of Human Rights to be the cornerstones of a democratic society, and any such interference will be subjected to strict scrutiny.
- 1.21 A use of force, which does not attain the minimum level of severity required to raise an issue under Article 3 of the ECHR may, however, raise an issue under Article 8 of the ECHR (which encompasses a right to moral and physical integrity).
- 1.22 A forced entry into a person's home (whether they are the owners of the premises or not) will invariably constitute an interference with the right to respect for private life. (See Appendix 'A') All persons that live at the premises will be affected. Under Article 8, any interference must be in accordance with the law, necessary in a democratic society and in pursuance of a legitimate aim (which will usually be the prevention of disorder or crime, or possibly in the interests of public safety or national security). In concrete terms, therefore:
- There must be a legal basis for the search.
 - The search must be an appropriate measure to take in the circumstances.
 - There must be a clear objective to the search.

PSNI Manual of Policy, Procedure and Guidance on Conflict Management

- Any inconvenience to persons affected must be minimised, as far as possible.
- 1.23 Adequate records must be kept, for example of the decision process that led to the search and of any alternative courses of action considered. This will assist in showing that the requirements of Article 8 and the relevant domestic legislation have been complied with.
- 1.24 Article 1 of the 1st Protocol, guarantees the right to the peaceful enjoyment of property. Any interference by the police with a person's property must be lawful, necessary and proportionate. For example, all reasonable steps must be taken to minimise any damage caused to a person's property during a forced entry. 'Property' is broadly defined, and it should be assumed to include anything of any value which a person may own.
- 1.25 It is recognised within ECHR law that the responsibilities of the police extend not only to refraining from acts which violate individual rights but also to taking positive action to protect these rights and freedoms. It is therefore vitally important that the legal parameters of each of these rights and freedoms must be carefully considered. There is a presumption that convention rights can only be interfered with by any kind of state action where the Convention expressly allows it. These conditions are set out within the legitimate aims contained within each of the qualified rights, i.e. Articles 8-11.

In general terms, the rights can only be interfered with:

- Where the action is prescribed by law; and
 - It is 'necessary in a democratic society'; and
 - The aim is legitimate to protect one of the interests below as per Articles 8.2-11.2:
 - ◆ National security
 - ◆ Territorial integrity
 - ◆ Public safety
 - ◆ Preventing disorder or crime
 - ◆ Protecting health
 - ◆ Protecting morals
 - ◆ Protecting the rights of others
- 1.26 In deciding whether the action was 'necessary in a democratic society' it will be necessary to show that the action:
- Fulfilled a pressing social need; and
 - Pursued a legitimate aim; and
 - There was a reasonable relationship of proportionality between the means employed and the aim pursued. This means that the action was designed to:

PSNI Manual of Policy, Procedure and Guidance on Conflict Management

- ◆ Impair as little as possible the right or freedom in question
- ◆ Meet the objectives of the domestic law in question; and
- ◆ Not be arbitrary, unfair or based on irrational consideration; and
- ◆ Be balanced against the severity of the effect that the measure has on the individual or group. The more severe the adverse effects of the measure, the more important the objective must be if it is to be classified as legitimate.

1.27 The ECHR is a 'living instrument' and seeks to take account of changes in society and its values. Therefore, state actions that were considered necessary and proportionate in the past might not be viewed as necessary and proportionate today.

Investigations

1.28 In the event of the use of force by a PSNI officer, an effective investigation may be required. If so, this will be carried out by the Police Ombudsman's Office. [See also Policy Directive 04/09 – Policies and Procedures Relating to the Police Ombudsman for Northern Ireland (PONI)]. All PSNI officers and staff must comply with any such investigation.

Children and Members of Other Vulnerable Groups

1.29 Special consideration should be given to the heightened vulnerabilities of children and members of other vulnerable groups in relation to the use of force. Although not incorporated into domestic legislation, officers should take cognisance of the United Nations Convention on the Rights of the Child (UNCRC). Article 3 of the Convention requires the best interests of children to be a primary consideration in all actions concerning children.

Other Relevant Legal Provisions

Corporate Manslaughter

1.30 On the 6 April 2008 the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) came into force throughout the UK. In England, Wales and Northern Ireland, the new offence is called corporate manslaughter, and in Scotland it is called corporate homicide.

1.31 Under Section 1 of the CMCHA 2007, an organisation is guilty of an offence if the way in which its activities are managed or organised:

- Causes a person's death; and
- Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

- 1.32 An organisation is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in CMCHA 2007 subsection (1).

Misconduct in Public Office

- 1.33 This is a common law offence. The elements of misconduct in public office are:

- A public officer acting as such; and
- Wilfully neglects to perform his duty and/or wilfully misconducts himself; and
- To such a degree as to amount to an abuse of the public's trust in the office holder; and
- Without reasonable excuse or justification.

Health and Safety at Work (Northern Ireland) Order 1978

- 1.34 Section 31 (1)(a) of The Health and Safety at Work (Northern Ireland) Order 1978 creates a single offence of failing to discharge the duties imposed by Articles 4 to 8. The relevant duty in this situation is provided by Article 5(1), which states:

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety”.