

Harm on Removal: Excessive Force against Failed Asylum Seekers

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MEDICAL FOUNDATION
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Harm on Removal: Excessive Force against Failed Asylum Seekers

Executive Summary

Over a period of 15 weeks (19th April – 30th July 2004), 14 individuals who claimed they had been subjected to the excessive or gratuitous use of force during an attempt to remove them from the UK were examined by a doctor who either currently works at, or has worked for, the Medical Foundation in the past. All 14 of the individuals had originally claimed asylum in the UK, and their claims had been unsuccessful. They were all held in one of four identified detention facilities prior to the removal attempt. In all 14 cases, doctors prepared a medical report containing their assessment of the consistency between the individual's account of the treatment suffered and the injuries noted on examination. These reports were examined collectively, and the findings form the basis of this study.

The cases reveal worrying incidences of harm, which in turn suggest certain practices of abuse, with four patterns emerging: (i) the use of inappropriate and unsafe methods of force which carry higher than acceptable injury risk; (ii) the use of force even after termination of the removal attempt, often out of sight inside escort vehicles; (iii) continued use of force even after the detainee had been restrained; and (iv) the misuse of handcuffing, which would appear to be deliberate in some cases. Although our sample is small, the patterns that emerge are repeated in many of the cases, raising concern that there may be a systemic problem of abuse, rather than a number of isolated incidents.

Analysis of the cases suggests that excessive or gratuitous force was used during the removal attempt of 12 out of the 14 individuals examined. In all 12 cases, medical evidence supports the detainee's allegations of the injury method. In the other 2 cases, although medical evidence reveals the presence of some injuries, it is difficult to state with any degree of certainty whether or not the force employed was disproportionate. The final judgement in all 14 cases would, of course, rest with the Courts.

The use of excessive force against individuals who are in the custody of the State will automatically raise issues under human rights provisions for both the State and the private security company involved in the actual abuse. In addition, the abuse will almost certainly constitute an assault, leaving perpetrators subject to criminal prosecution or civil action.

The Medical Foundation is extremely concerned by the findings of this study, and strongly recommends that an automatic medical examination take place of any individual who is the subject of a failed removal attempt. In addition, it is vital if this practice is to be eradicated that malpractice is reported, and perpetrators investigated and prosecuted where appropriate. To this end, it is essential that the victim of the assault, together with any witnesses, be permitted to remain in the UK in order to pursue any legal course of action. It is essential that those involved in the physical removal of failed asylum seekers receive comprehensive training in the proper use of restraint techniques.

Introduction

This report presents the findings of research conducted by the Medical Foundation for the Care of Victims of Torture (the “Medical Foundation”) on the occurrence of harm by State or private detention custody officers of individuals whose claims for asylum in the UK have been unsuccessful and who are detained pending their removal, and deals in particular with the use of force occurring during the attempt to remove individuals from the United Kingdom.

This research was initiated in response to growing concerns amongst human rights organisations, refugee agencies, immigration detainee visitors groups,¹ and legal practitioners about a small but worrying number of allegations of harm occurring in detention, during transfers and on attempted removal. Immediately prior to the initiation of this project, the Medical Foundation documented two cases of alleged assault that had been referred to us for medical documentation, on 21st January and 1st April 2004 respectively. In both cases the individuals concerned demonstrated clinical findings consistent with their allegations of very recent abuse. In light both of growing concerns generally and its own experience, the Medical Foundation sought to investigate this problem through the recording of harm of detainees alleging assault during the removal process.

It is not the intention of this report to consider the legitimacy of the detention or removal from the jurisdiction of asylum seekers or failed asylum seekers *per se*. Nor does it deal with the general provision or adequacy of medical care within detention facilities, save where this relates specifically to the issue of physical harm and abuse during failed removal attempts.

During a 15-week data collection period (19th April – 30th July 2004), 14 individuals who alleged that they had been subjected to the use of excessive force during the attempt to remove them were interviewed and medically examined by a doctor who either currently works at, or has worked at the Medical Foundation in the past. In each case, the doctor detailed the examination findings in a medical report, and these reports form the basis of this study.

It is acknowledged that involuntary removal may necessitate the use by escort personnel of control and restraint techniques and occasionally a proportionate degree of force,² and that such techniques carry an inherent risk of injury, particularly where removal is physically resisted. Section I of this report considers the compatibility of

¹ Visitors groups are non-State, unregulated groups who seek to befriend and visit immigration detainees, and are thereby distinguished from, for example, Prison Visitors, Independent Custody Visitors and Visiting Committees (now known as Independent Monitoring Boards), all of which have a statutory function and report to the Home Secretary.

² A detainee custody officer authorised to perform escort and removal functions: Detention Centre Rules 2001, SI 2001, No. 238, para 2. Throughout this report the terms “detainee custody officer”, “escort officer” and references to “security personnel” are used interchangeably.

the medically documented injuries with the use of reasonable, proportionate force, indicating where appropriate the application of seemingly excessive or gratuitous force. The section indicates the various methods of force identified by the 14 detainees during interview. It goes on to examine the nature of the injuries sustained as a result of the application of that force, and concludes with an examination of a number of concerns raised by the nature and extent of the injuries recorded.

In order to set these alleged assaults and the corresponding medical findings in their legal context, Sections II and III of this report provide an examination of the legal consequences and avenues of redress in respect of assaults occurring in State custody.

Section II provides an assessment of the human rights law implications of the abuse of detainees. This section includes an analysis of the justifiability of force and the interaction of the principle of reasonable force with human rights standards. It explores the issue of State liability where facilities or aspects of the operation of immigration enforcement and control have been contracted out to a private security service, before going on to consider the practicalities of establishing a breach of human rights provisions.

Section III assesses the criminal and civil law implications of the assault of detainees. Experience has shown that it is typically a member of an immigration detainee visitor group or, if still acting, the individual's asylum lawyer who is first made aware of the allegation of excessive or gratuitous force. These individuals may be unfamiliar with the criminal and civil law implications of the actions complained of, or of the procedures necessary to initiate a legal action. Identifying and instructing a lawyer with experience in these areas may take time, a problem that is exacerbated by a lack of funding for the pursuit of these actions. In the meantime, if any subsequent action is to succeed, and if impunity is thereby to be avoided, it is vital that evidence be collected as soon as possible. This section is therefore intended to provide guidance on steps that should be taken to protect evidence before a lawyer with particular expertise in criminal and civil law can be instructed. It provides a practical summary of the various avenues of legal redress open to an individual who has been assaulted in the custody of the State, and includes some of the evidential considerations that may need to be addressed.

Neither Section II nor Section III attempts to provide a legal argument or case in respect of the individually documented cases included in Section I. They refer instead to the general principles applicable where such harm occurs. It is intended that Sections II and III will help practitioners and other interested parties to collect appropriate evidence and pursue a legal action in respect of any allegation of harm arising in similar circumstances.

Section IV of this report concludes with a number of recommendations, indicating where improvements might be made to current practice. These recommendations arise directly from the medical findings, the legal summaries and the individual testimonies provided for the purpose of this study, and are not intended to represent an exhaustive

list. It is hoped, however, that the implementation of these recommendations might assist in stemming the apparent practice of excessive or gratuitous force on removal identified in this study.

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Section I

Harm on Removal: Medical Findings

by Dr Charlotte Granville-Chapman⁴

1 Introduction

Medical findings contained in this report have been presented and analysed with the understanding that some degree of force or restraint will almost inevitably be used during some non-voluntary removal attempts. The author has assumed that any recourse to force during the removal process should be limited to that strictly necessary under the circumstances. Despite this working assumption, however, the evidence collected in this study suggests that methods of restraint are being misused in a manner not consistent with principles of necessity, proportionality, safety and dignity.

The descriptions of ill treatment contained in this report come solely from the individuals alleging excessive use of force. In each case, however, medical evidence is available to test the allegation of abuse, and to provide objective, corroborative medical opinion as to whether or not the injuries could have occurred in the manner and timeframe described.⁵

Several patterns of alleged ill treatment emerge when the data are examined collectively. This section describes these patterns and summarises the medical evidence collected. It concludes with a number of concerns raised by the medical findings.

2 Methodology and referrals

Referrals of individuals alleging assault on attempted removal were provided by visitor groups and solicitors, who were asked to complete and return a referral form (Appendix A). Referrals were considered by the Medical Foundation Legal Officer and a doctor in order to assess whether the case should be accepted for interview and documentation.⁶ Several referrals were not accepted, either because the referral was received too late after the alleged incident or because (in one case) an operation was required as a result of the alleged use of force and the hospital clinician was therefore better placed to document the injury; meaning, therefore, that potentially the most serious case was excluded from this study. In addition, one individual was removed from Harmondsworth Removal Centre prior to our conducting a medical visit, although the visit had been arranged prior to the removal. This case was previously known to the Medical Foundation, which had produced a medico-legal report documenting evidence of past torture in the individual's country of origin.

⁴ The author is grateful to Dr Victoria Evans MB BS MRCP LLM DMJ DFFP, and to Dr Duncan Forrest MB ChB (NZ) FRCS, who reviewed this section. Any errors are the author's own.

⁵ For further details see para. 4.1.

⁶ 'Accepted' means accepted for a medical visit under the remit of this project. This is distinct from acceptance criteria for ongoing Medical Foundation care and treatment.

At the outset of the project we aimed to conduct medical examinations within five days of the alleged incident, in order not to miss clinical signs such as bruising and swelling. This period proved in most cases, however, to be unrealistic, as there were delays both in receiving the referrals and in arranging medical visits. These delays mean it is possible that our findings under-represent the injuries sustained. The time periods between incidents and examinations were: 5 days in two cases, 7 days in three cases, 8 days in two cases, 11 days in two cases, 12 days in one case, 13 days in one case, 15 days in two cases, and 21 days in one case (giving a mean of 10.3 days).

Six doctors were involved in conducting medical examinations; all either work currently, or have worked, at the Medical Foundation.⁷ They summarised their findings in the form of objective medical reports, which form the basis of the information given in this paper. Consent was sought from each detainee by the visiting doctor to obtain relevant medical records, share information with a legal representative, and to use their information in anonymised form for research purposes.

Data collection began on 19th April 2004 and ended on 30th July 2004, giving a data collection period of 15 weeks.⁸ The decision to stop collecting data was taken when we had identified certain patterns of abuse to which we felt we must draw attention. Notwithstanding this, referrals continue to be made, suggesting that problems persist.

3 Summary of the data

3.1 Overview

The six doctors visited detainees whose removal attempts had started in Yarl's Wood, Tinsley House, Campsfield House and Harmondsworth removal centres.

Of the 14 cases, 12 were male and 2 female. Their countries of origin were Uganda (2), Ivory Coast (1), Guinea Conakry (2), Liberia (1), Guinea-Bissau (1), Nigeria (2), Tanzania (1), Ghana (1), Togo (1), Jamaica (1) and South Africa (1). All were black.

Cases 1, 5, 8 and 13 disclosed previous torture in their countries of origin, and cases 1 and 5 described a deterioration in their psychological state following the removal attempt, stating that it had 'stirred up' memories of past violence.

3.2 Force used

The methods of restraint or assault described by the detainees include: being dragged along the ground, being kicked or kneed, being punched – including to the head and face, being elbowed, having the thumb forcibly bent back, pressure being applied to the angle of the jaw, pressure exerted on the neck, being sat on (thorax and abdomen), and assault to the genitals.

⁷ The Medical Foundation is grateful to Dr Judith Cook at Médecins Sans Frontières for her contribution to this project.

⁸ Within this period there were riots in Harmondsworth removal centre with subsequent evacuation of detainees to other detention facilities, which may conceivably have reduced referral rates.

None of the 14 cases reported being subject to pharmacological restraint or sedation, although case 7 reported that he was threatened that “he would be injected with drugs”.

3.2.1 Type of force used dangerous or unjustifiable

Some methods of force described are in themselves concerning – firstly, in terms of injury risk: any form of restraint involving restrictive positioning (especially compression of the chest) or pressure on the neck carries with it risk of serious injury and even, in the most extreme circumstances, death, and its use must therefore be infrequent, very cautious, and seen as a method of last resort for the self-defence of the custody officer only.^{9,10,11,12} Case 5 reported being pushed prone to the ground, with pressure exerted on the back of his neck, his arms handcuffed behind his back whilst an officer sat on his upper back, and repeatedly pushed his chest down into the ground. This description raises concern that neck and chest compression are being used, as does case 13, where it is recorded that “one male escort put a hand onto his neck hard enough so that he could no longer draw breath”. Another example is given by case 11: “he said that another escort officer took hold of his throat over his larynx causing pain...He said he felt his eyes were coming out and he was nearly dead.” These allegations are to an extent corroborated by examination findings such as bruising under the jaw and tenderness over the larynx.

Secondly, certain methods of described force seem hard to justify either as appropriate forms of restraint or as strictly necessary under the circumstances recounted to us, or in any case. Examples include blows directed at the head and face, and squeezing and pulling of the genitals.

3.2.2 Misuse of force

Another issue arising is the apparent misuse of restraint techniques, in particular in relation to handcuffing. The data raise concerns about the way in which handcuffs are being used and about ongoing force being used against already handcuffed individuals.

3.2.2 (i) The use of handcuffs

Given that the 14 cases describe incidents having allegedly occurred during attempted removal (and therefore whilst in the custody of escort officers rather than police or prison service custody) it is not known which types of handcuff are being used.¹³

⁹ Paterson B et al. Deaths associated with restraint use in health and social care in the UK. *Journal of Psychiatric and Mental Health Nursing* 2003;10:3-15.

¹⁰ Pedal I et al. Fatal incidences during arrest of highly agitated persons. *Arch Kriminol* 1999;203(1-2):1-9

¹¹ Pollenan MS et al. Unexpected death related to restraint for excited delirium: a retrospective study of deaths in police custody and in the community. *CMAJ* 1998;158(12):1603-7.

¹² *Safer Restraint*, Report of the conference held in April 2002, Police Complaints Authority, April 2002.

¹³ Handcuffs can be of different types. Some are rigid with a locking mechanism; these feel uncomfortable and will be painful if the detainee continues to struggle (and that in itself constitutes a form of restraint). Tightness should be checked before locking the cuff – once locked, the cuffs should not get tighter. If not locked, they may get tighter and frequent checks should be made by the officer

In 12 of the 14 cases, detainees report being handcuffed. Eleven of these 12 cases report what would appear to be improper use of handcuffing, including the use of force after being restrained in handcuffs:

- case 1 claimed she was dragged on her back up the aircraft steps by the handcuffs;
- case 2 alleged that he was pulled forwards by the handcuffs, then kicked and punched while restrained in handcuffs;
- case 3 alleged he was pulled by handcuffs and then restrained in such a way that he found it difficult to breathe, while still in handcuffs;
- case 5 claimed he was punched and pushed down against the ground while in handcuffs;
- case 6 reported being punched and kicked whilst tightly handcuffed;
- case 7 alleged he was held in a head lock, pushed and kneed whilst handcuffed;
- case 8 reported escort officers twisting the handcuffs and pulling his wrists apart whilst handcuffed together;
- case 10 alleged that an officer forced his arm against the restraint of the handcuff, so that it was painful, and that he was pushed, punched, and slapped while in handcuffs;
- case 11 reported being kicked in the abdomen, chest, legs and mouth while on the ground with his hands cuffed behind him;
- case 12 claimed that while in handcuffs her head was banged against a fire extinguisher, causing a laceration; pressure was applied to her jaw and nose, and that the escort officer pulled on, and twisted, the handcuffs;
- case 13 reported being pulled up by the handcuffs, being sat on, being kneed and being restrained in a neck hold while in handcuffs.

This apparent misuse of handcuffs is medically significant. The medical complications of handcuff use are discussed in paragraph 4.3 below.¹⁴

3.2.2 (ii) Alleged assault inside transport vehicles, after the failed removal

Even after abortion of the removal attempt, several detainees reported being shut inside the van or put into the car, where assault continued.

Examples of this:

- case 2 alleged he was elbowed and punched in a vehicle;
- case 5 reported being pushed into a car, where he was punched;
- case 6 claimed he was shut inside a van and punched;
- case 8 alleged that most of the violence occurred after the removal attempt inside a van;
- case 10 alleged he was put into the van where they re-handcuffed him, punched him in the mouth and slapped him in the face;
- case 11 said that after the removal attempt was abandoned he was handcuffed inside the van, where he was kicked in the chest and abdomen.

concerned. The handcuffs commonly used in transfers, however, are quite different, and should not normally cause problems with tightness, pain or injury.

¹⁴ The human rights law implications of misuse of 'reasonable' force, including the use of handcuffs, is discussed in Section II, at para 10.

3.2.2 (iii) Verbal abuse

Some of the reported verbal abuse by escort officers might be seen to be the result of the difficult circumstances surrounding removal attempts (for example, “shut up” and “shut your mouth”). More disturbing verbal abuse, however, was reported by six detainees:

- case 2 said he was called “dirty”;
- case 3 reported that an escort officer had told surrounding aircraft passengers that they were [removing him from the country] “because he has been selling weapons to children”;
- case 4 reported being called “you fucking bastard” in addition to other insults related to being black;
- case 8 reported being verbally abused (but the actual language was not recorded);
- case 10 claims to have been called a “black bastard”;
- case 12 alleges she was called “you black bitch”.

Cases 4, 10 and 12, where the verbal abuse would appear to be of a racist nature, are of particular concern.

4 The medical data

Having identified the nature of the force allegedly employed against the 14 individuals, it is appropriate to describe the injuries resulting from its application. The following were described to the examining doctors:

4.1 Injuries reported

Problems complained of immediately following the alleged incidents included:

- loss of consciousness;
- swelling of the wrists, painful wrists;
- numbness of fingers, weakness of the hand;
- hip pain on weight-bearing;
- pain in the chest on inspiration;
- cut to the forehead;
- painful knee, swollen knee;
- bruising and scratches;
- neck and back pain, limited neck movement;
- pain on swallowing and inability to eat solid food;
- pain in the jaw and painful bite;
- tooth coming loose, bleeding from the mouth;
- pain over the cheek bone;
- pain in the abdomen;
- testicular pain;
- difficulty passing urine;
- nose bleed.

The Medical Foundation doctors examined all reported injuries, and gave their opinions as to the consistency of the injuries with the reported attributions. The

injuries documented as being supportive of the described mechanism of injury include:¹⁵

injuries to limbs:

- cuts over the wrists from handcuffing;
- nerve injuries from handcuffing;¹⁶
- marked tenderness to the base of the thumb with limited range of movement – possible fracture or soft tissue injury;
- abrasions to the shins from being kicked;
- knee effusion (fluid in the knee causing swelling) and medial ligament tenderness following forced twisting of the knee.

injuries to head, neck and face:

- sprained neck from having neck forcibly flexed (head pushed down);
- bony tenderness over the cheekbone from a punch to the face;
- abrasion over the cheekbone from being dragged along the ground;
- lip laceration (splitting) from having head pushed down against the ground;
- bruising under the jaw and tenderness over the larynx from fingers being pressed to the throat;
- laceration over the temple from having head banged against hard object.

injuries to torso:

- tenderness or swelling over rib, sternum (breastbone) or pectorals from pushing, punching or kicking, variously;
- swelling and tenderness in the scrotal area from having scrotum squeezed;
- abdominal wall tenderness from a punch to the abdomen.

4.2 Medical attention

Medical attention was required by many of the 14 cases, and ranged from needing painkiller medication to needing hospital assessment (including X-ray).

It is not the focus of this project to comment on the availability or quality of medical attention received by these detainees after the removal attempts. It is important to note, however, that medical check-ups following the use of control and restraint are not routine,¹⁷ and that the quality of documentation of injuries by detention health care staff in the cases considered was poor. It is not known whether health care staff in detention facilities are raising concern in cases where injury suggests more than reasonable force. There are strong professional ethical arguments for doctors to consider such reporting duties as their moral responsibility.¹⁸

¹⁵ These injuries were recorded as being “consistent with”, “highly consistent with” or “typical of”. These terms are recommended by the *UN Manual on Effective Investigation and Documentation of Torture and Other Cruel and Inhuman Degrading Treatment or Punishment (The Istanbul Protocol)*, UN Office for the High Commissioner for Human Rights, Geneva and New York, 2001.

¹⁶ Discussed in more detail at para 4.3.

¹⁷ “A prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary treated, by a medical doctor.” *CPT Standards*, Strasbourg: Council of Europe, 2002:31 (CPT/Inf/E(2002)1-Rev.2004).

¹⁸ “[Prison doctors]...may discover evidence of unacceptable violence, which prisoners themselves are not in a realistic position to denounce. In such situations, doctors must bear in mind the best interests of

Given the prevalence of handcuff use and injuries among the individuals interviewed for this study, it is appropriate to include here a more detailed analysis of injuries arising through the misuse of handcuffs.

4.3 Handcuff neuropathies

Handcuffing is a known cause of nerve injury at the wrist,^{19,20,21,22,23} with any of three possible nerves being involved: superficial radial, median and ulnar nerves. The severity of the injury depends on the nerve affected (which determines the functional limitation, i.e., the disability), and the duration of symptoms, which may resolve over a couple of months or may even persist over several years. Symptoms can include pain, numbness or abnormal sensations, and weakness of the hand.

What is striking in our data is the frequency of nerve injury: four cases out of the twelve who were handcuffed (33.3%) exhibited symptoms and signs of nerve damage. While our sample size is too small to allow confident or detailed analysis of this figure, the percentage is nevertheless higher than expected. Although data on the incidence of nerve damage resulting from handcuff use are sparse, and there is no ideal control population, one incidence figure available in the literature is 6.3%.¹⁹

Case 1 had an ulnar nerve injury in the dominant hand; case 3 had a superficial radial injury in the non-dominant hand; case 8 had median nerve damage in one hand and superficial radial nerve injury in the other; and case 10 had superficial radial nerve damage in the non-dominant hand. We were not able to follow up these cases with further investigation such as electrophysiological studies.

It is hypothesised that continuing to struggle whilst handcuffed, over-tightened handcuffs and pulling on any ligature around the wrist can lead to nerve injury.¹⁹ The cases previously described in paragraph 3.2, where force was reportedly used against the detainee whilst handcuffed (which might cause continued struggling) or where pulling or twisting force was applied to the arms while in the handcuffs, are therefore highly relevant. It is likely that this apparent misuse of handcuffs is contributing to the worryingly high rate of nerve injury. These injuries – which can be disabling – should be considered preventable in most cases.

the patient and their duties of confidentiality to that person but the moral arguments for the doctor denouncing the evidence of maltreatment are strong.” *Istanbul Protocol*, see footnote ¹⁰.

“Doctors have a duty to monitor and speak out when services with which they are concerned are inadequate, hazardous or otherwise pose a potential threat to health...Above all, doctors must take appropriate action when aware of practices which abuse or compromise patients’ rights or leave patients vulnerable to foreseeable harm. Appropriate action may be reporting the matter to relevant authorities, those empowered to change procedures or national medical associations.” *Doctors with Dual Obligations*, British Medical Association, November 1995.

¹⁹ Chariot et al. Focal Neurological Complications of Handcuff Application. *J Forensic Sci* 2001;46(5):1124-5.

²⁰ Haddad FS, Goddard NJ, Kanvinde RN, Burke F. Complaints of pain after use of handcuffs should not be dismissed. *BMJ* Jan 1999;318:55.

²¹ Stone DA, Lauren R. Handcuff Neuropathies. *Neurology*. 1991 Jan;41(1):145-7.

²² Levin RA, Felsenthal G. Handcuff Neuropathy: two unusual cases. *Arch Phys Med Rehabil*. 1984 Jan;65(1):41-43.

²³ Grant AC, Cook AA. A prospective study of handcuff neuropathies. *Muscle and Nerve* 2000, 23(6):933-938.

5 Discussion

Analysis of the medical data highlights particular areas of concern (pertinent cases are given as an illustration of each point):

- There appears to be misuse of normally accepted restraint methods, which in some cases would seem to be deliberate and intended to cause pain or suffering: case 12, for example, claimed that while in handcuffs her head was banged against a fire extinguisher, causing a laceration, and that pressure was applied to her jaw and nose, while the escort officer pulled on, and twisted, the handcuffs.
- Certain forms of force described are unlikely to be deemed strictly necessary or reasonable under almost any circumstances, such as kicks and punches directed at the head and face. This is particularly concerning in cases where the detainee reports these types of force being applied even after they are physically restrained: case 11 reported being kicked, including in the mouth while on the ground with his hands cuffed behind him.
- Force reportedly continues to be used even after abandoning the removal attempt, often inside vans where this assault cannot be witnessed by passengers or airport staff: case 10 alleged he was put into the van where they re-handcuffed him, punched him in the mouth and slapped him in the face.
- Verbal abuse is reported, in some cases apparently racially motivated. This is clearly unjustifiable and unnecessary.

Section II

Harm in Custody: The Human Rights Law Position

by Ellie Smith²⁴

6 Introduction

This section looks at how principles of human rights law can be brought to bear on incidents of harm in State custody, where harm has been inflicted by an agent of the State, such as a prison guard or escort, or by an employee of a private security firm, where the running of a facility or its removal services have been contracted out by the State.

Much of the caselaw referred to in this section relates to the ill treatment of prisoners who have been detained following their conviction for a criminal offence. Notably, however, the principles identified are applicable to the rights and treatment of all those who are detained, be it pursuant to, or prior to a trial, in a penal institution or in police custody or to those unlawfully held. They will therefore apply to those who have been detained either whilst their asylum application is processed or who are held pending removal. In his book *The Treatment of Prisoners Under International Law*,²⁵ Sir Nigel Rodley describes prisoners or detainees as “any persons who are so positioned as to be unable to remove themselves from the ambit of official action and abuse”. This broad definition is adopted here for the purpose of describing the rights of those asylum seekers who are harmed either during their detention or their attempted removal from the UK. The terms “prisoner” and “detainee” are used interchangeably in this section.²⁶

It is not intended here to examine the full scope of the right not to be subjected to ill treatment, but rather, to concentrate on the application of that right to those in detention. However, a brief analysis of the right is included for the sake of completeness and in order to place the rights of detainees in their legal context. Nor is it the purpose of this article to consider the legitimacy of the detention of asylum seekers *per se*.

There are several international and regional instruments that relate either specifically or more generally to the protection of detainees. This section will concentrate only on those that are directly applicable and enforceable in the UK’s domestic courts, and in particular, on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁷

²⁴ The author is grateful to Professor Sir Nigel Rodley, who reviewed a draft of this section prior to publication. Any errors of law, however, are solely those of the author.

²⁵ Nigel S. Rodley, Second Edition, Oxford University Press, 1999.

²⁶ Although it is noted that in the vast majority of cases unsuccessful asylum seekers held in detention pending removal have not been convicted of any criminal offence in the UK.

²⁷ Notably, however, in addition to this provision, Article 5 pertains to an individual’s right “to liberty and security of the person” [emphasis added], indicating the extent of the concern of the drafters to protect those in the hands of the State. Although Article 8 ECHR has been interpreted to encompass the protection of an individual’s moral and physical integrity, which is generally deemed to have a lower threshold than that required for Article 3, the author has concentrated here solely on Article 3, since

Given the nature of the cases medically documented for the purpose of this report, this section will deal with the “inhuman treatment” aspect of Article 3 ECHR only, although legal practitioners should be aware that the infliction of severe harm may, under certain circumstances, amount to torture.²⁸ In addition, as the witness statement attached at Appendix B shows, ill treatment can, in some cases, be degrading contrary to the standards of Article 3.²⁹

As seen in the medically documented cases in Section I of this report, some of the harm complained of appears to stem from the application of restraint techniques, including the misuse of handcuffs. This section examines the compatibility of both excessive and seemingly reasonable or legitimate force with the standards of Article 3.

This section begins with an overview and interpretation of the applicable human rights standard. The issue of justifiability is then examined, together with the issue of State liability for harm where a reception or detention facility is operated by a private body. The section then goes on to consider how practically to establish a breach of Article 3 where an individual has been injured in detention, and includes an analysis of certain human rights principles that assist in the factual proof of harm, the causal link between harm and detention and the appropriate threshold in order for harm to fall within the remit of the Article. The section examines the compatibility of reasonable force with Article 3, and concludes with a consideration of the compatibility and interaction between human rights actions and domestic criminal proceedings.

7 Background: the application of European human rights standards to domestic law

The ECHR was incorporated into UK domestic law by virtue of the Human Rights Act 1998 (HRA), rendering the provisions of the Convention directly applicable in UK domestic courts.

Section 2(1) HRA provides:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission...so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”

harm occurring in State custody will automatically engage that article (discussed in further detail below, at para 9.2).

²⁸ See in particular the case of *Selmouni v. France* (1998) EHRLR 510, which gives some guidance as to the threshold of pain and suffering established by the European Court of Human Rights when considering torture in detention contrary to Article 3 ECHR. See also *Rape as a Method of Torture*, Medical Foundation, May 2004, which includes a legal analysis of when harm in detention will constitute torture contrary to Article 3 ECHR.

²⁹ The incident referred to in the witness statement was not referred to the Medical Foundation for documentation, and so is not detailed in Section I of this report.

As a result, when interpreting or applying ECHR provisions, domestic courts must have regard to the jurisprudence of both the European Court of Human Rights (“ECtHR” or “the Court”) and of the European Commission of Human Rights (“the Commission”).

In applying international treaty provisions in the domestic for a, it is important to be aware that the ECHR, as an international instrument, follows different rules of interpretation to its domestic counterparts. Interpretation will be governed by the Vienna Convention on the Law of Treaties (1969).³⁰ The primary method of interpretation for international instruments is contained in Article 31(1) of that Convention:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.”

In order to do this, both bodies have examined the Convention’s preamble and annexes.³¹

Where recourse to primary methods of interpretation prove inconclusive, the Vienna Convention lists a number of secondary methods, which include recourse to the Convention’s *travaux préparatoires* or other documents relating to the negotiation and conclusion of the instrument.³²

Both the ECtHR and the Commission have interpreted the ECHR dynamically, as a “living instrument”.³³ As a result, the interpretation of various provisions has evolved through caselaw, with the effect that older decisions or judgments may prove less reliable than more recent decisions. Notably, the Court and Commission have attempted to interpret provisions of the Convention according to “notions currently prevailing in democratic States”,³⁴ and more recent decisions reflect a heightened awareness of the need to protect and secure human rights across States party. This has been marked by an increased intolerance of breaches and a sensitivity to the need to provide greater protection of individuals at the hands of State actors. Consequently, acts which might not have fallen within the threshold of Article 3 ECHR as a whole, or within the respective thresholds of the Article’s component parts in the past, might now engage State responsibility under that article, or find themselves “promoted” within the Article – e.g., from being described as inhuman treatment to torture.

³⁰ Although enacted after the ECHR, and, by virtue of Article 4, not having retrospective effect, the ECtHR has acknowledged that the rules of interpretation expressed in the Vienna Convention represent international law, and that therefore it should follow those principles: see *Golder v. UK* (1979 – 1980) 1 EHRR 524, paras 29 – 30 and 34 – 36.

³¹ Article 31(2) Vienna Convention on the Law of Treaties. For an example of the application of the principle in the European forum, see *Artico v. Italy*, (1980) 3 EHRR 1.

³² Article 32, Vienna Convention on the Law of Treaties (1969)

³³ *Van der Musselle v. Belgium*, (1984) 6 EHRR 163

³⁴ *Ibid.*

8 Interpretation: what is meant today by “inhuman treatment”

8.1 Overview

Article 3 ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The article therefore identifies and proscribes three separate forms of abuse: torture, inhuman treatment or punishment, and treatment or punishment that is degrading.

As noted in the introduction to this section, this report is limited to the consideration of the application of the second of these elements: inhuman treatment.

8.2 Inhuman treatment and justifiability

Inhuman treatment was first considered and defined by the Commission in the *Greek* case as being:³⁵

“at least such treatment as deliberately causes severe suffering, mental or physical, *which, in the particular circumstances, is unjustifiable* [emphasis added].”

Notably, however, Article 3 is framed in absolute terms, with the result that the right cannot be qualified, limited or balanced against other rights in any circumstance. As an absolute right, a breach of the article can never be excused, and a breach cannot be justified either by the proper application of domestic law,³⁶ or the imposition of national, judicial penalties.³⁷ The article, excluded from the ambit of Article 15 ECHR, is thereby non-derogable, with the effect that the protection provided by the article continues even in times of “war or other public emergency threatening the life of the nation”.³⁸ The absolute nature of the article applies equally to all of its component elements, including to inhuman treatment.

The reference by the Commission in the *Greek* case to the justifiability of inhuman treatment was therefore seemingly at odds with the absolute prohibition apparently contained in the ECHR.

The Commission took the opportunity to clarify the position in the case of *Ireland v. UK*, commenting:

“the term ‘unjustifiable’ ... has given rise to some misunderstanding and [the Commission] therefore finds it necessary to state clearly that it did not have in

³⁵ (1969) 12 Y.B. 1. The case was brought against Greece by Denmark, Norway, Sweden and the Netherlands, and arose out of the conduct of the country’s security forces following a military coup in the mid 1960s. During that period, a number of people were arrested and detained, and many of those claimed to have been subjected to ill treatment by officials of the State whilst incarcerated.

³⁶ See *A v. UK*, (1998) 27 EHRR 611.

³⁷ See *Tyler v. UK*, (1978) 2 EHRR 1.

³⁸ Article 15(1) ECHR

mind the possibility that there could be a justification for any treatment in breach of Art. 3.”³⁹

The Commission’s position has since been endorsed by the Court. In the case of *Tomasi v. France*,⁴⁰ for example, the Court was asked to take into account, when assessing the treatment of the Applicant while in detention,⁴¹ the “particular circumstances” pertaining in Corsica at the time, together with the fact that the Applicant was suspected of involvement in terrorist activity.⁴² In finding a breach of Article 3, the Court held:

“The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”⁴³

The judgment was confirmed in *Chahal v. UK*,⁴⁴ which involved the proposed removal of a prominent Sikh separatist from the UK. The UK Government argued that while the Applicant faced a risk of torture if returned to India, this risk was overridden by the threat that the Applicant posed to national security. In considering this argument, the Court concluded:

“The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct... Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation... The prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases... The activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”⁴⁵

8.3 The extent of State liability under Article 3: contracting out security

Individuals who are awaiting a decision on their claim, as well as individuals who are held pending their removal, may be detained either in State-run prisons⁴⁶ or specialist immigration detention facilities.⁴⁷ The running of the latter, together with the

³⁹ *Ireland v. UK*, 19 YB 512, at 750 (1976)

⁴⁰ (1992) 15 EHRR 1

⁴¹ “Applicant” here refers to an individual bringing an action before the ECtHR or the Commission.

⁴² At para 114.

⁴³ At para 115.

⁴⁴ (1997) 23 EHRR 413

⁴⁵ At paras 79 - 80.

⁴⁶ State run prisons are either given over to the purpose of immigration detention, or facilities for unconvicted prisoners are used. The UK does not detain asylum seekers with convicted prisoners except in exceptional circumstances.

⁴⁷ Detention/removal centres are located at Campsfield House (Oxfordshire), Dover, Dungavel House (Scotland), Harmondsworth, Haslar (Gosport), Lindholme (nr. Doncaster), Tinsley House (nr. Gatwick airport), Oakington (nr. Cambridge) and Yarl’s Wood (Bedfordshire). Management and operational control will transfer from the Prison Service to IND in respect of Haslar and Dover over the next 18 months. Lindholme will operate under a Service Level Agreement with a view to reverting to a mainstream prison in the future: *Change of Management at Immigration Removal Centres*, Home Office Press Release, 218/2004, 29th June 2004.

provision of security escort services, is typically contracted out to private operators, and it is therefore appropriate to consider whether the State can be held liable under Article 3 for acts committed by staff employed by these private contractors.

An initial reading of the article suggests that it imposes a negative obligation on the contracting State: to refrain from committing acts in breach of the provision. When read in conjunction with Article 1 ECHR, however, which obliges States party to “secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention”, it becomes clear that a more extensive, positive burden exists.

As a result, States party must take active measures to protect individuals within their territory from experiencing treatment that breaches the standards of the article, and this responsibility will include harm inflicted by private actors. This duty will naturally extend to responsibility for harm inflicted by detention custody officers, where State functions, including the detention and removal of individuals, have been contracted out by the State.

This proposition is supported by the jurisprudence of the ECtHR. In the case of *Costello-Roberts v. UK*,⁴⁸ the Court, in assessing State liability in respect of corporal punishment meted out to the Applicant, a pupil of a private school, noted:

“...the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”.⁴⁹

Finally, the issue of continuing State liability is reinforced by the interpretation to be given to the term “public authority” under the HRA. Although the term is not expressly defined in the Act, section 6(3) indicates that it will include “any person certain of whose functions are functions of a public nature”.⁵⁰ It is clear that a private security company managing a contracted-out prison or immigration detention facility is exercising a public function within the meaning of section 6(3), with the effect that the State will remain liable for breaches committed in the purported exercise of those official functions.⁵¹

9 Establishing a breach of Article 3

Where a detainee alleges harm whilst in the custody of the State, State liability for that harm will arise where established harm can be shown to have occurred whilst the Applicant was in the custody of the State. Once this has been established, it is necessary to prove that there is a link between the harm sustained and the alleged ill treatment such that the State can be considered responsible for that harm, and finally, that the harm complained of attains the minimum threshold necessary to engage the protection of Article 3. These aspects are considered in turn below.

⁴⁸ (1995) 19 EHRR 112

⁴⁹ At para 27 of the judgment.

⁵⁰ At section 6(3)(b).

⁵¹ This interpretation is reinforced by the wording of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which, at Article 16, notes the positive obligation on the State in respect of harm inflicted “by or at the instigation of or with the consent or acquiescence of a public official *or other person acting in an official capacity*” [emphasis added].

9.1 Establishing the fact of harm arising during a period of State detention: standard of proof

Before finding State liability under Article 3, the ECtHR must be satisfied *beyond reasonable doubt* that there has been a violation of that Article.⁵²

It is the responsibility of the Applicant to establish that the harm complained of occurred, and that it arose during a period of State custody. The former can typically be done by the production of medical evidence documenting the injuries sustained, although the caselaw of the ECtHR indicates that in addition to medical evidence, harm can be proven by the examination and cross-examination of parties and witnesses, the assessment of the credibility of the parties involved and an analysis of the consistency of accounts given.⁵³ Caselaw indicates, however, that medical evidence is by far the most persuasive means of proving harm, and in many cases brought before the ECtHR where a breach of Article 3 was alleged, and where medical evidence was available to substantiate part but not all of the claim to ill treatment alleged, the Court found a breach in relation only to those allegations supported by medical evidence.⁵⁴

In cases of asylum detention, the question of whether the harm occurred during a period of detention will often not be in issue, although again the caselaw of the Court indicates that medical evidence dating recent injuries will be considered as corroborative of the individual's complaint where the timescale of injuries is disputed.⁵⁵

9.2 Causal link between the alleged ill treatment and medically documented injuries: establishing State responsibility

In addition to the practical methods of establishing liability referred to above,⁵⁶ the Court in the case of *Ireland v. UK* gave some further guidance as to how State responsibility under Article 3 might be proven, noting:

“Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebuttable presumptions of fact.”⁵⁷

Such an inference arises in the case of harm occurring in detention.

In cases where an individual is harmed by an official of the State whilst in custody, the circumstances of their ill treatment might be difficult to prove. Often, there will be no independent witnesses to the treatment complained of, and a detainee may not have

⁵² See *Ireland v. UK*, (1978) 2 EHRR 25.

⁵³ See for example in the case of *Aydin v. Turkey*, (1998) 25 EHRR 251, at paras 39-40.

⁵⁴ This was the case, for example, in *Aksoy v. Turkey*, (1997) 23 EHRR 553. In that case the Applicant claimed to have been subjected to Palestinian hanging and electric shocks. Medical evidence was available to support the former allegation, but not the latter (see paras 59-60). The Court concluded that Turkey was liable for torture on the basis of the Palestinian hanging, going on to say that there was therefore no need to consider other allegations made by the Applicant. See also *Tomasi v. France*, (1993) 15 EHRR 1 at paras 111 and 115.

⁵⁵ See for example the case of *Tomasi v. France*, (1993) 15 EHRR 1 at para 110.

⁵⁶ At section 9.1.

⁵⁷ At para 161.

immediate access to medical treatment or care, an independent lawyer or to a family member. As a result, the cause of any documented injuries may be difficult to establish in a legal forum.

These difficulties are compounded by the weakened and vulnerable position of the detainee vis-à-vis the State. As a result of this, and having regard to the heightened duty of care owed by the State to individuals in its custody, both the ECtHR and the Commission have held that a rebuttable presumption of State responsibility under Article 3 arises in respect of any harm suffered by an individual in detention.

This doctrine was first propounded by the Commission, and subsequently approved by the ECtHR, in the case of *Tomasi v. France*.⁵⁸ The case involved the ill treatment of the Applicant, an active member of a Corsican political organisation, who had been arrested and detained by French authorities following an attack by the Corsican National Liberation Front on the offices of a Foreign Legion rest centre. One man was killed in the attack, and a second seriously injured. The organisation also claimed responsibility for 24 other bomb attacks perpetrated on the same evening.

Whilst detained, the Applicant claimed to have been slapped, kicked and beaten, deprived of food, threatened with a firearm, spat upon and forced to stand naked in front of an open window. The Applicant was examined by a number of doctors throughout and after his detention, and various bruises were documented.⁵⁹

Both the Commission and Court, noting that the medical evidence offered by the Applicant was consistent with his account of abuse⁶⁰ and that the State had not been able to provide an alternative explanation as to how those bruises occurred,⁶¹ indicated that State responsibility could therefore be presumed.

The position has since been approved and followed by the ECtHR,⁶² and in the case of *Ribitsch v. Austria*⁶³ the Commission noted that the presumption was applicable “particularly if [the Applicant’s] account was supported by medical evidence”.⁶⁴ In the case of *Aksoy v. Turkey*,⁶⁵ the Court was asked to consider the treatment of the Applicant, a suspected PKK collaborator, at the hands of security officials. In his application⁶⁶ the Applicant claimed that whilst he was being held for interrogation, he was severely beaten and subjected to Palestinian hanging⁶⁷ and electric shocks.⁶⁸ The

⁵⁸ (1993) 15 EHRR 1

⁵⁹ See para 113. For details of the medically documented harm occasioned by the ill treatment, see paras 47-48, 50-51, 65 and 68-69.

⁶⁰ Para 110

⁶¹ Para 110. The Court suggests here that such a credible explanation might be that the bruises already existed before the Applicant was detained, or that they were either self-inflicted or sustained by the Applicant during an attempted escape. The examples given by the Court do not appear to be offered as an exhaustive list.

⁶² See for example *Selmouni v. France*, (1998) EHRLR 510, at para 87; see also *Dikme v. Turkey*, (no. 20869/92), 11th July 2000, at para 78, *Ribitsch v. Austria*, (1996) 21 EHRR 573 at para 31.

⁶³ (1996) 21 EHRR 573; discussed in more detail below in relation to the standard of proof in such a case.

⁶⁴ At para 31

⁶⁵ (1997) 23 EHRR 553

⁶⁶ The application, although originally filed by the Applicant, was in fact pursued by the Applicant’s father, following the death of the Applicant.

⁶⁷ The victim is suspended by the arms or wrists, which are tied behind the back.

Applicant requested access to medical care whilst in detention. This was initially refused, although the Applicant later saw a doctor, who, on examining the Applicant, recorded only that he “bore no traces of blows or violence”.⁶⁹ The Applicant visited a hospital five days after he was released from detention, where he was diagnosed as suffering from paralysis in both arms caused by nerve damage in the upper arms, consistent with his account of Palestinian hanging.

In considering the Applicant’s complaint, the Commission, noting the medical documentation of the injury, indicated that there was no evidence that the injury existed prior to his detention or that it had occurred after his release. In addition, it noted the State’s failure to offer an alternative explanation for the harm. The Court, accepting the Commission’s conclusions, and finding a breach of Article 3, noted:

“...where an individual is taken into police 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 as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.”⁷⁰

The consequence of this presumption is that where harm has been sustained in detention the burden of proof has effectively shifted to the impugned State.⁷¹

The standard of proof in these circumstances was considered by the Court in the case of *Ribitsch v. Austria*.⁷² In that case, the Applicant and his wife had been arrested for drug trafficking offences. The Applicant was held in police custody for questioning, during which time he claimed to have been punched and kicked, pulled to the ground by his hair and his head banged against the floor.⁷³ Shortly after his release the Applicant attended the local hospital, which recorded a number of bruises, together with symptoms consistent with nerve damage in his neck.⁷⁴ The Austrian authorities did not dispute that the injuries had occurred whilst the Applicant was in the custody of the police, but claimed that rather than being sustained in the manner claimed, were caused instead when he slipped and fell whilst getting out of a police car.

In assessing the State’s liability for the harm, the Court noted that once it was established that injuries had been sustained in police custody, it was then for the State to establish “satisfactorily” that the injuries complained of were sustained otherwise than by the treatment the Applicant claims to have undergone.⁷⁵ The Court implicitly accepted the Commission’s conclusion that the State, in order to displace the presumption of liability under the Article, had to put forward an alternative

⁶⁸ Paras 14 and 60.

⁶⁹ Judgment of the European Court of Human Rights, para 16.

⁷⁰ At para 61. Notably, the finding of State responsibility for the harm was limited to the Palestinian hanging, since the harm occasioned by that treatment had been established and therefore the account of torture found to be credible.

⁷¹ In respect of injuries which might have occurred prior to detention, Detention Centre Rule 34(1) requires that “Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered practitioner...) within 24 hours of his admission to the detention centre.”

⁷² (1996) 21 EHRR 573

⁷³ See paras 12, 15 and 16.

⁷⁴ See para 13.

⁷⁵ See paras 31 and 34.

explanation which was “*sufficient to cast a reasonable doubt* on the applicant’s allegations concerning the ill treatment he had allegedly undergone while in police custody [emphasis added].”⁷⁶

9.3 Threshold: harm in detention

Before State liability can be engaged under Article 3, harm must first attain “a minimum level of severity”.⁷⁷ In addition, the component elements of the article themselves require harm to attain a minimum level of severity before their terms can be used to describe the harm complained of.⁷⁸

While the article itself is absolute in nature, the determination of whether or not harm is sufficiently serious to engage the protection of the provision is, to some extent, relative, and may depend on the circumstances of the case. In addition, where it has already been accepted that the case falls within the Article’s remit, the same relative factors are pertinent in the consideration and assessment of which element of the article applies to a given case. Relevant circumstances will include, but may not be limited to, the physical and mental effects of the treatment on the individual concerned, the duration of the treatment, and in some cases, the sex, age and health of the victim.⁷⁹

Where an individual has been harmed in detention, the fact of their captivity will be relevant both to the assessment of whether or not the harm attains the threshold required to engage Article 3 *per se*, and so falls within its remit, and also to which of the article’s elements are engaged by the harm complained of. These two aspects are discussed separately below.

⁷⁶ See para 31.

⁷⁷ *Ireland v. UK*, (1979 - 1980) 2 EHRR 25, at para 162.

⁷⁸ In respect of torture and Article 3 ECHR: see the judgment of the Court in *Ireland v. UK*, (1979 - 1980) 2 EHRR 25, at para 167, which, in distinguishing between torture and other acts of inhuman treatment, indicated that the difference was one of the intensity and severity of suffering inflicted, noting: “In order to determine whether the [harm complained of] should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted.” In respect of inhuman treatment, see the Court’s judgment in *Tyrer v. UK* (1978) 2 EHRR 1, para 29: “the suffering occasioned must attain a particular level before a punishment can be classified as ‘inhuman’ within the meaning of Article 3”. The Court addressed the issue of degrading punishment in the same case, noting that “in order for a punishment to be ‘degrading’ and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level”(para 30). Note that there is an argument that the differentiation between torture and inhuman treatment on the basis of severity of pain and suffering is peculiar to the European human rights law system; see, for example, Sir Nigel Rodley, “The Definition(s) of Torture in International Law”, *Current Legal Problems*, 2002, Vol. 55, p.467.

⁷⁹ *Ireland v. UK*, (1979 - 1980) 2 EHRR 25, at para 162, where the Court noted: “...ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, 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 victims, etc.” The Court’s use of the phrase “such as”, and the word “etc.” indicate that it did not intend the list of relevant, aggravating factors to be exhaustive.

9.3.1 harm in detention and the threshold for Article 3

The ECtHR and Commission have acknowledged that the State bears an additional burden of care where an individual is in its custody. In its deliberation in the case of *Ribitsch v. Austria*,⁸⁰ for example, the Commission noted that “a State was morally responsible for any person in detention, since [the detainee is] entirely in the hands of the police.”⁸¹ In the same case the Court acknowledged the Applicant’s “particular vulnerability” whilst held in police custody.⁸² In that case the Court, in considering whether the harm complained of attained the necessary threshold to engage the protection of Article 3, noted:

“...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 Article 3 (art. 3) of the Convention [emphasis added].*”⁸³

As a result, it is clear that any use of physical force by a State official against a detainee which was not made strictly necessary by the detainee’s conduct will fall within the threshold of Article 3, and so constitute a breach of that article.

9.3.2 harm in detention and the component elements of Article 3

The inherent indignity of using excessive or gratuitous force against those in custody, together with the abuse of power such harm engenders, constitute aggravating factors that will render harm more severe in the eyes of the Court.

This principle is illustrated by the case of *Aydin v. Turkey*.⁸⁴ In that case the ECtHR was asked to consider the treatment of a 17-year-old girl who had been detained by the Turkish authorities as a suspected PKK collaborator. During her detention, the Applicant was subjected to severe physical and mental ill treatment, including rape. In assessing the ill treatment, the Court indicated that the Applicant’s detention placed her in a weakened and vulnerable position vis-à-vis the State, and that this in turn constituted an aggravating factor in assessing the cruelty and severity of the ill treatment she experienced:

“Rape of a detainee by an official of the state must be considered to be an especially grave and abhorrent form of ill treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.”⁸⁵

In the case of *Tomasi v. France*,⁸⁶ the Court, in assessing the gravity of the treatment complained of, similarly took note of what it described as the “vulnerability of a person held in police custody”. In considering the categorisation of the ill treatment

⁸⁰ The details of this case are outlined above, at section 9.2.

⁸¹ At para 31. See also para 36.

⁸² At para 36.

⁸³ At para 38.

⁸⁴ (1997) 25 EHRR 251

⁸⁵ At para 83.

⁸⁶ Discussed above, at section 9.2.

which the Applicant complained of, the Court observed that while the documented injuries appeared to be “relatively slight”, they nonetheless constituted both inhuman and degrading treatment, again indicating that harm arising in detention is thereby rendered more severe.⁸⁷

The Court’s judgment in *Tomasi* is significant in that it gives some indication as to the level of harm required before the ill treatment of a detainee might be considered “inhuman” within the meaning of Article 3. Guidance can also be found in the case of *Ireland v. UK*.⁸⁸ In that case, the Court, in considering the incompatibility of interrogation practices with Article 3, agreed with the Commission in finding that the evidence revealed a “practice of inhuman treatment”. In reaching this conclusion, the Court referred to a number of illustrative cases where medical evidence supported the presence of a range of injuries, varying in severity and including “contusions and bruising”⁸⁹ in one case and a “perforation to the right eardrum and some minor bruising” in another.⁹⁰

10 The use of reasonable force or restraint

As previously noted, the Court in the case of *Ribitsch* observed that Article 3 would be engaged where a detainee was subjected to physical force “which has not been made strictly necessary by his own conduct”.⁹¹ This comment of the Court indicate that there would be situations where the use of force against a detainee would not constitute a breach of Article 3 ECHR – i.e., where the force used was necessitated by the Applicant’s conduct, so displacing the presumption of State liability for the harm.

This interpretation is supported by cases such as *Tomasi*⁹² and *Aksoy*,⁹³ where the Court noted that the proportionate use of force against an individual who was trying to escape would not engage Article 3.

Some guidance as to when force might be considered “reasonable”, and therefore not in breach of Article 3, can be obtained from caselaw relating to the use of handcuffs.

The compatibility of the use of handcuffs *per se* with Article 3 was considered by the Court in the case of *Raninen v. Finland*.⁹⁴ In that case the Applicant, a conscientious objector, was handcuffed by military police and then taken past members of his support group to a military vehicle. The Applicant complained that the use of handcuffs, and in particular, the fact that he had been seen handcuffed in public, constituted degrading treatment contrary to Article 3. The Court rejected his claim, noting:

“...handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful arrest or detention and does not entail use of force, or public exposure,

⁸⁷ At para 113.

⁸⁸ (1978) 2 EHRR 25

⁸⁹ In the case of three detainees. At para 110.

⁹⁰ At para 115.

⁹¹ (1996) 21 EHRR 573, at para 38. The details of the case are outlined at section 9.2.

⁹² (1993) 15 EHRR 1

⁹³ (1997) 23 EHRR 553

⁹⁴ (1998) 26 EHRR 563.

exceeding what is reasonably necessary in the circumstances. In this regard, it is of importance for instance *whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.*” [emphasis added]⁹⁵

As a result, while the use of handcuffs will generally not raise an issue under Article 3, it will be difficult for a State to justify their use where there is no evidence that the Applicant might resist arrest, attempt escape, cause themselves or others injury or interfere with evidence.

Where restraint is accompanied by the excessive or gratuitous use of force, however, an issue will arise under Article 3. In the case of *Rehbock v. Slovenia*,⁹⁶ for example, the Applicant was arrested by police shortly after crossing the border from Austria carrying a package of pills intended for a third party. In the course of his arrest, the Applicant was attacked by a number of policemen, pushed down on to the bonnet of a car and handcuffed. While handcuffed, four men continued to beat him on the head with their fists and cudgels, causing injuries to his face and severe pain.⁹⁷ At no point had he sought to resist arrest.

His injuries were examined by a doctor, who found him to be suffering from a double fracture of the jaw and facial contusions.⁹⁸ While the State did not contest the medical findings, it alleged that the injuries had incurred instead when the Applicant fell against a car. A domestic investigation, launched some five months after the incident, concluded that the arrest had been lawful, although the report did not indicate its evidential basis, and was found by the Court to be inconsistent with the State’s original explanation given for the harm.

Given the serious nature of the injuries, the fact that the Applicant had not resisted arrest or otherwise threatened the arresting officers and that the arrest operation had been planned in advance, the Court concluded that it was the responsibility of the State to show that the use of force employed had not been excessive.⁹⁹ The Court held that the State had failed to provide

“...convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the arrest operation”.¹⁰⁰

It therefore found the assault constituted inhuman treatment contrary to Article 3.

⁹⁵ At para 56. Similarly, in the case of *M-AV v. France*, (21788/93) 79 BDR 54, the Court concluded that there was no breach of Article 3 where the Applicant had been handcuffed to a radiator in a police station for a period of three hours.

⁹⁶ App. No.9520/81; 34 DR 107

⁹⁷ See para 12 of the judgment.

⁹⁸ See paras 18–19.

⁹⁹ At para 72 and 76

¹⁰⁰ At para 76.

11 Interaction with domestic criminal prosecution

As a consequence of the positive obligations under the Convention,¹⁰¹ the State is obliged to ensure that any alleged breach of the article's standards is promptly and adequately investigated, and meaningful judicial sanctions imposed on those found responsible for the harm.¹⁰²

Notably, however, the institution of criminal proceedings, which themselves are deemed to be fair and which comply with internationally recognised fair trial guarantees, will not necessarily absolve the State of liability under Article 3. In the case of *Ribitsch*,¹⁰³ for example, the alleged perpetrator of an assault against a detainee was acquitted in domestic criminal proceedings. Neither the ECtHR nor the Commission sought to suggest that the criminal proceedings were unfair.¹⁰⁴ In going on to find the State liable for a breach of Article 3, however, the Court observed:

“[The perpetrator’s] acquittal in the criminal proceedings by a court bound by the principle of presumption of innocence does not absolve Austria from its responsibility under the Convention.”¹⁰⁵

Notably, the Court placed particular emphasis on the domestic court’s differing approach. While the Austrian national courts, in seeking to establish the criminal guilt or innocence of an individual, were bound by the presumption of innocence, the European Court, in assessing the compatibility of State actions with the provisions of the Convention, is seeking instead to establish whether the State has provided a plausible alternative explanation for the harm suffered. In addition, the Court drew attention to the high standard of proof required to secure a domestic criminal conviction, with the implicit suggestion that the failure to satisfy that standard would not necessarily preclude an adverse finding of liability by the ECtHR.

As a result, the domestic acquittal of an individual of criminal charges will not automatically preclude the finding of State responsibility under Article 3. Notably, however, while extenuating circumstances could never justify a breach of Article 3 in the eyes of the Court, it has acknowledged that where the domestic courts have considered such circumstances to be mitigating factors for the purpose of passing sentence on an individual perpetrator, this will not, of itself, signify State tolerance, contrary to Article 3, of the actions complained of. This was noted by the Commission in the case of *Ireland v. UK*:

“...any such strain on the members of the security forces cannot justify the application on a prisoner of treatment amounting to a breach of Art. 3. On the other hand, as a matter of fact, the domestic authorities are likely to take into account the general situation as a mitigating circumstance in determining the sentence or other punishment to be imposed on the individual in a case which

¹⁰¹ Discussed above at section 8.3.

¹⁰² See, for example, the case of *Osman v. UK*, (2000), 29 EHRR 245 in relation to the duty to prevent breaches of the right to life, Article 2 ECHR.

¹⁰³ (1996) 21 EHRR 573

¹⁰⁴ And in their joint dissenting opinion, Judges Ryssdal, Matscher and Jambrek emphasised the fairness and legitimacy of the domestic proceedings.

¹⁰⁵ At para 34.

is brought against him before the domestic authorities and courts for acts of ill treatment. This does not, of course, in proceedings brought under [ECHR], affect the responsibility of the High Contracting Party concerned under the Convention for the acts in question. However, where a penalty has been so mitigated by the domestic judicial or disciplinary authorities, having due regard to the severity of the acts involved and the necessity of preventing their repetition, this fact cannot in itself be regarded as tolerance on the part of these authorities.”¹⁰⁶

Notably, the Commission in that case observed that the domestic criminal prosecution of an individual perpetrator would not affect State responsibility under Article 3 in proceedings before the ECtHR.

12 Concluding comments

The abuse of a detainee by an official of the State is a particularly abhorrent and worrying phenomenon given the vulnerability of the individual concerned and their weakened position vis-à-vis the State. The disproportionate use of force against an individual in State custody will automatically give rise to a breach of the Article’s standards, while the heightened vulnerability of the detainee serves as an aggravating factor in considering which element of the article is engaged by the assault.

It is clear that even where a detention facility is operated by a private party, the State will continue to be liable for the use of excessive force against individuals held there, and it is under a strict, positive obligation to investigate and punish any acts of individual abuse. In instances where there is a pattern of abuse, such as that identified in this study, the State’s positive obligations under Article 1 require it to act to eradicate the practice.

¹⁰⁶ 19 YB 764-6 (1976)

Section III

Harm on Removal: Criminal and Civil Law Aspects

by Neil Moloney¹⁰⁷

13 Introduction

It is both important and desirable that individuals who allege the use of disproportionate or unwarranted force should be aware of the potential avenues of legal redress available to them. Whilst it is not intended in this section to provide a comprehensive guide to bringing a legal action, or to set out in detail all the types of action that may be brought or the procedures involved (such a task would require a considerably longer publication), this section does provide a practical outline of the various avenues of legal redress in domestic law for individuals who raise complaints such as those identified in Section I of this report.

This section is intended to serve as a guide to those without experience or expertise in conducting criminal or civil law actions, but who are acting in the interests of the individual prior to the instruction of a criminal or civil lawyer. These people will typically include members of visitors groups or, if they are still acting, the Complainant's asylum lawyer. In instances of abuse occurring in detention, it is essential to the success of any criminal or civil case that evidence is collected as soon as possible thereafter, and in many instances this will necessitate action before a criminal or civil lawyer can be engaged. Time is of the essence in the collection of evidence if the perpetrator is to be held accountable for his or her actions. This section provides guidance on what evidence might be available, and how it should be taken.

Notably, the allegations referred to in Section I have not yet been examined or tested by any formal legal process,¹⁰⁸ and it is not intended here to provide a legal analysis of the particular cases identified. In light of the nature of the injuries documented for the purpose of this study, however, the examination of criminal assaults has been confined to the offences of common assault and assault occasioning actual bodily harm. Charges of grievous bodily harm may, however, be appropriate where more severe injuries are inflicted.

This section begins with an overview of the rules governing the use of force in both prisons and immigration detention centres, before going on to outline the various potential courses of redress in both criminal and civil law available to the victim of an assault in detention. The section concludes with a practical guide to some of the evidentiary matters arising in cases of harm in State custody.

¹⁰⁷ The author is grateful to Sailesh Mehta, a barrister at 2 Hare Court, who reviewed an earlier draft of this section. Any errors of law are the author's own.

¹⁰⁸ Although it is understood that a number of the cases identified are currently in the process of seeking some form of legal redress in respect of harm sustained.

14 Overview: The use of force in prisons and removal centres

A claim for assault and battery against an individual in State custody may arise: (1) where excessive force is used to carry out an otherwise lawful order; (2) where force is used to execute an unlawful order; or (3) where a restraint is imposed for too long, i.e., after a detainee has ceased to be a danger to himself or to others.

Different rules apply depending on whether an individual is detained in an immigration detention centre or a prison.

Detention centres follow a set of ‘house rules’ which lack any formal means of enforcement. This in turn leads to problems for both detainees and staff, including in relation to the powers of staff to use control and restraint techniques, where staff appear to have no more legal authority to use force than any other citizen. Under the heading “use of force”, Rule 41 of The Detention Centre Rules 2001 states simply:¹⁰⁹

“(1) A detainee custody officer dealing with a detained person shall not use force unnecessarily and, when necessary, no more force than is necessary shall be used.

“(2) No officer shall act deliberately in a manner calculated to provoke a detained person.

“(3) Particulars of every case of use of force shall be recorded by the manager and reported to the Secretary of State.”

The relevant Operating Standard,¹¹⁰ which provides guidance on the implementation of Rule 41, provides:

“Minimum Auditable Requirements

“1. The Centre will ensure that force is used only when necessary to keep a detainee in custody, to prevent violence, to prevent destruction of the property of the removal centre or of others and to prevent detainees from seeking to prevent their own removal physically or physically interfering with the lawful removal of another detainee.

“2. Force will only be used as a measure of last resort and strictly within the terms of the Rule 41 of the Detention Centre Rules 2001.

“3. If handcuffs are used as part of use of force Detention Services Order 1/2002 must be adhered to.

“4. The Centre will use and purchase training for control and restraint

¹⁰⁹ SI 2001, No. 238

¹¹⁰ Operating Standards are designed to establish “minimum requirements expected of operators. It is...open to individual operators to exceed these minimum requirements or, where no single approach is stipulated, to select the most appropriate means of meeting a particular standard in the centre concerned.” Beverley Hughes’ answer to a parliamentary question put by Mrs Curtis-Thomas, Hansard, 27th January 2004, Column 261W.

techniques from the Prison Service for England and Wales. Advance training should be carried out by the Prison Service training establishments for England and Wales. Basic training may be carried out by the Centre's own instructors provided that they have been trained and currently certified by the Prison Service for England and Wales.

“5. In the event of force being used, the Centre must ensure that detainees are seen by a member of the healthcare team as soon as practicable.

“6. The Centre must have a system for recording all incidents where use of force is applied and to monitor that use. Where use of handcuffs is planned in advance and the detainee does not resist, this should not be recorded under use of force.

Detention Services Order 1/2002, referred to above, provides specific guidance on the use of handcuffs on immigration detainees. In particular, it states:

“Introduction

“These guidelines implement and support a Ministerial decision to give more discretion to service providers regarding the use of handcuffs when escorting detainees outside detention facilities....

“Purpose

“2. The purpose of handcuffing detainees is to reduce the risk of:

- (i) Abscond
- (ii) Harm to the public, detainees or staff
- (iii) Damage to property
- (iv) Preventing their own removal from the UK
- (v) Preventing the removal of another detainee.

“3. Handcuffs must only be used when necessary and not as a matter of routine. Their application must be proportionate to the circumstances...

...

“5. Escorting staff may also apply handcuffs as part of minimum use of force to prevent an immediate incident...

...

“10. All uses of handcuffs or ankle straps must be recorded and records inspected by managers or contract monitors...Where the detainee resists or handcuffing is in response to an incident...it should also be recorded as part of use of force.”

By contrast, immigration detainees held in criminal prisons (and in the Haslar Holding Centre, which is managed by the Prison Service) are subject to Prison

Rules,¹¹¹ which contain considerably more detail, including greater safeguards aimed at securing detainees against the use of disproportionate force or restraint by prison staff. Existing Standing Orders make it clear that they should be treated in the same manner as a remand prisoner.

The general principle governing the use of force against prisoners by staff is found in Rule 47, which provides:

“(1) An officer in dealing with a prisoner shall not use force unnecessarily and, when the application of force to a prisoner is necessary, no more force than is necessary shall be used.

“(2) No officer shall act deliberately in a manner calculated to provoke a prisoner.”

The use of mechanical methods of restraint¹¹² is addressed and sanctioned by Rule 49, which provides:

“(1) The governor may order a prisoner to be put under restraint where this is necessary to prevent the prisoner from injuring himself or others, damaging property or creating a disturbance.

“(2) Notice of such an order shall be given without delay to a member of the board of visitors, and to the medical officer or to a medical practitioner...

“(3) On receipt of the notice the medical officer, or the medical practitioner referred to in paragraph (2), shall inform the governor whether there are any medical reasons why the prisoner should not be put under restraint. The governor shall give effect to any recommendation which may be made under this paragraph.

“(4) A prisoner shall not be kept under restraint longer than necessary, nor shall he be kept for longer than 24 hours without a direction in writing given by a member of the board of visitors or by an officer of the Secretary of State (not being an officer of a prison). Such a direction shall state the grounds for the restraint and the time during which it may continue.

“(5) Particulars of every case of restraint under the foregoing provisions of this Rule shall be forthwith recorded.

“(6) Except as provided by this rule no prisoner shall be put under restraint otherwise than for safe custody during removal, or on medical grounds by direction of the medical officer or of a medical practitioner such as is mentioned in rule 20(3). No prisoner shall be put under restraint as a punishment.

¹¹¹ SI 1999, No. 728

¹¹² According to administrative policy, the only approved mechanical restraint is a body belt: PSO 1600; the PSO states “in particular, for the purpose of this order, ratchet handcuffs are not a mechanical restraint”.

“(7) Any means of restraint shall be of a pattern authorised by the Secretary of State, and shall be used in such a manner and under such conditions as the Secretary of State may direct.”

In addition, the Prison Service has its own training manual on the use of control and restraint techniques. This is an internal, restricted document that is not available to the public.¹¹³

The standards set for the running of a private prison or immigration detention centre are contained in the contract concluded between the Home Secretary and the individual contractor. Where an allegation of assault by a custody officer is raised in a civil action for tort, the appropriate defendant will be the private contractor, unless it was being alleged that it was negligent for the Home Secretary to have appointed the particular contractor. In the latter case, proceedings may be brought by way of judicial review or by private action.

15 Legal remedies

This section provides an overview of the various potential courses of redress open to an individual who claims to have been subjected to a disproportionate or excessive use of force in State custody. For the sake of convenience, this section has been divided into remedies available in the criminal and civil law jurisdictions respectively. Notably, an assault and battery constitutes both a criminal offence and a tortious delict (i.e. a civil wrong), and both are considered in turn below. The section concludes with a look at the interaction between criminal and civil proceedings.

In addition to pursuing formal legal proceedings through the police or courts, which are the focus of this section, the Complainant may also wish to pursue their grievance through internal complaints mechanisms in accordance with the Detention Centre Rules,¹¹⁴ through the Independent Monitoring Boards,¹¹⁵ or via the Prison Ombudsman where appropriate.

15.1 Criminal offences¹¹⁶

The following paragraphs provide guidance on the offences of common assault and assault occasioning actual bodily harm, the difference between the two offences being one of degree. This part also includes an outline of some practical considerations to be

¹¹³ Conversations with civil litigation solicitors who have acted, in the past, on cases of alleged abuse within prisons revealed the existence of this manual. It is not in the public domain, was not available to the author, and so is not quoted here. It should, however, be sought on discovery: see section 16.2.

¹¹⁴ See Detention Centre Rules 2001, rules 38 and 48. See also the Operating Standard on Race Relations, in respect of complaints of a racial nature.

¹¹⁵ See Detention Centre Rules 2001, rules 60 – 62.

¹¹⁶ Whilst it is theoretically possible for an individual to bring a private prosecution in respect of an assault, this course of action may be undesirable in practice, and there are difficulties with this route. In particular, public funding is not available, while the requisite standard of proof is the high, criminal standard. In addition, the process will involve a level of disclosure of the prosecution case that may assist the opponent in any later civil claim, while in some instances, a conviction for common assault may be a bar to subsequent civil proceedings. As a result, the author has concentrated on criminal prosecutions brought by the authorities in this section.

borne in mind when considering whether or not to pursue a criminal action, together with brief details of private prosecutions.

15.1.1. Common assault

In criminal law, assault and battery are, strictly speaking, separate offences, although the term “assault” is commonly used to describe both. An assault is committed when the accused intentionally or recklessly¹¹⁷ causes another to *apprehend* immediate and unlawful violence.¹¹⁸ A battery is committed when the accused intentionally or recklessly *applies* violent force.¹¹⁹ An assault may be committed by the use of threatening words alone.¹²⁰ The burden of proof in criminal cases is on the prosecution and the standard of proof to be applied is “beyond reasonable doubt”.

The Crime and Disorder Act 1998, s 29, creates a racially aggravated form of the offence which carries a higher penalty.¹²¹ Where the racially aggravated form of the offence is not charged, however, it appears that racial or religious aggravation cannot be taken into consideration as an aggravating feature on sentencing.¹²²

15.1.2. Assaults occasioning actual bodily harm

Assault occasioning actual bodily harm is proscribed by section 47 of the Offences Against the Person Act 1861.

The term “actual bodily harm” has its ordinary meaning and “includes any hurt or injury calculated to interfere with the health or comfort of the victim, but must be more than merely transient or trifling.”¹²³ In practice, the Charging Standards agreed between the police and the CPS suggest that the charge should be brought for injuries such as bruising and cuts requiring medical treatment and broken teeth. As long as an assault was intentionally or recklessly inflicted, it is not necessary to prove that the injury sustained was foreseeable.¹²⁴ Psychiatric injury may be a form of actual bodily

¹¹⁷ Reckless here being subjective recklessness.

¹¹⁸ *R v. Ireland*, [1998] AC 147

¹¹⁹ *R v. Williams (G)*, 78 Cr.AppR. 276

¹²⁰ *R v. Ireland*, [1998] AC 147

¹²¹ Section 28 of the Crime and Disorder Act 1998 defines an offence as being racially aggravated if:
“(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or
(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group...”

Racially aggravated assaults are described in Section 29 of that Act:

“(1) A person is guilty of an offence under this section if he commits-
(a) an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
(b) an offence under section 47 of that Act (actual bodily harm); or
(c) common assault,
which is racially aggravated for the purposes of this section.”

¹²² *Lawrence* (1983) 5 Cr App R (S) 220.

¹²³ Archbold, *Criminal Pleading, Evidence and Practice*, 2004, para 19-197.

¹²⁴ *Savage* [1992] 1 AC 699.

harm,¹²⁵ although such injury must go beyond mere fear and anxiety, and its proof will require psychiatric evidence from a qualified expert.¹²⁶

As for common assault or battery, the burden of proof rests on the prosecution, which must establish the commission of the offence beyond reasonable doubt.

Similarly, the offence of actual bodily harm has a racially aggravated form which again attracts a higher sentence.¹²⁷

15.1.3. Deciding whether or not to pursue a criminal action: police involvement and prosecution by the Crown Prosecution Service

Naturally, where victims of an alleged assault wish to remedy their situation, they may want to seek the protection of the police. Whether or not to take this course of action is a tactical consideration for both the Complainant and his legal advisors. A decision to seek police involvement may produce both positive and negative implications for a potential subsequent civil action for assault:

Positive:

1. The victim may feel police involvement would stop further harassment by putting a spotlight on the perpetration of harm;
2. Signals may be sent to the institution responsible that the practices will not be allowed to occur with impunity, leading to a reduction or cessation in the practice;
3. A case for civil action may be assisted by the disclosure of evidence obtained by prosecuting authorities for the purposes of undertaking a criminal investigation.

Negative:

1. Making a complaint may put the other side on notice that legal action is being considered at too early a stage. This in turn may encourage them to strengthen their case by, for example, seeking corroboration from colleagues which they might not otherwise have sought.
2. Criminal proceedings require a high level of disclosure from the prosecuting authorities that may provide potential defendants to a civil action with evidence that may damage a civil action for assault.

15.2 Civil law remedies

The following paragraphs provide brief guidance on the torts of assault and battery, before identifying a number of racial actions which might be of relevance to an individual who alleges the use of excessive force in State custody. This part also

¹²⁵ *Chan-Fook*, [1994] 1 WLR 689

¹²⁶ *Chan-Fook*, [1994] 1 WLR 689; Ireland [1998] AC 147.

¹²⁷ S.29 Crime and Disorder Act, 1998.

includes some guidance as to the institution of civil or judicial review proceedings and concludes with a brief assessment of exemplary and aggravated damages.

15.2.1 Tort: assault and battery

As with the criminal offence, the tort of battery involves the actual infliction of unlawful force, intentionally or recklessly on another person,¹²⁸ while the tort of assault occurs where an intentional or reckless act causes another person to apprehend the infliction of immediate force.¹²⁹ If force is applied, directly or indirectly, unlawfully or without the consent of the person assaulted, then there has been a battery, however slight the force used. It is the application of force, rather than the resulting physical harm, that gives rise to a claim for damages.

The applicable burden of proof is the “balance of probabilities”. To prove a battery it is not necessary to show intention to cause injury, only that the defendant applied force intentionally or knew the act was likely to result in the application of force.¹³⁰

15.2.2 Race discrimination

The following offences might also be relevant to any civil action concerning the use of excessive force against an individual in State custody, including force directed at an asylum seeker whose claim for protection has been unsuccessful and who faces removal. Where it can be shown that an offence had a racial element, this may increase damages, or may form the basis of a separate action.¹³¹

(i) Section 19(B) of the Race Relations Act 1976 makes it “unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination”.

(ii) Direct discrimination contrary to section 3(4) of the Race Relations Act 1976. Direct discrimination exists where there has been treatment less favourable, where the Complainant has suffered disadvantage of any kind. A comparator is required, and it must be shown that a person of a different racial group in the same or at least not materially different circumstances was or would have been treated more favourably.

(iii) Indirect discrimination contrary to section 1(b) of the Race Relations Act 1976. This constitutes treatment which applies equally to all racial groups but which adversely affects particular racial groups.

15.2.3 Aggravated and exemplary damages

The victim of an alleged assault in State custody, where they have been detained pending their removal, is particularly vulnerable in the following main respects:

¹²⁸ *R v. Williams (Gladstone)*, (1983) 78 Cr. App. Rep. 276, 279.

¹²⁹ *Fagan v. Metropolitan Police Commissioner*, [1969] 1 Q.B. 439, 444D–E

¹³⁰ *Wilson v. Pringle*, [1987] Q.B. 237, 252

¹³¹ Representatives should bear this in mind when collecting evidence, see further at para 16.

- i) they are detained by the same authorities who are also responsible for the removal process;¹³²
- ii) they are detained pending removal, and so fears of impunity increase where successful removal prevents the individual from making any formal complaint in respect of any harm sustained;
- iii) they are in a foreign country that is likely to be unfamiliar and unsettling;
- iv) they are people who may well have suffered persecution, torture or inhuman and/or degrading treatment in the countries they left to seek sanctuary in the United Kingdom.

Given the heightened vulnerability of an individual held in State custody, the infliction of disproportionate force arguably constitutes a particular affront to the dignity of the individual. A Complainant who succeeds in a claim for an assault carried out by detention or removal personnel may be entitled to an award of aggravated and exemplary damages. Aggravated damages are part of the award of compensatory damages. Their effect is to increase the level of damages above what might otherwise have been recovered, and they arise where the manner of commission of the tort “was such as to injure the plaintiff’s proper feelings of dignity and pride”.¹³³ Exemplary damages are imposed as a punitive measure in order to deter the wrongdoing from occurring in future.¹³⁴

Any issues which may impact upon the assessment of damages should be included in any witness statements taken for the purpose of pursuing a civil action.¹³⁵

15.3 The interaction of civil and criminal proceedings

In certain circumstances, summary criminal proceedings¹³⁶ preclude the institution of subsequent civil proceedings. Section 44 of the Offences Against the Person Act 1861¹³⁷ provides power to magistrates to issue a certificate where the facts of the complaint have not been established and the charges dismissed.¹³⁸ In such circumstances, the Complainant is barred from bringing any other action – be it civil or criminal – against the accused. Notably, a certificate can only be obtained where there has been a trial, and thus cannot be obtained if the defendant pleads guilty or if

¹³² The Woolf Report pointed out that “a prisoner, as a result of being in prison, is peculiarly vulnerable to arbitrary and unlawful action. Accordingly it is essential that prisoners have a number of avenues of redress open to them whereby the illegal exercise of power may be challenged, and by which compensation can be recovered for the infringement of such civil rights as survive in all prisoners notwithstanding their imprisonment.” Woolf Report, *Prison Disturbances*: April 1990 (Cm 1456, 1991), para 14.293.

¹³³ *Clerk and Lindsell on the Law of Torts*, 15th Edition, 1982, pp242-3.

¹³⁴ *Thompson v Commissioner of Police* [1998] Q.B. 498, 517

¹³⁵ Guidance on taking a witness statement is provided below, at para 16.3.

¹³⁶ i.e. criminal proceedings brought in the Magistrates Court.

¹³⁷ As amended by s.50 of the Magistrates’ Courts Act 1980.

¹³⁸ Section 44 provides “If the justices upon the hearing of any case of assault or battery upon the merits where the [information] was preferred by or on behalf of the party aggrieved. . .shall deem the offences not to be proved, or shall forthwith make out a certificate under their hand stating the fact of such dismissal, and shall deliver such a certificate to the party against whom the dismissal was preferred”.

the summons is withdrawn.¹³⁹ A similar bar to subsequent proceedings arises where the accused has been convicted of the offence complained of and has paid in full any money or fines due, or has served the given period of imprisonment in respect of the offence.¹⁴⁰

16 Evidential considerations

This section provides an outline of potential sources of evidence that may assist representatives in their own investigations, either before a decision is taken as to the most appropriate form of legal action, if any, or after legal proceedings have begun and the purpose of seeking evidence is to strengthen the case. This section focuses in particular on evidence that might be sought in order to instigate or bolster a civil action.

This section identifies three discrete areas for the collection of evidence: evidence obtainable from the police following an investigation, evidence which might be obtained from the detention facility where the individual concerned was held, and evidence which the individual's representative can obtain through their own endeavours, and in particular, witness statements. These three areas are discussed in turn below.

16.1 Evidence available following a police investigation

In cases where the police have been involved in the investigation of claims of assault on a detainee, they will almost certainly be in possession of interview transcripts and other materials emanating from their investigation of the complaint. The police authority may provide disclosure of these materials on a voluntary basis once the investigation is completed, either by a trial or a decision not to prosecute.¹⁴¹ Alternatively, the Complainant can make an application to the court for disclosure of this material. The court may order disclosure if the material is deemed relevant, and where disclosure is necessary in the interests of fairness or efficient case management.¹⁴²

16.2 Documents obtainable from a prison or private detention facility

In addition to obtaining evidential documents following a police investigation and compiling various statements, some or all of the following documents, available from prison authorities,¹⁴³ might also be relevant to any legal proceedings. In the event the

¹³⁹ *Hancock v Somes* (1839) 1 E. & E. 795.

¹⁴⁰ Section 45 of the Offences Against the Person Act, 1861, as amended by the Criminal Justice Act 1948 and the Magistrate's Courts Act 1980, provides "If any person against whom any such [information]... shall have been preferred by or on behalf of the party aggrieved shall have obtained such a certificate or, having been convicted, shall have paid the whole amount adjudged to be paid or shall have suffered the imprisonment or imprisonment with hard labour, in every case he shall be released from further or other proceedings, civil or criminal for the same cause."

¹⁴¹ In the event that criminal proceedings are pursued by the Crown Prosecution Service, the Crown will be under a duty to disclose evidence which may assist with the defence, even where this evidence does not form part of the prosecution case.

¹⁴² Stephen Livingstone, Tim Owen QC, Alison Macdonald, *Prison Law*, 3rd Edition, 2003.

¹⁴³ Although note that the housing of immigration detainees by the Prison Service is being phased out: discussed above, at footnote 47.

victim was detained in a private detention facility, equivalent documents, where appropriate, should be sought.¹⁴⁴

(i) Prisoner's personal record (F2050) - This is a loose-leaf file which is supposed to be a comprehensive record of a prisoner's time in prison. The personal record should include the following documents, some or all of which may be helpful, depending upon the circumstances of the case: A History Sheet - this should record each transfer as well as any applications/ petitions and governors' observations from prison to prison; a Medical Record - this should record the medical officer's view of the prisoner's state of health and work classification on each reception; and a Medical History sheet - this should record the results of any reception medical examination. In addition, the detainee's disciplinary record should include security information, including information on escapes or attempted escapes, which may indicate a need for restraint in certain circumstances. In addition, the record should detail suicide attempts or concerns, together with any special medical problems.

(ii) Continuous Inmate Medical Record (IMR) - The IMR should record all entries by prison doctors relevant to a detainee's medical history in prison. Hospital case papers/Kardex- If a detainee is housed in a prison hospital, a separate set of records will normally be kept. Any treatment and drugs prescribed will be recorded on special Treatment Cards.

(iii) Reception Assessment Form (Form F2169) - Each detainee held in a prison should be screened for suicide risks at reception and at each transfer by a hospital officer and a doctor. If a member of staff is concerned at any time that a prisoner is or may be suicidal, a Self Harm At Risk Form (F2052SH) should be completed to ensure an assessment of risk by the medical officer.

(iv) Use of Force Reports - Whenever a member of staff uses force against a prisoner, he or she should give a brief factual report explaining why force was necessary.

(v) Report of Injury to an Inmate (F213) - This form should be filled in by the medical officer whenever it is believed that a prisoner has been injured.

(vi) Register of Non-Medical Restraints (F2323) - This is the form used whenever a prisoner is placed in any form of mechanical restraint or is ordered to be located in a special cell under Rule 48 of the Prison Rules. The reason for the use of the restraint must be recorded and approved by the medical officer. The document should also

¹⁴⁴ In particular, the Operating Standards on the use of force require any detention facility to operate a system for recording all instances where force has been used, and as a result, disclosure of those written records should be sought. In addition, under the Detention Centre Rules 2001, rules relating to an individual's rights and responsibilities in the detention centre, known as the "compact", are to be distributed to each detainee on their admission. A copy of these rules should also be made available to any detainee upon their request (Rule 4). In addition, a personal record of each detainee is kept (Rule 5), which will include information relating to the individual's physical characteristics. Medical practitioners at the detention facility will hold medical records relating to the detainee (Rule 33(8)) and these would presumably include records of the medical examination given on the detainee's admission to the facility, pursuant to Rule 34(1). The Immigration Service Operation Enforcement Manual gives some further information about procedures to be followed during a removal attempt and the appropriate forms which accompany each stage - see in particular Chapter 9.

indicate where the restraint took place, together with information as to when the restraint commenced and ended.

(vii) The Control and Restraint Training Manual – This manual provides guidance on the use of control and restraint techniques in prisons. It is not in the public domain, but should be made available on discovery.

16.3 Evidence obtainable by representative's investigations: witness statements

Where statements are to be taken for a civil action, naturally it is beneficial if they are taken as soon as possible after the incident that is the subject of complaint so that recall will be as accurate and detailed as possible. The following steps should be considered by the Complainant and their legal representatives:

- Write a clear, chronological account of the relevant incident or sequence of events based on the account given by the Complainant.
- The statement should be signed and dated. Ask a member of staff of the detention facility to countersign if possible.
- The statement must record as much detail as possible, indicating who did what, what was said by all parties involved, who might have witnessed the assault, and giving details, for example, of where blows landed, whether they were kicks or punches etc., how they were delivered.
- The Complainant should state how they perceived the nature of the incident, the effect it had on them and what if any fears it caused them to have.
- Whether the ill treatment alleged was inflicted in a manner which might be considered embarrassing or humiliating for the Complainant – e.g., was it inflicted publicly?
- If handcuffs were used, was the Complainant told why they were being used? How long were they used for and how were they used?
- Was any abusive behaviour or language used? If so, what was done or said?
- Medical evidence should be obtained as soon as possible after the date of the alleged assault, recording the nature of the injuries noted on examination and an assessment of the consistency of the injuries sustained with the victim's account as to how those injuries were sustained.
- Where the identity of the assailant is not known, the victim should be asked to give as detailed a description of them as possible. The same approach should be taken to establish the identity of any potential witnesses. Where any are successfully identified, written statements

should be obtained from them, ideally while memories are fresh. These should be signed, dated and countersigned, where possible by a member of staff.

- Where abuse or ill treatment has occurred over a period of time (for example, racist language), it would be sensible for the compliant to log such incidents in a diary if practicable.

17 Conclusion

The provisions governing the use of force differ as between conventional prison facilities¹⁴⁵ and immigration detention centres, with the former providing greater protection to inmates against the use of excessive force by staff, despite the fact that the vast majority of individuals detained in the latter have been neither charged with, nor convicted of, any criminal offence.

It is clearly an imperative, if impunity is to be avoided, that legal redress is readily available to victims of assault in these circumstances. While the decision as to which course to follow will be a tactical one, depending in part on the facts of the case and the nature of the evidence available, it is vital that any evidence be collected as soon as possible after the alleged incident.

¹⁴⁵ Albeit where immigration detainees are held on remand, rather than convicted wings in prisons.

Section IV

Conclusions and Recommendations

18 Conclusions

The medical data presented in this report indicate that the degree of force used during the process of removing an unsuccessful asylum seeker from the UK may be excessive. The injuries documented in the course of this research suggest that in some cases the force employed cannot have resulted from either the use or misuse of any recognised or established control or restraint technique. Other injuries indicate that restraint techniques, including the use of handcuffs, are being misused, while accounts given during interview suggest that force has been gratuitously employed, including in cases where the removal attempt has already been aborted. In addition, the research reveals that the use of force may be accompanied by verbal abuse, including abuse of a racist nature. The cumulative nature of the information obtained, and the patterns of abuse subsequently identified, indicate that far from constituting an isolated incident, a practice of abuse exists.

There are clear legal implications for the State, the security company concerned and individual perpetrators as a result of the disproportionate use of force in these circumstances. The excessive or gratuitous use of force against those detained, either by the State or by private groups carrying out a State detention function, clearly raises issues of State responsibility under Article 3 ECHR, which are exacerbated by the very fact of detention and the vulnerable position of the detainee. In addition, abuse will constitute an assault, leaving perpetrators subject to both criminal prosecution and civil suit.

The findings of this study are extremely worrying, and it is vital that steps be taken to eradicate the practices identified. In addition to the moral imperative to act, the positive obligations owed by the State under the ECHR impose a clear legal obligation to do so, requiring it to investigate any allegation of abuse, and ensure that any perpetrator is properly tried. Where evidence reveals, as it does in this case, the existence of a *practice* of inhuman treatment, then in addition to instituting meaningful investigative and judicial proceedings against the accused perpetrator, a State is required to take effective measures aimed at the eradication of the practice.

With this in mind, the Medical Foundation makes the following recommendations. These recommendations arise directly from the results of this study, and are limited in scope to the various areas of expertise of the individual authors. The list is not intended to be exhaustive, although it is hoped that the adoption of the recommendations might go some considerable way to the eradication of the practices identified.

19 Recommendations

(i) Automatic medical examination following failed removal

The medical evidence presented in this report indicates that some injuries, such as nerve injuries occasioned by the inappropriate use of handcuffs, might not be immediately apparent to those involved in the removal attempt, yet require clinical

investigation. As a result, where an attempt to remove an individual from the UK has failed, it is essential that a medical examination of the individual take place, unless the individual concerned refuses such an examination. Examination should include proper documentation of any injuries in the medical notes. Training may be required in order to enable health staff to comply with these obligations.

Rule 34(1) of the Detention Centre Rules requires that:

“Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner...) within 24 hours of his admission to the detention centre.”¹⁴⁶

Where a removal attempt has been abandoned and the individual concerned is returned to a detention centre, their return should be deemed a formal admission for the purpose of Rule 34(1).

Where individuals are held elsewhere following a failed removal attempt – for example, in a police cell – a medical examination must take place there.

Appropriate medical follow-up of injuries sustained (such as nerve damage) should be made available.

Any automatic examination would probably also highlight any other injuries occasioned by the excessive use of force, would serve to deter future abuses, and thereby so go some way to eradicating the practice of assault.

(ii) Reporting malpractice and the presence of injuries

Following automatic medical examination, healthcare staff should report cases where the examination has revealed findings indicating the use of inappropriate or disproportionate force.¹⁴⁷ Again, additional training may be required in order to enable staff to fulfil this function.

In addition, it is noted that in most instances detailed in this report, detainees allege the involvement of more than one escort officer in their abuse (usually three). Escort officers should be both encouraged and contractually obliged to oppose and report, without fear of recrimination, the use of unlawful or disproportionate force by colleagues.

(iii) Review of force used

Detention Centre Rule 45(6) requires custody officers to treat detainees “such as to encourage their self-respect, a sense of personal responsibility and tolerance towards others”. Clearly, the use of gratuitous force or abusive language is inconsistent with

¹⁴⁶ This accords with the international Standard Minimum Rules for the Treatment of Prisoners, article 24 of which provides: “The medical officer shall see and examine every prisoner as soon as possible after his admission.” The rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, and subsequently approved by the UN Economic and Social Council, resolution 663 C (XXIV), as amended.

¹⁴⁷ This is provided for, in the case of detention facilities, by Detention Centre Rule 45(2).

this provision. In addition, the Operating Standard on the Use of Force indicates that “Force will only be used as a measure of last resort”.¹⁴⁸

Detention Centre Rule 41(3) requires that any use of force must be logged and reported to the Secretary of State. Where force has been used against an immigration detainee held in a prison, a “Use of Force” form should always be completed. For this purpose, the use of handcuffs should be considered a use of force.

It is essential, if the excessive or gratuitous use of force is to be deterred, that all reported instances of force are reviewed by a senior officer in the first instance in order to assess the proportionality of the force employed in any given case. To this end it is vital that detailed logging of incidents take place, which includes information of the full circumstances surrounding the use of force, the nature and extent of force used, and why it was deemed necessary in the circumstances.

A review of logged incidents should also encompass medical evidence pursuant to an automatic medical examination (discussed above).

(iv) Safety of force used and restraint techniques

The medical data collected for the purpose of this study suggest that in some cases force was used which poses an unacceptably high degree of risk to the detainee. This would include the application of pressure to the jaw, throat and neck, all of which are potentially dangerous.

The Medical Foundation recommends a thorough review of the use of these techniques. Their use should be cautious, very carefully considered, and used only in extreme cases of necessity, where no other recognised restraint technique can be employed in the self-defence of the officer concerned. The use of such techniques should be automatically logged in accordance with Detention Centre Rule 41(3) or in accordance with Prison Rules where appropriate, and should include a detailed account of the circumstances leading to their use. This should then be reviewed by a senior official in order to ensure that their application was absolutely necessary in the circumstances.

(v) Training in use of handcuffs

Medical findings reveal a worrying frequency of handcuff misuse, with resulting nerve damage in a third of the handcuffed detainees. It is essential that escort officers and others involved in the removal and transportation of individuals within the asylum detention process receive full and adequate training in the proper use of handcuffs. Such training should encompass the risk and nature of injuries associated with handcuff use, and identify methods of minimising this risk, such as checking tightness and responding promptly to complaints of pain and tightness. In addition, training should clearly indicate that any force deliberately applied to the wrists whilst handcuffed, or force deliberately applied via the handcuffs, cannot be considered safe

¹⁴⁸ Para 2. The report *Safer Restraint*, produced by the Police Complaints Authority, April 2002, also at p. 15 that “Control and restraint is well established as the prison service’s most effective *last option* [emphasis added]”.

or acceptable, and that the continued use of force against a detainee who is already restrained is likely to amount to excessive force.

(vi) Race awareness training

All of those subjected to the use of force in this study were black. This, together with the worrying incidents of verbal abuse reported, including the use of racial slurs, indicate a need for the introduction or reinforcement of race awareness training for staff dealing with detainees, and the full investigation of complaints relating to allegations of racial abuse.¹⁴⁹ Notably, while the Detention Centre Rules make reference to the need to respect the dignity of the detainee and to deal sensitively with issues of cultural diversity,¹⁵⁰ they are silent on the specific issue of racial abuse. Given the inevitable racial mix of individuals held in such centres, this is both surprising and of concern.

Training must stress the unacceptability of racial abuse, and should incorporate an overview of the laws prohibiting racial discrimination. Awareness of racism as an aggravating factor in an assault should be also be raised.

Rigorous investigation of allegations of racial abuse must take place, and those found guilty of using such language should suitably sanctioned.

(vii) Abuse occurring within vehicles

The research reveals a practice of physical abuse, frequently following a failed removal attempt, where an assault on a detainee is concealed inside a vehicle, and where there are no independent witnesses. In order that this practice cease, any vehicles used by security personnel to transport detained asylum seekers, irrespective of their asylum status, should carry some form of CCTV or equivalent monitoring.

Similar surveillance is appropriate in departure areas within the airport used for the assembly of returnees.

(viii) Non-removal while action is taken and evidence gathered

Individuals who claim to have been assaulted, either during an attempt to remove them from the country, or once that attempt has failed, have a right to pursue a legal action in respect of the harm sustained, and to make a formal complaint of the assault to the police or other bodies responsible for complaints channelled through the internal complaints mechanism of a detention facility in the UK. It is essential to the realisation of that right, as well as to the eradication of the practice of assaults, that individuals are able to remain in the UK to pursue any action or to participate in criminal proceedings. The same principle applies to any others who witness an assault.

¹⁴⁹ The institution of training in detention centres is currently the responsibility of the Race Relations Liaison Officer, pursuant to the Operating Standard on Race Relations. The standard does not, however, indicate how those found responsible for racial abuse will be sanctioned.

¹⁵⁰ Rule 3.

(ix) Funding to allow pursuit of legal remedies

Where an individual has been subjected to the use of excessive force it is vital for the eradication of the practice that perpetrators should not be allowed to act with impunity, and that those who have been abused are able to bring a legal action in respect of the abuse suffered. In many of the cases in the study, the individual was financially unable to pursue any legal action: they are detained, are unable to work in any event, and have insufficient private resources. It is therefore both essential to the individual and in the public interest that public funding for these actions be made available to individuals seeking a course of legal redress.

Bibliography

Books and Reports

Archbold, *Criminal Pleading, Evidence and Practice*, 2004.
Blackstones Criminal Practice, 2004.

Richard Clayton QC and Hugh Tomlinson QC, with Edwin Buckett and Andrew Davies, *Civil Actions Against the Police*, 3rd Edition.

Hansard.

Stephen Livingstone, Tim Owen QC, Alison Macdonald, *Prison Law*, 3rd Edition, 2003.

Medical Foundation for the Care of Victims of Torture *Rape as a Method of Torture*, May 2004.

Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, Second Edition, Oxford University Press, 1999.

Jessica Simor and Ben Emmerson QC *Human Rights Practice*, Sweet and Maxwell.

Keir Starmer *European Human Rights Practice: The Human Rights Act 1998 and the European Convention on Human Rights*, Legal Action Group, 1999.

Police Complaints Authority, *Safer Restraint*, April 2002.

Woolf Report, *Prison Disturbances*: April 1990, Cm1456, 1991.

Articles and Journals

Chariot et al. *Focal Neurological Complications of Handcuff Application*. J Forensic Sci 2001;46(5):1124-5.

Haddad FS, Goddard NJ, Kanvinde RN, Burke F. *Complaints of pain after use of handcuffs should not be dismissed*. BMJ Jan 1999;318:55.

Stone DA, Lauren R. *Handcuff Neuropathies*. Neurology. 1991 Jan;41(1):145-7.

Levin RA, Felsenthal G. *Handcuff Neuropathy: two unusual cases*. Arch Phys Med Rehabil. 1984 Jan;65(1):41-43.

Grant AC, Cook AA. *A prospective study of handcuff neuropathies*. Muscle and Nerve 2000;23(6):933-938.

Paterson B et al. *Deaths associated with restraint use in health and social care in the UK*. Journal of Psychiatric and Mental Health Nursing 2003,10:3-15.

Pedal I et al. *Fatal incidences during arrest of highly agitated persons*. Arch Kriminol 1999;203(1-2):1-9.

Pollenan MS et al. *Unexpected death related to restraint for excited delirium: a retrospective study of deaths in police custody and in the community*. CMAJ 1998;158(12):1603-7.

Sir Nigel Rodley, *The Definition(s) of Torture in International Law*, Current Legal Problems, 2002, Vol. 55, p.467.

Legal Instruments

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Vienna Convention on the Law of Treaties (1969)

Human Rights Act (1998)

Crime and Disorder Act (1998)

Magistrates Court Act (1980)

Offences Against the Person Act (1861)

Race Relations Act (1976)

Other Instruments

UN Manual on Effective Investigation and Documentation of Torture and Other Cruel and Inhuman Degrading Treatment or Punishment (The Istanbul Protocol), UN Office for the High Commissioner for Human Rights, Geneva and New York, 2001.

Doctors with Dual Obligations, British Medical Association, 1995.

CPT Standards, Strasbourg, Council of Europe, 2002:31(CPT/Inf/E(2002)1-Rev.2004).

Prison Services Order 1600.

Detention Centre Rules 2001, SI 2001, No. 238.

Guidelines on the Use of Handcuffs on Immigration Detainees Under Escort, Detention Services Order 1/2002.

Detention Centre Operating Standard: *The Use of Force*.

Detention Centre Operating Standard: *Race Relations*.

Prison Rules, SI 1999, No. 728.

Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955.

Cases

UK

Chan-Fook, [1994] 1 WLR 689
Fagan v. Metropolitan Police Commissioner, [1969] 1 Q.B. 439
Hancock v. Somes (1839) 1 E.& E
Lawrence, (1983) 5 Cr App R (S) 2002
R v. Ireland, [1998] AC 147
R v. Williams (G), 78 Cr App R 276
Savage, [1992] 1 AC 699
Thompson v. Commissioner of Police, [1998] Q.B. 498
Wilson v. Pringle, [1987] Q.B. 237

ECHR

A v. UK (1998) 27 EHRR 611
Aksoy v. Turkey, (1997) 23 EHRR 553
Artico v. Italy, (1980) 3 EHRR 1
Aydin v. Turkey, (1998) 25 EHRR 251
Chahal v. UK, (1997) 23 EHRR 413
Costello-Roberts v. UK, (1995) 19 EHRR 112
Dikme v. Turkey, no. 20869/92, 11th July 2000
Greek case, (1969) 12 YB 1
Golder v. UK (1979 – 80) 1 EHRR 524
Ireland v. UK, 19 YB 512, (1978) 2 EHRR 25
M-AV v. France, (21788/93) 79 BDR 54
Osman v. UK, (2000) 29 EHRR 245
Raninen v. Finland, (1997) 26 EHRR 563
Rehbock v. Slovenia, App. No. 9520/81, 34 DR 107
Ribitsch v. Austria, (1996) 21 EHRR 573
Selmouni v. France (1998) EHRLR 510
Tomasi v. France, (1992) 15 EHRR 1
Tyrer v. UK, (1978) 2 EHRR 1
Van der Musselle v. Belgium, (1984) 6 EHRR 163

Miscellaneous Documents

Change of Management at Immigration Removal Centres, Home Office Press Release, 218/2004, 29th June 2004.

Immigration Service Operation Enforcement Manual.

Appendix A

Referral Form used for this project

REFERRAL to Medical Foundation for the Care of Victims of Torture FOR
MEDICAL EXAMINATION FOLLOWING ALLEGED ASSAULT BY STAFF

Criteria:

- Assault within the last 5 days (we need to have a doctor there *within* 5 days, so refer asap please)
- Assault occurred during attempted removal
- Allegation that the assault probably involved more than reasonable force

Referring agency(Phone.....)

Name of detainee:

MF reference (if relevant):

Nationality:

Date of birth:HO Ref:.....

Legal representative: (Phone.....)

(Fax.....)

Currently detained at:

Asylum status:

Date of incident:

Place of incident:

Staff involved in incident:

.....

Description of restraint and force used (as much detail as possible):

.....

.....

.....

.....

.....
.....

Detainee's description of injuries sustained:

.....
.....
.....
.....
.....
.....

Medical attention received afterwards? (If so, please include copy of medical notes where possible)

.....
.....
.....
.....

To be completed by the detainee:

- I give permission for the Medical Foundation to contact the medical centre or NHS services to obtain relevant medical records from them.
- I request that the Medical Foundation consider conducting a medical examination.

Signed:

Print name:

Date:

Appendix B

Witness Statement of Jessica Hurd

The names of individual custody officers involved in this incident have been omitted for the purpose of this report.

Statement of Evidence

1. I, Jessica Hurd of 38 Gayton House, Chiltern Road, Bow, London E3 4BX, was on a flight TE453 from Gatwick to Vilnius on 29 April 2004 at 2.00pm. I am a press photographer.
2. I was at the Lithuania flight boarding gate. A delay was announced. This took five or ten minutes. The passengers were then allowed to board. As they got on the plane, an Immigration Official made an announcement to us that there were 3 women and 3 children being deported on the plane, they were being very loud but we were told they would 'calm down' when the flight took off. I think this was the official I later knew to be called [A] (paragraph. 15). I was standing near the back of the boarding queue.
3. When I got on the plane (a small aircraft), I was to be seated towards the front on the right hand side.
4. I got to my seat, some women were screaming at the back of the plane. They were obviously in considerable distress. I put my bag in the overhead compartment and went to the back of the aircraft to see what was going on. I did this because I was concerned. They appeared to be writhing in pain and shouting. It was too distressing not to intervene.
5. I walked to the back of the plane. There was a woman blocking the gangway, I assumed she was an Immigration Official. On the right hand side (looking towards the plane's tail) was a young girl aged about 12 or 14 years, seated and flanked by two security officers. The security officers were dressed in Navy Blue. They were not wearing any identifying logo. As far as I could see, the officers were all men apart from one female Immigration Officer.
6. The official on the girl's right appeared to have his hand on her neck. I am not sure if she was handcuffed at that point, though the woman behind her definitely was. The girl had tears streaming down her face and was obviously in a lot of distress.
7. On the row behind her I looked more closely at the woman behind. She was an older woman, probably in her mid-thirties, also flanked by two security people. She had handcuffs on and was only wearing her underwear: bra and pants. These were the seats right at the back of the plane. I said, "She has no clothes on!"

8. On the left side, at the back row, there was another woman flanked by two security people, but I could not see her so clearly. I peered over the shoulder of a standing official to see her. In front of her, there were three children (differing ages, about 10 years and under) sitting on the seats in front, looking very scared and shaken. The youngest looked about six years old.
9. I asked the immigration woman standing up, what was happening. She responded that it was no concern of mine. I said that the women appear to be in some pain. There was some conversation between us concerning the treatment of the women. At this point I said (pointing to the girl on the right hand side) that she was not a woman, she was a girl. I said, "She's in a neck hold – this is outrageous, you can't treat people like this". They seemed at this point to be twisting the arm of the woman behind, who was throwing her head around. The IO told me to sit down and said I was "making them worse".
10. I said "I think you will find the behaviour of those security men is making them worse." I said something to the effect that I was making a complaint about the treatment of these people being deported and it was my right to do so. I said it was an abuse of their human rights. I said I would not sit down until something was done about this situation. The female Immigration Officer went away.
11. I just stood there. One American passenger was shouting at me as well – telling the Immigration people to get me off the plane. I replied to him that we live in a democracy, and have a right to complain when we see abuses like this. By now, some other passengers on the right hand side had turned around to look. They had started doing this during the conversation, particularly after I had said about the woman having hardly any clothes on.
12. The female Immigration Officer returned and I asked her what she was going to do about this. She said, "Some people want you removed." I said "Is that right? Would you like me to go up and down the cabin asking who they would like removed, the women or me?" She said "Nononononono". I said I was not prepared to travel on this flight while these women were in such distress.
13. The female Immigration Officer went off briefly and returned. I asked again what she would do and she said she would take them off the plane, and she asked me to sit down.
14. I asked her to confirm this, which she did and I went back to my seat. The whole flight had to see the women being dragged back through the plane, one with only her bra and pants on. She was hunched over trying to preserve her modesty while she walked down the plane. She was still in handcuffs and being pulled from the front and pushed from behind.
15. After they left, an official came up to me and asked me what my name was. I asked why he needed to know. He said I had been "obstructing Government

business” and he needed to make a report. I asked him for his name, which he gave – [B]. Another came up and said he was called [A]. I then gave them my name. [A] already had the seating list so I knew he had my name. I think he was just trying to intimidate me.

Signed _____

Date _____

Signed before:

Julian Fountain
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