

Neutral Citation Number: [2008] EWCA Civ 1160

Case No: C1/2008/1325

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE COLLINS
CO23772008

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22/10/2008

Before :
THE RIGHT HONOURABLE LORD JUSTICE WARD
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE JACKSON

Between :

	THE QUEEN ON THE APPLICATION OF GRAEME REYNOLDS	<u>Respondent</u>
	- and - INDEPENDENT POLICE COMPLAINTS COMMISSION -and-	<u>Appellant</u>
	CHIEF CONSTABLE OF SUSSEX POLICE	<u>Interested Party</u>

Mr Richard Clayton QC & Mr Ben Brandon (instructed by **IPCC**) for the **Appellant**
Mr Sam Grodzinski (instructed by **Hickman & Rose**) for the **Respondent**
Mr Richard Perks (instructed by **Litigation & Advocacy Section Legal Services**) for the **Interested Party**

Hearing dates : 6th & 7th October 2008

Judgment Lord Justice Longmore:

1. This appeal is, we are told, the first case in which this court has been called to consider the powers and duties of the Independent Police Complaints Commission (“the IPCC”) which was set up in 2002 by the Police Reform Act of that year, as a successor to the old Police Complaints Authority. The IPCC says it is anxious to receive as much guidance from the court as possible, but such guidance as the court can give must necessarily relate to the facts of this case.

The Facts

2. In the early hours of the morning of 2nd March 2008, Mr Garry Reynolds left a party which he had been attending in Brighton. He hailed a taxi being driven by Mr Ansell in Eastern Road and asked to be taken to a place called Southwick Square. When he arrived he did not appear to know where he wanted to get out. Mr Ansell thought his fare may have been somewhat affected by drugs or drink. Sensing trouble he decided to drive back to the centre of Brighton to seek police assistance. He saw some police officers at about 2.35 a.m. in West Street and said that his fare was refusing to pay. The police told him to get out of his taxi and Mr Reynolds became abusive. The officers arrested Mr Reynolds for being drunk and disorderly and called for assistance in detaining him. Other officers arrived and a police sergeant gave the order that Mr Reynolds should be taken to the ground. As this was done, there was the sound of a thud or a crack. It is suggested that Mr Reynolds may have hit his head on the ground at that point. He continued swearing at and being abusive to the police officers. He was restrained by VIPER straps and taken to the police station. According to police records, there was no apparent need for medical attention. He continued to be abusive until 4.30 a.m. At 5.30 a.m. he was seen to be sitting on a bench in the cell and awake. He then slept until about 9.00 a.m. when he refused a meal and drink. He went back to sleep. The police tried to wake him up at about 11 a.m. but could not do so. They therefore summoned an ambulance. Mr Reynolds was in a coma for a long time thereafter. We were told by counsel that, although he has now come out of that coma, he has severe paralysis and significant cognitive impairment.

3. Once it was clear that Mr Reynolds was in a coma and likely to have suffered serious injury, the police informed the IPCC that an incident of serious injury had occurred and a protocol for the necessary ensuing investigation was agreed. Initially it was arranged that the police would investigate events occurring between 12 p.m. on 1st March and 2.35 a.m. on 2nd March, while the IPCC would investigate events following police contact at 2.35 a.m. in West Street. The police investigation was given the title "Operation Flansham".

4. Mr Reynolds was in no position to consider whether he could require any investigation into his own injuries but his family were, very naturally, deeply concerned at what had happened. They initially sought to prevent the Sussex police force from doing their own investigation into what had happened; their concern had increased when they discovered that the police had on 2nd March in the evening taken a statement from the taxi-driver and that he had said in that statement that one of Mr Reynolds' pupils, at the time he was in the taxi, was white or that he had a "white eye". When the taxi-driver was re-interviewed on 8th March in the presence of Mr Tom Milsom of the IPCC he said (page 8) that he could only see the white of Mr Reynolds' right eye. If true, that might indicate to a medically qualified person that Mr Reynolds had suffered an injury (or potential

injury) to his brain before he got into the taxi. That might in turn make it less likely that his coma and subsequent brain damage were caused by the police. Mr Reynolds' brother (Mr Graeme Reynolds to whom I shall as necessary refer as "the claimant") initiated judicial review proceedings seeking to restrain the Sussex police from investigating what happened to Mr Garry Reynolds before he was arrested and detained by the police and seeking an order that the Sussex police transfer the conduct of the investigation to another police force altogether. Irwin J refused to make any order on a without notice application save as to the copying and supply by the police to the IPCC of records, statements and evidence. The IPCC were named as an interested party in the proceedings and were represented on the return date of the application before Cranston J. On 13th March 2008 that learned judge ordered that the Sussex police to use their best endeavours to secure an independent investigation and report to the court on 19th March what steps they had taken in the light of his order.

5. On 17th March Mr Graham Cox of the Sussex police wrote to Mr Hardwick, the Chair of the IPCC, requesting the IPCC to investigate independently what had happened before 2.35 a.m. on 2nd March or, if that was unacceptable, to "supervise or manage" the police's own investigation. That elicited the following reply of 19th March from one of IPCC's Commissioners, Ms Nicola Williams:-

"The functions of the IPCC are clearly set out in section 10 of the Police Reform Act 2002. The investigation of criminal matters involving members of the public falls under the direction and control of the Chief Officer [of police]. The IPCC does not have jurisdiction to conduct such investigations as I am sure that you are aware

Not wishing to be repetitious our powers in relation to supervised investigations only extend to investigations into police complaints or police conduct. Operation Flansham does not involve an inquiry into police officers."

6. This caused the claimant to re-think the ambit of his judicial review claim and by the time the case came before Collins J on 16th May 2008 the thrust of his application was against the IPCC rather than the Sussex police and he sought declaratory relief (1) that the IPCC did indeed have jurisdiction to investigate pre 2.35 a.m. events at any rate to the extent that Mr Reynolds' injury might have been caused or contributed to by such events and (2) that they had a duty to conduct such an investigation.

7. Collins J held that it was necessary for the IPCC to investigate how any death or serious injury has been caused, and that the IPCC had power to consider events which may have occurred before 2.35 a.m. when the police first came on the scene. He came to that

conclusion as a matter of domestic law on the true interpretation of the terms of the Police Reform Act 2002, which set up the IPCC. The judge held, further, that the same conclusion was, in any event, required by reason of Articles 2 and 3 of the European Convention on Human Rights because it had been effectively held both by the European Court and the House of Lords that those articles required an independent inquiry to be held into any death or serious injury occurring to a person while in state custody. The judge added as an obiter comment that there would be no breach of independence if the IPCC used the Professional Standards Department (“PSD”) of the local police branch to assist them in their investigation, since the officers of that department were themselves independent of those who took Mr Reynolds into custody.

8. In the event the judge made declarations in the following terms in paragraph 2 of his order

“(i) The second defendant erred in law in concluding that it had no power to investigate the events prior to Garry Reynolds’ first contact with the first defendant’s officers at 2.35 a.m. on 2nd March 2008, and in particular to investigate whether some event prior to that time might have caused or contributed to his medical condition thereafter.

(ii) Such an investigation is necessary in order to meet the requirements of Articles 2 and/or 3 ECHR.”

Counsel informed us that paragraph (ii) of the declaration was considered to be necessary because it was important to make clear that the IPCC did not merely have the power to investigate any pre – 2.35 a.m. cause but also had the duty to do so.

9. The IPCC now appeal. They submit

- a) that the judge was wrong to interpret the terms of the Police Reform Act as giving the IPCC the power to investigate matters occurring before the police became involved; investigating whether Mr Reynolds had suffered some injury while at the party or between leaving the party and entering the taxi would mean investigating whether a crime had been committed; that was for the police to investigate not for the IPCC;
- b) that the Human Rights Convention does not require an “independent” inquiry into any death or serious injury but only when it is plausibly alleged that potentially lethal force was used by agents of the state; if such force was used by a third party, it is only necessary to have an “effective official inquiry”; it is for the police to conduct that inquiry not the IPCC; if, however, it is for the IPCC to conduct it, it need not be independent;

- c) if there is a necessity for an independent inquiry, that requirement cannot be met by using the PSD of the local police force and the judge's obiter remarks were wrong and should not be followed.

The 2002 Act

10. In the light of these submissions it is necessary to consider the terms of the Police Reform Act 2002. Section 9 sets up the IPCC. Section 10 is the critical section and is headed "General functions of the Commission". The relevant sub-sections provide:-

"(1) The functions of the Commission shall be –

- (a) to secure the maintenance by the Commission itself, and by police authorities and chief officers, of suitable arrangements with respect to the matters mentioned in subsection (2);
- (b) to keep under review all arrangements maintained with respect to those matters;
- (c) to secure that arrangements maintained with respect to those matters comply with the following provision of this part, are efficient and effective and contain and manifest an appropriate degree of independence

(2) Those matters are –

- (a) The handling of complaints made about the conduct of persons serving with the police;
- (b) The recording of matters from which it appears that there may have been conduct by such persons which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings;
- (ba) the recording of matters from which it appears that a person has died or suffered serious injury during, or following, contact with a person serving with the police;
- (c) the manner in which any such complaints or any such

matters as are mentioned in paragraph (b) or (ba) are investigated or otherwise handled and dealt with.”

Sub-sub-section (ba) was added to the PRA by section 160 of the Serious Organised Crime Act 2005. Section 10 continues:-

“(4) It shall be the duty of the Commission –

- (a) to exercise the powers and perform the duties conferred on it by the following provisions of this Part in the manner that it considers best calculated for the purpose of securing the proper carrying out of its functions under subsections (1) and (3); and
- (b) to secure that arrangements exist which are conducive to, and facilitate, the reporting of misconduct by persons in relation to whose conduct the Commission has functions.

(5) It shall also be the duty of the Commission –

- (a) to enter into arrangements with the chief inspector of constabulary for the purpose of securing co-operation, in the carrying out of their respective functions between the Commission and the inspectors of constabulary; and
- (b) to provide those inspectors with all such assistance and co-operation as may be required by those arrangements, or as otherwise appears to the Commission to be appropriate, for facilitating the carrying out by those inspectors of their functions.

(6) Subject to the other provisions of this Part, the Commission may do anything which appears to it to be calculated to facilitate, or is incidental or conducive to, carrying out of its functions.”

11. The scope of a death or serious injury (“DSI”) matter is defined in sub-sections 2A – 2D of section 12 but since there is no dispute that a death or serious injury matter has arisen within that definition those sub-sections need not be set out. Section 13 then provides for complaints and DSI matters to be handled in accordance with Schedule 3 of the Act.
12. Part 2A of schedule 3 relates to the handling of DSI matters. Paragraphs 14A and 14B

impose a duty on the police to record DSI matters and preserve relevant evidence. Paragraph 14C requires the police to refer DSI matters to the IPCC and paragraph 14 D provides:-

“(1) It shall be the duty of the Commission, in the case of every DSI matter referred to it by a police authority or a chief officer, to determine whether or not it is necessary for the matter to be investigated.

(2) Where the Commission determines under this paragraph that it is not necessary for a DSI matter to be investigated, it may if it thinks fit refer the matter back to the appropriate authority to be dealt with by that authority in such manner (if any) as that authority may determine.”

In the present case the IPCC did determine that it was necessary to investigate the matter and did not refer the matter back to the police. We have not been shown any written record of that decision but the IPCC’s response to the judicial review claim so states.

13. Paragraph 15 is headed “Power of the Commission to determine the form of the investigation” and provides:-

“(1) This paragraph applies where –

- (a) a complaint, recordable conduct matter or DSI matter is referred to the Commission; and
- (b) the Commission determines that it is necessary for the complaint or matter to be investigated.

(2) It shall be the duty of the Commission to determine the form which the investigation should take.

(3) In making a determination under sub-paragraph (2) the Commission shall have regard to the following factors –

- (a) the seriousness of the case; and
- (b) the public interest.

(4) The only forms which the investigation may take in accordance with a

determination made under this paragraph are –

- (a) an investigation by the appropriate authority on its own behalf;
- (b) an investigation by that authority under the supervision of the Commission;
- (c) an investigation by that authority under the management of the Commission;
- (d) an investigation by the Commission.”

In the present case the IPCC rejected options (a) (b) and (c) and decided that the investigation should be by the Commission itself. It is, therefore, unnecessary to delve into the niceties of the difference between a supervised investigation and a managed investigation but the essence of it is that in a managed investigation the IPCC directs and controls the investigation from the beginning, whereas a supervised investigation remains under the direction and control of the police, although the IPCC can, pursuant to its supervision powers, require that various actions be taken.

14. Paragraph 19 of Schedule 3 then provides that in relation to the IPCC’s own investigations, the IPCC is to designate both a member of their own staff to take charge and other members of their staff to assist him. It then provides for such members of staff to have the powers and privileges of a constable for the purposes of carrying out their investigation and all purposes connected with it.

Powers and duties of IPCC under the 2002 Act

15. Mr Clayton QC for the IPCC put forward a careful argument submitting that the functions of the Commission were confined to securing maintenance of suitable efficient and effective arrangements in respect only to the matters set out in 10(2) and those matters were (relevantly) only the handling of complaints, the recording of matters relating to death or serious injury during or following contact with the police and the manner in which such complaints or such death or injury were investigated or dealt with. It followed from this that there was no power to conduct a criminal investigation which was a matter for the police. As the submission proceeded, Mr Clayton became constrained to accept that since, on any view, sub-sections 10(2)(a) and (c) went beyond merely recording of matters but extended to the handling of complaints and the manner in which such complaints, or relevant death or serious injury, were investigated, the IPCC would have “to consider” any relevant evidence put before them in relation to such

complaint or death or serious injury but, he said, it would not be for the IPCC to test that evidence, let alone actively to search out such evidence.

16. I cannot accept these submissions. The fact is that the IPCC pursuant to section 10 and paragraph 14D of Schedule 3 has both a power and a duty to investigate both cases of death or serious injury in custody and cases in which a complaint is made about the police. In the present case there has been a serious injury which manifested itself while Mr Reynolds was in police custody; the claimant has, moreover, made a formal complaint to the IPCC about that matter. That being the case it is a relevant question whether the injury to Mr Reynolds was caused by the conduct of police officers. It is obviously possible that such injury was caused at the time of arrest and detention when Mr Reynolds' head hit the ground. It is also possible that it was caused at a time before Mr Reynolds came into contact with the police. It is not possible to determine whether the conduct of the police caused or contributed to Mr Reynolds' injury without, at least, considering any evidence there might be pointing to a competing cause. If that competing cause occurred prior to police contact, that cause must be considered just as much as if that competing cause was during police custody; otherwise the IPCC cannot determine whether the injury was caused or contributed to by the police which is the whole point of the investigation.
17. That does not mean that the IPCC has to conduct a criminal investigation into the potentially criminal activities of third parties. That, of course, is for the police. But, quite apart from the fact that any competing cause may not be a criminal act at all, the IPCC cannot, in my view, do its job unless it evaluates any evidence there may be in relation to a competing cause even if it has occurred before contact with the police. It is not sufficient for it merely "to consider" the evidence of that competing cause whatever that may mean. It must evaluate or test it.
18. It is more difficult to say whether the IPCC has a duty to initiate its own inquiries. It clearly has the power to do so, if it sees fit. But that is academic on the facts of this case since, we are told, no evidence of an incident involving a third party has emerged. If a witness had come forward, whether voluntarily or at the behest of the police, who said that Mr Reynolds had met with an injury before 2.35 a.m. on 2nd March, the IPCC would have to decide what to do in relation to such a witness. But that has not happened and it would be idle to speculate what, in that event, the IPCC might decide to do and whether whatever they did could be subject to challenge.
19. I reach these conclusions without reference to section 10(6) of the Act on which the judge to some extent relied. But that sub-section, on any view, provides another reason for the conclusion I have otherwise reached.

Does the Human Rights Act make any difference?

20. Articles 2 and 3 of the Convention set out the right to life and the right not to be subjected to torture or other degrading treatment. Convention jurisprudence has decided that if those rights are infringed, the state must have a proper and effective system of investigation into that infringement. In a case of death, an inquest will often satisfy that requirement. There is no equivalent of an inquest in the case of serious injury but, if the serious injury is (allegedly) suffered at the hands of agents of the state (such as the police), an inquiry will be necessary; in other circumstances a police investigation into the possibilities of a crime having been committed may well normally suffice. No doubt the addition of sub-sub-section (ba) relating to death and serious injury in sub-section 10(2) of the Police Reform Act was due largely to the existence of Articles 2 and 3 of the Convention.
21. Both the jurisprudence of European Court of Human Rights and the House of Lords have emphasised that any inquiry into death in custody must be an independent inquiry. In my judgment the same requirement of independence must apply to any inquiry into serious injury occurring while a person is in custody. It is only in this respect that it can be said that the Human Rights Act now adds anything to the provisions of the Police Reform Act. That is because paragraphs 15(2) and (4) of Schedule 3 of the Act give the IPCC both the power and the duty to determine the form of the investigation and some forms of investigation (e.g. those in sub-paragraph 4(a) and (b)) are less independent than others (e.g. those in (c) and (d)). In the case of death and serious injury in custody, the independence of the inquiry will be essential.
22. The judge cited both Jordan v United Kingdom (2003) 37 EHRR 52 (a case of a shooting by the security service in Northern Ireland) and Amin v United Kingdom [2004] AC. 653 (a killing of a prison inmate at Feltham by his racist cell-mate) in support of his conclusion in para. 27 that Amin in particular emphasised two important considerations:-

“first, that an investigation, where there is a death or serious injury for which the police may have been responsible, must be an independent inquiry; and secondly that there must be involvement of the family or the next-of-kin so that they themselves can be kept informed of the investigation and, no doubt, can make representations if they wish to do so as to any aspect of the investigation if they feel that matters need to be further investigated. Of course, the extent to which those representations would be acted on would be a matter for consideration by the IPCC in the circumstances of any individual case.”

I would indorse what the judge there said and cannot improve upon it.

23. Mr Clayton for the IPCC submitted that, if IPCC had the power and the duty to

investigate matters relating to the cause of Mr Reynolds' coma even though that meant investigating what may have happened before Mr Reynolds came into contact with the police, that aspect of their inquiry need not be independent since it would ex hypothesi be an inquiry into matters with which the police were not concerned. He relied for this purpose on decisions of the European Court of Human Rights, such as Menson v United Kingdom, 6th May 2003 Yasa v Turkey, 2nd September 1998 paras 24, 30 and 98-107 and Angelova v Bulgaria, 26th July 2007 paras 92-96, where death or serious injury had been inflicted by members of the public and the requirement of the European Court was that there be an "effective official inquiry" without the word "independent" being used. In the light of these authorities Mr Clayton submitted (a) that it was not for the IPCC to conduct any investigation into the conduct of members of the public and/or (b), if it was for the IPCC to do so, the investigation need not be independent of the police.

24. This submission confuses the duties of the police and the Commission. It is, as I have already said, for the police not the IPCC to conduct investigations into possible criminal conduct of members of the public. But it is for the Commission to investigate possible misconduct on the part of the police. That will often require the Commission to investigate whether death or serious injury was caused by the police or by someone (or something) else. That is an inquiry into causation. To the extent that a member of the public may have caused death or serious injury, that will tend to exonerate the police; if other causes of death or serious injury are never suggested or can be excluded, that may make it more likely that death or serious injury was caused or contributed to by acts or omissions of the police. Inquiry into causation is a single although (in this case) composite inquiry and it is idle to suggest that part of that inquiry must be independent of the police but part of it need not be. The fact that the IPCC's inquiry may overlap the police's own investigation into possible antecedent criminal conduct does not absolve the Commission from making its own independent investigation into how Mr Reynolds' coma came about. Such overlapping should not give rise to difficulty in practice. How the IPCC goes about their investigation will be a matter for them; but it will usually be possible for potential witnesses or assailants to be interviewed jointly by the police and a member of the Commission's staff, as in fact did happen in the present case when Mr Ansell, the taxi-driver, was interviewed and gave a statement for a second time on 8th March.
25. I would therefore reject Mr Clayton's submissions on this aspect of the case and affirm the judge's conclusion that the Commission have a power and a duty independently to investigate the cause of Mr Reynolds' coma even if that means they must investigate events which occurred before Mr Reynolds came into contact with the police on the morning of 2nd March 2008. I would, however, reiterate that it is for the Commission to decide how they conduct their independent investigation; since the method of investigation is a matter for their discretion, it is unlikely that any successful attack could be made on any particular method which they choose, so long as it is clear that it is

independent.

26. This conclusion is consistent with and does not, in my view, differ from the IPCC's own publicly stated views of their duties to be found on their website although not, as I understand it, contained in any published document. The judge cited it and it reads:-

“Where the alleged conduct of a person serving with the police has resulted in death or serious injury Articles 2 and 3 of the European Convention on Human Rights may be engaged. If they are engaged, the IPCC, as a public authority under the Human Rights Act 1998, has an obligation to determine a form of investigation that is an effective independent investigation that does not have any hierarchical or institutional connection with those implicated in the events. It would only not have to do that where there has been an inquest that satisfied Article 2. An independent investigation into a death conducted by the IPCC itself would satisfy the requirement of independence under Article 2. An IPCC managed investigation into a death involving the police would satisfy the requirement of independence under Article 2 of the Convention provided that it was conducted by an external police force. Not all death or serious injuries that occur following contact with the police will engage Article 2 or 3. For example where the death was obviously from natural causes or the police contact was sufficiently remote from the time of the death or serious injury.”

The judge's obiter comments

27. The judge concluded his judgment by saying that in his view the IPCC could use the services of the local police force, if those services were provided by the Professional Standards Department of the force rather than the force's ordinary operational officers. These obiter comments were attacked both by Mr Grodzinski for the claimant and the police themselves who did not want their own officers to be involved. More surprisingly it was also attacked by Mr Clayton no doubt for the forensic purpose of showing how impossible in practical terms it would be to have a truly independent inquiry and thus that an “effective official inquiry” would be enough.
28. These submissions put the court in difficulty since no one in court was prepared to support the judge's observations and all counsel agreed that they ought not be left on the record for the future.
29. This difficulty is accentuated by the fact that the IPCC has not actually decided to progress its inquiry by using the local police and, in the absence of any specific proposal

to do so, it is difficult to say whether any such reliance would prejudice the independence of the inquiry.

30. In these circumstances this court cannot, in my judgment, do more than to say that the obiter remarks of the judge should not be taken to be authoritative and to repeat that how the IPCC decides to progress their investigation in any particular case is, in the first instance, a matter for their discretion. No doubt that discretion can, in theory, be challenged on well-known public law principles but any litigant who wishes to challenge their discretion will have an uphill task. Further than that it is not necessary or wise to go.

Conclusion

31. It follows from all this that I would not alter the terms of the declaration granted by the judge and would dismiss this appeal.

Lord Justice Jackson:

32. I agree.

Lord Justice Ward:

33. I also agree.