

Report of a Complaint Handling Review in relation to Strathclyde Police

under section 35(1) of the Police Public Order
and Criminal Justice (Scotland) Act 2006

Summary and Key Findings

The applicant's complaints arise from his vehicle being stopped and his thereafter being charged with driving an unregistered and uninsured vehicle.

Of the two complaints considered, the Commissioner found that one was dealt with reasonably while the other was not. A single recommendation was made in this connection and a learning point also identified.

In light of the issues raised by one of the complaints, the Commissioner intends to write to the Scottish Government, Crown Office and the Association of Chief Police Officers in Scotland.

The Commissioner's role

Section 35 of the Police Public Order and Criminal Justice (Scotland) Act ("the Act") gives the Commissioner the power to examine the manner in which a policing body has dealt with a "relevant" complaint, as defined in the Act.

The Commissioner is independent of the police service and performs his functions in a fair and impartial manner. Before considering a complaint, the Commissioner's office obtains all papers held by the policing body against which the complaint has been made. These papers are considered alongside information provided by the applicant. The Commissioner then assesses whether the policing body's handling of the complaint was reasonable in all the circumstances. The Commissioner will look at the entire handling process, from the initial investigation by the policing body to the final response issued to the applicant. Among the factors which the Commissioner takes into account are the following:

- whether the policing body's response to the complaint is supported by all material information available;
- whether in dealing with the complaint the policing body has adhered to all relevant policies, procedures and legal provisions;
- where the complaint has resulted in the policing body identifying measures necessary to improve its service, whether these measures are adequate and have been implemented;
- whether the policing body's response to the complaint is adequately reasoned; and
- whether the policing body has communicated with the applicant in a reasonable manner.

Background

The incident giving rise to the complaints

The applicant is a national of an EU member state within the European Economic Area. As such, the applicant is entitled to live and work in the UK (subject to adherence to certain legislation, not relevant to this review). At the time of the incident which gave rise to his complaints, the applicant's English was poor.

In May 2007, the applicant contacted his insurers in his home country to request insurance to drive in the UK. The applicant was advised by his insurers that as the UK was part of the EU, he would be insured to drive his car there, provided the vehicle was returned to his home country within four to five months.

On 2 July 2007 the applicant moved to Scotland and the following day took up employment with a local company. He did not bring any vehicle to the UK at this time. On an unspecified date towards the end of September 2007, the applicant travelled to his home country to attend a family wedding. On 4 October 2007 he returned to the UK by car with his wife. According to the applicant, he intended to use the car for sightseeing and for Mrs A to leave the UK with the vehicle in January/February 2008.

According to the applicant, in addition to the information provided to him by his insurer, he was also in possession of a "Driving in Scotland" booklet published by what was then the Scottish Executive. The booklet was published in both English and the applicant's native language. Information contained within the booklet led the applicant to believe that he could drive in the UK

on his existing insurance certificate for a period of up to six months. The booklet contains the following passages relevant to the applicant's case:

"This booklet is for visitors from overseas who are living in Scotland and explains what you will need if you wish to drive in this country. If you are resident in the UK (that is for more than 185 days in any 12-month period), then the vehicle you are using must be registered, licensed and insured in the UK. Otherwise you may be breaking the law ...

If you have brought your car from your own country and it has been registered and taxed there, you can use it for 6 months in any 12-month period. To use it beyond this time, contact a DVLA local office ..."

As the applicant's car was not registered in the UK, it was immediately distinguishable from UK vehicles by its foreign number plates.

At around 11 am on 14 January 2008, the applicant was driving home when he was stopped by Constables B and C. Although he did not speak English well, the applicant was able to communicate that he was the owner of the vehicle and that he had been living and working locally since July 2007. The applicant was unable to produce any insurance documents at that time and checks by the officers established that there was no trace of the vehicle on the police national computer. The applicant contacted his friend, Mr D, by telephone to act as an interpreter. Mr D spoke with Constable B on the telephone and arrangements were made for the applicant to attend at the local police office on a voluntary basis so that further enquiries could be conducted with the aid of an official telephone interpreter.

The applicant thereafter attended the local police office and was met there by Mr D. Arrangements were also made for the applicant's car to be collected from the roadside by the local recovery agent for the Contractual Vehicle Removal Scheme ("the recovery scheme") who attended at approximately 11.30 am. The vehicle was seized under section 165A of the Road Traffic Act 1988.

The applicant was cautioned and interviewed through the telephone interpreter. As he admitted during interview to having been resident in the UK since 2 July 2007, the officers cautioned and charged him in relation to alleged breaches of sections 143 (1) and (2) (driving without valid insurance) and 64A (failure to register a vehicle for excise purposes) of the Road Traffic Act 1988 ("the 1988 Act"). This was on the basis that, despite having been resident in the UK for more than 185 days, he had failed to insure or register his vehicle in the UK.

At some stage, the applicant produced a copy of the Driving in Scotland booklet referred to above. However, Constable C explained to him that, according to the booklet, any person resident in the UK for more than 185 days must have their vehicle registered, licensed and insured in the UK.

Some further discussion thereafter took place through Mr D who acted as an interpreter. The applicant was provided with a seizure notice in respect of the vehicle under section 165A of the 1988 Act. The notice was in English and contained instructions on how to collect the vehicle. The notice also contained a warning that failure to collect the vehicle within 14 days could result in it being sold or scrapped. The applicant never collected his vehicle and it was subsequently sold by the local recovery agent. The applicant's personal belongings were removed from the vehicle prior to its sale but were destroyed by a fire at the premises of the local recovery agent in July 2008.

Subsequent legal proceedings

A report was thereafter submitted to the Procurator Fiscal who raised proceedings against the applicant for alleged contraventions of sections 143 and 64A of the 1988 Act. The applicant pled not guilty to the two charges libelled against him. On 29 July 2008, the Procurator Fiscal Depute accepted the applicant's plea of not guilty in relation to the contravention of section 64A. However,

on 2 September 2008, following trial, the applicant was convicted driving without valid insurance under section 143 of the 1988 Act.

The applicant sought to appeal his conviction but the High Court rejected his application for leave to do so. He thereafter applied to the Scottish Criminal Cases Review Commission (SCCRC) which on 11 February 2010 referred his case on the High Court on the basis that a miscarriage of justice may have occurred.

On 20 April 2010 the High Court quashed the applicant's conviction. This followed an acknowledgement by the Crown that the applicant had a valid certificate of insurance in place at the relevant time.

The Complaints

Based on the contents of the application form, the correspondence received from the applicant, and the information obtained from Strathclyde Police, the Commissioner has identified the following complaints:

- (1) that the applicant's car was seized by officers of Strathclyde Police; and
- (2) that the applicant's car was stopped because it had non-UK licence plates.

The Commissioner's Review

This section sets out the Commissioner's views on the manner in which the complaints were handled by Strathclyde Police.

Complaint 1: Seizure of vehicle

The applicant has maintained throughout that, as he held valid insurance, his car should not have been seized by Strathclyde Police.

Internal Handling

As the applicant's complaints related to a traffic incident, they were dealt with by the divisional Road Policing Department. Inspector G was appointed to make enquiries. Statements were obtained from the applicant on 20 August 2009 and from Mr D on 8 September 2009, both through an interpreter. Inspector G also obtained copies of the statements which Constables B and C had prepared at the time the alleged offences were reported to the Procurator Fiscal. Constables B and C provided operational statements on 3 September 2009 in which they addressed the applicant's complaints.

Constable B stated the following in his operational statement:

"[The applicant] was identified as a UK resident by virtue of his employment status when he was first stopped at the locus. He openly admitted to being employed on a full time basis by a local company he was wearing their uniform and another passing member of staff from that company stopped and identified [the applicant] as being employed by the local company. This meant [the applicant], having been identified as being a UK resident driving a foreign registered vehicle and being unable to supply a valid British insurance certificate fulfilled the force criteria for action under terms of section [165A] of the 1988 Road Traffic Act and therefore it was appropriate to seize the vehicle."

Constable C stated the following:

"I suspected [the applicant] did not have valid insurance for the vehicle, due to the fact that [the applicant] was a permanent UK resident in full time employment. This fact meant that the vehicle should have been re-registered and insured with immediate effect, rendering the 185 days rule redundant. However, the 185 day rule was used to ensure that he was treated as fairly as possible. I therefore seized the vehicle in terms on [section 165A of 1988 Act]."

In his report of 29 September 2009, Inspector G stated the following regarding this complaint:

"13.7 The reporting officer is of the opinion that [the applicant] has misinterpreted his requirement regarding the use of a vehicle in the UK. He is of the opinion a visitor to the UK may bring a vehicle into the UK for a period of 6 months in a calendar year. The citizens advice in [the applicant's home country] deem this period to run from 1st January to 31st December, however, the interpretation in this country is a rolling period ie 1st July to 30 June. He is aware that he was a resident in the UK for a period in excess of 185 days if taken from when he commenced his residency on 2 July 2007 to when he was stopped on 14 January 2008, however ... this was not what he interpreted in that his residency was the period ie 2 July 2007 to 31 December 2007 being one year and 1st January to 14 January being part of the next year the number of days do not add up to 185 days. He does not agree with the UK interpretation.

13.8 Within the Scottish Executive Safer Scotland, Driving in Scotland leaflet it specifies if someone is a UK resident, for more than 185 days in any 12 months period then the vehicle must be registered, licensed and insured (Page 2 of Driving in Scotland) and can use the vehicle for 6 months in any 12 month period (Page 12 of Driving in Scotland). [The applicant] was residing in the UK for 202 days which is in excess of the 185 day period and therefore should have registered, licensed and insured his car in the UK.

13.9 The MIB (Motor Insurance Bureau) states that if the driver is to permanently reside within the UK then the vehicle should be registered immediately. This is not highlighted in the Scottish Executive leaflet. [The applicant's] interpretation is that he was not a UK resident at the time having not applied for residency. He is of the opinion that if you wished to apply then you would have to wait until a period of 12 months of residency passed before any application."

Inspector G determined that Constables B and C had acted correctly; however, he sought guidance from Strathclyde Police's Legal Services Department on the legal definition of the term "UK resident". This advice was given on 7 October 2009.

On 13 October 2009 Superintendent H provided the following response to the complaint:

"Following initial enquiries your vehicle was seized as it was alleged that you did not have any insurance for your vehicle due to your residency within the UK. I am further informed that you attended at [local police office] where you were interviewed using a [language] interpreter and it was established that you had resided in the UK since 2 July 2007 and employed at local bus company since 3 July 2007.

Due to your residency being in excess of the 185 days you had a legal obligation to ensure that you registered and insured your vehicle in the UK ...

It would appear that you attended at [local] District Court on 2 September 2008 where you were found guilty of using your vehicle without insurance and subsequent appeals against this conviction have been dismissed. This re-affirms that the action taken by the police officers on 14 January 2008 was legally sound."

As noted above, in April 2010 the High Court quashed the applicant's conviction for driving without valid insurance. On 5 July 2010 the applicant wrote to Strathclyde Police challenging the terms of

Superintendent H's response. Following further correspondence, on 10 January 2011 Inspector K wrote to the applicant in response to his concerns. With reference to the present complaint, Inspector K wrote:

"As regards the information you state you had received from a DVLA advisor, 'that permanent residency should be calculated over a calendar year and not a 12 month period', I can confirm that clarification has been sought from the DVLA Policy & External Communications Directorate, who have confirmed the position. However, the DVLA have further confirmed that the calendar year, for the purposes of such calculations – should start from the date of an individual's first entry to the UK. By way of explanation the DVLA advised that, should a person enter the UK on 4 April in one year, the calendar year would run to 3 April the following year ...

As regards the lawfulness of the actions undertaken by the officers in stopping and seizing your vehicle, I am satisfied that the officers had reasonable belief that you were driving a vehicle without a valid insurance certificate.

While your conviction has now been overturned that is, with respect, a matter for the Scottish Court Service: there is no suggestion that the officers acted in any way unlawfully. Their actions were lawful, in good faith and without malice, and based upon their interpretation of the statutory provision in force at the time."

Consideration

The relevant legislation and procedures

The applicant's vehicle was seized under section 165A of the Road Traffic Act 1988. This provides that a vehicle may be seized where:

- (a) a constable requires a person to produce evidence that a motor vehicle is not being driven in contravention of the requirement for valid insurance;
- (b) the person fails to produce such evidence; and
- (c) the constable has reasonable grounds for believing that the vehicle was being driven without insurance.

Where these conditions are satisfied, the constable must warn the person that the vehicle will be seized unless evidence of valid insurance is produced immediately.

Strathclyde Police's standard operating procedures on the seizure of vehicles provide the following:

"... Section 165A is designed to remove motor vehicles from use until valid documents are produced or disposal is arranged ...

... Provided database checks give reasonable grounds to suggest an absence of documents [e.g. valid insurance documents] the vehicle may still be seized and held until documents are produced or disposal arranged."

The SCCRC's report and the High Court's decision in the applicant's appeal

In support of his application, the applicant submitted to the Commissioner's office a copy of the SCCRC's report which sets out the reasons why his case was referred to the High Court. Although the report contains an extensive analysis of relevant European legislation and case law, for present purposes the findings can be summarised quite briefly.

A key factor in the decision to report the applicant to the Procurator Fiscal, and in his subsequent prosecution and conviction, was the period of time which it was considered the applicant had been resident in the UK. As noted above, the applicant had moved to the UK on 2 July 2007 and was stopped by the police on 14 January 2008. The view taken therefore was that at the time the officers stopped him, the applicant had been resident in the UK for a period in excess of 185 days. In light of this, it was considered that he was legally obliged to register and insure his car in the UK. The insurance cover he had obtained in his home country was therefore deemed to be invalid.

As a result of its examination of the various European legal provisions, the SCCRC considered this approach to be incorrect. The SCCRC found that, according to a particular European Directive, a person's "normal residence" is the place where he/she "usually lives ... for *at least* 185 days in each *calendar year*" [emphasis added]. The SCCRC found that in the calendar year 2007, the applicant had spent fewer than 185 days in the UK. Similarly, in respect of the calendar year 2008, the SCCRC found that, by the date on which he was stopped by the police, the applicant had spent only 14 days habitually resident in the UK.

As noted above, at the applicant's appeal the Crown conceded that the applicant had been driving with valid insurance at the relevant time. Although the High Court did not issue a written opinion, its "interlocutor" (i.e. the document which records its decision) states the following:

"The Advocate Depute informed the Court that the Crown did not oppose the Bill of Suspension [i.e. the method by which the applicant appealed] and that, after investigation into the complex legislation concerned, confirmed that there was a valid certificate of insurance in place at the relevant time;

The Court, having heard Representative for the appellant/complainer and the Advocate Depute, Passed the Bill of Suspension, quashed the conviction of the inferior court dated 2nd September 2008 and Decerned."

As the court did not issue an opinion, the rationale for its decision to quash the applicant's conviction is not entirely clear. It is, however, reasonable to assume that the decision was based, at least in part, on the Crown's concession that the applicant was driving with valid insurance. It is also reasonable to assume that the Crown's concession was based to some extent on the findings of the SCCRC in this connection.

The applicant and Mr D's accounts

The applicant stated the following with regard to the provision of his driving documents to the police:

"When they stopped me they asked for my insurance. I did not quite understand, so I telephoned my friend [Mr D] so he could speak to the police ...

My friend [Mr D] brought in my documents to the Police Station and the police looked at them, but were not interested."

Mr D stated the following in this connection:

"At the beginning of January 2008 ... I received a phone call from [the applicant]. He described ... what happened and asked me to bring car documents for him to where he was stopped by the police ...

I came to [the applicant's] flat and ask his wife for car documents ...

I said to the officer 'I am just with documents' but the officer said to me 'we don't need any document' ...

We both tell the officers we were disappointed and not happy because we couldn't understand what was the reason ... We couldn't understand why the police take the car when documents was okay, correct."

The Commissioner's views on the seizure of the applicant's car

As noted above, Inspector G stated the following in his letter to the applicant of 10 January 2011:

"While your conviction has now been overturned that is, with respect, a matter for the Scottish Court Service: there is no suggestion that the officers acted in any way unlawfully. Their actions were lawful, in good faith and without malice, and based upon their interpretation of the statutory provision in force at the time."

There is no doubt that Constables B and C were acting in good faith when they seized the applicant's car. However, as a result of its examination of the European legislation surrounding this issue, the Crown conceded at the applicant's appeal that he had in fact been driving with valid insurance at the time he was stopped. As noted above, this concession led to the High Court quashing the applicant's conviction.

In these circumstances, and with the benefit of the High Court's interlocutor, the Commissioner does not consider that the seizure of the applicant's car was lawful. This is because, in light of the court's decision, the applicant must be deemed to have been driving with valid insurance at the time. Taking into account the evidence of the applicant and Mr D, it follows that the applicant did in fact produce valid insurance documents at the police station. Accordingly, one of the key conditions of section 165A (the failure to produce a valid insurance document) which would have justified the seizure of the applicant's vehicle, was not met.

The Commissioner's views on the general handling of the applicant's complaint

The Commissioner notes from the complaints file that Constable C (one of the officers subject to complaint) was involved in gathering evidence in connection with Inspector G's investigation into the applicant's complaints. On 16 September 2010 Constable C emailed Ms L of the DVLA seeking clarification of a number of issues arising from the applicant's case. The following is a passage within the email:

"I would appreciate a speedy response as my Inspector needs to submit a report regarding this in relation to a complaint against the Police."

There is nothing in the complaints file to explain why Constable C was involved in the investigation of complaints about himself. In the Commissioner's view, while his involvement had no adverse effect upon the outcome of the complaints, clearly this should not have occurred, particularly given the nature of complaint 2 (in which the applicant alleges that he was subject to racial discrimination).

The implications for similar future incidents

As noted above, the Driving in Scotland booklet states the following:

*"If you are resident in the UK (that is for more than 185 days in **any** 12-month period), then the vehicle you are using must be registered, licensed and insured in the UK. Otherwise you may be breaking the law ..."*

This advice was reflected in Inspector K's letter to the applicant of 10 January 2011 in which he stated:

"As regards the information you state you had received from a DVLA advisor, 'that permanent residency should be calculated over a calendar year and not a 12 month period', I can confirm that clarification has been sought from the DVLA Policy & External Communications Directorate, who have confirmed the position. However, the DVLA have further confirmed that the calendar year, for the purposes of such calculations – should start from the date of an individual's first entry to the UK. By way of explanation the DVLA advised that, should a person enter the UK on 4 April in one year, the calendar year would run to 3 April the following year."

In light of the SCCRC's findings, the concession made by the Crown at the applicant's appeal and the quashing of the applicant's conviction, there is now significant doubt as to whether the above approach to calculating periods of "normal residence" within the UK is correct. Specifically, it appears that in terms of European legislation, the period should be calculated over individual calendar years rather than over "any" 12 month period.

If the present means of calculating periods of normal residency is wrong, it could have serious implications for foreign drivers who may be rendered liable to arrest and prosecution based on an erroneous application of the residency rules. The Commissioner considers it appropriate to highlight this risk and will therefore be writing to Scottish Government, Crown Office and the Association of Chief Police Officers in Scotland (ACPOS) in this connection.

Conclusion

Following receipt of the applicant's letter of 5 July 2010, Strathclyde Police had the opportunity to revise its earlier approach to this complaint in light of the applicant's acquittal. As this opportunity was not taken, the Commissioner does not consider that the complaint was dealt with in a reasonable manner. The Commissioner recommends that Strathclyde Police apologise to the applicant for its unlawful seizure of his car under section 165A of the 1988 Act.

Complaint 2: Reason for traffic stop

The applicant claims that he was only stopped by Constables B and C as he was driving a vehicle with licence plates from his home country. According to the applicant, the officers' actions amounted to racial discrimination.

Internal Handling

According to his report, on 8 September 2009 Inspector G met with the applicant and advised him that his vehicle had been stopped due to concerns about foreign drivers failing to comply with UK legislation.

Inspector G reached the following conclusion in respect of this complaint:

"There is no evidence in relation to discriminatory procedures as the vehicle was stopped as part of a routine stop check to ensure if the vehicle was required to be registered in the UK."

There is, however, no reference to the complaint in Superintendent H's letter of response of 13 October 2009.

The matter was revisited following receipt of the applicant's letter of 5 July 2010. In his letter of 10 January 2011, Inspector K stated the following:

"In respect of your claim that, according to the Committee [presumably a reference to the SCCRC], the statement and the report of the police seemed to confirm your impression that you were pulled over because your car had [other EU member state] plates, I can advise that both officers had – prior to 14 January 2008 – received an input from the Senior DVLA Enforcement Officer for Scotland, during which the police were asked to take a robust approach to foreign registered vehicles driving in the UK without appropriate insurance cover and to subsequently report them to the Courts.

The DVLA have attended at [local town] on another occasion to identify and pursue offenders.

The suggestion that the officers were in any way racially motivated in stopping you is categorically refuted. The officers were reacting to an issue that had been highlighted by a Partnership Agency for enforcement. While you state that, prior to stopping your vehicle, the officers were travelling in the opposite direction and turned, I must stress that neither officer has ever denied this: in their statements they confirm that, at the time of stopping you, they were behind your vehicle."

Consideration

Constable B stated the following in the statement he provided at the time of the alleged offence:

"... I was travelling North on [road] ... when I observed a ... [foreign] registered [car], which was travelling in front of me. I stopped this vehicle and spoke with the driver who identified himself as [the applicant]. The [applicant] ... appeared to have limited knowledge of spoken English. He did however confirm that the stated vehicle belonged to him and that he resided in [location]. I asked the [applicant] for his Insurance certificate for the vehicle but he was not able to produce one ...

I suspected that the [applicant] did not have valid Insurance for the vehicle and therefore seized the vehicle in terms of s165 RTA 1988.”

Constable C provided a similar account.

In light of these accounts, and the approach apparently being taken by the police to foreign registered vehicles being driven without valid insurance, it seems likely that the applicant's car was indeed stopped due to its having foreign number plates. However, the Commissioner does not consider that this, in itself, indicates that the applicant was subject to racial discrimination.

The Commissioner has already stated that, in light of subsequent legal proceedings, the seizure of the applicant's car was unlawful. However, this does not mean that the decision by the officers to stop the applicant's car in the first instance was unlawful or unjustified. In the Commissioner's view, in stopping the vehicle the officers were acting in accordance with their powers under section 163 of the 1988 Act (as interpreted the courts). The decision to do so followed representations by the DVLA regarding what was perceived to be a growing problem of uninsured foreign vehicles being driven on the roads. In these circumstances, while the applicant must be deemed to have been driving with valid insurance at the time, this does not call into question the decision by the officers to stop his vehicle.

For the reasons given, the Commissioner considers that this complaint was dealt with in a reasonable manner.

Conclusions, Recommendations and Learning

Complaint 1: Seizure of vehicle

In the Commissioner's view, this complaint was not dealt with in a reasonable manner. The Commissioner recommends that Strathclyde Police apologises to the applicant for the unlawful seizure of his car under section 165A of the 1988 Act.

Complaint 2: Reason for traffic stop

In the Commissioner's view, this complaint was dealt with in a reasonable manner. Accordingly no further action is required in this connection.

Learning Point

As noted above, Constable C was involved in the enquiries undertaken in respect of complaint 1. Although this had no adverse impact on the outcome of the complaint, in order to ensure an appropriate degree of independence clearly such involvement must be avoided.

John McNeill
Police Complaints Commissioner for Scotland

Hamilton House
Caird Park
Hamilton
ML3 0QA