

# Police bail without charge: a funny way to restore lost rights

The Coalition government, argues Ed Cape, failed its own test at the first hurdle

When it came to power in May 2010, the Coalition government promised to take action to 'reverse the substantial erosion of civil liberties and roll back state intrusion' and, in particular, 'to restore rights of non-violent protest' (HM Government, 2010). Yet, when presented with a challenge to the power of the police to restrict and control the movements and activities of people arrested for non-violent protest, rather than restoring the rights of protesters, the government immediately buckled in the face of police demands.

## Peaceful protesters

26 March 2011, on the day of the TUC March for the Alternative to Cuts, 145 UK Uncut activists who occupied Fortnum and Mason in Piccadilly were arrested after being tricked into leaving the shop by being told that, if they left peacefully, they would be free to go. The police chief inspector who told them this described the protestors as non-violent and sensible (Malik, 2011). The majority of them were charged and bailed to appear at City of Westminster Magistrates' Court but some of them, and others arrested that day, were not charged but bailed to return to the police station many weeks later. Many of those given bail had conditions imposed on them, including a requirement that they must not enter central London on 29 April 2011, the day of the Royal Wedding. In July – well after the wedding (and the honeymoon) – the Crown Prosecution Service dropped charges against 109 of the UK Uncut protestors, saying that prosecutions were no longer in the public interest. It is hard to avoid the conclusion

that a principal purpose of the arrests was not to prosecute them but to enable the police to control their movements over the weeks following their arrest.

## Control through bail

This, of course, was not the first – or last – large-scale use of conditional police bail. Pre-emptive arrests, followed by the imposition of conditional bail, were used against more than 100 protesters at the Ratcliffe-on-Soar power station two years earlier. Many of them were not subsequently prosecuted, and many had their convictions quashed (Evans and Lewis, 2011). In fact, police bail without charge, often with conditions attached, is imposed on thousands of people a year – although we do not know how many because the police are under no obligation to collect or report statistics on the use of these powers. The power of the police to arrest and then release on bail people who have not been charged with any criminal offence goes back many decades. Originally, it was a way of ensuring that those arrested were not unnecessarily detained at a police station. However, over the years the power has been transformed into a mechanism for allowing the police to place controls on people – and people in respect of whom there is not sufficient evidence to charge – for months, and in some cases, years. This happened in stages, largely by stealth, and mostly under the government of New Labour.

Powers to release an arrested person from a police station on bail, but without any conditions attached, were codified in the *Police and Criminal Evidence Act 1984* (PACE). The power to do so without having

charged the person with an offence meant that the person could be released on bail while the police continued with the investigation. Failure to return to the police station without reasonable cause is itself a criminal offence (even if the person is never charged with or found guilty of a substantive offence). Significantly, no time limit was placed on the period for which bail can be granted, nor any limit placed on the number of times that bail can be renewed. The courts have made it clear that they will not intervene other than in exceptional circumstances (*R (C) v Chief Constable of A* [2006] EWHC 2352 (Admin)) – and bail decisions of this kind appear never to have been successfully challenged.

## More police powers

Between 2003 and 2006, the New Labour government made a number of legislative changes that significantly increased police powers to bail without charge, and that changed the character of police bail. The *Criminal Justice Act 2003* gave the power to arresting officers to bail the person arrested without even taking them to a police station (known as 'street bail'). In 2006 powers of arrest were extended to all criminal offences, however minor, and over that period, by a number of legislative reforms, the police were given the power to attach conditions to police bail, whether street bail or bail without charge from a police station. Almost any condition can be imposed provided that the police consider it necessary to ensure that the person returns to the police station, to prevent them from offending, to prevent them from interfering with the investigation, or for their own protection. Conditions might include a requirement to regularly report to a police station, to live at a specified address and/or to stay at home between specified hours (in other words, a curfew). However, they can be even more intrusive, prohibiting the person from going to specified locations, or from associating with specified people, and could even prevent them from communicating by email or through social media. Breach of conditions,

whilst not a criminal offence, means that the police can arrest them. The person can apply to a police custody officer or to a magistrates' court to vary or remove conditions, but a court can rely on police assertions that the conditions are necessary without hearing any evidence (*R (Ajaib) v Birmingham Magistrates' Court* [2009] EWHC 2127 (Admin)).

### A toxic mix

So we have a toxic mix – a wide range of minor offences for which people can be arrested, a low threshold of suspicion justifying arrest, no limit to the time for which bail can be granted, a wide range of conditions that can be imposed by low-ranking police officers, and limited involvement of the courts. This toxic mix places the cold hand of state restraint on a person who not only has not been found guilty of any offence, but in respect of whom there is not even sufficient evidence to charge, and who may never be charged, with a criminal offence. As I have argued elsewhere, these provisions may well breach the right to liberty, the right to private life and the right to freedom of expression under the *Human Rights Act 1998* (Cape and Edwards, 2010), but there has been no successful challenge on these grounds.

### Restore rights

Clearly, in view of their promises, the police bail without charge provisions should be in the sights of the Coalition government, so what has it been doing about it? In short, nothing. The opportunity to do so was presented in June 2011. A decision of the Divisional Court in the case of *Hookway* [2011] EWHC 1578 (Admin) overturned the widely accepted view that, when a person is released on police bail, time does not run for the purpose of calculating the

police detention time limits under PACE (Zander, 2011). These restrict detention without charge to 36 hours, or 96 hours if authorised by a magistrates' court. The police said, wrongly in my view, that their investigative powers were severely hampered because they could not place a person they had not charged on bail for longer than 96 hours even with a court's authority. The Law Society sent a letter to the government on 1 July 2011 saying that, if they were to restore what was understood to be the status quo, they must tackle the injustice of indefinite conditional police bail by limiting its use and placing a time limit on it (Law Society, 2011).

### Meeting demands

Those representations were simply ignored. Addressing the Association of Chief Police Officers (ACPO) on 4 July 2011 the Home Secretary Theresa May said,

*When events happen, like the Hookway court judgment, there is a clear need to act fast to make sure we put things right for the police. That's why an hour after receiving ACPO's legal advice last Thursday, Nick Herbert went to the House of Commons and announced that we would be introducing emergency legislation. There is no question that I will always give the police the tools and powers they need.* (May, 2011)

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The answer? 'The Home Office has had extensive discussion with the Association of Chief Police Officers

and the Crown Prosecution Service' following the judgement (*Police (Detention and Bail) Bill* Explanatory Notes, 2011, para 11). There was not even an attempt to acknowledge the serious concerns about the civil liberties implications of such extensive police powers.

### And more of the same

As a sign of things to come, with the 2012 Olympics now in sight, in August 2011 the Metropolitan Police launched 'Operation Razorback' four weeks in advance of the Notting Hill Carnival, with the explicit aim of 'preventing troublemakers from getting anywhere near carnival'. In the first few days of the operation, 97 people were detained, most on suspicion of possession of drugs, in what were described as 'pre-emptive' arrests, and warned not to attend the carnival. Rolling back state intrusion? Reversing the substantial erosion of civil liberties? It does not look like it. ■

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