Subject: Operation Rapid – (Report Number 1)

To Assistant Chief Constable, Crime Operations

In accordance with your terms of reference dated 6 February 2007 I wish to submit this first report in respect of the review of eight persons known as ‘on the runs’. This report relates to the following:-

General

As part of the ongoing political process in Northern Ireland Sinn Fein representatives have passed details to the British Government of a number of individuals who they assert are ‘on the runs’. In addition a solicitor has been engaged to act on behalf of those named to the British government.

The purpose of this review is to examine what basis if any the Police Service of Northern Ireland has to seek the arrest of those individuals identified by Sinn Fein to the British Government and passed to the Chief Constable. Operation Rapid is a review conducted within the statutory parameters of the Police Service of Northern Ireland and is not the subject of political intervention or influence. As Head of
Serious Crime Branch it is my delegated responsibility to review those wanted for serious crime and to ensure that persons circulated as ‘wanted persons’, are indeed persons against whom the police have intelligence of a sufficient grading, evidence of a significant standard or both to justify the arrest without warrant of an individual. The reviews within Operation Rapid have been conducted on this basis.

Terms of Reference

Op Rapid is the operational name for the review of persons circulated as ‘wanted’ by the PSNI in connection with terrorist related offences up to the 10 April 1998.

Head of Branch C2 will have the responsibility to undertake this review with the purpose of identifying those individuals for whom a legal basis remains to seek their arrest based upon: -

- existing evidence, the integrity of which would withstand a legal challenge within a judicial process in Northern Ireland; or
- reasonable suspicion of committing serious crime in Northern Ireland, such suspicion being based upon a standard which meets current Human Rights standards; or
- being unlawfully at large having escaped from custody or failed to return to prison from parole or having failed to surrender to a court as a condition of the granting of bail.

The terms of reference for this review are as follows:

1. Responsibility for the completion of the review will rest with the Head of Branch C2, who will have the support of other Crime Operation Departments in undertaking supporting work in respect of reviewing intelligence and forensic exhibits.

2. A small team of investigators of 1 D/C/Inspector, 2 D/Sergeants and 3 civilian assistant investigators will be formed to work on the review.
3. The review will be conducted under terms of confidential reporting in order to prevent a misinterpretation of the purpose of this review.

4. Assistant Chief Constable, Crime Operations will supply a list of those individuals identified to the PSNI as having requested information as to their status with the PSNI as a ‘wanted person’

5. Each offence will be reviewed on an individual basis; although where a number of separate offences have been identified relating to one individual these will be grouped together to enable a collective assessment of intelligence, forensic and other evidence to be made.

6. The Head of Branch C2 will make a recommendation in respect of each individual in one of the following terms:-
   
   a. Wanted for arrest for …..offence(s) on the following grounds:-
      
      i. Intelligence exists which is of such a required grade, which has been assessed as to support a reasonable suspicion to be formed that ‘X’ committed the offence for which he/she has been circulated.

      ii. Evidence exists which supports reasonable suspicion that ‘X’ committed the offence for which he/she has been circulated. This evidence has been reviewed and has been assessed as retaining its integrity and would withstand a legal challenge within a judicial process in Northern Ireland.

      iii. Forensic evidence directly links ‘X’ to the offence for which he/she has been circulated. Such forensic evidence has been reviewed and it has been assessed that its integrity in terms of scene recovery, continuity of handling, scientific examination and subsequent storage is such that it would withstand a legal challenge within a judicial process in Northern Ireland.

      iv. An international warrant has been issued by another jurisdiction for ‘X’ and is in possession of the PSNI on behalf of the United Kingdom legal authority. Clarification has been made with the
issuing jurisdiction and the warrant for arrest remains valid and enforceable.

v. Wanted for arrest as ‘X’ has escaped from lawful custody, failed to return to prison from a period of parole or failed to surrender to a court as a condition of the granting of bail.

b. No longer wanted for arrest for ......Offence(s) on the following ground:-

i. Original intelligence in respect of the offence has been reviewed and deemed to be of a grade that would not support a reasonable suspicion being formed that ‘X’ committed the offence for which he/she has been circulated.

ii. Original intelligence in respect of the offence cannot be released to the review team due to National Security considerations and therefore cannot be released to an SIO. It has been assessed in these circumstances that a reasonable suspicion based upon disclosed information to support an arrest cannot be made at this case.

iii. The personal details of ‘X’ cannot conclusively be connected with the personal details of the person currently identified as being wanted. In such circumstances a reasonable suspicion to arrest ‘X’ cannot be formed at this point.

iv. There are reasonable grounds to arrest ‘X’ for the offence(s) of ...... however, it has been assessed in consultation with the PPS that the conduct of the PSNI in addressing the detention and apprehension of ‘X’ is such that to act at this stage would be in contravention of Art 6 of the ECHR in respect of abuse of process.

v. The offence of ......allegedly committed by ‘X’ is statute barred or in the view of the PPS the case is of such a minor nature that there is no reasonable prospect of a prosecution being sustained after a prolonged period of time.
7. The Head of Branch C2 will ensure that a proper detailed record auditing the review and decision making process in respect of each individual is made and retained.

8. The Head of Branch C2 will expeditiously undertake this review and will submit responses to individual cases as soon as an accurate assessment can be made.

Law and Jurisprudence

The Police Service of Northern Ireland is mandated under Section 32 of the Police (Northern Ireland) Act 2000 with the following general statutory duty:

"32 (1) It shall be the general duty of police officers-
   (a) to protect life and property;
   (b) to preserve order;
   (c) to prevent the commission of offences;
   (d) where an offence has been committed, to take measures to bring the offender to justice."

Section 32(1)(d) is relevant to Operation Rapid. It is the statutory duty of ‘constables’ within the Police Service of Northern Ireland to take measures to bring offenders to justice where an offence is committed.

The Police and Criminal Evidence (NI) Order 1989 as amended provides a power of arrest without warrant to a constable under article 26 as follows:

"26(2) if a constable has reasonable ground for suspecting that an offence has been committed, he may arrest without warrant anyone whom he has reasonable grounds to suspect of being guilty of it"

Article 26 provides the legal framework for an individual constables power of arrest; namely he must have ‘reasonable grounds to suspect a person is guilty of an offence which he has reasonable grounds for suspecting has been committed.

O’Hara v Chief Constable of the Royal Ulster Constabulary [House of Lords 12 December 1996] provides guidance on the standard of what constitutes reasonable
grounds to effect an arrest for an offence under terrorist legislation. In summary their Lordships held that:

- no person may be arrested without warrant (i.e. without the intervention of a judicial process) unless the constable arresting him has reasonable grounds to suspect him to be guilty of an arrestable offence
- An arrest is not lawful if the arresting officer honestly but erroneously believes that he has reasonable grounds for the arrest but there are unknown to him in fact in existence reasonable grounds for the necessary suspicion, e.g. because another officer has information pointing to the guilt of the suspect
- The reasonable grounds to suspect must actually exist in reality and not only in the mind of the arresting constable, i.e. the constable must actually know of the reasonable grounds
- The Constable must personally have the reasonable grounds – he is not protected from an action for unlawful arrest if ‘knowing nothing of the case, he acts on orders from another officer who, perhaps does have such grounds
- The reasonable grounds need not be evidence amounting to a prima facia case; but the information which causes the reasonable grounds for suspicion must be in existence to the knowledge of the police officer at the time he makes the arrest (Hussien v Chong Fook Kam [1970] A.C. 942, 949 (2))
- The fact that an arresting officer had been instructed by a superior officer to effect an arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1) of the Northern Ireland (Emergency Provisions) Act 1978 [Now Terrorism Act 2000]
- A constable must be given some basis for a request to arrest someone under provisions such as terrorist legislation, e.g. a report from an informer

The decision in O’Hara is extremely relevant to the issue of ‘Wanted persons’ within Operation Rapid. The individuals involved all require to know if they are wanted by the police in Northern Ireland for offences which clearly fell within the Northern Ireland (Emergency Provisions) Act 1978 and the legislation which replaced it. It is therefore essential that in determining whether or not a person should be circulated as wanted, that reasonable grounds to suspect that a person is guilty of a specific offence actually exists. Such evidence must be real, not only did it exist at the time of the
offence but it must now exist to enable a police officer in 2007 to be satisfied in his mind to the point that it creates within his mind reasonable grounds that a person is guilty of an offence.

It is clear that where such evidence does not remain in existence or the integrity of such evidence is corrupted; then it would be unsafe and unethical to present such material to a currently serving officer knowing that such evidence would not be admissible in judicial proceedings to support the prosecution.

The existence of intelligence may provide reasonable grounds to a serving police officer to a degree that it would generate a suspicion that a person was guilty of an offence. However, there are dangers in relying on historical intelligence unless it has been properly graded and assessed. In addition such intelligence must be available to be scrutinised by the defence in criminal proceedings. Where Intelligence Branch cannot release the intelligence or it cannot be graded in accordance with the current standards as set out within the National Intelligence Model (5X5X5) it is very difficult to assess the provenance and reliability of such intelligence. The issue is therefore; how much reliance can be placed upon such intelligence in respect of the formation of reasonable grounds to suspect.

In O’Hara (1996) their Lordships suggested that a police officer could be told that there was a ‘report from an informer’. I do not believe that this would presently be a satisfactory basis to create reasonable grounds without an indication as to the grade of the intelligence and integrity of the CHIS. Since 1996 the Human Rights Act 1998 has been implemented which creates rights for a person suspected of committing an offence under Article 6 in respect of a fair and open trial.

Intelligence must be assessed as to its accuracy, and graded before it can be relied upon. In reviewing the cases within Operation Rapid it is apparent that a considerable amount of intelligence, particularly in the 1970’s was gleaned from interviews of detained persons at military establishments and at Castlereagh. It is a mixture of intelligence debriefs and information from co-accused. It has been held by the European Court of Human Rights in ‘the Republic of Ireland v the United Kingdom 1989’ that Article 3 of the European Convention of Human Rights was breached in
Holding centres and that prisoners were subjected to degrading and inhuman treatment. The judicial context in 2007 has changed dramatically since the 1970’s and it would no longer be acceptable to base a case for ‘reasonable grounds to suspect’ upon intelligence interviews and information contained within confessions obtained under the regimes operating within Holding Centres in the 1970’s prior to the European Court ruling. That is not to argue that information obtained could not be correct or was unreliable but simply an acknowledgement that the jurisprudence of the European Court indicates that information should not be used within a judicial process under Article 6 where it has been obtained in breach of Article 3.

It is not possible in my view to accept without question intelligence reports from that era and that source without severe caution as to its integrity and value. Therefore an assessment has to be made as to the integrity of such intelligence and its relationship to being ‘real’ in the mind of the arresting officer to attain the standard required to form the necessary reasonable grounds.

Another aspect of Article 3 of the Human Rights Act is the issue of the diligence in which the state investigated the allegations and suspicions against a person. In Assen v Bulgaria (1999) 28 EHRR 651 it was held that Article 3 was violated as the state had failed to carry out an effective investigation into breaches of the Human Rights Act as referred to under Article 1. In effect this means that a failure to properly investigate in respect of criminal proceedings is ‘de facto’ a breach of Article 3. (Ase of Sevtap Veznedaroqlu v Turkey (2000) also refers.)

In pursuing an individual as wanted the state must act expeditiously to gather evidence and to take steps to secure the apprehension of an individual (Moldovia Case ECHR). This cannot be argued with any credibility where a person has been circulated as wanted and this circulation then cancelled or subsequently re-circulated without any additional new evidence being present. It is questionable if such subsequent action by law enforcement agencies could create the necessary reasonable grounds for an arrest after a decision had been taken on available evidence to cancel a person as wanted for arrest.

Article 6 states that:-
(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

In considering reasonable grounds for arrest the constable must be satisfied that a person is guilty of an offence. Article 6 considerations are important, especially 6(3)(b) and 6(3)(d). In order to have the necessary standard of reasonable grounds a constable must be satisfied as to have reasonable suspicion that a person is guilty of an offence. Being guilty of an offence requires at least a minimal possibility of a conviction. O'Hara v Chief Constable of the Royal Ulster Constabulary 1996 indicated that the standard is not as high as a prima facia case but some reasonable
suspicion must exist. It is not in my view possible to attain this standard to the satisfaction of the courts where the rights of an individual under Article 6 cannot be guaranteed.

Where exhibits are lost, witness statements missing or the integrity of exhibits cannot be guaranteed it creates grave doubts as to whether or not a person could be found guilty of an offence following a proper judicial process under Article 6 considering the rights which a defendant has to properly prepare a defence and to examine witnesses or exhibits.

Whilst it is not a requirement that evidence must exist to a prosecution standard before an arrest is made, the lawfulness of an arrest must be questionable where the police know that evidence is missing, witnesses unavailable or unwilling (having consideration to the rules of evidence which admit hearsay), or the integrity of evidence has been contaminated to such an extent that there is no likelihood that a successful prosecution could be commenced. In this context the management of scenes; and exhibits where relevant is extremely important as courts in recent years have required the continuity of exhibits and scene preservation to be proved.