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Winner of the Council of Europe Human Rights Prize

CAJ's submission to the

Diplock Review

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1. INTRODUCTION

The CAJ welcomes the decision of the Secretary of State to review the arrangements for non-jury trials in Northern Ireland. The CAJ believes that this decision is long overdue. The inception and maintenance of the Diplock system in Northern Ireland has created a two tier criminal justice system, the operation of which has led to confidence in the judicial system being undermined.

We anticipate that in keeping with the Government's stated objective to return to jury trial in Northern Ireland and its obligations under the Good Friday Agreement, the review will consider how best to move away from the current system in the shortest possible time-frame.

2. THE CHANGING CONTEXT

The Diplock system of non-jury trial and ancillary provisions, which was introduced in 1973 as part of the first Emergency Provisions Act, has remained in operation in a substantially unmodified form since that time.

Successive governments have justified the Diplock system and the other emergency powers that have been used in Northern Ireland on the basis that they were a temporary expedient necessitated by the public emergency posed by paramilitary violence. The departure from fundamental domestic and international norms, it was argued, was a necessary evil to protect the community from even greater harm.

The CAJ has always questioned whether the panoply of powers contained within the emergency legislative framework, and especially the Diplock courts, was a reasonable and proportionate response to the conflict in Northern Ireland. We have always contended that the easy resort to emergency powers represented a grave abandonment of the state's responsibility to abide by internationally agreed human rights standards. The injury that has been caused to civil liberties throughout the three decades of violence has provoked a crisis of confidence in the institutions of the state and in the administration of justice in particular. In many respects, the use of emergency powers has proved to be counter-productive.

The necessity of a swift return to a non-emergency justice system should be obvious. The cessations of violence adopted by all the major paramilitary protagonists have been in place since mid to late 1994. With periodic exceptions these positions have been maintained. The political representatives of these groupings have shown a willingness to engage in the political process and have worked to prevent a return to violence.

CAJ believes that the caution which has attended the Government's deliberations on the question of the continued need for emergency powers can no longer be justified. The changing political and security context requires a radical change of approach to these issues.

3. THE DIPLOCK SYSTEM: CAN IT BE JUSTIFIED?

This review is predicated on the basis that a return to jury trial is a desirable objective. The terms of reference identify the "level of threat" as the sole obstacle to an immediate return to jury trial, and invite commentators to suggest interim measures which might "facilitate the transition to a system of trial by jury". It is indicated that a return to jury trial will not be contemplated until "Ministers judge [that] the time [is] right." The terms of reference are silent on the criteria which Ministers will examine to determine when change will be implemented.

No serious observer could contend that Northern Ireland remains in the throes of an emergency. Even if that situation ever pertained – an assertion that the CAJ has consistently challenged – the current climate is far removed from the definition of emergency accepted by international norms. It would be a nonsense to suggest that the absence of decommissioning and the failure of paramilitary organisations to formally disband justifies the use of the label "emergency".

In the absence of an emergency in Northern Ireland can the Government justify, on purely legal/security as opposed to political considerations, its continued reliance on the Diplock system?

The original justification for imposing the Diplock scheme was two-fold: firstly, it was said that jurors were being intimidated by paramilitary groups, and secondly it was argued that there was a risk that jurors would seek to return verdicts partial to their own political aspirations.

It is widely acknowledged that the evidence to support these arguments was piecemeal at best. In any event no effort was made to experiment with a variety of well thought out precautions which may have addressed the weaknesses Lord Diplock saw in the system of jury trial. (see for example the observations of S.C. Greer and A. White, Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland: Cobden Trust). These precautions are discussed in detail below.

In the absence of an emergency situation it is clear that the twin arguments adopted by Lord Diplock for recommending juryless trials become even less convincing. We welcome the Government's commitment "to move as quickly as circumstances allow to jury trial for all offences," (para.13.5, Legislation Against Terrorism, Cmnd. 4178), but we are concerned that the status quo is being preserved for the time being without justification.

We call upon the Secretary of State to spell out in unequivocal language the precise reasons accepted by him to justify "the continued need for Diplock type trials for a transitional period," (para. 13.5, Legislation Against Terrorism). How has he reached the conclusion that the level of threat is too high to contemplate an immediate return to jury trial? We would ask him to explain what circumstances will need to exist before a full return to jury trial is regarded as appropriate.

CAJ believes that the onus rests with the Government to justify the continued use of the Diplock framework. CAJ notes with concern that even the transitional measures

proposed by Lord Lloyd in his Inquiry into Legislation Against Terrorism have not found a place on the statute book. Much has changed since this report was published in 1996 and CAJ contends that it is no longer sufficient for the Government to think simply in terms of transitional measures. The caution which attends law reform is understandable, but in this instance such caution can no longer be justified.

If there is no emergency, emergency laws, including juryless courts, can be dispensed with. We support the call of the Committee on International Human Rights of The Association of the Bar of the City of New York, and many others, for an immediate return to jury trial (see Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights, June 1999, at page 23).

4. ISSUES FOR THE REVIEW

The Review has invited respondents to address the following particular questions:

A. What conditions do you consider to be necessary for a return to jury trial and what steps might need to be taken to enable such a return?

As has been made clear in the foregoing CAJ holds the firm view that the decision to remove the right to jury trial was taken prematurely for reasons of political expediency. We have never been convinced that the risk of intimidation or bias was so high as to justify this removal of fundamental rights.

It follows that we believe that the conditions remain in place for a return to jury trial. It should be obvious that judicial systems throughout the world which employ trial by jury are prone to the threats of perverse verdicts and intimidation of jurors. Nevertheless, even at the height of the violence in Northern Ireland there was no substantive body of evidence to suggest that this problem was particularly difficult here.

The reduction in violence and tension in Northern Ireland affords us even more confidence that jury trial can flourish. The suggestion that the level of threat remains too high to contemplate an immediate return to jury trial appears to us to be without sufficient foundation. Furthermore, the risk of juror bias has been lessened by the selection of jurors from the complete electoral list as opposed to a list of rate-payers.

B. When the point is reached where Ministers judge that a return to jury trial is consistent with a diminished level of threat, are there practical measures the Government might introduce to help safeguard and demonstrate the continuing proper administration of justice?

CAJ believes that the Government should provide for legislation allowing an immediate return to jury trial for all criminal offences tried before the Crown Court in Northern Ireland. We recognise that individual jurors and the community in general may have genuine concerns about the ability of such courts to function safely and

fairly. Therefore, CAJ would encourage the Government to consider the following safeguards:-

- Whether the current arrangements in the criminal law are sufficient to deal with attempts to intimidate, threaten or influence any juror or jury panel in the exercise of their functions and whether a specific offence should be established;

- The use of measures to protect the anonymity of jurors at or about the precincts of the court:

  - ensuring that jurors can only be seen by the defendant(s), lawyers and judge involved in the particular trial;
  - adapting the layout of the courthouse so that jurors have no contact with members of the public at any time during the trial;
  - the use of transport so that jurors cannot be identified as they arrive at court or leave court during the time when the case is at trial;
  - the provision of a special security complex for jurors during a trial, to which members of the public could not gain access.

  (Consideration should be given to how these measures could be integrated into the design of the new court complex at Chichester Street in Belfast).

- The use of measures to impose strict control on information surrounding the identity of jurors:

  - the names, addresses and occupations of jurors should not be disclosed to defence or prosecution lawyers, or the police;
  - access to jury lists and information relevant to the trial should be strictly controlled and limited to a small group of court officials;
  - the right to challenge a juror and the use of stand-by should be removed, objections to jurors only being permissible with cause;
  - consideration of whether juries should be pre-selected from the electoral list by computer;
  - The consideration of what further safeguards can be adopted in the procedure for summoning jurors.

Even if it is accepted that in the absence of disbandment of paramilitary groups a residual risk to the safety of jurors continues to exist, CAJ contends that the adoption of these safeguards will provide a compelling argument in favour of a return to jury trial. In the event that, having adopted these safeguards, nevertheless there is an attempt to interfere with members of a jury, consideration could be given to the use of "out of town jury panels." - jurors from Derry, for example, can be asked to hear cases in Belfast say, and vice versa. Alternatively the trial could be moved to another venue in order to minimise the potential for interference with the jury. In addition lessons could presumably be learned from the measures taken to protect witnesses who may be subject to threat.

C. Should the Government consider that, at present, the level of threat means that it is not yet possible to return to jury trials in all cases, are there any practicable changes which ought to be made to the present system?

and

D. Have you any views on the specific offences which are brought within the scope of the Diplock arrangements? Where relevant offences are being considered, ought the presumption to be in favour of 'Diplock' trial or jury trial?

This paper has argued that the introduction of Diplock trials in the first place was without sufficient justification. Furthermore, it seems clear to the CAJ that circumstances have never been better for restoring juries to their central role at the heart of the criminal justice process in all cases. We would urge the Government to respond to the current political and security developments and reject the cautious approach that would forestall real change.

Nevertheless, if the Government takes the view that the level of threat remains substantial and wishes to adopt interim measures which recognise that a jury trial may not be suitable in all cases, the CAJ contends that the following minimum standards should be put in place:-

i. Scheduling In:

The system should revert to one of "scheduling in" as opposed to "scheduling out". In other words the Attorney General should presume that a case is suitable for trial by jury unless, upon application by the Prosecution (or more rarely, the Defence), s/he reaches a view that trial by jury is unsuitable. A presumption in favour of jury trial would represent a more reasonable and proportionate approach and would identify a juryless court as the exception rather than the norm. The adoption of the presumption would also represent an approach which is more consistent with the standards of international human rights norms.

Any such decision by the Attorney General should be subject to effective judicial review unlike the current arrangements which virtually insulate the decisions of the Attorney General in this regard from challenge.

It is notable that Lord Lloyd was happy to endorse this transitional measure of "scheduling in" in his report (para. 16.16, Inquiry into Legislation Against Terrorism).

ii. Unsuitability:

CAJ believes that if the Attorney General reaches the view that a case ought not to be tried by a judge sitting with a jury s/he should issue a certificate of unsuitability. The certificate shall state the reasons for reaching that view. Given that an emergency no longer exists (if it ever did) the criteria for scheduling in should be changed so as to reflect the new context. No longer should the test for Diplock trial depend upon whether a particular offence is connected to the

emergency, but rather the reasons must in our view be strictly circumscribed so as to relate solely to a real fear that a jury or juror would be the subject of intimidation or the threat of intimidation by a paramilitary group.

iii. Particular Offences:

If the "scheduling in" proposal is accepted and applied so as to work effectively according to the criteria set out above, the majority of offences committed should be capable of being heard before a judge sitting with a jury. Nevertheless, consideration should be given to whether a greater number of particular offences should be deemed incapable of being tried before a juryless court regardless of the circumstances. We submit that all offences under the Offences Against the Person Act, robbery, as well as relatively minor offences such as rioting should be deemed incapable of being tried before a juryless court.

iv. Holding centres and access to lawyers

CAJ has long believed that those arrested under the emergency laws should be detained in designated PACE stations and under PACE Codes of Practice. This would mean that suspects would have the safeguard of the continual presence of their solicitor.

v. Voir Dire:

If it is decided that an immediate return to jury trial for all cases is not yet feasible another step towards normality would be to change the conditions currently governing the voir dire. The number of cases which require a voir dire should of course be massively reduced in light of the audio and video recording of interviews (and particularly if our recommendations at iv. adopted). However, we believe the following recommendation still has merit. In a case where a defendant challenges the admissibility of his/her confession the trial judge typically rules on its admissibility before continuing to hear the rest of the evidence. If s/he rules that the confession is inadmissible s/he must seek to disregard it when weighing the other evidence in the balance. This is clearly a difficult task. CAJ recommends that in all cases in which it is necessary to conduct a voir dire the defendant should have the right to have his/her case heard by another judge if s/he believes the judge has been prejudiced.

E. Have you any comments to offer on matters associated with the Diplock arrangements such as the granting of bail and the admissibility of confession evidence?

CAJ takes the view that the Emergency Provisions Act contains a number of arrangements which depart fundamentally from the standards set by the ordinary criminal law. We believe that this process of review affords an ideal opportunity to assess whether these arrangements continue to be justified particularly given recent developments in Northern Ireland. If emergency legislation continues in existence, we would suggest the following arrangements should be considered:

i. Bail in the Magistrates Court:

The requirement that a person charged with a scheduled offence must make a bail application to a High Court judge is no longer appropriate. The main justification for the provision was that the Magistrate was more susceptible to intimidation than a High Court judge. With the imposition of appropriate security measures within the precincts of the court it is unlikely that this will occur.

CAJ recommends that a person charged with a scheduled offence should have an opportunity to make a first bail application before a Magistrate with a right of appeal to the High Court.

ii. A Right to Bail:

Under the ordinary law there is a right to bail subject to some obvious and justifiable exceptions. However, High Court judges are provided with a discretion to grant bail to those charged with a scheduled offences; an automatic right to bail is not recognised in the legislation. This means that currently if an individual is charged with a scheduled offence under the Offences Against the Person Act, that individual cannot be released on police bail even where it is clear that the offence has no connection with the conflict in Northern Ireland, and where it is quite obvious that the person will be granted bail before the courts. This results in individuals sometimes spending a number of days in police custody unnecessarily.

CAJ takes the view that as all of the major paramilitary organisations have ended their campaigns of violence, the pressure which dictated a departure from the ordinary law governing bail applications is no longer appropriate. There should be an immediate repeal of the emergency provisions on bail and a return to the ordinary law.

iii. Confessions:

CAJ welcomes Lord Lloyd's conclusion that the standard governing the admissibility of confession evidence set down in the Emergency Provisions Act is no longer appropriate in light of the standard adopted in PACE. The Government, belatedly seems to have accepted this view (para. 13.8, Legislation Against Terrorism). It is to be hoped that steps will be take as soon as possible to ensure that PACE is adopted as the standard governing the admissibility of confessions in all cases.

iv. Onus of Proof in Possession Cases:

In cases where it is proved that an item, normally a firearm or explosive substance, is found in premises where the accused was also present or where s/he was the occupier, the burden of proof reverses and the accused has to persuade the court of his/her innocence. CAJ believes that the reversal of the burden of proof in this context is unacceptable and may well be contrary to fair trial provisions in the European Convention (now of course also contained

within the Human Rights Act). It is notoriously difficult for an accused to prove a negative. CAJ recommends the urgent repeal of this provision.

5. CONCLUSION:

Radical changes are required so as to repeal the framework of emergency powers. The time for the caution of interim measures has long since passed.

CAJ believes a failure to introduce trial by jury in all cases in the immediate future will represent a major abdication of responsibility on the part of the Government. To adopt some half way house approach will be regarded as mean-spirited and backward looking. The current climate demands a new approach.

CAJ believes that the optimism that has followed the successful conclusion of the peace process presents us all with an important opportunity to undo much of the hurt of the past thirty years. In the area of law reform this review provides a key opportunity to reverse the damage which has been occasioned to the reputation of the criminal justice system in Northern Ireland. Coupled with the introduction of the Human Rights Act, the removal of juryless trials would provide an impressive foundation upon which to build for the future.

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