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Winner of the Council of Europe Human Rights Prize

CAJ's submission to the

UK Government in relation to

European Court of Human Rights cases

May 2006

Submission No. S.174
Price £2.00

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Submission to government by the Committee on the Administration of Justice (CAJ) in relation to European Court of Human Rights cases (May 2006)

Finucane v UK
Jordan v UK
Kelly and Others v UK
McKerr v UK
McShane v UK
Shanaghan v UK

The Committee on the Administration of Justice (CAJ), an independent cross-community human rights group based in Belfast and affiliated to the International Federation of Human Rights, has followed the above cases very closely and is concerned that there be no precipitate move to close down examination of these cases by the Committee of Ministers. These, and many other related cases currently in the domestic courts, have not been satisfactorily resolved, and their families await effective remedies for their loss. Some inquests have been opened as long ago as the early 1990s, and the families' grief and distress has been exacerbated by the large number of preliminary hearings on issues such as disclosure and scope. For example, in the inquest of Roseanne Mallon, killed in 1994, an inquest has opened but – 12 years later – has still to be concluded.

Moreover, the European cases raise a number of major policy issues that have not been satisfactorily addressed by government in the form of general measures. CAJ would urge that government and the Committee of Ministers continue their examination of the many important issues arising from these different European Court rulings. We indicate below the many concerns the organisation has, both in cases where we are legally representing individual clients, and in more general policy terms, and we indicate also some of the steps that could usefully be taken to move these cases to a more effective resolution.

Introductory remarks: Letter to CAJ from government (Minister Shaun Woodward) dated 22 March 2006

In this letter the Minister refers CAJ to various mechanisms in place to ensure the families are kept up to date with developments in each case. The letter fails to acknowledge that there has not been any process of direct engagement by government with the families, or their legal representatives. With the sole exception of the family of defence lawyer Patrick Finucane, none of the families in the cases being supervised by the Committee of Ministers have been consulted about the measures to be taken, nor have they been offered a meeting or copied in on any government proposals. The Finucane initiative came from the family rather than government. While the families have indeed drawn inferences about the implementation of measures to address the issues, these remain unresolved since the European Court's judgments in May 2001(*McKerr v UK,*

Jordan v UK, Kelly and ors v UK, and Shanaghan v UK), May 2002 (*McShane v UK*), and July 2003 (*Finucane v UK*).

Mr. Spellar, the Minister for State at the time, stated in his letter of the 22 November 2004, that *"The Government has always taken seriously its obligation to abide by the final judgment of the European Court of Human Rights in any case to which it is party. The Government's policy remains that all European Court of Human Rights judgments will be implemented"*. One of the practical ways of giving effect to this commitment would be for government to ensure that there is a mechanism in place which ensures that victims are involved and consulted, as a matter of course, about the practical measures proposed. Appropriate consultation with the victims in these cases may well have avoided the protracted and costly litigation that has ensued as a result of the lack of practical measures.

Even the general measures the UK has put in place concerning the action of the security forces in Northern Ireland have not ensured compliance with the judgments for those we represent and the other families. This, coupled with the continuing delay, greatly exacerbates the suffering of the families of those killed.

The rest of this submission addresses the specific comments made by government with regard to each of the individual cases, and the general measures, in their most recent paper to the Committee of Ministers.

Government response to Committee of Ministers (cover letter dated 3 April 2006)

A – Lack of independence of police officers investigating the incident from those implicated

Retired police officers

With regard to investigating the actions of police officers, the government's response does not address the issue of the investigation of officers who have since retired from duty. The paper provides no information on this point. It would be important to confirm that the Committee of Ministers is correct in asserting that the Police Ombudsman has no authority to investigate complaints made against police officers who have subsequently retired and who choose not to cooperate. It would therefore be helpful if government were to provide the Committee of Ministers with information and statistics regarding the number of cases which the Office of the Police Ombudsman for Northern Ireland (OPONI) has failed to complete (i.e. cases have been started and subsequently stopped, or which have been deemed inappropriate for investigation) because they involve retired officers. In particular, what number of cases, forwarded by OPONI to the Director of

Public Prosecutions (DPP)[1], could not be proceeded with because of the evidential difficulties created by the fact that they involved retired officers?

CAJ is apprehensive about the implications this limitation on OPONI's authority may have generally on older cases, and particularly those where article 2 is engaged. The lengthy time it has taken for any effective measures to be put in place means that many of those who should be subject to OPONI's investigation are now likely to have retired, and therefore fall out-with of OPONI's effective scrutiny.

"Grave" or "exceptional" cases

The government response to the Committee of Ministers failed entirely to engage with the Committee's request to give definitions of "grave" or "exceptional" as these terms apply to OPONI. CAJ is unaware that any definition has been established, and believes that government should respond to this issue in its next submission to the Committee of Ministers. Nor did government provide any examples that might have shed light on the circumstances which come within the ambit of these terms.

No information has been provided on retrospective investigations, as was also requested. In fact, the government response asserts that as current cases are the responsibility of the Ombudsman it would not be appropriate to provide any detail. The implication of this statement is that OPONI has not completed any retrospective investigation since it started work in November 2000. This clearly is not the case. The Committee of Ministers were probably not seeking detailed confidential information on on-going cases, but they do need reassurance as to the practice and procedures of OPONI in this crucial area of retrospective investigations.

Interplay PPS and OPONI

CAJ notes that government is awaiting information from the PPS regarding cases forwarded to it from OPONI. Further to the earlier information we supplied to the Committee of Ministers, it may be helpful if we enclose herewith more recent statistics which were supplied to us by the PPS in response to a Freedom of Information request dated 16 December 2005. These statistics report that in 2005 the PSNI submitted over 20,000 cases to the PPS, and 13,110 people were prosecuted; whereas in the same year, OPONI submitted 114 files to the PPS and only 2 people were prosecuted. If the figures were aggregated over the years 2002-2005, the stark differences would be relatively unchanged – 48,505 files submitted by the PSNI, and 33,786 persons charged, whereas out of 549 OPONI files, only 33 persons were charged.

[1] The Office of the Director of Public Prosecutions (DPP) was replaced in 2005 by the Office (and Director) of the Public Prosecution Service. The terms DPP and PPS are for the most part used interchangeably in the text since the decision-making timeframe is not always clear – cases initially lodged with the DPP may be decided upon by the PPS. The Director of the PPS has made a virtue of the transitional continuity in approach in moving from the DPP to the PPS, and the leadership is little changed.

Of course the statistics beg a number of questions that government may want to discuss with the Committee of Ministers – such as (a) why do the figures distinguish between "cases" supplied by the PSNI and OPONI and "persons" prosecuted/not prosecuted by the DPP, thus making it difficult to compare like with like? (b) are these figures to be read cumulatively – since presumably all decisions are not made within the year that the file is submitted? (c) OPONI seems to have a much lower 'success' rate – if compared to the files submitted to the DPP by the PSNI and resulting in a decision to prosecute. Whilst this disparity may have many explanations, not all of them by any means reflecting badly on any of the institutions involved, there is clearly a very sharp disparity. This disparity between the DPP/PPS treatment of PSNI and OPONI files requires close examination and explanation.

B - Defects in the police investigation

CAJ shares many of the concerns of the families about the proposed approach to past cases.

Past cases

For example, the families in the case of *Kelly and Ors v UK* have serious reservations about how the Historical Enquiries Team (HET) process can provide a remedy in their cases. The families have concerns regarding the independence and effectiveness of the mechanisms for review and the reinvestigation of past cases by the HET and OPONI. One obvious concern in this case is the direct involvement of both military and police and, therefore, whether either of the mechanisms on offer is appropriate to tackle the overlap in authority between these different branches of the security forces. The family have doubts as to whether either mechanism, or both in combination, can ensure an article 2 compliant investigation. Representatives of the families involved will, however, be attending a preliminary meeting with the HET team to explore these matters further and determine if, in practical terms, this process can offer any satisfaction to address their concerns.

In the Shanaghan case, there are allegations of collusion against both police and military, and there are obvious concerns about the extent to which, if at all, any investigation will be able to secure adequate access to security force information. The family have very grave concerns about the independence and scope of the investigative process with regard to this case.

As is apparent from recent local press coverage (see attached articles in the Irish News dated 2 and 3 May 2006), collusion has a long history. These media reports raise questions about the number and seniority of people who had access to information on collusion, were in decision making and policy making positions, and yet took no action. The documents relied upon *"show that Downing Street knew that significant numbers of soldiers were linked to loyalist paramilitaries, but failed to act"*. Families will need a lot of reassurance, especially about the independence and scope of investigation, if they

are to have any confidence that the HET process is an appropriate mechanism to address the outstanding individual issues.

Interplay between OPONI and HET

CAJ would be grateful to receive from government a copy of the Memorandum of Understanding (MoU) agreed between OPONI and HET. We are not aware of this material having been made available to the families or other legal representatives. In the absence of sight of this MoU, it is unclear from the government's response what is the exact interplay between OPONI and the HET.

CAJ understands that OPONI believes that it has responsibility in all matters where a death has occurred and that it has instructed HET accordingly to forward to it any cases where there is an issue of police involvement in a case resulting in death. This authority is assumed to derive from section 55(2) of the Police (NI) Act 1998: *"The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person"* (emphasis added). OPONI's investigative remit is however generally limited in that complaints must relate to matters that took place within the 12 months before the complaint was made. The statutory regulations - Royal Ulster Constabulary (Complaints etc) Regulations 2001 (see paragraphs 5, 6 and 9)) provide for an exception to this limitation where the *"the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances"* (see discussion earlier on page 3).

One might have assumed that the involvement of a police officer in a death might constitute both "grave" and "exceptional" circumstances, but CAJ is not clear that this interpretation is open to the authorities. Section 65 of the Police (NI) Act 2000 inserts a new subsection in the law, as 64.2A(b) *"The Ombudsman shall not investigate any matter referred to him under section 55(1) (2) or (4) if the actions, behaviour or conduct to which the matter relates took place more than the prescribed period before the date on which the reference is made"*. This clause appears (in its reference to 55 (2)) to explicitly rule out the retrospective investigation by OPONI of cases where police conduct may have resulted in someone's death. Government should clarify to the Committee of Ministers, and to others, what legal authority the Ombudsman is relying upon when asserting that she is under a statutory duty to investigate all deaths involving the police, regardless of when the death occurred.

Even if the legal ambiguity is resolved, CAJ still has concerns about the procedure followed and we have serious doubts about how the interplay between OPONI and HET can result in an article 2 compliant investigation and provide the requisite accountability for the following reasons:

1. The scope of any OPONI investigation is limited and prescribed by her governing legislation. For example, the practical effect of Section 52(9) of the Police

(Northern Ireland) Act 1998[2] is that it will be impossible for OPONI to conduct an effective investigation where an officer has already faced criminal or disciplinary proceedings. We have commented earlier on the serious difficulties with investigations where officers have taken retirement, since they thereby effectively fall outside OPONI's authority. Moreover, where officers are on sick leave, OPONI's practice is not to interview them until their return to work. While such a practice is understandable, it adds further delay, creates obstacles to due process, and is open to abuse facilitating a culture of extended sick-leave to avoid accountability.

2. Further we have concerns that OPONI has interpreted the statutory provision about disclosure (section 63 (1-3))[3] narrowly and restrictively. CAJ took judicial review proceedings against the Ombudsman (and the Chief Constable) on this issue[4], but the High Court found in favour of a narrow interpretation of the law on OPONI's obligation to disclose. We are very troubled that the practical effect of this interpretation will result in limiting disclosure to families, their representatives and others who have a legitimate public interest in such disclosure. An OPONI process will not, therefore, be compatible with article 2, particularly in respect of disclosure and giving due recognition to victims. Accordingly, if families are to secure greater disclosure of relevant material, further legislation may be required. Government should report to the Committee of Ministers how they intend to address this concern. A five yearly review of OPONI's powers and legal remit is currently taking place; it is not clear if this issue is included in that review.

3. Government should also be aware that they may face claims, under article 14 of the Convention, that the right to life of some victims is being treated differently,

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[2] S59(2) " If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part (Part VII of the Act) shall have effect in relation to the complaint in so far as it relates to that conduct."

[3] S63 (1)"No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies except-

(a) to a person to whom this subsection applies;

(b) to the Secretary of State;

(c) to other persons in or in connection with the exercise of any function of the Ombudsman;

(d) for the purposes of any criminal, civil or disciplinary proceedings; or

(e) in the form of a summary or other general statement made by the Ombudsman which-

(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to-

(a) the Ombudsman; and

(b) an officer of the Ombudsman.

(3) Any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale."

[4] In the matter of an Application by the Committee for the Administration of Justice and Martin O'Brien for Judicial Review of a decision of the Police Ombudsman – see attached.

and less favourably, than victims killed by people other than police officers. This concern is something that should be explored with the Committee of Ministers.

C – Lack of public scrutiny and information to victims' families on the reasons for the decision of the DPP not to bring a prosecution

CAJ expressed its reservations about the supposedly improved DPP policy with regard to the giving of reasons in our response to the revised draft Code for Prosecutors as follows:

"While the policy of giving reasons has moved slightly to one of 'when asked and in the most general terms', as opposed to refraining, CAJ believes this approach is still insufficient and is in direct contradiction to both the spirit and actual recommendations of the Criminal Justice Review. The Review was very clear that the presumption should shift towards the giving of reasons where appropriate, and in detail. However, in this Code, and indeed in its actions, the Service maintains its practice of refraining from giving reasons other than in the most general terms, and as an exception rather than a rule. This is highly disappointing, and since it goes to the heart of the transparency of the Prosecution Service calls into question the Service's actual commitment to change" (CAJ commentary on the Revised Code of Prosecutors, May 2005).

Since this commentary, CAJ has been made aware of a judgment of the Northern Ireland Court of Appeal delivered on 28 April 2006 by the Lord Chief Justice.

This judgment (see attached) was in an appeal from a judicial review of the failure of the DPP to give reasons to Mr. John Boyle for a direction not to prosecute two police officers who had allegedly perjured themselves in relation to a disputed confession by Mr. Boyle. As a result of the alleged perjury, Mr. Boyle was convicted and sentenced to imprisonment. OPONI investigated the allegations against the police officers and it would appear from the court record that OPONI recommended to the DPP (now PPS) that the officers should be charged with criminal offences. The DPP chose not to do so, and the Court of Appeal upheld the right of the DPP not to give reasons for its actions, other than in the most general terms, arguing legal rulings to the effect that this policy was "neither irrational or aberrant". The court went on to rule that *"he (the DPP) is entitled to refuse a request that he give reasons for not prosecuting unless he is satisfied that the case comes within an exceptional category"*. If the courts do not consider the false imprisonment and detention of someone on the basis of allegedly perjured police statements does not constitute an "exceptional" category, it is difficult to see in what cases the DPP/PPS can ever be expected to provide reasons.

Since all the individual cases being examined by the Committee of Ministers are several years old, the relevant policy of 'giving reasons' by the DPP will of necessity be the policy that preceded the changes recommended by the Criminal Justice Review (itself a development from the Good Friday/Belfast Agreement). The new policy deriving from the Review's recommendation - that the PPS institute a presumption of giving reasons

when deciding not to prosecute - will however be relevant to future actions by the PPS. The Committee of Ministers will presumably want to be reassured that, at least in cases where article 2 is engaged in future, that the PPS will in fact operate from the premise of being as transparent as possible? The government should also inform the Committee of Ministers what policy relating to the giving of reasons will be applied in any historic cases brought to the attention of the PPS in future? In particular, can families be assured that there will be a presumption for the giving of more detailed reasons for not prosecuting?

The Committee of Ministers will be particularly interested in the policy of giving reasons and transparency of PPS decision making in those cases where article 2 is engaged? CAJ, for example, has requested that the PPS place in the public domain statistics that not only indicate the proportion of cases being submitted to them that are and are not proceeded with, but also – given their particular public importance - specific statistics relating to those cases forwarded to them by both the Historic Enquiries Team and the Police Ombudsman. Without such an approach, it is not clear how one can monitor crucial investigations as they pass through the various investigative phases.

Extensive public resources are going to be expended in efforts by the HET and OPONI. If their recommendations for prosecution are not proceeded with by the PPS, this needs to be known, and the reasons explored thoroughly. Needless to say, any public confidence that is secured thanks to professional and rigorous investigations by the HET or OPONI, will be rapidly undermined if the PPS finds it impossible to proceed to prosecution and is unable or unwilling to give reasons for its inaction.

G– Non-disclosure of witness statements

CAJ notes that the Committee of Ministers is closing examination of measures regarding the non-disclosure of witness statements to the families in the course of inquest proceedings. However, CAJ is concerned that problems still exist in relation to ensuring that families have access to relevant material.

For example, we are unsure of any changes that have occurred recently that would have prevented the problems that arose in the Mallon inquest in 2003. In that case, the PSNI disclosed redacted material to the coroner. Following the refusal of the PSNI and MOD to provide full and unredacted documentation to him, the Coroner for East Tyrone and Magherafelt ruled in September 2003 that the material sought by him was relevant to the inquest, and that the PSNI and MOD should furnish it to him within 21days. This ruling was complied with but the coroner was required to view the documentation at a PSNI station. Then, when he was leaving the police station, he was advised that he could not take his notes with him. As a result of this treatment, the coroner stated in open court that he was unable to rely on any information disclosed by his examination of the papers in the conduct of the inquest. There has been no resumption of this (and related) inquests. When the inquest is re-convened, it is not clear that all relevant material will be disclosed

to the coroner. Nor is it clear that this issue of disclosure has been generally resolved so that it will not occur in any future inquest.

Given the importance of the independence of the coroner and his role in ensuring compliance with article 2, the government should indicate what procedures are now in place – relating to both pre and post Human Rights Act cases – to ensure that coroners will receive full unredacted disclosure in all outstanding inquests?

I – Update on Jordan case

The government has failed to respond to the request from the Committee of Ministers for an update on developments in the Jordan case. This update was requested because the case is seen as illustrative of the functioning of the current inquest system.

It is insufficient to state that there is ongoing litigation. It is also deeply unfortunate if government is implying that the issue of delay results from the family's action by way of a judicial review. To cite the European judgment in the Jordan case:

> *"137. The Court observes that these adjournments were requested by, or consented to, by the applicant. They related principally to legal challenges to procedural aspects of the inquest which he considered essential to his ability to participate – in particular access to the documents. It may be noted that the judicial review proceedings which resulted in an adjournment from 2 June 1995 to 20 March 1997 (over one year and nine months) concerned access to witness statements which have now been disclosed voluntarily due to developments in what is perceived as desirable practice vis-à-vis a victim's relatives. Nor can it be regarded as unreasonable that the applicant consented to an adjournment to await a case which might have resulted in making legal aid available for his representatives. The Court notes that funding for legal representation at inquests in Northern Ireland has now become possible under an Extra-Statutory Scheme which recognises, under provisional criteria, that the family of the deceased may require legal assistance in order to participate effectively in inquest proceedings and that an effective investigation by the State into the death may be necessary in the circumstances of the case and the inquest may be the only way to conduct it (see paragraph 67 above).*
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> *138. While it is therefore the case that the applicant has contributed significantly to the delays, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures (see paragraphs 132 and 134 above, concerning a lack of legal aid and the non-disclosure of witness statements). It cannot be regarded as unreasonable that the applicant made use of the legal remedies available to him to challenge these aspects of the inquest procedure. "*

The legal action that the family has taken since the ECtHR's judgment has similarly arisen directly from the family's attempts to ensure an article 2 compliant inquest. It is a mark of government's failure to take satisfactory steps that the family has had to engage in lengthy litigation, serving only to exacerbate their distress.

J - Delay in inquests

The government is, or should be, aware of totally unacceptable delays in the holding of inquests. There are many cases in Northern Ireland where inquests into deaths occurring before October 2000 have not yet been held because the law is unclear and there have not been any initiatives from government to resolve the issues and put in place effective general measures addressing the article 2 cases.

The NI Human Rights Commission published in February 2006 an excellent report entitled "Investigating Lethal Force Deaths in Northern Ireland: the application of article 2 of the European Convention on Human Rights" by Fiona Doherty and Paul Mageean (copy attached). In their findings, the authors included a study of the view of coroners wherein the coroners "*acknowledged that there is often delay between the date of a death and the opening of an inquest. They (the coroners) indicated that reasons for this may vary and can include the following: delay in the provision of material relating to the death from the police; delay in the provision of a post mortem report (on occasion up to three years), and delay due to ongoing litigation in other cases, the outcome of which will affect the conduct of inquests generally*" (p.42). Clearly one reason for the delay in inquests – but not the only one – is the fact that the coroner is awaiting the outcome of litigation, and in particular, the Appeals in *Jordan, McCaughey and Grew* and *Hurst* (see discussion on Hurst later).

There is to be a judicial review hearing in the High Court in the week of 22 May 2006 relating to the compatibility with Article 2 of state action in a recent case where the inquest did not take place until over 2 years after the death took place. Obviously delays of this nature have many adverse consequences in terms of memory loss, death of witnesses etc.

CAJ is concerned that promised reforms of the coronial system will not have a positive impact on the cases under supervision by the Committee of Ministers and other outstanding inquests where death occurred before October 2000. It is not clear how these reforms will deal with the issues and problems resulting from the effect in domestic law of the date of death (see below for concerns in particular individual cases).

The Committee asked for a detailed list of outstanding inquests and government responded that this was being compiled by the Court Service. CAJ and others would appreciate receiving a copy of this list once completed and we note that it would be useful if such a list included the date of death and, where relevant, the date of opening of the inquest, dates of any preliminary hearings, and information about the issues raised at

these preliminary hearings, as well as some indication as to the reasons for ongoing delay.

K – *Questions raised under the McShane case*

CAJ strongly disagrees with the government's response that there is an appropriate system in place as regards complaints against the army.

Remit of OPONI

The government accepts that the remit of OPONI does not extend to complaints against the army but claims that the armed forces routinely assist OPONI in her investigations into complaints against the police, in those instances where the army has acted in support of the police. However, it is clear from a recent investigation carried out by OPONI into the inadequate police investigation of the murder of Sean Brown (murdered in 1997) that the army withheld crucially important video evidence. The government will be aware of the recent BBC Spotlight programme (an investigative current affairs TV programme broadcast on 9th May 2006) which highlighted the serious weaknesses in the initial police investigation, the failure of the armed forces to cooperate with the Ombudsman's investigation, and the innovative approaches being taken to trying to ensure family involvement in getting at the truth of the murder.

CAJ believes that OPONI needs to be given the necessary legal powers to compel disclosure beyond the police. Government will want perhaps to explain to the Committee of Ministers how it proposes to address this (and indeed other inadequacies in OPONI's powers) in the course of the current five-yearly review into OPONI's work?

Armed Forces/MOD procedures to resolve complaints

Government does not explain the roles of the Civil Secretary and the Civil Representatives, other than to assert that they are independent of the army. A simple assertion is insufficient, and it would be helpful if the Committee of Ministers were given more information on the respective roles of these different entities. It does not appear to CAJ that these officials can have any pretensions to provide an article 2 compliant investigation since they do not have the requisite level of practical independence from the services being investigated.

The Northern Ireland Human Rights Commission and others have recommended to government that the Police Ombudsman's remit should be extended beyond the police to cover complaints against the armed forces. This recommendation should be discussed between government and the Committee of Ministers as a general measure that would give greater legitimacy to complaints lodged against members of the army?

Alternatively, how would government propose introducing a more independent element to oversee complaints about army behaviour?

Role of the Independent Assessor of Military Complaints Procedures (IAMCP)

The terms of reference for the Independent Assessor are set out in section 98 of the Terrorism Act 2000 and give the Assessor an oversight role of the complaints procedures. Although the Assessor may report to the Secretary of State on any matter that comes to his/her attention in the course of the performance of the duties, he/she is not empowered to conduct any independent investigations. It is quite clear in the legislation that the Assessor's role is confined to examining the procedures established by the army, and he can comment on complaints about the system of handling complaints, but cannot investigate specific complaints against army officers, or army actions.

An interesting example of the inadequacy of the powers of the Independent Assessor can be found in his annual report for 2004. In response to serious public disorder in Belfast in the summer of 2004, the Independent Assessor asked for information from the army regarding their role and was refused access to the material. His report notes that he was *"immensely disappointed that the army has refused me access to papers surrounding their role"*, but does not report on any further action taken. Interestingly, he compares the army response to his request unfavourably with the police response. Although the Independent Assessor has no authority whatsoever with regard to the police, the same report notes that *"the Chief Constable and Assistant Chief Constable Urban have been totally open and helpful in making their records available to me but unfortunately these do not give the military perspective."* Clearly the Assessor was unable to require the army to respond to his questions, and he clearly cannot therefore be seen as an adequate oversight mechanism for army actions/inactions. While the IAMCP can report his concerns to the Secretary of State, it appears that there are no sanctions he can rely on where the armed forces do not voluntarily cooperate with him.

The Independent Assessor has also in his reports expressed concern about the reintegration into the army of the two Scots Guardsmen, convicted of the murder of Peter McBride in 1992. He was disappointed that the judiciary had found in favour of the army in a judicial review brought by Mr McBride's mother, and alluded to the undermining of the rule of law in the decision to re-instate. The Assessor's concern was clearly insufficient to influence the army's decision making process (p.28 of 9th annual report, 2001, of Independent Assessor of Military Complaints Procedures in Northern Ireland).

Individual measures

The statement in the government's response to the Committee of Ministers to the effect that government views its obligations as arising from article 46 rather than under article 2, is unhelpful. It is clear the Committee of Ministers intends that practical and effective measures are put in place by the government to address the violations found in these

cases. These are intended not only to prevent similar violations in the future, but also to address the individual issues not dealt with by the award of financial just satisfaction for those who took the cases.

Moreover, the victims' efforts in these cases to ensure they obtain a practically effective remedy have been undermined. This is not only because the outstanding issues we have referred to have not been addressed. Where there have been changes in the domestic law or practice resulting from the E Ct HR judgment, which the families reasonably expected would resolve matters and provide closure for them, these cannot be applied to these cases in domestic law. The government has not proposed any alternative adequate, effective and practical measures by which the inconsistency between the effect of the domestic court's judgment in *McKerr* and the outstanding obligations in these cases will be resolved.

We have commented on concerns in the cases of Kelly, Jordan and Shanaghan above in some detail already.

In the McShane case the family were advised the inquest would proceed in 2005. It has not and they are still waiting for information as to when it will resume as well as confirmation that it will be an article 2 compliant inquest. It is not the case that all preliminary work has been carried out by the Coroner. There are outstanding issues around disclosure which have been mentioned at every hearing over the last few years and remain to be resolved. In addition, the government has said that the coronial service is keeping in touch with families. In McShane the last correspondence from the coroner was on the 29 September 2005.

CAJ is aware that the Finucane family met with the Secretary of State but understands that their concerns and reservations that any inquiry under the Inquiries Act 2005 cannot be independent and effective were not alleviated by the meeting. In fact, further serious concerns were raised as the Minister indicated that he intended to exercise his power under s. 19 of the Inquiries Act 2005 and issue a restriction notice before the hearings.

In relation to the Inquiries Act, CAJ, along with Amnesty International and British Irish Rights Watch, have intervened in the judicial review taken by David Wright. This review challenges the conversion of the inquiry into his son's death in the Maze prison from one under the Prisons Act (NI) 1953 into one under the Inquiries Act 2005. In our written intervention (see attached) we address the reasons why we believe an inquiry under the Act into an incident where article 2 is engaged is incompatible with human rights standards and particularly with the accepted procedural requirements of article 2. The NIHRC has also made a written intervention (attached) focusing on the Act's incompatibility and referring the court to section 4 of the Human Rights Act 1998.

HET investigative competence

See earlier comments.

Hurst

The government has stated that *Hurst* is not a Northern Ireland case and has cited the effect of the doctrine of precedent to indicate the potential limitations of its findings in Northern Ireland. The government's response disregards the stated policy of the NI Court of Appeal in Beaufort Developments (NI) Ltd v Gilbert Ash (NI) Ltd & Another [1997] NI 142 where, at 155, Carswell LCJ said:

> *"If the matter was res integra, we should be attracted to an interpretation of the contract which would allow the court to review the architects' certificates, with the consequence that we should allow the appeal and refuse to stay the action. ... We are conscious however of the practice which the Court of Appeal in this jurisdiction had adopted in the past of following the decisions of the English Court of Appeal where it has pronounced upon a topic, even where we think that another conclusion might be preferable."*

This view was most recently confirmed by the NI Court of Appeal in Re Mary Doherty's Application for Judicial Review (unreported judgment delivered 8 May 2002).

More importantly, however, the government's response also disregards the fact that the relevant point at issue in the case of Hurst, is also at issue in the NI cases of *Jordan* and *McCaughey and Grew*. The common issue is the extent to which section 3 of the Human Rights Act 1998[5], requires a coroner to carry out an inquest in a way which is compatible with Convention rights even though the death occurred before the coming into force of the Human Rights Act.

The decision on the scope of section 3 on this point will have a direct and practical impact on the effectiveness of the implementation of the government's commitments in the individual cases and indeed is the only route forward, unless the government proposes and implements alternative measures to resolve these issues.

It is of course open to the government to introduce the necessary measures to ensure effective and article 2 compliant inquests for these cases and avoid any further delays. Further, we are concerned about what remedy the victims will have if the House of Lords returns a restrictive and narrow interpretation which does not allow the outstanding commitments in these cases to be given any real effect in domestic law. Where will that leave these families, and indeed all those others whose inquests are outstanding?

Finucane

CAJ would be grateful to receive a copy of the letter from the UK delegation (dated 5 July 2006) of which we have not had sight.

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[5]Section 3 "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

Conclusions

CAJ is particularly concerned that the letter received (dated 22nd March 2006), from Mr. Woodward indicates that it is the UK government's intention that the meeting between the secretariat and the UK delegates will result in a resolution of these cases.

CAJ believes it would seriously undermine the Committee of Minister's supervisory role, under article 46, for it to sign off on these cases without the resolution of the outstanding issues to which we have drawn attention in this submission. It is clearly apparent from the concerns we have alluded to that there are a range of issues which are still outstanding and which must be addressed before closure is an acceptable option.

CAJ is very aware that the outstanding issues commented on above do not affect only the victims in these particular cases, but are applicable to the many other deaths which have been inadequately and ineffectively investigated. The concerns also apply to all those – unfortunately numerous – cases where there are serious allegations of police or army collusion in the death of the individual.

At a time when senior members of the UK government, and the Opposition, are expressing doubts about the efficacy and relevance of the European Convention on Human Rights, CAJ believes that it is vital that the Committee of Ministers uphold, and be seen to uphold, the rulings of the European Court of Human Rights. The families involved in all of these cases took the lengthy and difficult road to the European Court to seek a remedy and they cannot be denied that now. The Convention is vital in safeguarding the rights of all and it gives particular precedence to the right to life. We would submit that scrutiny by the Committee of Ministers of the implementation of judgments is required to be particularly stringent where there are allegations of direct and indirect state involvement in murder.

CAJ urges that the Committee of Ministers continue to keep these cases, and the general measures flowing from them, closely under review.