Submission to Committee of Ministers
from the Committee on the Administration of Justice (CAJ)
in relation to supervision of

Cases concerning the action of the security forces in Northern Ireland
(*Shanaghan v UK, Jordan v UK, Kelly & Ors. v UK, McKerr v UK, McShane v UK, Finucane v UK)*
(February 2007)

The Committee on the Administration of Justice (CAJ) would urge the Committee of Ministers to maintain its supervision of all of the above cases. Very little if any progress can be recorded on the individual measures, and recent developments (outlined below) confirm many of the criticisms made previously about some of the general measures that the UK government has placed such reliance upon.

The following is a short note on developments since the last examination of the cases.

1. Inquiries Act:

The Committee of Ministers is aware that many commentators, including the parliamentary Joint Committee on Human Rights, have expressed concerns regarding the ability of the Inquiries Act 2005 to be and to be seen to be independent. A recent judicial review into the legality of the Inquiries Act in the matter of the Billy Wright Inquiry (a loyalist prisoner killed by republicans whilst in prison) has indicated grave concerns on the part of the judiciary. The full judgment is attached, but the key issues are summed up herewith.

The judge (Justice Deeny) was asked to rule on the legality of the decision by the Secretary of State to convert the Billy Wright Inquiry from one to be held under the 1953 Prisons Act to one under the 2005 Inquiries Act (the legislation under which all current and future public inquiries into art 2 and other public interest issues will be held). He found that the Inquiries Act could not be challenged on grounds of its incompatibility with article 2 of the ECHR, but that the conversion decision was unlawful because the Secretary of State had not taken into account that an inquiry, once converted, would be less independent than one held under the old legislation.

For reasons already known to the Committee of Ministers (the Billy Wright case falls in the period preceding incorporation of the ECHR into domestic law and passage of the Human Rights Act), the judge found that legal certainty is currently being sought on the issue of retrospectivity from the House of Lords and he would not *"proceed to consider whether the sections of the Inquiries Act 2005 are incompatible with the European Convention on Human Rights"*. However, he expressed a number of concerns about the independence of inquiries held under the Inquiries Act.

For example, in discussing whether any inquiry under the Inquiries Act could be, and be seen to be independent, Justice Deeny indicated that section 14 (which allows the minister to bring an inquiry to an end) does not set out any reasons that might justify the minister's decision. Whilst noting that the inquiry chair should be consulted, and parliament must be informed of the minister's reasons for ending an inquiry, the judge notes that *"the power is otherwise untrammelled…..If (the minister) were to make a*

decision for another reason, it seems to me that it would be difficult for a party aggrieved by that decision to challenge it by way of judicial review because parliament has left such a wide discretion to the minister. In those circumstances one has to ask whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the minister, would or could be perceived to be truly independent" (all cites from para 41, emphasis added). He helpfully draws on analogies with the level of public confidence likely to be invested in "independent" scientists funded by the pharmaceutical companies being researched, or actuaries responsible for ensuring fairness to policyholders, and yet subject to dismissal by the insurance companies involved (para 44).

The judge was particularly critical of the legal advice given to the minister in determining to convert the Billy Wright Inquiry to one held under the Inquiries Act. *"Claiming equivalence with the 2005 Act save for restriction notices is clearly wrong in law. A wholly new power exists under s.14 (ie the minister's power to end an inquiry) inconsistent with past law and practice*" (para 58). Elsewhere the judge goes on to conclude that "*The decision maker….did not direct himself properly in law ….to an important matter which he was bound to consider, namely the novel and unrestricted power given to him and his successors, whether as at present or in the future as ministers in a NI administration, under section 14 of the Act*" (para 61). *"I have already referred to the equivalent provision in the Prison Act regarding the coroner. I observe no power to stop an inquiry existed under the 1953 or 1921 Acts. It is clear therefore that independence was an essential or at the very least a very important element in investigating the deaths of prisoners, long before article 2 of the Convention. But the Secretary of State was misled about the power to stop an inquiry under the 1953 Act and was not reminded of his wide new power under section 14 of the 2005 (Inquiries) Act"* (para 62, emphasis added throughout).

In his formal conclusion – *"….the Secretary of State failed to take into account the important and relevant consideration that the independence of such an inquiry (under the Inquiries Act) was compromised by the existence of Section 14 of the 2005 Act (and)…was wrongly advised that an equivalent power existed under the Prisons Act." (emphasis added).*

Note that at the time of writing, the family of Billy Wright have determined that they will not pursue the remedy of seeking an over-turning of the decision to convert, given the further delay that this would create for the Inquiry's work. Billy Wright's father, David Wright, is fairly elderly and unwell, and is determined that the inquiry should move ahead to some conclusion, regardless of the fundamental legal flaws that this ruling highlights. Government, instead of introducing systemic changes that could rectify or remedy these obvious failings in the legislation, has been able to rely upon the need of families for closure. This does not bode well for a fair and honest examination of the past. When combined with the fact that the Inquiry learnt before Christmas that more than 800 relevant files have already gone missing from the Prison Service, it is clear that the Inquiries Act is limited in the extent to which it will be able to hold the authorities fully to account.

It continues to be CAJ's contention that an inquiry held under the Inquiries Act (2005) will not be compliant with the article 2 requirements for an inquiry that is independent, impartial, effective and timely.

2. Investigative powers of the Police Ombudsman:

CAJ and others have previously brought concerns to the attention of the Committee of Ministers about the powers of the Police Ombudsman. A recent inquiry carried out by the Ombudsman into the circumstances surrounding the death of a single individual (Raymond McCord Jnr) found institutionalised and systemic collusion between the police and loyalist paramilitaries as late as 2003 (for full report, see website – www.policeombudsman.org).

This inquiry into allegations of collusion between police officers and loyalist paramilitaries found that a complaint about a single murder in November 1997 led the Ombudsman to consider the murder of ten persons, 72 instances of further crimes, including ten attempted murders, 10 punishment shootings and many other serious crimes. Key issues arising from the investigation that are directly relevant to the Committee of Ministers' supervision of article 2 cases:

a. OPONI sought the cooperation of a number of senior retired RUC/PSNI officers and despite flexibility on the side of OPONI (regarding times, venues, security safeguards etc) "*the majority failed even to reply"*

b. Other police officers "*including some serving officers, gave evasive, contradictory, and on occasion farcical answers to questions. On occasion, those answers indicated either a significant failure to understand the law, or contempt for the law. On other occasions the investigation demonstrated conclusively that what an officer told OPONI's investigators was completely untrue"* (para 5 of the report's executive summary, emphasis added)

c. The Ombudsman found that legally authorised systems for the handling of informants, used in the UK, and by the RUC Criminal Intelligence Department, were not used by Special Branch. Moreover, that new rules introduced by the RUC in 1997 for informant handling were set aside: "*A decision was made by chief officers that those rules should not apply to Special Branch"* (para 14). The Regulation of Investigatory Powers Act (RIPA) 2000 imposed statutory rules about the review, management, assessment and cancellation of informants but those rules were found by the Surveillance Commissioner not to have been complied with (para 14). Subsequently, in media interviews, the former Special Branch head, Chris Albiston, confirmed the Police Ombudsman's findings that Special Branch had not followed UK-wide guidelines and was reported as saying "*the systems you use in one place will not be appropriate in the other place. Don't forget we were working with a security intelligence service, MI5, throughout the UK, which was not part of the police structure"*.

c. "*Prior to 2003 some RUC/PSNI Special Branch officers facilitated the situation in which informants were able to continue to engage in paramilitary activity*" (para 17)

d. The Ombudsman recorded that "*significant changes*" have occurred in police practices since 2003. However, no explanation is given as to why

the current Chief Constable in a major review of police informers does not appear to have pursued charges against the 12% of informers who were 'dropped' at that time because of their alleged involvement in serious criminal activity. It is not clear whether any criminal charges were considered with regard to the police handlers of those informers considered to have been engaging in serious criminal activity (para 5.3)

e. The Ombudsman also notes that "*there are some examples where the Police Ombudsman has had to wait for periods ranging from a year to two and a half years before PSNI was able to confirm the answer to specific requests….this had the cumulative effect of delaying the investigation"* though things improved as the investigation continued (para 8.8)

f. OPONI also noted as "*a further significant obstacle to the investigation"* the poor standard of record keeping by Special Branch (para 8.14). These poor standards may have contributed to the fact that "*it emerged that a number of important documents were either missing, lost or destroyed. …Some material was destroyed routinely by Special Branch who had no effective systems for document retention*" (paras 8.18 and 8.19)

g. The investigation also highlighted instances of the police not disclosing information to the Director of Public Prosecutions, with "*the then Deputy Assistant Chief Constable for Special Branch (replying) that no such disclosure was required, despite the fact that there was a clear obligation to do so"* (para 10.14 and 10.15).

h. The report also provides several examples of "*Special Branch non-compliance with the Regulation of Investigatory Powers Act 2000"* (section 31.15 on). She concludes that certain Special Branch documentation on an informant under RIPA 2000 is "*selective, biased and misleading and it includes statements that are manifestly untrue"*.

i. The chapter entitled "collusion" is extensive and detailed. It leads her to conclude that the problem is systemic and that "*The RUC decisions not to adopt the rules relating to the handling, supervision and management of informants meant that it is not possible to attribute responsibility to individual officers for actual breach of rules"* (para 32.5)

j. Many of these findings indicate concerns about current serving officers and practices. Note in particular that government has reassured the public that the Surveillance Commissioner provides an important human rights safeguard over covert policing methods. To quote Mrs O'Loan's report "*Before the Police Ombudsman drew these matters to his attention, the Surveillance Commissioner had not been able to identify the misleading documentation which was created by some Special Branch officers……It is essential that in the arrangements for the future strategic management of national security issues in Northern Ireland, there will be accountability mechanisms which are effective and which are capable of ensuring that what has happened here does not recur*" (para 33.21)

3. Individual cases

There have been no significant developments in most of the cases, since they are either awaiting clarification/rulings from the House of Lords (Jordan, McKerr), or further developments from the Police Ombudsman and/or Historic Enquiries Team (Kelly & Ors, Shanaghan). Families continue to be concerned about whether and if so to what extent either the Ombudsman or the Historic Enquiries Team will really be able to secure independent and effective investigations.

Finucane: See resolution recently passed by US Congress. The announcement that there would be an inquiry held into the circumstances surrounding the death of the defence lawyer, Patrick Finucane, was made more than 2.5 years ago, nothing has happened. Looking at the three other "Cory" inquiries (see Billy Wright Inquiry discussed above, and those for Robert Hamill and Rosemary Nelson), it is clear that two years' into their work, hearings have still to commence. The Pat Finucane Inquiry, whenever convened, is likely to create even more legal and other challenges to be overcome than the other three.

Inquest delays continue to be endemic in the system. In one case heard recently into a death in police custody in Omagh, which did not involve major issues of law or fact (and indeed only took 1.5 days of hearings), the family had to wait five years for the case to get to an inquest hearing http://news.bbc.co.uk/1/hi/northern_ireland/6070954.stm)

See also attached a judicial review in the case of the death in prison custody of Patrick Mongan, and Irish Traveller; and an English judicial review on a suicide in prison before Justice Langstaff.

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