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)*
(May 2007)

The Committee on the Administration of Justice (CAJ), the Belfast-based independent cross-community human rights group affiliated to the International Federation of Human Rights, which acted in three of the above cases before the European Court of Human Rights, urgently requests the Committee of Ministers to maintain an active interest in all six cases.

Yet again, we have to report that there has been very little progress in the implementation of the European Court of Human Rights judgments in relation to the aforementioned cases. In some cases it has been over five years since the judgment was announced, but the United Kingdom government has yet to implement the rulings and comply with its international obligations under Article 2 of the European Convention on Human Rights (ECHR).

CAJ notes with interest Parliamentary Assembly Resolution 1547, passed on 18 April 2007, to the effect that:

> ***"The Assembly is concerned by the gap between solemn declarations and commitments undertaken by member states….and the situation in practice where human rights violations often remain without redress or remedy"*** **(para 31).**
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> ***"The Assembly considers that it is now time to end hypocrisy and to turn words into deeds. The Assembly further considers that the most effective method of preventing human rights violations is by showing zero tolerance towards such violations"(*****para 32).**
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> ***"It therefore resolves first and foremost to mandate itself, with respect to its future work, with a higher degree of priority to human rights and the rule of law, inviting the Committee of Ministers to do likewise" (para 33).***
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> ***"It also calls upon all member states of the Council of Europe (to)…...take all appropriate measures in a resolute effort to eliminate all human rights violations ….In this respect, the Assembly recalls, again, that the right to life and the prohibition of torture and inhuman or degrading treatment or punishment are non-derogable rights ……; (to) root out impunity of human rights violators …by ensuring that the law enforcement bodies carry out effective, impartial and transparent investigations…(& to) fully implement the judgments of the European Court of Human Rights within the legal order of all member states;…." (paras 34, 34.2, 34.3& 34.6).***

This Assembly Resolution was not available to us at the time that the CAJ and others were invited in March 2007 to make a submission to a UK parliamentary committee looking at the implementation of ECtHR judgments. However, we wrote to the Committee in fairly forthright terms: "*CAJ's experience of the process is that it is somewhat opaque. It is even difficult for us (who follow the process closely) to know exactly when and how to intervene in the oversight process. We have no guidance and/or information about what the government is doing to facilitate the implementation of these judgments, since the government makes little or no effort to engage with the families of the victims, or their legal or NGO representatives. As a result, in addition to the fact that the families remain aggrieved and frustrated, we feel that there is very little scope for our views, or those of the families and their legal representatives to be taken into account by the government"* (CAJ letter dated 14 March 2007). Nothing has changed since then.

Parliamentary Assembly Resolution 1547 also makes frequent reference to the role that national parliaments can and should play in holding governments accountable to abide by their human rights obligations. We note therefore with interest that the UK Parliamentary Joint Committee on Human Rights last year recommended that *"greater efforts should be made in government to make up-to-date information on ECtHR judgments available to the general public"* (Paragraph 7 of the Thirteenth Report of the Parliamentary Joint Committee on Human Rights on the Implementation of Strasbourg Judgments: First Progress Report – HL 133/ HC954, 8th March 2006). When we updated the parliamentary committee on the intervening lack of action by government, we drew their attention to their own recommendation of 2006, and confirmed that we were unaware of government giving any credence to the Committee's recommendation for better communication.

We refer to our numerous previous submissions to the Committee of Ministers and reiterate that there has been little or no progress with regard to many of the issues addressed in the Interim Resolution.

1. Inquiries Act

Despite the fact that the Inquiries Act 2005 has been subjected to extensive criticism from human rights quarters - see most recently CAJ submission to the Committee of Ministers in February 2007 – government has introduced no amendments. The many concerns about the extent to which an inquiry under the Inquiries Act could be truly independent of government were underlined in a ruling by Mr Justice Deeny (judgment promulgated on 2nd February 2007[1]), to the effect that:

> *"I will therefore grant a Declaration that the decision of 23 November 2005 to convert the Inquiry into the death of Billy Wright from one under the Prisons Act (Northern Ireland) 1953 into an inquiry under the Inquiries Act 2005 was unlawful: (a) because the Secretary of State failed to take into account the important and relevant consideration that the independence of such an inquiry was compromised by the existence of Section 14 of the 2005 Act but was*

[1] In the matter of an Application by David Wright for Judicial Review of a Decision of the Secretary of State for Northern Ireland [2007] NIQB 6

wrongly advised that an equivalent power existed under the Prisons Act; and……" (emphasis added).

David Wright (father of the murdered Billy Wright), is elderly and in poor health, and desirous of movement in the Inquiry. Accordingly, he and the family were willing to forego the remedy of nullifying the Inquiry, and instead were willing to accept that it continue its work under the Inquiries Act, albeit with its credibility and legitimacy sorely undermined. The Secretary of State has chosen to appeal against the judge's ruling. That appeal was heard on 22 and 23 May 2007 and judgment is expected soon. 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.

Despite the fact that the appeal is still to be determined, the Inquiry opened formal hearings on 30 May. This was the first occasion that the CAJ and others were made aware that the security services had sought (and been granted) party status to the Inquiry. The lawyer representing the family was only made aware of this fact a few days ago, and then only incidentally (when being told the seating arrangements that the Inquiry had determined upon). CAJ will be pursuing this matter with the Inquiry, and asking when this status was accorded to the security services, why the family and others were not invited to make legal representations on the matter, and why other parties to the Inquiry were not even formally informed of the Inquiry's decision in the matter. Needless to say, this lack of transparency in the decision-making process is likely to incite rather than allay concerns about the independence and impartiality of the Inquiry.

2. Investigative powers of the Police Ombudsman

The powers of the Police Ombudsman have not changed since CAJ last made submissions to the Committee of Ministers. A review of the Ombudsman's powers was to be carried out by her Office and made the subject of public consultation. CAJ understands that the Ombudsman has now determined that no such external consultation is required, and that she will engage directly with government proposing a variety of legislative changes. We have conveyed to her our disappointment that the review process is not more participative.

Some of the proposed changes – if they prove acceptable to government and are converted into successful legislative amendments – will address concerns that the Committee of Ministers has formerly explored; others will not.

For example, CAJ believes that the Ombudsman will propose that her Office have compulsion powers in relation to the actions of police officers who may have subsequently retired. It seems however that she will not propose that she be given the authority to investigate the actions of army officers, even when they are clearly acting in conjunction with, or under the authority of, police officers. This gap in accountability mechanisms will hopefully not create enormous problems in the future, since the army is now rarely deployed in joint operations, but this could be a severe limitation for retrospective investigations. Nor, more generally, is it clear how the Ombudsman intends to address the possible confused lines of authority in handling

retrospective cases, and whether any legislative changes could ameliorate the situation. Would her Office's independence, for example, be enhanced by giving a statutory basis to any Memorandum of Understandings being elaborated between the Police Ombudsman and the Historic Enquiries Team? Last but not least, it is CAJ's understanding that rather than facilitating access by complainants, and/or their legal representatives, to her investigations (which would bring her more in line with the police complaints system in England and Wales), the Ombudsman will be seeking to ensure that the rules governing disclosure of materials are further narrowed.

The Committee of Ministers will need to be very vigilant in this regard. They firstly should seek clarification on the powers that the Ombudsman is seeking, so as to receive adequate reassurance that her Office will be able to comply fully with her article 2 responsibilities. Secondly, to the extent that the Ombudsman has proposed positive legislative change, this does not of course mean that such change will occur – the Committee of Ministers will want to be kept informed of government's response to the review of the Ombudsman's powers, be assured that all the necessary legislative changes are in fact put in place, and be assured that there is no diminution of her powers or her independent status.

3. Historic Enquiries Team

The Committee of Ministers will be aware of the creation by the Police Service of Northern Ireland of a Historic Enquiries Team. The fact that HET is charged merely with identifying further evidentiary opportunities in any of the 3000+ conflict-related deaths does not of course comply with the article 2 duty to ensure a full and effective investigation. The fact that HET remains answerable to the Chief Constable also means that it cannot be seen as an independent investigation and many families continue to exhibit a lot of concern about this issue. At the time of writing, many HET "investigations" remain in their infancy and thus, despite welcoming the police's stated desire to be victim-centred, it is very hard to assess the efficiency and impartiality of the work of the Team.

4. Public Prosecution Service

The failure of the Director of Public Prosecutions in the past to give reasons for not prosecuting was a common complaint, and contributed to a serious lack of confidence in the independence of the office. The Criminal Justice Review established in the wake of the Good Friday/Belfast Agreement argued for a major change in this regard, and yet this was resisted strenuously by the DPP for a long time. The current Code for Prosecutors still leaves lot to be desired, since it promises only to give reasons "in the most general terms". Of particular interest to Article 2 cases, is the fact that the Prosecution Service has accepted that in cases where a death is, or may have been, occasioned by agents of the state, a reasonable expectation might arise that reasons would be given for not prosecuting. Subject to "compelling grounds for not giving reasons", the Prosecution Service accepts that it would be in the public interest to give reasons (para 4.12.4). For a number of reasons, it is far from clear whether these changes will prove sufficient.

Firstly, there is the problem that even in future cases, the Prosecution Service may determine to interpret the Code very narrowly. The Prosecution Service was very loath to move in this direction (it took several years, and several drafts of the Code for Prosecutors to secure these limited changes), and much depends on the judgment of individual prosecutors regarding "albeit in the most general terms" and "compelling reasons for not giving reasons". Nor is CAJ clear what weight should be accorded to the proviso that the death "is, or may have been, occasioned" by a state agent – does this automatically also cover cases where state agents are thought to have colluded (by action or inaction) in a lethal force incident?

Secondly, it is not clear with regard to 'historic' cases, which version of the Code will be applied to cases. If the old standard is to be used, then prosecutors will only give reasons for their decision-making when they determine the situation to be 'exceptional'. Will this standard be the one applied to all the cases forwarded to the Prosecution Service as a result of investigations by either the Police Ombudsman or the Historic Enquiries Team, on the grounds that though the investigation is recent, the alleged criminal actions precede the passage of this Code for Prosecutors? We draw the attention of the Committee of Ministers to CAJ's submission to the Committee dated May 2006 on this very point of the "giving of reasons" in 'historic' cases:

> *"….. 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 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* (Office of Police Ombudsman for NI) *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".*

Thirdly, this ruling highlights the limitations on the remedies that can be sought by victims who feel aggrieved by the failure of the DPP/PPS to give reasons for non-prosecution. The remedy of seeking a judicial review of the prosecutorial decision, to be successful, must prove that the PPS is being "Wednesbury unreasonable", which is a fairly high threshold. The threshold would be almost impossible to reach in those cases where the PPS relies on a "national security" justification for non-disclosure (a not-common argument in cases where the state stands accused of serious misconduct) - since the applicant for judicial review will most likely be denied adequate disclosure to contest the decision. Moreover, this case leaves one wondering what the courts would consider an "exceptional" case, since the false imprisonment and detention of someone on the basis of allegedly perjured police statements appears not to constitute

such a situation. In the light of this case, it is difficult to see in what cases the DPP/PPS would ever be required by the courts to provide reasons.

Given that all the individual cases being examined by the Committee of Ministers are many years old, CAJ had asked the Committee of Ministers to seek clarification from the government regarding which 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?

CAJ 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, and subsequent action. The significance of these cases, and the importance of accountability – albeit after the event – render public transparency crucial. 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. Is this something that the Committee of Ministers has sought some clarity on, or would consider doing now?

The Committee of Ministers might want to ask a series of questions, such as:

a. The number of cases referred to the PPS by PSNI for prosecution, and the number of those cases proceeded with, and not proceeded with, and the reasons given for the latter.
b. Is any breakdown done between cases forwarded by the PSNI, and by the Historic Enquiries Team within the PSNI, and the statistics relating to the latter?
c. The number of cases referred to the PPS by the Police Ombudsman for prosecution, and the number of those proceeded with, and not proceeded with, and the reasons given for the latter?
d. How many judicial reviews have been undertaken against the PPS regarding decisions not to prosecute; how many of these have over-turned the initial PPS decision?

5. Individual cases

Finucane: A bi-partisan Resolution has been passed by both Houses of the US Congress since the last meeting of the Committee of Ministers calling for an independent inquiry into the murder of human rights defence lawyer, Pat Finucane. The US legislators were particularly disturbed at the fact that little progress had been made in the case even though the UK government had announced 2½ years ago that an inquiry should be held. Long delays are also apparent in related 'Cory' cases (ie those cases which were inquired into by Canadian Supreme Court Justice Peter Cory (i.e. the deaths of Billy Wright in prison, which was alluded to above, and the murders

of Robert Hamill and Rosemary Nelson). Peter Cory recommended inquiries in all four of these cases, and whilst no movement is discernible at all on the Pat Finucane case, the other three inquiries – two years into their work – have still to commence hearings. The Pat Finucane Inquiry, when established, is likely to create even more legal and political challenges to be overcome than the other three.

Jordan: - the House of Lords has now delivered its decision in the cases of Jordan and McCaughey. In Jordan it was decided that section 3 of the Human Rights Act 1998 did not operate to compel insofar as is possible the interpretation of statutory provisions in a manner that complies with the Convention where the factual circumstances arose before the coming into force of the Human Rights Act. It therefore appears that the scope of an inquest into a death that occurred on or before 2 October 2000 will be determined, without reference to the rights guaranteed by Article 2 ECHR, under the "old" law. This decision is likely to mean that a "two-tier" inquest system will operate in Northern Ireland: an Article 2 compliant system for those deaths that occurred on or after 2 October 2000 and a system unchanged by reference to Article 2 for deaths that occurred before that date.

There are approximately 27 outstanding inquests in relation to pre-Human Rights Act deaths which are acknowledged to require an Article 2 compliant investigation according to Convention law. As the House of Lords has decided that there is no obligation in domestic law to provide such an investigation and certain aspects of the system condemned by the European Court of Human Rights remain, it seems inevitable that these cases will eventually be the subject of applications to the Strasbourg. Six years after the clear decisions in Jordan & ors v UK were delivered by the European Court of Human Rights the failure to take steps to fully implement the judgments is a damning indictment of the UK's respect for the Convention and its supervisory organs and a clear indication of the significant weaknesses in the Convention enforcement mechanism.

In McCaughey the House held that section 8 of the Coroners Act (NI) 1959 imposes a duty on police to provide all material in their possession concerning a death to the Coroner charged with hearing an inquest into that death. Failure to disclose all such material to Coroners has been a problem in a number of ongoing inquest cases. It remains to be seen how that decision will be complied with in practice.

McShane – The inquest into the death of Dermot McShane was adjourned pending the decisions in Jordan and McCaughey in the House of Lords. Since those decisions were delivered, Mrs McShane's solicitor has written to the Coroner requesting an update and a date for hearing but has not yet received a reply.

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